

ACC NCR FALL CONFERENCE
Advanced Topics for In-House Attorneys

**Updates From the DMV Attorneys' General
Offices – It's Not Always the Feds Who
Come Knocking**

What's Hot from the DMV Attorneys General Offices



ACC NCR FALL CONFERENCE – SEPTEMBER 14, 2022

Speakers



Jerry Kilgore
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Former Virginia Attorney
General and Virginia
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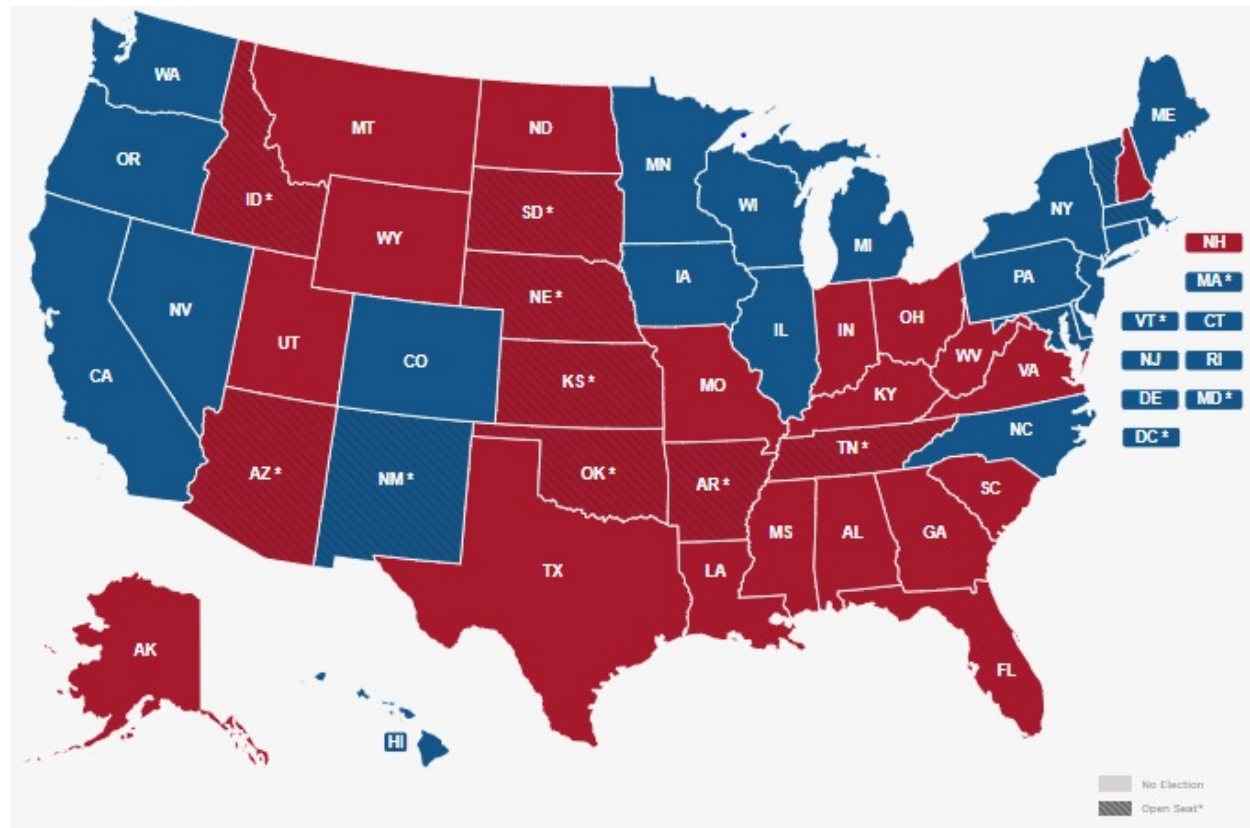
Milton Marquis
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State AG Group
Former MA and VA AAG and
Senior Counsel to DOJ
Assistant AG for Antitrust
Division liaison to AGs.



Theresa Coetzee
Marriott International, Inc.
Vice President & Assistant
General Counsel - Dispute
Resolution.



State AG Map Showing R and D States



27 Republicans, 24 Democrats

AGs in the DMV | DC

District of Columbia



Current AG Karl Racine (D)

- First elected AG for the District of Columbia.
- Term Served: 2015 -2023.
- Not seeking reelection in 2022.



Brian Schwalb (D)

- Won Democratic primary in June, and running unopposed in November.
- Current position: partner-in-charge of Venable's D.C. office.
- Priorities: Enhancing public safety, protecting consumers, safeguarding the environment, ensuring businesses play by the rules, standing up for democratic values, securing meaningful home rule and advocating for DC statehood.

AGs in the DMV | MD

Maryland



Current AG Brian Frosh (D)

- Term Served: 2015 -2023
- Not seeking reelection in 2022



Anthony Brown (D)

- Won Democratic primary in July, expected to win general election against Republican challenger.
- Current position: U.S. representative for Maryland's 4th congressional district.
- Priorities: voting rights, cannabis legalization, protection reproductive rights, gun violence prevention, environmental protections, lifting up Black Marylanders, criminal justice reform.

AGs in the DMV | VA

Virginia



Current AG Jason Miyares (R)

- Elected: 2021
- Priorities as AG: Privacy and public safety

2022 General Election Impacts on DMV Businesses

- Continued focus on consumer protection issues and enforcement
- Increased focus on privacy



Role Of State Attorney General

Regulator

Draft regulations

**Issue guidance &
warning letters**

Enforcer

**Broad
investigation &
enforcement
authority**

Multistates

Policymaker

**Use of
enforcement
discretion**

**Draft and support
legislation**

AG Enforcement Over The Years

AG Unfair, Deceptive Practices and Antitrust Enforcement

UDAP authority

RE: Unfair and deceptive practices re: data collection, sharing, and representations regarding safeguards

AG Data Breach Enforcement

UDAP, data breach notification statutes, & privacy statutes authority

RE: Failure to maintain reasonable security program & deceptive representations re: security

AG Privacy Enforcement

UDAP, personal protection/privacy statutes, IoT statutes authority

RE: Unfair and deceptive privacy practices and representations; unreasonable security practices

Recent Targets and Settlements

- Deceptive and Unfair Trade Practices
 - Claim substantiation
 - Pricing claims
 - Affiliations, endorsements and reviews
- Disaster/Public Health Related Claims
 - Price gouging & fraud
- Data Privacy & Cybersecurity Claims
 - State law violations



Data Privacy & Cybersecurity Issues

- Personal data collection and dark patterns drawing AG scrutiny from both regulators and litigants
 - 4 state AGs (DC, IN, TX and WA) filed parallel lawsuits in January 2022 against Google related to the company's alleged tracking practices
 - Dark patterns:
 - Make it easy to opt into a service but very difficult to opt out
 - Manipulate information and disclosures to conceal details and prohibit informed choice
 - Restrict or misrepresent consumer control over the information collected about them
 - Wear down consumers by use of “nagging” tactics
 - Misrepresent false scarcity and bandwagon effects.
- Post-*Dobbs*, some AGs have asked companies collecting health information to adopt measures to protect consumer privacy.
 - CA AG issued alert regarding Confidentiality of Medical Information Act (CMIA), which establishes privacy protections beyond federal law.
- Biometric litigation no longer confined to Illinois
 - But this doesn't mean risk doesn't exist elsewhere, especially from state AGs

Breaches & Ransomware

- Primary areas of liability when there is a data security incident:
 - Violation of state data breach notification statute
 - Failure to maintain “reasonable” data security practices
 - Unfair or deceptive representations regarding robustness of security practices.
- Must have written Information Security Program and Incident Response Plan
 - Document internal and external texting, auditing, risk assessments processes, etc.
 - Document governance – how and when is the board/management notified of serious incidents, need for additional resources.
- State AGs continue to take the disposal of paper records and electronic devices containing PHI and PII very seriously.
- State AGs take a broad view of what constitutes a data breach:
 - Many consider Account Takeovers as data breach
 - State AGs have broad authority under UDAP laws to take enforcement action for privacy violations that fall outside of data breach laws
 - Ransomware attacks are on the rise



Data Breach Examples



State Privacy Regimes

- State data privacy laws in CA, VA, CO, CT and UT provide (or will soon provide) consumers in those states with certain rights regarding the collection, use and disclosure of their personal information
 - Business should carefully analyze whether these laws apply to them
 - California Consumer Privacy Act & Consumer Privacy Rights Act
 - Virginia Consumer Data Protection Act
 - Colorado Privacy Act
 - Connecticut Data Privacy Act
 - Utah Consumer Privacy Act
 - Similar legislation has been introduced in several states in 2022, or re-introduced in those states where it nearly passed in 2021 E.g., Massachusetts Information Privacy & Security Act, SB 2687
- Exemptions for certain entities, or types of data (e.g. PHI under HIPAA), vary from state to state.

Deceptive & Unfair Trade Practices

- Advertising and labeling claims must be substantiated
- Limitations must be disclosed and understandable to a reasonable consumer
 - A material omission may be UDAP violation, in certain states *or* if the disclosure is necessary to prevent deception or misrepresentation
- In 2022, frequent targets included:
 - Automotive retailers
 - Financial services
 - Big tech
- States have independent authority to enforce consumer protection statutes
- Unlike the FTC, states can get restitution (*AMG Capital*)

Recommendations For Mitigating Risk - Privacy

- Reasonable security features (device) & cybersecurity best practices (business) per prevailing standards (e.g. NIST)
- Robust program to identify & alert flaws
- Evaluate contractual obligations & insurance coverage



Recommendations For Mitigating Risk – Consumer Protection

- Clear & conspicuous disclosures, product inserts, representations re: security
- Consumer/patient/employee consent or opt-in; MFA
- Stay up-to-date with AG enforcement actions and AG guidance & public statements
- The AG canary: monitor consumer complaints
- Recordkeeping of compliance efforts



AGs' Independent Antitrust Authority

- AGs' authority is concurrent with federal antitrust authorities
- Includes authority to file federal civil antitrust suits
- Every state (except PA) has enacted a state antitrust statute
- AGs can and do often act independently of the federal antitrust enforcement agencies (JetBlue, Google)
- AGs have absolute authority to investigate and enforce federal and state antitrust statutes as they see fit, regardless of federal enforcement prerogatives.

If An AG Calls

Be Responsive

- Understand the structure & policy objectives of the AG and staff to place inquiry in context
- Engage early to narrow scope of inquiry

Be Creative

- As problem solvers for consumers, AGs are often open to briefings to help them understand the business
- Identify simple fixes to address consumer complaints

Know the AG's Power

- Seek confidentiality protections based on availability of state protections & open records laws
- Understand liability and penalty exposure and AG settlement benchmarks

Questions?

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Appendix – Relevant Statutes

Consumer protection statutes for DC, MD and VA

District of Columbia Consumer Protection Procedures Act, 11. D.C. Code §§ 28-3901 to 28-3913:

<https://code.dccouncil.us/us/dc/council/code/titles/28/chapters/39>

Maryland Consumer Protection Act, Md. Code Ann., Com. Law § 13–101, *et seq.*: <https://law.justia.com/codes/maryland/2021/commercial-law/title-13/>

Virginia Consumer Protection Act, Virginia Code §§ 59.1-196 to 59.1-207: <https://law.lis.virginia.gov/vacode/title59.1/chapter17/section59.1-196/>

Antitrust statutes for DC, MD and VA

District of Columbia Antitrust Act, DC Code §§ 28-4501 to 28-4518: <https://code.dccouncil.us/us/dc/council/code/titles/28/chapters/45/>

Maryland Antitrust Act, Md. Code Ann., Com. Law §§ 11-201, *et seq.*: <https://law.justia.com/codes/maryland/2021/commercial-law/title-11/subtitle-2/>

Virginia Antitrust Act, Virginia Code §§ 59.1-9.1 to 59.1-9.17: <https://law.lis.virginia.gov/vacodepopularnames/virginia-antitrust-act/>

New privacy statutes in CA and VA

California Consumer Privacy Act of 2018, Civil Code § 1798.100 *et seq.*:

https://leginfo.ca.gov/faces/codes_displayText.xhtml?division=3.&part=4.&lawCode=CIV&title=1.81.5

Virginia Consumer Data Protection Act, Virginia Code §§ 59.1-575 to 59.1-584: <https://law.lis.virginia.gov/vacode/title59.1/chapter53/>

GDPR

General Data Protection Regulation, Regulation (EU) 2016/679

<https://op.europa.eu/en/publication-detail/-/publication/3e485e15-11bd-11e6-ba9a-01aa75ed71a1>