

ACC NCR In-House Primer Conference

# State Attorneys General: What You Need to Know

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September 12, 2023



# Team



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Former Attorney General of Virginia,  
2014 to 2022



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Partner, Akin  
Former Deputy Solicitor General of  
Virginia; Former Senior Counsel, Office  
of the White House Counsel



**Jennifer Guy**

Senior Counsel,  
Dispute Resolution, Hilton

# Program Overview

Background - AG 101

Issues

- False Claims Act/Medicaid Fraud
- Consumer Protection
- Privacy
- Antitrust + Health Care
- Artificial Intelligence

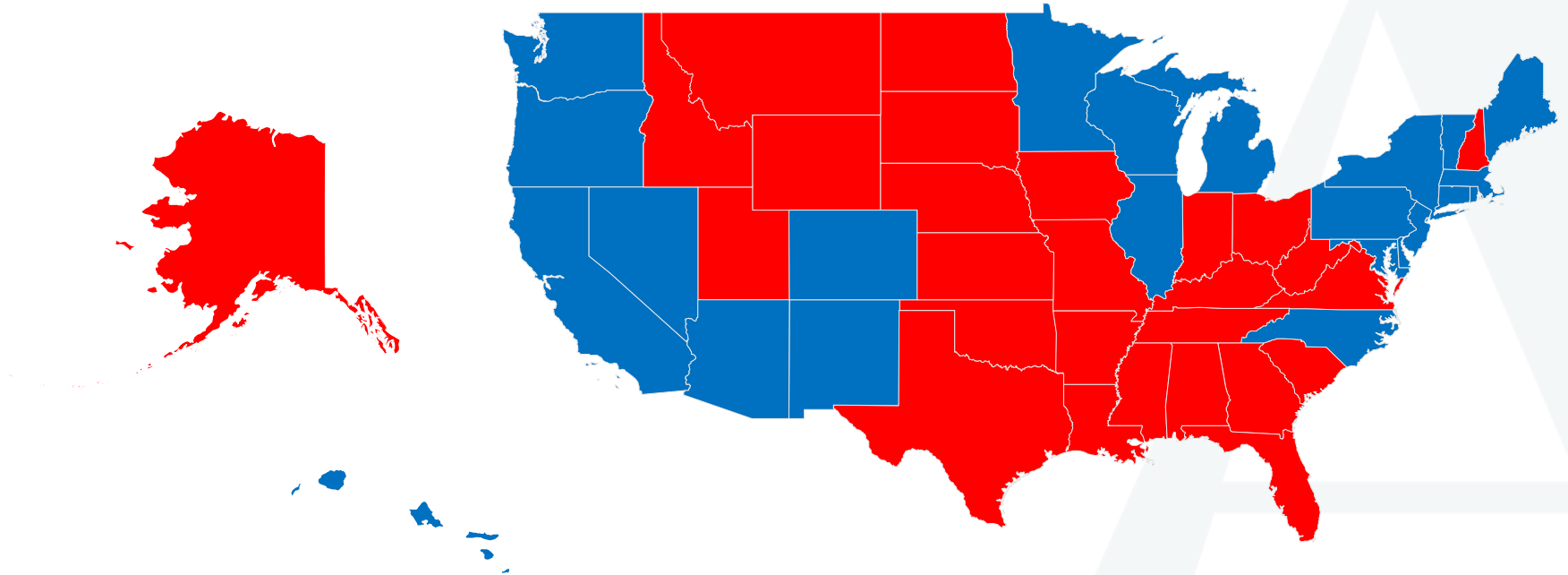
Trends and Engagement Strategies

# Background





Each state, territory, and commonwealth in the United States has an attorney general.



By and large, AGs are popularly elected on a partisan basis, currently 27 Republicans and 24 Democrats.

# Historical Influences

Guardians of the Public Interest

Check on executive power

Work at the intersection of law and politics

Independent

# Sources of Authority

Constitution

Statute

Common Law

*Parens Patriae*

In practice, there are also many constraints.

# Role of the Attorney General

While it varies from one jurisdiction to the next, the role of the AG typically includes:

- Chief legal officer of the state government
- Almost all have some criminal jurisdiction
- Handle all civil litigation in centralized fashion
- Representing the public interest and acting as a public advocate

# Resources

Career lawyers -  
nationwide about  
12,000-13,000

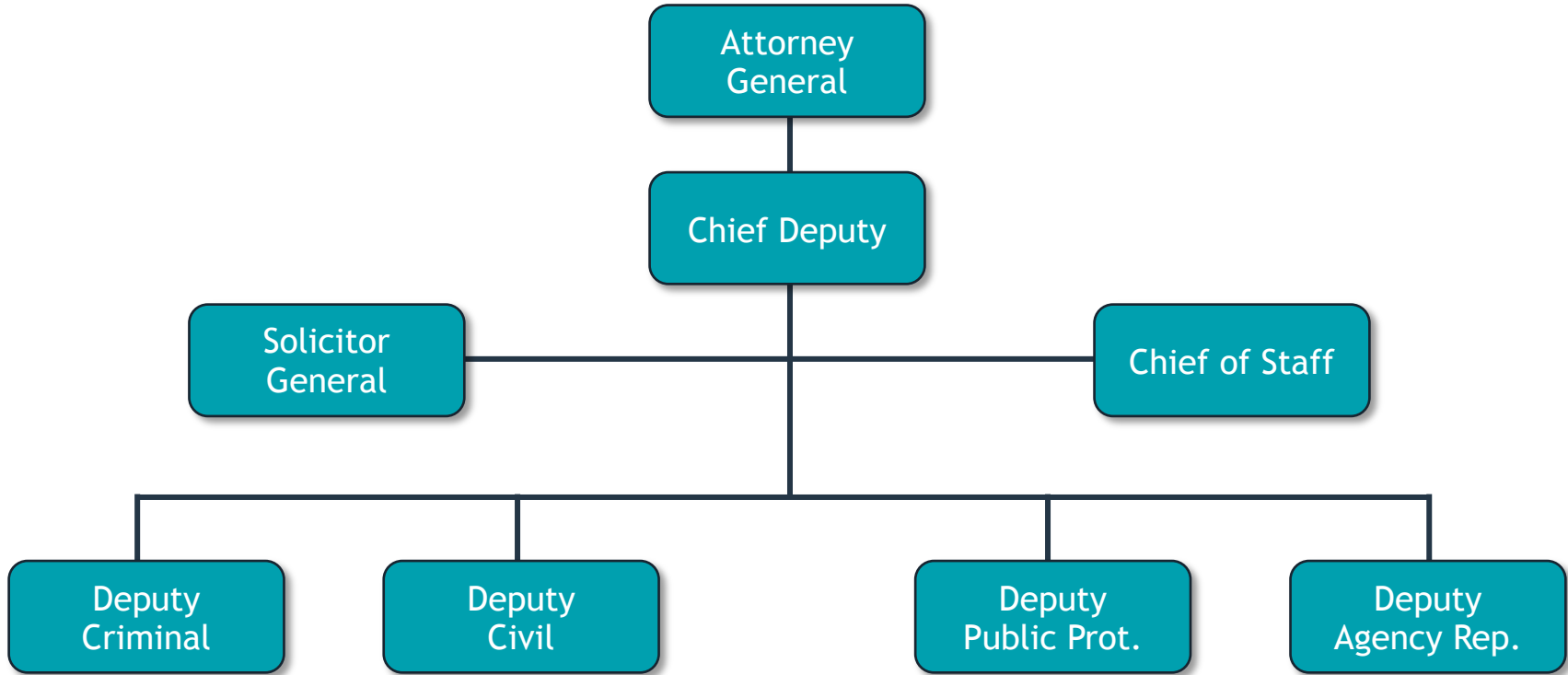
Non-lawyer  
professional staff  
and investigators

Non-contingent  
fee outside  
counsel

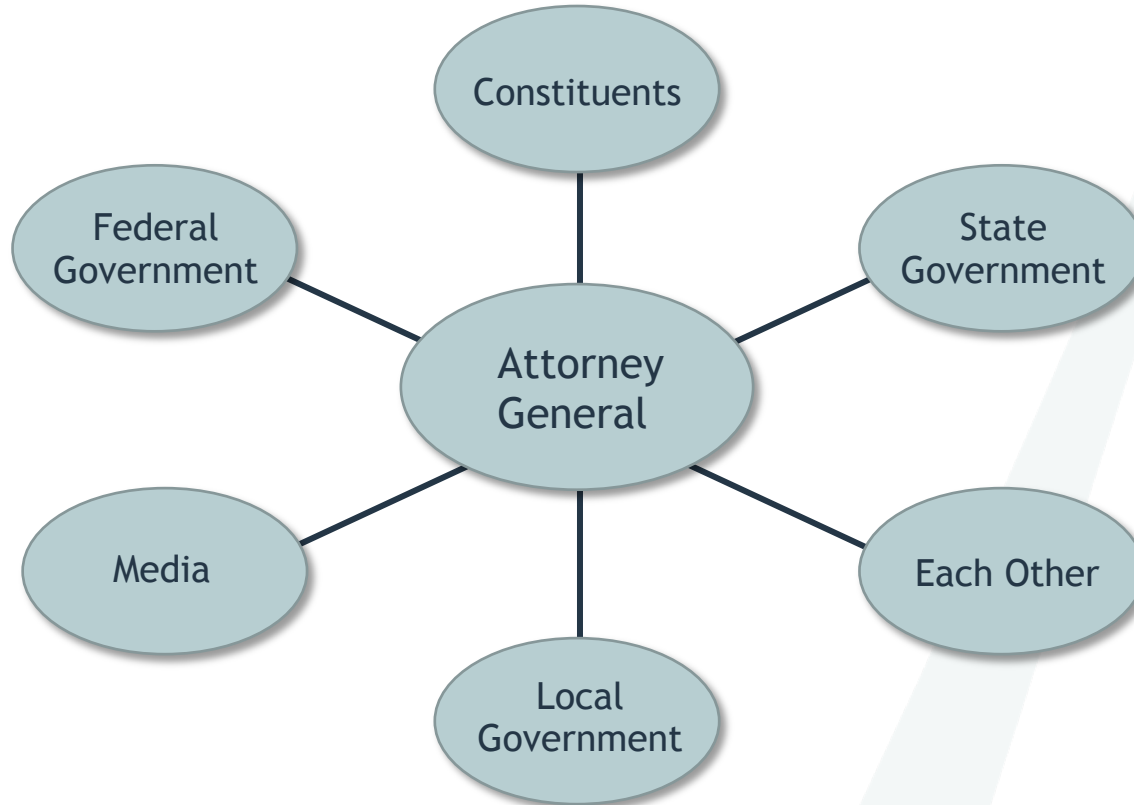
- Specialized
- Spread out
- Staffing

Contingent fee  
outside counsel

# Organization



# The AG Network of Relationships



# AGs in the National Capital Region



## District of Columbia

**Brian Schwalb (D)**

Term began January 2, 2023

Priorities: Helping children, closing equity gaps, protecting core democratic values (including Home Rule and statehood), institutional excellence with the OAG



## Maryland

**Anthony Brown (D)**

Term began January 3, 2023

Priorities: Public safety, civil rights enforcement, police reform



## Virginia

**Jason Miyares (R)**

Term began January 15, 2022

Priorities: Public safety



# Issues



# Issues

State False Claims/Medicaid Fraud

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# False Claims Act

- Under the federal False Claims Act, any person or entity that knowingly submits a false or fraudulent claim for payment of US Government funds is liable for significant penalties and fines.
- Most states have state law analogues that provide a mechanism by which states can recover funds that were unlawfully paid to private parties.
- Most of these laws:
  - authorize state AGs to bring civil actions on behalf of the state
  - provide for recovery of civil penalties, treble damages, and attorney fees
  - allow *qui tam* plaintiffs to bring actions
  - provide whistleblower protections against retaliation

# Medicaid Fraud

- Many False Claims Act cases are premised on allegations of Medicaid Fraud.
- All States, plus DC, Puerto Rico, and the US Virgin Islands have Medicaid Fraud Control Units dedicated to recovering money unlawfully retained by providers or other participants in the Medicaid programs.
- Almost all MFCUs are housed within state AG offices (DC's is within the OIG).
- In 2022, the 53 units collectively recovered over \$1.1 billion in criminal fines and civil damages and settlements.

# *United States ex rel. Schutte v. SuperValu Inc. and United States ex rel. Proctor v. Safeway*

- The Supreme Court considered whether a defendant's objectively reasonable interpretation affecting an FCA claim is sufficient to defeat the FCA's "knowing" requirement.
- Reversing the Seventh Circuit, the Court found that an objectively reasonable basis to believe a claim is not false is insufficient to defeat liability.
- Evidence of a defendant's subjective belief is relevant to the ultimate question of liability even where the defendant has presented a legal theory that is objectively reasonable.
- The Court left a number of questions unaddressed, including what constitutes an "unjustifiable risk" that a claim is false.

(Slip Opinion)

OCTOBER TERM, 2022

1

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

## Syllabus

UNITED STATES ET AL. EX REL. SCHUTTE ET AL. *v.*  
SUPERVALU INC. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT

No. 21–1326. Argued April 18, 2023—Decided June 1, 2023\*

# *United States, ex rel. Polansky v. Executive Health Resources, Inc.*

- The Supreme Court considered the circumstances under which the government can dismiss an FCA case filed as a *qui tam* action.
  - The Court held that Rule 41 standards govern motions to dismiss, but application of the Rule will differ in two respects from the standard case.
    - First, as a matter of procedure, the *qui tam* relator should be given notice and an opportunity to be heard.
    - Second, the court should take into account the relator's interests since they will have invested substantial resources into the case.
  - Nonetheless, government motions to dismiss “will satisfy Rule 41 in all but the most exceptional cases.”

(Slip Opinion)

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# Issues

State False Claims/Medicaid Fraud

Consumer Protection

Privacy

Antitrust + Health Care

Artificial Intelligence

A grayscale image of a laptop with a magnifying glass resting on it. A semi-transparent document icon with lines representing text is overlaid on the screen. The document has a header with three dots and a table with two columns and two rows. The background is blurred, showing what appears to be a person's face.

# Consumer Protection (laws and practice)

- State AGs have broad authority to investigate violations of consumer protection laws in their jurisdictions and to undertake enforcement actions where appropriate.
- Civil Investigative Demands are common state AG tools.
- Enforcement actions can lead to damages, fines, and/or injunctive relief precluding particular practices.
- For matters that are national or regional in scope, AGs frequently band together to form multi-state coalitions to investigate and pursue enforcement actions.
- FTC is now partnering with state AGs more frequently, partly due to the Supreme Court's holding in *AMG Capital Mgmt v. FTC* that the FTC could not obtain equitable monetary relief, such as disgorgement or restitution, under § 13(b) of the FTC Act.





## Consumer Protection (frequent targets)

- With respect to consumer products, many investigations involve allegations that a manufacturer has marketed a product in a false or misleading manner.
- Investigators are focused on “dark patterns” used by online retailers.
  - Dark patterns are online user interfaces that influence users into making choices they ordinarily wouldn’t.
  - Examples might include ambiguously worded buttons that trick people into selecting them, unnecessarily lengthy click-thru process before getting to cancel, requiring a lengthy scroll through to opt out of data sharing.
- Other current frequent targets are hidden or junk fees, and customer disclosures on fintech platforms.



## Consumer Protection (examples)

1. On November 14, 2022, Google agreed to pay \$391.5 million to settle claims brought by 40 state AGs alleging Google misled users into thinking they had turned off location tracking in their account settings, when they had not and Google continued to collect their location data. (dark pattern + privacy claims)
2. In April 2023, a coalition of 11 state AGs announced settlements with a telehealth company alleging it made unsubstantiated, false, or misleading marketing claims about the accuracy and safety of its vision tests and unfair or deceptive representations about customer satisfaction rates and guarantees.

A magnifying glass is positioned over a laptop screen. A stylized, semi-transparent document with horizontal lines and a header section is overlaid on the screen. The background is a blurred image of a person's face.

## Consumer Protection (examples)

AGs are also using their consumer protection authorities in novel ways to pursue investigations and enforcement actions that resonate with their political bases.

1. Multiple Democratic AGs, including D.C., have sued oil and gas companies alleging that they misled consumers about the impacts of fossil fuels on climate change.
2. New Jersey is investigating the advertising practices of a large gun manufacturer.
3. Coalitions of Republican AGs are investigating banks, asset managers, and other entities within the financial services industry based on allegations that their focus on ESG investing harms consumers.

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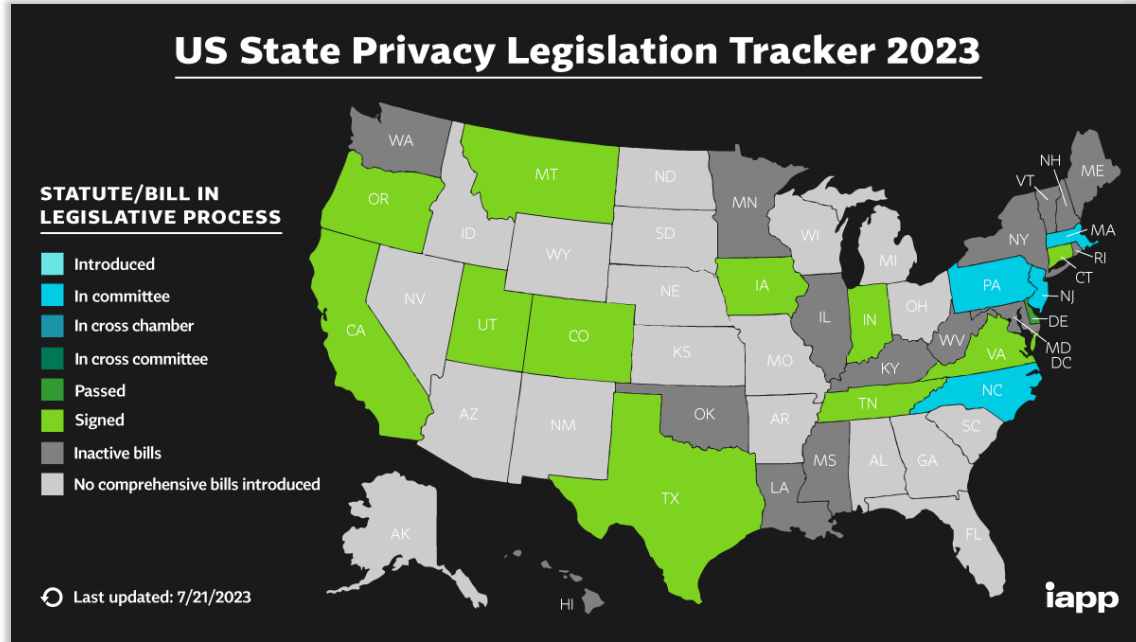
Antitrust + Health Care

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# Privacy

All 50 states plus DC have enacted data breach notification laws requiring that companies notify consumers when they experience a breach of their customers' personal information, and most of those laws are overseen and enforced by state AGs.

Ten states have passed comprehensive privacy laws and six more state legislatures are considering it.



# Common Features of New Comprehensive Privacy Laws

## Consumer Rights

- Right to access
- Right to correct
- Right to delete
- Right to opt out of certain processing
- Right to portability
- Right to opt out of sales
- Right to opt in for sensitive data processing
- Right against automated decision making
- Private right of action

## Business Obligations

- Opt-in default (age requirement)
- Notice/transparency requirement
- Risk assessments
- Prohibition on discrimination (exercising rights)
- Purpose/processing limitation

# State AG Enforcement of Privacy Laws

State AGs have long-standing role in privacy enforcement through state UDAP laws. Virginia's enforcement scheme is the model many other comprehensive state privacy statutes are following.

- The AG has exclusive authority to enforce provisions of the CDPA. Va. Code Ann. § 59.1-584(A).
- The AG may seek injunctive relief, civil penalties, and attorney fees, but must first give 30 days to cure alleged violations.
- The AG may issue a CID requiring a controller to disclose any data protection assessment that is relevant to an investigation conducted by the AG. Va. Code Ann. § 59.1-580 (C).
- The AG is authorized to issue a CID whenever the AG has reasonable cause to believe that any person has engaged in, is engaging in, or is about to engage in any violation of the CDPA. Va. Code Ann. § 59.1-583.

HIPAA and COPPA also authorize state AGs to enforce violations affecting residents of their respective states.

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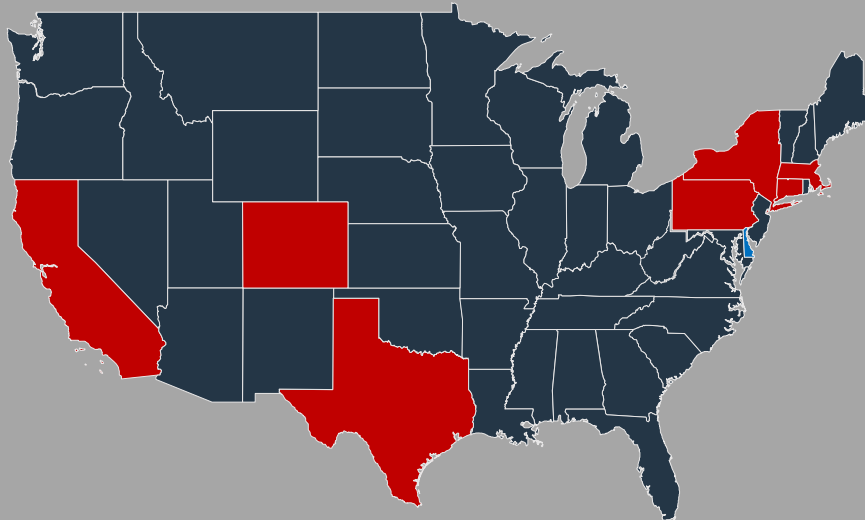
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# Antitrust

- State AGs have become increasingly active in the antitrust arena
- There are a few states in particular that have sophisticated antitrust units and are leaders on those matters
- Those States include: Colorado, New York, California, Texas, Massachusetts, Connecticut, and Pennsylvania
- The NAAG antitrust task force has important coordinating role



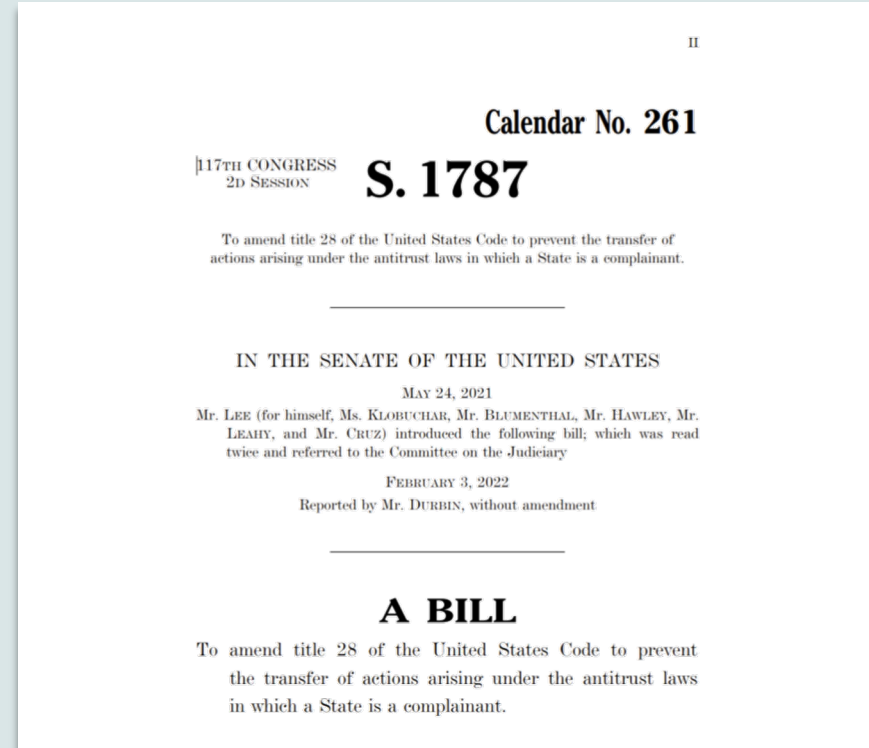
# Antitrust

- The FTC and DOJ have overlapping federal antitrust jurisdiction, although the FTC has additional authority under the FTC Act for other anticompetitive practices and regulatory authority.
- The FTC and DOJ have developed expertise in different areas (e.g. FTC - health care provider markets and DOJ - health insurance markets) and have a clearance process to determine which agency leads in merger investigations.
- Antitrust cases typically involve coordination between the federal government and at least some state AGs.
- Sometimes state AGs will go it alone. See *State of Ohio v. Ascent Health Svcs.*



# Antitrust: State Venue Act

- Late last year, the State Antitrust Enforcement Venue Act was signed into law
- The Act puts States on the same footing as the federal government insofar as it prevents antitrust actions filed by States from being consolidated and moved into multi-district litigations at the request of companies
- The upshot of the Act is that State antitrust plaintiffs will be permitted to remain in their preferred venue



# AG Authority to Oversee Health Care Markets

- AG authority under antitrust laws can converge with AG authority over charitable assets in the health care context.
- AG authority to review health care consolidations varies by state.
  - Some states have no merger notification requirements or authority to review proposed mergers.
  - Some states provide for merger notification requirements and authority to narrowly review proposed mergers under either general or health care-specific nonprofit laws that seek to ensure the charitable purposes of the entities continue.
  - Some states provide for merger notification requirements and authority to use competition-based criteria for review of either non-profit hospitals or most hospital mergers generally.



# AGs and COPAs

**COPAs** are state laws that provide state regulatory oversight over mergers and collaborations among health systems that immunize them from antitrust violations under the state action doctrine exemption, i.e. *Parker Immunity*. *Parker v. Brown*, 317 U.S. 341 (1943).

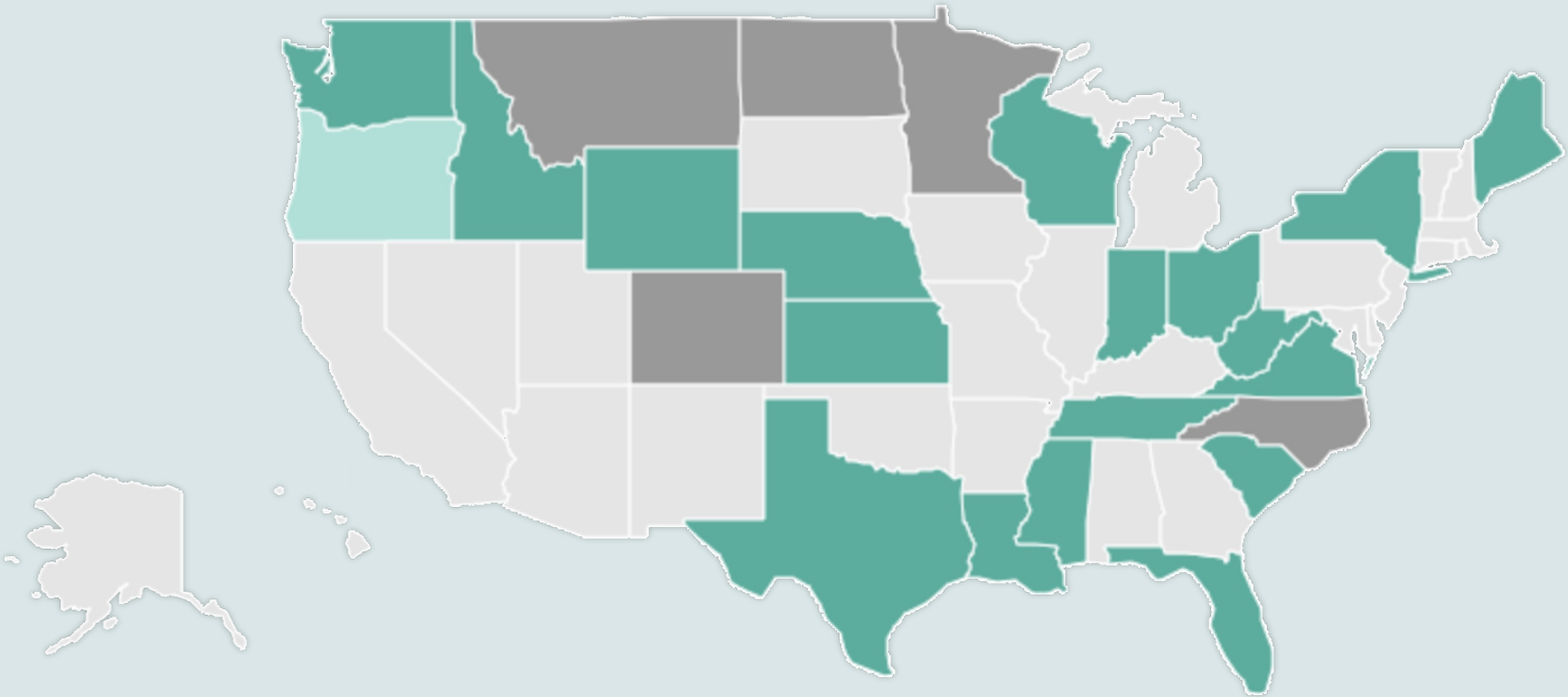
## AGs often have multiple roles:

- Participant in policy/legislative debate
- Legal advisor to executive branch agencies, especially health commissioner or department
- Independent antitrust decisionmaker and sometimes issuer of COPA
- COPA enforcer

**COPAs** are by definition anticompetitive and are disfavored by the FTC.

**Does Hart-Scott-Rodino Act apply?**

# AGs and COPAs



Virginia and 18 other states have some form of COPA laws. Five states have repealed COPA laws.

# Issues

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An abstract graphic on the left side of the slide, featuring a dark background with a complex network of glowing blue lines and nodes, resembling a digital or neural network structure.

# AGs and Artificial Intelligence

- State AGs have broad enforcement authority in a number of areas that could significantly impact how AI tools are created and deployed. These include:
- **Unfair or deceptive trade practices** if, for example, consumers were to be misled about what they are seeing, hearing, reading, or otherwise experience an unfair outcome
- **Data privacy**, where AI is used to collect personal data
- **Cybersecurity**, if AI were manipulated for malicious purposes
- **Anti-discrimination laws**, if AI were to produce harmful instructions or biased content, or use of AI tools led to biased outcomes



# Trends and Engagement Strategies



# Trends

- We expect States to continue to be active in pursuing Medicaid fraud and other False Claims Act suits, particularly in light of the Supreme Court's recent decision in *Schuette/Proctor*.
- We expect States to continue aggressively using their consumer protection authorities to target companies the AGs believe have engaged in unfair or deceptive practices, especially where they see:
  - new technology and business models that don't fit traditional regulations
  - dark patterns
  - hidden or junk fee
  - an opportunity to advance political agendas
- We expect States to continue to file antitrust actions where they see substantial costs to the consumer, potentially focusing on issues like vertical integration in the healthcare field and Big Tech.
  - An unanswered question is whether States continue to pursue actions even where the federal government has opted not to participate.

# AG Engagement

- State AGs are generally accessible, especially as compared to other elected officials, like governors.
- AGs attend regular meetings organized by partisan and non-partisan organizations.



- The meetings offer opportunities to engage directly with State AGs or their high-level staffs both to build goodwill and to raise issues.

# Engagement with State AGs

- It is also possible to seek a meeting with an AG representative if an issue arises or could potentially arise.
- This type of engagement should be approached very intentionally.
- Particularly when a party is under investigation, there are risks inherent in engaging with an OAG.
- If a determination is made that the benefits of engagement outweigh the risks, the meeting should be well planned with affirmative points and responses to likely hard questions thoroughly vetted.
- Thought should be given to who in the OAG is the right person to meet with and who from the company is the right representative to carry the message.
- Company representatives, as well as outside counsel, should be prepared to keep the conversation focused and avoid detours into sensitive areas.

# AG Engagement, Cont.

- What if you receive a request for information?
  - Do treat it seriously. Do not ignore it!
  - Understand the AG's jurisdiction or authority.
  - Use early engagement to understand the zone of conduct that prompted the inquiry and attempt to narrow the scope of requests.
  - Think creatively about how to address complaints that might be driving the inquiry. Help solve the problem.
  - Know potential exposure and settlement benchmarks

# For more information, contact us:



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**Jennifer Guy**

# APPENDIX

# Slide 7: Sources of state attorney general authority in DC, MD, and VA

## Constitutions

D.C. Code 1-204. § 35

Md. Const. art. V, §§ 1-6

Va. Const. art. V, § 5

## Statutes

D.C. Code §§ 1-301 through -301.91

Md. Code Ann., State Government, §§ 6-101 through -702

Va. Code Ann. §§ 2.2-500 through -524

**\*\***There are many other specific ones scattered throughout the codes.

## Common Law

For a thorough discussion of state attorney general common law powers, see *Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976). State constitutions and statutes can abrogate common law powers of attorneys general. See *State v. Burning Tree Club*, 301 Md. 9 (1984).



# Slide 15: State False Claims Act Analogues in DC, MD, and VA

D.C. Code §§ 2-381-01 through -381.10

Md. Code Ann., General Provisions, §§ 8-101 through -111

Va. Code Ann. §§ 8.01-216.1 through -216.19

# Slide 16: State Medicaid Anti-Fraud Statutes in DC, MD, and VA

D.C. Code §§ 4-801 through -805

Md. Code Ann., Health--General, §§ 2-601 through -611

Md. Code Ann., Criminal Law, §§ 8-508 through -519

Va. Code Ann. §§ 32.1-310 through -322

# Slides 17, 18: Two False Claims Act cases decided by the Supreme Court this term

United States ex rel. Schutte v. SuperValu Inc.

United States ex rel. Polansky v. Executive Health Resources, Inc.

## Slide 20: State Consumer Protection Statutes in DC, MD, and VA

D.C. Code §§ 28-3901 through -3913

Md. Code Ann., Commercial Law, §§ 13-101 through --411

Va. Code Ann. §§ 59.1-196 through -207

AMG Capital Management, LLC v. FTC, 593 U. S. \_\_\_\_ (2021)

# Slide 27: Virginia Consumer Data Protection Act

Va. Code Ann. §§ 59.1-575 through -584

# Slide 29: State Antitrust Statutes in DC, MD, and VA

D.C. Code §§ 28-4501 through -4518

Md. Code Ann., Commercial Law, §§ 11-201 through -213

Va. Code Ann. §§ 59.1-9.1 through -9.17

# Slide 32: Virginia Disposition of Assets by Nonprofit Health Care Entities

Va. Code Ann. §§ 32.1-373 through -375

Virginia AG Form for Pre-merger Notification

# Slide 33: AGs and COPAs

[COPA Policy Paper \(ftc.gov\)](https://www.ftc.gov/policy/copa-policy-paper)



# Slide 34: Virginia COPA Statute

Va. Code Ann. §§ 15.2-5368 through -5386