

# State Attorneys General and Unfair or Deceptive Acts or Practices (UDAP)

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Almost every state has its own deceptive and unfair trade practices law (UDAP), enforced by that state's attorney general (AG). No fraud need be involved. The enforcement is civil, not criminal, but the statutory civil fines can be steep. The Federal Trade Commission (FTC) has ceded much of the enforcement to the states. In the wake of COVID-19, in addition to price-gouging, there will likely be many new enforcement actions against corporations who are alleged to have participated in unfair, deceptive or misleading acts that draw the attention of AGs.

In some instances, these enforcement actions will involve multistate investigations in which sizeable numbers of attorneys general join together to investigate and possibly litigate. Some examples of areas that may face scrutiny include the following:

## Health Care: Off-Label Drug Use

Off-label prescriptions, or the use of pharmaceutical drugs for an unapproved indication or in an unapproved dosage, dosage form or age group, is generally legal and frequently used by healthcare providers.

While in general there is nothing illegal in the off-label use of prescription drugs by doctors, marketing of pharmaceuticals or use of a drug for purposes outside of regulatory approvals is prohibited in most cases, and pharmaceutical companies have frequently been the subject of state AG investigations for doing so. As the race to find treatments for COVID-19 continues to accelerate, it is likely that representatives of some pharmaceutical companies will face scrutiny for promoting off-label use with hospitals and doctors.

## Hotels and Leisure

Norwegian Cruise Lines is already being investigated under UDAP based on alleged communications from company employees to customers who prepaid for cruises, to the effect that the Norwegian Cruise Line ships had been sanitized, and so there was nothing to fear from COVID-19 in taking the planned cruise. The company allegedly had ample notice that its "sanitation" was insufficient to prevent the spread of the virus.

## Advertising

Companies that host advertisements designed to sell products on their internet sites and take a fractional share of the sales revenue or profits garnered from the ads can be held responsible for misleading statements in the ads or misleading information about the charges to customers. This is true even in instances in which the seller/advertiser is located overseas and out of reach of a US enforcement action. Increased online sales suggest that these kinds of investigations are likely to increase. For example, with a huge surplus of used cars now on the market for the

foreseeable future, AG investigations of false, misleading or deceptive advertising in online advertisements for used cars likely will increase, as well as investigations of misleading auto financing proposals - areas of traditional active UDAP enforcement.

Dentons' State Attorney General practice is a full-service, nationwide practice to advise and assist clients when dealing with state AGs and their staff. If you have questions or an interest in more information on any of the items above and would like to discuss, please contact State AG practice co-chairs Thurbert Baker and Bill McCollum.

## Related Information

Please also view Dentons' recently published alert: " U.S. Food and Drug Administration, Federal Trade Commission Step-Up Enforcement of Product Misbranding and Efficacy Claims Related to COVID-19" for more insight on FDA and FTC actions related to COVID-19.

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