



RETAIL INDUSTRY LEADERS ASSOCIATION

CONSUMER PRODUCTS COMMITTEE

**STATE ATTORNEYS GENERAL UPDATE:
TRENDS AND AREAS OF INTEREST FOR
CONSUMER PRODUCTS RETAILERS**



I. STATE ATTORNEYS GENERAL HAVE ALWAYS BEEN ACTIVE IN REGULATING CONSUMER PRODUCTS

- A. Areas of ongoing concern include:
 - 1. Price gouging (typically during an emergency but can expand).
 - 2. Consumer privacy.
 - 3. Antitrust litigation.
 - 4. Environmental issues / harmful substances in products.
- B. State Attorneys General (AGs) act independently and regardless of federal action.
 - 1. State AGs are still coordinating more regulatory actions with federal agencies.
 - 2. Supreme Court ruling in *AMG Capital Management v. FTC*.

II. PRICE GOUGING

- A. Most states have applicable emergency price gouging statutes, regulations, or orders.
- B. Some laws only apply to goods or services considered necessary to health and welfare, however other laws apply more broadly to non-essential products.
- C. Claims will generally turn on whether the products are excessively or unconscionably priced.
 - 1. Based on a comparison of the current price to the price before an emergency.
 - 2. Change in cost is critical to support price increases.

III. PRICE GOUGING (CONTINUED)

- A. Price gouging has become a big issue since the start of the March 2020 pandemic, and with the increase of natural disasters (major fires, hurricanes, other severe weather events, etc.).
- B. Not all states require a declaration of emergency.
 - 1. Many states have broad language prohibiting unconscionable conduct that may be used to attack unconscionable price increases.
 - 2. The pandemic and recent natural disasters have generally heightened State AG focus on prices to protect consumers who have suffered economically given these challenges.
 - 3. Some states still have declarations of emergencies in effect (Mississippi and Kentucky).

IV. PRICE GOUGING (CONTINUED)

- A. What many states consider when evaluating price increases.
 - 1. The reasonableness of price increases.
 - 2. Some states have percentage limits on price increases that apply to essential goods and / or non-essential goods.
 - 3. Some state regulations could apply to B2B sales that also may cover essential goods and / or non-essential goods.

V. PRICE GOUGING (CONTINUED)

- A. Many State AGs actively and aggressively investigate price gouging.
 1. New York AG Letitia James has made clear that price gouging will not be tolerated.
 2. Most State AGs have followed suit (D.C., CT, CA, MN).
 3. Recent cases primarily involve price gouging of personal protection products (face masks, hand sanitizers, disinfectants, etc.).

VI. PRICE GOUGING (CONTINUED)

- A. But, State AGs have also actively and aggressively investigated other products.
 1. Oregon AG Rosenblum has enforced price gouging regulations against hotels and motels after forest fires.
 2. States (Kentucky, Pennsylvania) have investigated sellers on third-party platforms for price gouging their products.
 3. States (D.C., North Carolina, Texas) have pursued claims against gas stations after major events (catastrophic weather and the Colonial Pipeline Shutdown).
 4. States (D.C., NY, CT) have pursued claims relating to health clubs and mobile dining services.

VII.PRICE GOUGING (CONTINUED)

A. Overall Guidance.

1. States have broad authority even without a declaration of emergency so sensible price increases minimize risk.
2. Price increases of 10% or less will generally be low risk.
3. Always try to tie price increases to increased costs.
 - a. Best practice is to have documentation of increased costs (especially if price increases are more than 10%).
4. States will also view inflationary price increases from a post-emergency standpoint rather than looking backward.

VIII.PRIVACY CONCERNS

- A. State AGs remain focused on protecting consumer privacy.
 - 1. Data breaches.
 - 2. Unlawful location tracking.
 - 3. Violating the Children's Online Privacy Protection Act (prohibits collecting / storing information of children under 13).
 - 4. AI and its affects on due process and civil rights. Upcoming NAAG Conference to discuss the balance between technology advances and individuals' privacy rights (CT, D.C., MA, NY, and VT).
 - 5. State laws creating specific privacy rights.

IX. PRIVACY CONCERNS (CONTINUED)

- A. Arizona AG Brnovich has investigated companies tracking consumer smartphones' locations.
- B. Vermont AG Donovan has pursued claims against companies “screen scraping” the images of consumers including children without any notice to them and without their consent.
- C. New Mexico AG Balderas has pursued claims against gaming companies for unlawfully collecting and selling the personal data of children.
- D. A couple of years ago New York AG James looked into a smart phone glitch allowing callers to hear conversations before a call was picked up.

X. PRIVACY CONCERNS (CONTINUED)

- A. State-specific laws require detailed compliance.
 - 1. Colorado Privacy Act (operative July 1, 2023) – the CPA.
 - 2. Virginia Consumer Data Protection Act (operative January 1, 2023) – the VCDPA.
 - 3. California Consumer Privacy Act (in effect) – the CCPA / California Privacy Rights Act (operative January 1, 2023) – the CPRA.

XI. PRIVACY CONCERNS (CONTINUED)

- A. These state-specific laws have similar requirements
- B. Consumer rights:
 1. To access their personal data.
 2. To correct any inaccuracies in personal data (the CPA, VCDPA and CPRA not the original CCPA).
 3. To delete personal data.
 4. The portability of data.
 5. To opt out of using personal data, including for targeted advertising or the sale of personal data.
 6. To appeal a business' denial to take action on a consumer's request to exercise his or her rights within a reasonable time period (the CPA and VCDPA only).
 - a. Under the CA framework, businesses are only required to disclose any right consumers may have to an appeal but are not required to offer such a right.

XII. PRIVACY CONCERNS (CONTINUED)

A. Obligations of Companies:

1. Transparency relating to what personal data is collected, how it is used, and the consumer's rights.
2. Limits on collections and use.
3. Avoiding secondary use of personal data (under CPRA, CPA and VCDPA not CCPA).
4. Protecting the security of confidential personal data.
5. Avoiding unlawful discrimination.
6. Duty regarding sensitive data and only processing such data with consumer consent (under CPA and VCDPA only).

XIII.PRIVACY CONCERNS (CONTINUED)

A. State Enforcement Powers:

1. State AGs have authority to enforce the CPA, VCDPA and CCPA.
2. District Attorneys in Colorado also have authority to enforce the CPA.
3. The CPRA in California creates a new agency to enforce the laws in California: The California Privacy Protection Agency.

XIV.PRIVACY CONCERNS (CONTINUED)

A. California Consumer Privacy Act / California Privacy Rights Act.

1. The California Privacy Rights Act has made significant changes to the California Consumer Privacy Act but has not replaced it.
2. Despite the confusing name of the California Privacy Rights Act, it is not a stand alone statute, but rather, it is an amendment to the California Consumer Privacy Act.

XV.PRIVACY CONCERNS (CONTINUED)

A. California Consumer Privacy Act / California Privacy Rights Act.

1. The CCPA was a ballot initiative and ultimately pushed through the California legislature too quickly in 2018 to avoid the ballot initiative.
2. Privacy advocates upset because the CCPA was less robust than desired.
3. As a result, those same privacy advocates drafted a new ballot initiative to amend the CCPA for the November 2020 Election – this was the California Privacy Rights Act (CPRA).
4. California voters passed the CPRA ballot initiative and as of January 1, 2023, the CPRA amendments will become effective.

XVI.PRIVACY CONCERNS (CONTINUED)

- A. California Consumer Privacy Act / California Privacy Rights Act.
 - 1. CPRA is an addendum to the CCPA that expands the rights of Californians.
 - 2. The California Privacy Protection Agency replaces the CA AG as enforcement body
 - 3. Primary impact of CPRA.
 - a. Definition of “business” changed to exclude smaller businesses and include certain larger businesses.
 - b. Right to data portability, right to access information about automated decision making, right of rectification.
 - c. Distinguishes between Personal Information and Sensitive Personal Information and sets out increased obligations and rights regarding Sensitive Personal Information.

XVII.PRIVACY CONCERNS (CONTINUED)

A. California Consumer Privacy Act / California Privacy Rights Act.

1. Primary impact of CPRA (continued).
 - a. Makes businesses responsible for how third parties share data that businesses collected.
 - b. Introduces the requirements of data minimization.
 - i. Use of personal information “shall be reasonably necessary and proportionate to achieve the purposes for which the personal information was collected or processed.”
 - ii. Storage limitations (length of time to store data or if not possible the criteria used to determine the length of time – but businesses cannot retain a consumer’s Personal Information or Sensitive Personal Information for each disclosed purpose for which the Personal Information was collected for longer than is reasonably necessary for that purpose).

XVIII. INCREASED ANTITRUST LITIGATION

- A. The US Senate Judiciary Committee approved legislation on September 23, 2021 that would allow State AGs to choose which court hears their antitrust cases.
 - 1. Bill is retroactive.
 - 2. Intent is to prevent MDLs.
 - 3. Congress is also considering increases in DOJ's budget, specifically for the Antitrust Division, and also for the FTC.

XIX. ANTITRUST LITIGATION (CONTINUED)

- A. Facebook—NY AG and 48 AGs to end Facebook’s monopoly, case was dismissed in June 2021.
- B. Amazon—D.C. AG is pursuing novel State-law based antitrust claims against International retailer.
- C. Lawsuit by 37 AGs against the “Gatekeeper of Our Digital Devices.”

XX. HARMFUL SUBSTANCES IN PRODUCTS / ENVIRONMENTAL ISSUES

- A. Typically involve emissions, discharges or use of harmful chemicals, releases of contaminants into the air, ground, and/or water, and the sale of any products harmful to the environment.
- B. Talc Litigation J&J, D.C., NY, possibly others are considering litigation against J&J over the baby powder contamination claims.
- C. Environmental Enforcement
 - 1. Chlordane/PFAS Litigation—D.C. AG is investigating and considering litigation against chemical manufacturer for the distribution and sale of synthetic pesticide.
 - 2. Toxins in groundwater.
- D. PBM Litigation.
 - 1. Regulation of pharmacy benefit managers.
 - 2. More than 30 AGs are interested in this issue.

XXI. HARMFUL SUBSTANCES IN PRODUCTS / ENVIRONMENTAL ISSUES (CONTINUED)

- A. Baby Food—D.C. AG is soliciting counsel to investigate and possibly litigate, manufacturers of contaminated baby food.
- B. E-Cigarettes are also a health focus amongst the State AGs.
- C. State AGs are interested in the safety of child booster seats.

XXII. HARMFUL SUBSTANCES IN PRODUCTS / ENVIRONMENTAL ISSUES (CONTINUED)

- A. CA AG Bonta has secured a court decision requiring a public health agency to comply with air monitoring requirements for petroleum refineries.
- B. A coalition of 20 State AGs sent a letter to Congressional leadership, asking Congress to allocate funding in its reconciliation bill to programs that promote clean energy, fight pollution, and improve air and water quality.
 - 1. The States noted that climate issues often disproportionately impact communities of color, low-income and immigrant communities, and Tribal and indigenous communities.
- C. DE AG Jennings filed a lawsuit against agrochemical company Monsanto and two of its spinoffs for damaging Delaware's natural resources through their use of polychlorinated biphenyls (seeking clean-up costs and damages).

XXIII. HARMFUL SUBSTANCES IN PRODUCTS / ENVIRONMENTAL ISSUES (CONTINUED)

- A. A coalition of 15 State AGs have submitted comments to the U.S. Environmental Protection Agency (“EPA”) in support of the EPA’s proposal to include per - and polyfluoroalkyl substances, also known as PFAS, in the Contaminant Candidate List 5.
 - 1. Listing PFAS will be the first step in gathering data about whether these chemicals are in drinking water supplies and considering their regulation as a class in drinking water.
- B. NY AG James entered an agreement with a property management company, resolving a lawsuit alleging that the company violated New York City’s laws preventing lead poisoning.

XXIV. HARMFUL SUBSTANCES IN PRODUCTS / ENVIRONMENTAL ISSUES (CONTINUED)

- A. VT AG Donovan filed a lawsuit against fossil fuel companies alleging that they violated Vermont's consumer protection law by concealing information and disseminating misleading marketing about climate change and fossil fuels (seeking disgorgement, civil penalties, and injunctive relief).
- B. A coalition of 13 State AGs sent a comment letter to the National Highway Transportation Safety Administration ("NHTSA") asking the NHTSA to re-implement penalties for automobile manufacturers that failed to meet corporate average fuel economy standards.
- C. WV AG Morrisey filed a lawsuit against a used car dealer and its executives for allegedly selling unsafe vehicles, seeking civil penalties, restitution, and permanent injunctive relief.

XXV. HARMFUL SUBSTANCES IN PRODUCTS / ENVIRONMENTAL ISSUES (CONTINUED)

A. Why it matters?

1. Environmental concerns remain a focus of State AGs so companies should remain vigilant in their manufacturing and waste disposal procedures.
 - a. States have engaged in dumpster diving to establish claims.
 - b. Ensure retail locations are also compliant (in addition to distribution centers, warehouses, etc.).
2. The safety of products, especially those for children, remain a focus for State AGs so it is important to ensure the manufacturing of products are safe (non-harmful content).



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