

Playing Doubles: Managing the Increased Coordination and Cooperation Between State Attorneys General and the Consumer Product Safety Commission and Federal Trade Commission

By Margaret Feinstein and Christopher J. Allen

During the last decade, State Attorneys General (AGs) have become highly influential consumer protection advocates who often act more quickly and on a broader variety of issues than their federal counterparts. Every State, as well as the District of Columbia, has a consumer protection statute that empowers its AG to protect consumers from unfair or deceptive trade practices. Many AGs have used their consumer protection authority to change how major industries conduct business.

Some of the increased AG activity is the result of the hesitation of federal agencies to enforce federal consumer protection regulations aggressively. New leadership and increased support from Congress, however, have reenergized the United States Consumer Product Safety Commission (CPSC) and Federal Trade Commission (FTC), which together are responsible for most federal regulation of consumer protection. These agencies regulate the business practices of a wide range of consumer industries.

The resurgence of the CPSC and FTC coincides with their increased coordination with AGs. Key leaders of the CPSC and FTC come from state agencies and view AGs as partners in consumer protection enforcement efforts. This synergy can be seen in the increase of joint enforcement actions by these federal agencies and the AGs. Such partnerships become consumer regulatory “force-multipliers,” allowing those agencies and AGs to husband scarce resources while changing how more businesses conduct their consumer marketing. These joint efforts also provide AGs with national platforms for enforcement actions, which, in turn, helps further their political objectives. Understanding this trend is a critical first step in dealing with the enhanced regulatory environment.

The Reenergized CPSC and Its State Outreach Efforts

The CPSC is the primary federal agency responsible for ensuring the safety of consumer products. It can: (1) promulgate regulations regarding specific products, (2) investigate products that violate those standards or that

otherwise pose an unreasonable risk of harm to consumers, (3) halt sales or distribution of consumer products, (4) order recalls, and (5) levy fines on companies that distribute non-compliant or hazardous products. 15 U.S.C. §§ 2051 *et seq.*

In response to the massive recall of millions of lead-contaminated toys imported from China in 2007, Congress drastically expanded the CPSC’s resources and authority through the Consumer Product Safety Improvement Act of 2008 (CPSIA). Public Law 110-314 (2008), which amends, among other statutes, the federal Consumer Product Safety Act, 15 U.S.C. §§ 2051 *et seq.* As a result, the CPSC’s 2010 resources have jumped by more than 71 percent since 2007, including a \$107 million budget and 530 total staff (up from \$63 million and 401 total staff), and its current number of commissioners has increased from three to five. The commissioners that President Obama appointed have strong ties to state government. The new chair, Inez Tenenbaum, spent much of her career in state government, having most recently served as superintendent of education in South Carolina. Commissioner Robert Adler was a Deputy AG at the Pennsylvania AG’s Bureau of Consumer Protection prior to serving as a counsel for both the CPSC and the U.S. House Subcommittee on Health and the Environment.

Not surprisingly, one of Chair Tenenbaum’s first acts at the CPSC was to strengthen the relationship between her office and AGs. In recent congressional testimony, Chair Tenenbaum emphasized that AGs are an essential supplement to the CPSC’s authority and that close cooperation with them is key. *See* Testimony of Inez Tenenbaum before the Senate Committee on Appropriations, Subcommittee on Financial Services and General Government (Apr. 14, 2010). Because the CPSIA empowers AGs to stop the sale of products that violate certain federal consumer product safety standards, including restrictions on lead content, 15 U.S.C. § 2073(b)(2), Chair Tenenbaum has directed the CPSC’s Office of General Counsel to hold quarterly meetings with AGs to coordinate enforcement action. Almost every AG (either personally or through a consumer protection representative from his or her office) has attended these meetings. *See* Tes-

timony of Inez Tenenbaum before the Senate Committee on Appropriations, Subcommittee on Financial Services and General Government (Apr. 14, 2010). This coordination is already having real consequences. The Kentucky AG recently launched a program called “KY Kids Alert,” which coordinates activity between Kentucky state agencies and the CPSC to inform quickly thousands of child care centers and interested communities of any product recalled for posing a risk to children. Press Release, Ky. Att’y Gen., *AG and State Partners Team with U.S. Consumer Product Safety Commission to Launch New Child Product Recall Initiative* (Feb. 25, 2010). The Illinois and Kentucky AGs have investigated the safety of various consumer products with the CPSC, including their recent joint recall of drop-side cribs and their request to the Juvenile Products Manufacturers Association that it withdraw its approval from such products. Press Release, Ill. Att’y Gen., *Infants Still at Risk Amid New Crib Recalls* (Apr. 30, 2010); Press Release, Ky. Att’y Gen., *AG Issues Warning on Drop-Side Cribs* (May 12, 2010).

AGs also have helped the CPSC to facilitate the recall of other unsafe products. Indeed, before the CPSIA was enacted, AGs investigated companies for selling products with excessive levels of lead, including a coordinated action by 39 AGs in 2007 that resulted in Mattel’s recall of two million toys made in China and a \$12 million settlement. Press Release, Pa. Att’y Gen., *AG Announces \$12 Million Multi-State Consumer Protection Agreement with Mattel & Fisher-Price Concerning Recalled Toys* (Dec. 15, 2008). Since Congress enacted the CPSIA, AGs regularly notify the CPSC about unsafe products which, in turn, results in national recalls by the CPSC. See, e.g., Press Release, CPSC, *Children’s Toy Jewelry Sets Recalled by Playmates Toys; Charms Violate the Total Lead Standard* (Feb. 2, 2010) (“CPSC was alerted to this hazard by the State Attorney General of California.”).

Further, AGs and the CPSC are jointly investigating other potential toxic chemicals in children’s products, notably cadmium. After the CPSC and Connecticut AG announced their concern in May 2010 that overseas manufacturers are replacing lead in their products with other heavy metals, including cadmium, the Connecticut AG started to investigate cadmium levels in children’s jewelry sold in his State. Justin Pritchard & Jeff Donn, *Walmart Pulling Jewelry Cited in AP Cadmium Report*, Associated Press, May 22, 2010. In June 2010, McDonald’s agreed, in cooperation with the CPSC, to recall twelve million Shrek Forever After 3D collectable glasses because of high levels of cadmium. Press Release, CPSC, *McDonald’s Recalls Movie Themed Drinking Glasses Due to Potential Cadmium Risk* (June 4, 2010).

Renewed Consumer Protection Focus of the FTC and Its State Outreach Effort

Although often better known for its oversight of antitrust and mergers, the FTC also is empowered to prevent unfair and deceptive trade practices in commerce. 15 U.S.C. § 45. Like the CPSC, the FTC has recently become more aggressive in such enforcement, and a cornerstone of its strategy is working with AGs. In recent Congressional testimony, the new FTC chair, Jon Leibowitz, emphasized that partnering with AGs has allowed the FTC to extend its regulatory reach and to notify consumers of potential danger more quickly and effectively. See Testimony of Jon Leibowitz before the Senate Committee on Appropriations, Subcommittee on Financial Services and General Government (May 20, 2010). Chair Leibowitz also recognized that the ability of AGs to collect civil fines, which the FTC lacks, provides significant additional leverage in the federal agency’s enforcement efforts. *Id.*

The recent appointment of Julie Brill as the FTC’s newest commissioner will only strengthen the coordination between the FTC and AGs. Before her appointment in April 2010, Commissioner Brill was Chief of Consumer Protection and Antitrust for the North Carolina Department of Justice and before that she was a Vermont Assistant Attorney General for Consumer Protection and Antitrust for more than twenty years. She also has lectured at the Columbia Law School’s State Attorneys General Program, which educates AGs and their staff on consumer issues.

The close coordination between the FTC and AGs already is evident in the enforcement actions against manufacturers and sellers of consumer products. In 2008, an FTC and 32 AG investigation of Airborne Health and its claims that its cold remedy product effectively prevented and treated the common cold resulted in a \$37 million payment to the AGs and consumers. Tracy Turner, *Maker of Airborne Settles False-Claim Suit*, Columbus Dispatch, Dec. 17, 2008, at 8C. More recently, in March 2010, the FTC and 35 AGs jointly obtained a \$12 million settlement and injunctive relief from LifeLock for misrepresenting the identity theft protection it offered consumers. Press Release, FTC, *LifeLock Will Pay \$12 Million to Settle Charges by the FTC and 35 States That Identity Theft Prevention and Data Security Claims Were False* (Mar. 9, 2010).

In addition to enforcement actions, AGs are assisting the FTC’s efforts to develop new regulations addressing specific consumer protection issues. In 2008, the AGs of Arkansas, California, Connecticut, Delaware, Illinois, Maine, Mississippi, New Hampshire, New Mexico, Oklahoma, and Vermont filed a letter with the FTC urging its adoption of rigorous standards for “green claims,” which tout a product as

being environmentally friendly. *Letter from Vermont Office of the Attorney General*, FTC Filing No. 533254-00051, Project No. P074207 (Jan. 25, 2008), available at <http://www.ftc.gov/os/comments/carbonworkshop/533254-00051.pdf>. The FTC has held a workshop to consider the AGs' proposals, and it is anticipated that the AGs will likely have a significant impact in this and other rulemaking. FTC Announcement of Public Workshop; Request for Public Comment, 73 Fed. Reg. 11,371-75 (Mar. 3, 2008).

Preparing for a Game of Doubles by Understanding the Role of AGs and the CPSC and FTC

The coordination and cooperation between AGs and their federal counterparts in the CPSC and FTC will grow as it further enhances their efficacy as regulators. This means that companies making, distributing, or selling consumer products face a greater likelihood of confronting coordinated challenges from AGs and the federal government. Companies that do not routinely deal with AGs may not anticipate the impact of these kinds of joint investigations.

Responding to an AG investigation or litigation initiated by an AG is different from dealing with a private litigant. Many AG and consumer protection statutes empower AGs to issue subpoenas and demand sworn testimony. *See, e.g.*, Fla. Stat. §§ 501.206-207 (AG may request information under oath, subpoena witnesses or documents, collect evidence, and obtain court orders commanding compliance with his or her investigation of suspected violations of the consumer protection law); N.Y. Gen. Bus. Law § 349 (New York AG may issue subpoenas to investigate any practice believed to be harmful). Yet, tools to limit discovery, such as those available under the Federal Rules of Civil Procedure, are generally unavailable in AG investigations. These factors substantially increase the complexity for companies attempting to respond to AG investigations, especially when conducted in coordination with their federal counterparts. Dealing with these issues becomes even more challenging when trying to resolve an investigation in a manner that avoids litigation and the accompanying negative publicity.

In-house counsel, as well as those in government relations, should therefore make efforts to understand AGs and their consumer protection staff, who often have been in their AG's office before the AG was elected (and may therefore exert significant influence over an AG's decision to pursue a matter). Having an existing relationship with AGs or counsel who regularly specialize in this area on a national basis may help companies to quickly, efficiently, and effectively address the consumer protection concerns that AGs and their staff have before those concerns escalate. Companies should also work at understanding the priorities of key personnel at the CPSC and FTC. Again, retaining counsel who regularly

deal with the CPSC and FTC as well as AGs will enable a company to develop a comprehensive strategic plan to resolve issues as favorably as possible. Ultimately, adapting to the reality of increased coordination between federal regulators and AGs is a necessity for any company hoping to comply successfully with the regulatory climate of the 21st Century.

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