

Cybercrime, Consumer Protection and Tobacco Settlement are Top Issues for State Attorneys General in 2010

By The National Association of State Attorneys General

While the modern office of the attorney general continues to perform its traditional role of providing legal advice and legal representation in matters affecting the state's interests, those state interests now include an infinitely broader range of social and economic policies and protection of the public interest. Three of the top issues for attorneys general this year are cybercrime, consumer protection and tobacco. As the chief legal officer of each state or jurisdiction, attorneys general are committed to arresting online predators and providing services to victims of child pornography, protecting consumers during the economic downturn from lending abuses and scams, and continuing to interpret, implement and enforce the Master Settlement Agreement reached with the tobacco industry in 1998.

Cybercrime

Attorneys general became heavily vested in prosecuting cases involving technology-facilitated crimes when the U.S. Office of Juvenile Justice and Delinquency Prevention, under the authority of the 1998 Justice Appropriations Act, created the Internet Crimes Against Children program. This program provided funding to help state and local law enforcement agencies develop an effective response to online child pornography and online child exploitation. Today, 14 of the 59 Internet Crimes Against Children task forces are housed in an attorney general's office.

Attorneys general have also played a role in supporting legislation with provisions that allow them to prosecute Internet crimes. All states have enacted laws that criminalize online child solicitation and pornography, often with enhanced penalties for repeat offenders. Many states have also enacted criminal statutes for computer intrusions, many of which have enhanced penalties for hacking a government computer. Other computer crimes such as Internet fraud, Internet auction fraud and computer-facilitated identity theft are addressed through updated state consumer protection laws.

Cybercrime is another area where attorneys general have worked together to enforce online safety, particularly as it applies to young children, tweens—youth between the ages of 9 and 12—and teen-agers. Attorneys general formed a task force to investigate social networking sites MySpace and Facebook, resulting in agreements where the sites made significant changes to their network practices to protect children against online predators and child pornographic images. Most recently, a

task force of attorneys general began investigating Craigslist for adult postings and Limewire for facilitating distribution of child pornography.

Attorneys general have been at the forefront of prevention and prosecution of online crimes against children. Most attorneys general have held online safety forums in communities and schools in their states. In addition, Internet safety tips and information are a prominent part of the Web sites of many attorneys general.

The National Association of Attorneys General Cybercrime Project assists attorneys general by training their prosecutors and civil enforcement attorneys in handling cases involving technology-based crimes. To date, nearly 1,000 of these attorneys have attended project trainings. The project publishes a bimonthly e-newsletter that keeps attorneys general and their staff abreast of new developments in cyber law, case law, federal and state legislation, and new tools and publications. The project supports the task forces discussed above and provides technical support. It has also assumed responsibility for providing training on best practices in handling electronic discovery, including remote trainings for individual attorneys general offices. Finally, the project publishes a monthly e-discovery bulletin of new case law, discovery rules and practice tips.

Consumer Protection during the Economic Downturn

The attorneys general continue to lead the nation in protecting their states' consumers. They have primary responsibility for the enforcement of their

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states' consumer protection laws. Every state has a consumer protection statute prohibiting deceptive acts and practices. These broad general statutes are supplemented in all jurisdictions by laws that target specific industries or particularly problematic practices. During the economic downturn, many attorneys general focused their consumer protection efforts on protecting their state's residents from subprime lending abuses, foreclosure rescue and mortgage loan modification scams, and debt settlement and illegal debt-counseling operations. Such action will continue in 2010.

Attorneys general have various tools and authority to address abuses in the marketplace. These include civil and criminal litigation, mediation, public education, and cooperative enforcement ventures with state, local, and federal enforcement agencies, as well as creating and commenting on state and federal legislative proposals.

In June 2009, attorneys general won a significant battle in their ongoing war against federal preemption. The U.S. Supreme Court ruled in *Cuomo v. Clearing House Association* that state prosecutors are permitted to bring actions against national banks for lending discrimination.

Foreclosure Initiatives

Attorneys general have long identified the predatory and deceptive mortgage practices that led to the economic meltdown. As such, attorneys general, using a multi-pronged approach that will continue in 2010, are in the forefront of addressing the mortgage foreclosure crisis through a number of initiatives. For example, attorneys general reached a landmark multi-state settlement with Countrywide Home Loans and Bank of America (Bank of America acquired Countrywide during the states' investigation), resolving allegations that Countrywide engaged in unfair and deceptive conduct by marketing and originating unnecessarily risky and costly mortgage loans for homeowners.

With respect to mortgage foreclosure rescue scams and loan modification scams, attorneys general participate with the Federal Trade Commission in the Mortgage Foreclosure Rescue Scam Working Group, coordinating enforcement efforts against scams by companies that purport to help consumers facing foreclosure of their homes. The working group shares information on potential enforcement targets and on model state legislation. In 2009, the working group announced *Operation Stolen Hope*, a nationwide crackdown on mortgage foreclosure rescue and loan modi-

fication scams that involved 118 actions by state and federal agencies and *Operation Loan Lies*, an effort that involved 189 actions.

Understanding the severity of the foreclosure crisis and the need for collaboration, attorneys general are working closely with their federal and local law enforcement counterparts. Attorneys general formed the State-Federal Task Force on Mortgage Fraud Enforcement with the U.S. Department of Justice, Department of Treasury, the Department of Housing and Urban Development, and the Federal Trade Commission. The purpose of the task force is to develop strong working relationships between the federal agencies and attorneys general in protecting citizens against mortgage fraud and abuse.

Attorneys general and banking regulators from 13 states also formed the Subprime Foreclosure Prevention Working Group, aimed at persuading mortgage-servicing companies and investors to restructure troubled subprime loans and explore ways to find long-term solutions for borrowers facing foreclosure, such as lowering the borrower's mortgage interest rate, rather than creating a repayment plan that only offers a quick fix.

In addition to enforcement efforts, attorneys general addressed the foreclosure crisis on the legislative front. For example, North Carolina passed legislation that limits the ability of mortgage brokers to charge customers above-market rates and prepayment penalties and protects subprime borrowers from high risk adjustable-rate mortgages. Colorado passed legislation that creates a duty of good faith and fair dealing for mortgage brokers in their communications and transactions with borrowers. Under the Colorado law, mortgage brokers must not induce the borrower to enter into a transaction that does not have a reasonable, tangible net benefit to the borrower. Illinois passed legislation that requires brokers and lenders to assess a borrower's ability to repay a loan, including the borrower's ability to repay both the initial monthly payment and the higher monthly payment when adjustable loans reset. The Massachusetts attorney general issued a regulation that prohibits a specific type of rescue plan in which a business or individual claims to offer assistance to distressed homeowners facing foreclosure if the homeowner gives over ownership of the property.

Debt Settlement

Another enforcement priority for attorneys general is in the area of debt relief services. As consumers continue to find themselves drowning in unpaid

bills and tremendous debt, many attorneys general have focused their energies on combating debt settlement schemes whereby, for a fee, a professional debt-settlement company falsely claims that it will help consumers get rid of their debt for as little as half the amount owed.

To address this growing concern, attorneys general are working collaboratively with each other and other law enforcement groups. Attorneys general participate in a debt settlement working group where they share information about consumer complaints, targets and legislative initiatives.

In addition to participating in law enforcement sweeps, many attorneys general brought numerous enforcement actions against unscrupulous businesses that falsely promise to help consumers lower their debt.

Attorneys general submitted comments in October 2009 to the Federal Trade Commission regarding debt relief services. In the comments, the attorneys general highlighted the complaints they received about debt settlement companies. They urged the Federal Trade Commission to amend a federal rule that would require debt relief service companies to provide services before collecting any fees, discourage unscrupulous operators from flocking to this industry, and facilitate efficient and timely enforcement.

During the economic downturn, attorneys general saw a tremendous rise in consumer financial fraud. They are committed to using their law enforcement authority aggressively to help consumers during this recessionary economy and to bring these schemes to a halt.

Arbitration Begins under Tobacco Master Settlement Agreement

The tobacco Master Settlement Agreement, negotiated 12 years ago by state attorneys general, is a historic, landmark agreement that generates billions of dollars for settling states to cover the health care costs created by smoking and has played a significant role in bringing about a decrease in smoking rates among adults and youth in the U.S. It has changed the way tobacco companies operate, greatly restricting the advertising and promotion of their products, dissolving entities and eliminating practices designed to obscure tobacco's health risks, and creating an entity devoted exclusively to smoking prevention and cessation. The Master Settlement Agreement is responsible for raising a generation that has never seen cartoon characters in ads selling cigarettes. The "coolness" of smoking

is no longer an advertising message that tobacco companies can send to children. NAAG, through its Tobacco Project, is dedicated to helping the attorneys general interpret, implement and enforce this agreement. Attorneys general are also committed to preserving, enforcing and improving both the Master Settlement Agreement's monetary and public health mandates.

2010 Tobacco Action

The signatory states to the tobacco Master Settlement Agreement will begin the first arbitration in January 2010. The signatory states include 46 states, Washington, D.C., the Commonwealth of Puerto Rico and four U.S. territories. Florida, Minnesota, Mississippi and Texas all settled separately with the tobacco companies and will not be part of the arbitration.

At issue is state funding generated from the Master Settlement Agreement, which is used for a variety of state programs and services. The arbitration will resolve with finality disputes over whether state Master Settlement Agreement revenues will be lowered by a "Non-Participating Manufacturer Adjustment." A participating manufacturer is a tobacco product manufacturer that has settled state claims over smoking-related costs by signing the Master Settlement Agreement. The agreement obligates participating manufacturers to, among other things, make settlement payments to the states annually and in perpetuity. The Master Settlement Agreement specifies an annual base payment, which is then adjusted upward and downward according to the agreement provisions by an independent auditor, PriceWaterhouseCoopers. One such downward adjustment is the Non-Participating Manufacturer Adjustment.

A non-participating manufacturer is a tobacco product manufacturer that has not settled state claims over smoking-related costs. No state is currently suing a non-participating manufacturer over these claims, but each state retains the right to do so. For years in which participating manufacturers lose market share to nonparticipating manufacturers because of the Master Service Agreement, the Non-Participating Manufacturer Adjustment can potentially significantly reduce participating manufacturers' settlement payments to the states.

The disputes to be arbitrated pertain to a 2003 Non-Participating Manufacturer Adjustment of approximately \$1.1 billion that, if applicable, would have reduced Master Settlement Agreement revenues due the states in 2004. However, the arbitra-

tion could resolve underlying legal issues and create precedents for disputes over potential 2004–2008 Non-Participating Manufacturer Adjustments that total an additional \$4.1 billion.

The arbitration will focus primarily, but not exclusively, on whether a particular prerequisite to applying the 2003 Non-Participating Manufacturer Adjustment has been satisfied. Specifically, if during a relevant year—2003 for purposes of this initial arbitration—a state had in full force a qualifying statute and diligently enforced that statute, its share of settlement revenues for that year would not be subject to the 2003 Non-Participating Manufacturer Adjustment. Rather, its share would be reallocated to those states, if any, that did not meet one of these two requirements. Under this reallocation provision, a state that did *not* meet one of the two requirements could potentially lose all its Master Settlement Agreement revenue due in 2004. On the other hand, if all states were to meet both requirements for 2003, the 2003 Non-Participating Manufacturer Adjustment would be inapplicable to the participating manufacturer's payment.

A qualifying statute requires a non-participating manufacturer to escrow each year a specified sum for each of its cigarettes sold in a state during the preceding year. The escrowed sum is slightly less per cigarette than the sum the non-participating manufacturer would have paid per cigarette had it been a Master Settlement Agreement signatory. For the first 25 years after the escrow deposit is made, the deposit can be released only to pay a judgment or settlement obtained by the state against the escrowing non-participating manufacturer. If there is no such judgment or settlement within 25 years, the deposit is released back to the non-participating manufacturer.

Where a dispute is subject to Master Settlement Agreement arbitration, the states and the participating manufacturers each select a neutral arbitrator, and the two arbitrators then select a third neutral arbitrator. All arbitrators must be former Article III federal judges. The states and the participating manufacturers selected the Honorable Abner J. Mikva and the Honorable William G. Bassler, respectively, as arbitrators, and at press time, they are expected to select the third arbitrator. In the meantime, the states and the participating manufacturers are negotiating procedures to govern the arbitration. Where the arbitration will take place, how long it will last, and what form it will take were unknown at press time, but it will likely continue through 2010.

About the National Association of Attorneys General

The **National Association of Attorneys General** was founded in 1907 to help attorneys general fulfill the responsibilities of their office and to assist in the delivery of high quality legal services to the states and territorial jurisdictions.

The association provides a forum for the exchange of views and experiences on priority issues, fosters interstate cooperation on legal and law enforcement issues, conducts policy research and analysis of issues, improves the quality of legal services provided to the states and territories, and facilitates communication between its members and all levels of government. The association's members are the attorneys general of the 50 states and Washington, D.C., and the chief legal officers of the commonwealths of Puerto Rico (secretary of justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam and the U.S. Virgin Islands.

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