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New York Attorney General's Office Fall Round-Up

Client Alert | November 15, 2022

The New York Attorney General's Office (the "NYAG" or the "Office") continues to serve as a leader for other state attorneys general, having a profound impact on corporations, nonprofits, and individuals in New York and beyond. This round-up summarizes the major cases and initiatives pursued by New York State's 67th Attorney General, Letitia James, and her team since August 2021. AG James was just re-elected to another four-year term beginning January 2023.

The NYAG's priorities include a mix of local and national issues, including data privacy, cybersecurity, and data breaches; employee rights; investor protection; environmental and animal protection; protecting consumers, including homeowners, taxpayers, and seniors; and cracking down on Medicare fraud. There is certainly overlap in the NYAG's priorities and those of federal regulators, and, like attorneys general around the country, increasingly the NYAG investigates and brings high-profile actions alongside federal regulators—including in cases where she may not have jurisdiction.

One new trend is that AG James is issuing reports that provide information about the NYAG's investigative findings. Although these reports are not "legal proceedings" and often do not have any legal significance, the reports can have important public relations and reputational impact, and potentially spawn other regulatory investigations. Recently, for example, the Office has issued reports on the Nursing Home Response to the COVID-19 Pandemic, fake comments submitted in response to an FTC rulemaking on net neutrality, the sexual harassment allegations against Governor Andrew Cuomo, and the mass shooting in Buffalo, NY.

In terms of litigation, in recent years, the Office has made headlines for bringing large-scale suits in healthcare, including e-cigarette use among youth, the opioid crisis, and access to health care. That said, the Office initiates litigation in very few cases, resolving most through settlements. Like many AGs offices around the country, the Office is focused on enforcement against what it calls "Big Tech," based on various legal theories, and in the past year has initiated several high-profile investigations into technology companies and other businesses. AG James continues to advocate for legislation in various key areas, including health care and the environment.

The Office's biggest headline-grabber this year has been the September 2022 lawsuit against Donald Trump, the Trump Organization, senior management, and other entities. The case alleges that the Trump defendants engaged in years of financial fraud by falsely inflating Trump's worth by billions of dollars in order to induce banks to lend money to the Trump Organization on more favorable terms, satisfy continuing loan covenants, induce insurers to provide insurance coverage for higher limits and at lower premiums, and gain tax benefits.[1] On November 4, AG James won a motion that granted a preliminary injunction freezing certain assets, appointed an independent monitor to oversee the submission of financial information to certain third parties, and scheduled a preliminary conference for November 22 to set an expedited trial schedule.[2]

In this Round-Up, we discuss in further detail numerous of AG James's key cases and initiatives over the past year, including her support for antitrust legislation and efforts to

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enforce antitrust laws; her continued focus on data privacy rights of New Yorkers as reliance on consumer technology has increased as a result of the COVID-19 pandemic; her new efforts to in investor protection; her ongoing focus on health care, including abortion access; and her attention on the environment and labor and employment rights of New Yorkers.

I. Antitrust and Competition

AG James has continued to support efforts seeking to strengthen and modernize the antitrust laws. In September 2021, AG James co-led a bipartisan coalition of 32 state attorneys general in calling on Congress to fund state antitrust efforts in response to changing technology.[3]

In New York specifically, AG James has continued to be a proponent of enacting the 21st Century Antitrust Act, a bill that its supporters claim would update New York's antitrust laws to address the modern economy.[4] The bill passed the New York State Senate on May 25, 2022 but did not pass the Assembly.[5] The law seeks to expand antitrust liability under New York's Donnelly Act to, among other things, make it unlawful for a company to "abuse" a "dominant position" in a relevant market—a standard that is adopted from European law.[6] The bill has been criticized as excessively vague and potentially harmful to the New York economy.

AG James has also continued to aggressively investigate and pursue litigation against technology and pharmaceutical companies for alleged antitrust violations.[7] In January 2022, a coalition of 48 attorneys general (led by AG James) appealed the D.C. federal district court's dismissal of their claims against a tech giant for allegedly anticompetitive acquisitions.[8] Also in January 2022, the Southern District of New York ruled in favor of New York, the FTC, and six other states in finding that Martin Shkreli engaged in illegal and anticompetitive practices while serving as the CEO of a pharmaceutical company. Shkreli was banned from the pharmaceuticals industry for life and was ordered to pay nearly $65 million.[9]

AG James also launched antitrust investigations into and reached agreements with other businesses. For example, in November 2021, the Office reached an agreement with two large supermarket chains to divest stores located in New York in connection with the companies' proposed merger because it would have allegedly eliminated direct competition between local supermarkets.[10] And on July 28, 2022, AG James announced a lawsuit against a national pharmacy for alleged antitrust violations that allegedly impacted hospitals and clinics that provide care for underserved communities across New York State, by purportedly restricting their ability to take advantage of certain federal subsidies.[11]

II. Data Privacy, Cybersecurity, and Data Breaches

AG James continued to be active in the data privacy and cybersecurity realms over the past year, announcing several investigations arising from alleged data breaches, focusing on the importance of corporations keeping their customers' personal data safe. In fact, according to a list identifying the number of complaints AG James's Office received in 2021, which AG James published in March of this year, the Office received the greatest number of complaints for "Internet-Related" issues, including "data privacy and security" and "data breaches."[12] Notable investigations and settlements, specifically arising from data breaches, include the following:

- In January 2022, the Office reached a $600,000 agreement with a vision care provider, arising from an alleged 2020 data breach compromising the personal information of approximately 2.1 million consumers nationwide, including 98,632 New York State residents.[13] AG James's investigation was brought pursuant to the Stop Hacks and Improve Electronic Data Security Act (the "SHIELD" Act), New York's cybersecurity statute which, effective March 2020, expanded the

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State's data breach notification law and imposed cybersecurity requirements on companies that collect or maintain "private information" of New York residents.[14] In addition to the monetary payment, the company agreed to maintain a comprehensive information security program, regularly report any security risks to its leadership, maintain reasonable account management and authentication systems, encrypt sensitive consumer information, maintain appropriate logging and monitoring of network activity, and permanently delete consumers' personal information when there is no reasonable business or legal purpose to maintain it.[15]

- In June 2022, the Office, along with 45 other attorneys general, reached a $1.25 million settlement with a cruise line, arising from an alleged 2019 data breach that compromised the personal information of 180,000 employees and customers nationwide, including 6,575 New Yorkers.[16] Under the agreement, the cruise line will strengthen its email security and breach response practices, including by implementing and maintaining a breach response and notification plan; requiring email security training for employees; instituting multi-factored authentication for remote email addresses; requiring strong, complex passwords, password rotation, and secure password storage; maintaining enhanced behavior analytics tools to log and monitor potential security events; and undergoing an independent information security assessment.[17]
- In June 2022, the Office reached a $400,000 settlement with a grocery store chain based on allegations that the company exposed the personal information of more than three million consumers, including more than 830,000 New Yorkers, due to allegedly unsafe cloud storage practices.[18] The NYAG alleged that compromised data included usernames and passwords, customers' names, email addresses, mailing addresses, and data derived from driver's license numbers.[19] Under the terms of the settlement, aside from paying $400,000 in penalties, the grocery store will overhaul its security and data management policies, particularly those related to cloud assets.[20]

AG James has also launched several consumer protection investigations into various social media companies in connection with in allegedly harmful activity or prolonged social media engagement by young adult users.[21]

Additionally, on January 5, 2022, AG James released a Business Guide for Credential Stuffing Attacks after an investigation into "credential stuffing"—repeated, automated attempts to access online accounts using usernames and passwords stolen from online services—revealed that over 1.1 million online accounts had allegedly been compromised in cyberattacks at 17 well-known online retailers, restaurant chains, and food delivery services.[22] According to press reports, this "credential stuffing" allegedly compromised customer accounts at each of the companies.[23] The Office urged the companies to investigate and protect impacted users, and every company complied.[24]

Given evolving technology and the increase in cyber-attacks against businesses and consumers, we expect data privacy and cybersecurity to remain a high priority for the Office in the next year.

III. Cryptocurrency and Consumer/Investor Protection

We also expect that AG James will continue to scrutinize actors, investments, and exchanges in the cryptocurrency space, and generally in the consumer financial and investor protection areas. AG James's efforts this past year demonstrate continued scrutiny of allegedly misleading statements and practices, including by debt collection agencies and student loan servicing agencies, as well as scrutiny of general consumer financing practices by non-bank retailers and money transmitters.

AG James's focus on cryptocurrency investment has included an August 1, 2022 "investor alert" that urged "any New Yorker deceived or affected by the cryptocurrency

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crash to contact her office."[25] The alert also "encourage[d] workers in the cryptocurrency industry who may have witnessed misconduct or fraud to file a whistleblower complaint."[26] The alert, which is only AG James's most recent action in the space, came after the cryptocurrency market, in general, lost significant value this summer. Prior to this most recent notice, in March 2022, AG James issued a "taxpayer notice," reminding cryptocurrency investors and their tax advisors "to make sure that they accurately declare and pay taxes on their virtual investments" to avoid any violations of tax law.[27]

AG James has also focused on cryptocurrency exchanges. On October 18, 2021, AG James sent cease and desist letters to two unnamed cryptocurrency platforms and directed three other unnamed platforms to provide information about their activities and products.[28] According to redacted cease and desist letters made publicly available by the NYAG, the two unnamed exchanges are allegedly "unlawfully selling or offering to sell . . . securit[ies] . . . without having registered as required" under New York's Martin Act, which requires these exchanges to be registered with the Office as brokers, dealers, or salespersons, unless otherwise exempted.[29] The letters also came only weeks after AG James won a $3 million judgment against a cryptocurrency trading platform in New York County State Supreme Court.[30]

On September 26, 2022, AG James joined the securities regulators of seven other states in suing related cryptocurrency companies in New York County State Supreme Court for allegedly failing to register with the state as securities and commodities brokers or dealers and for allegedly misrepresenting their registration status to investors.[31] The defendants have not yet responded to the NYAG's complaint.

Moreover, on September 13, 2021, AG James settled alleged claims without admission against two related media companies in connection with allegations that they unlawfully sold stock and cryptocurrency without registering them in New York State.[32] In addition to offering and selling stock beginning in April 2020, the two companies allegedly raised more than $30 million from pre-sales of two digital instruments promoted as cryptocurrencies.[33] Pursuant to the agreement, the companies will get credit toward the $479.9 million settlement for payments to the Securities and Exchange Commission ("SEC") in connection with a related SEC investigation.[34]

AG James has also been active in the consumer financial protection space, particularly with respect to debt collectors and student debt services. Most recently, on August 16, 2022, AG James applauded the U.S. Department of Education for discharging the federal student loan debt of over 4,000 New Yorkers who attended certain for-profit colleges between 2005 and 2016.[35] Earlier this year, AG James also encouraged students who attended other institutions that allegedly inflated their job placement statistics to apply for federal loan discharges, and led a coalition of eight attorneys general in asking President Biden to fully cancel federal student debt writ large.[36] In August 2022, President Biden announced that the Department of Education will cancel $10,000 of student debt for borrowers who meet identified income requirements.[37] The Eighth Circuit Court of Appeals issued an administrative stay pausing the program on October 21.[38]

AG James also secured two agreements earlier this year with federal loan servicers. In the first, one of the country's largest student loan servicers agreed to cancel $1.85 billion in private student loan debt nationwide, and to pay $95 million in restitution to students and $142.5 million to states.[39] The agreement followed an investigation by 39 attorneys general, including AG James, into whether the servicer allegedly improperly caused students to enter into forbearance plans that were ultimately detrimental to borrowers.[40] In the second, the student loan servicer agreed to automatically review the accounts of approximately 10,000 New Yorkers and credit accounts as appropriate, in order to settle a 2019 lawsuit alleging the servicer mismanaged student debt.[41] In addition to student loan servicing, AG James has also devoted attention to practices of debt collection agencies. This year, AG James has settled claims with two debt collection businesses, enjoining these business from acting as debt collectors in the future.[42] AG James also

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issued a consumer alert in December aimed at educating consumers about their rights and warning of improper debt collection tactics.[43]

Aside from settling recent cases, AG James has also initiated litigations to enforce consumer protection laws in the financial services area. For example, in April 2022, AG James and the Consumer Financial Protection Bureau filed a lawsuit against a large money transfer provider, alleging the provider violated consumer protection laws, including by failing to timely transfer funds or refund consumers for delayed transfers.[44] In August, the money transfer provider filed a motion to transfer the action from the United States District Court for the Southern District of New York to the Northern District of Texas and to dismiss the complaint.[45] Moreover, in February 2022, state regulators, including AG James, along with the SEC and the U.S. Commodity Futures Trading Commission, brought a lawsuit alleging that a precious metals company and its owner unlawfully solicited nearly $68 million for precious metals and misrepresented fees charged to investors.[46] These litigations are still pending.

IV. Health Care

AG James has continued to focus on inadequately managed properties that threaten tenant and worker safety, health products that endanger children and babies, the opioid epidemic, the COVID-19 pandemic, and reproductive health.

AG James has sought to protect the public from inadequately managed properties that threaten tenant health. For example, in September 2021, AG James and the New York City Department of Investigation indicted four Certified Asbestos Investigators on 19 counts, including felony charges, for allegedly filing false asbestos inspection reports.[47] And in June 2022, AG James agreed to resolve an October 2021 lawsuit against a landlord in Syracuse for allegedly failing to protect children from lead paint.[48] This success comes in the wake of a multi-state call on the Environmental Protection Agency ("EPA")—which AG James led—to strengthen protections against lead poisoning for children living in low-income communities and communities of color.[49] That same month, AG James reached an agreement with a wireless network operator to help prevent the spread of Legionnaires' disease, which can be spread by poorly monitored building cooling towers.[50]

AG James has taken other steps involving children's health. In October 2021, AG James led a coalition of 23 attorneys general to petition the Food and Drug Administration to accelerate the removal of heavy metals from baby food.[51] She also issued an alert to protect children from deceptive cannabis products sold in snack packaging, warning New Yorkers to "remain vigilant" against such products.[52]

AG James has devoted significant attention to the opioid epidemic. In March 2019, AG James filed an extensive lawsuit aiming to hold various manufacturers and distributors accountable for the epidemic.[53] AG James entered three notable settlements in the suit in the last year, with one manufacturer for $523 million and another for $200 million (most of which are earmarked for opioid abatement) and with a pharmaceutical company for $58.5 million. She also sought to bring a previously dismissed pharmaceutical company back into the lawsuit, moving to vacate their dismissal for allegedly making "significant and intentional misrepresentations" to her Office regarding the extent of its role in its subsidiary's opioids business.[54]

AG James has also urged the CDC to adopt stronger opioid prescription guidelines,[55] and in recent months has distributed over $100 million from settlements with opioid manufacturers and distributors to communities across the State impacted by the epidemic.[56] AG James has also begun to distribute $256 million earmarked for New York City to combat the crisis—the first round of payments from the $1.5 billion that AG James has secured for the State from settlements with opioid manufacturers and distributors.[57]

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AG James has also continued to prioritize public health in light of the COVID-19 pandemic. For example, AG James issued a warning letter to a diagnostics company for allegedly misrepresenting its turnaround times for COVID-19 test results, and she launched an investigation into a clinic over reports that it allegedly wrongfully billed New Yorkers for COVID-19 tests.[58] AG James has helped consumers recover over $400,000 who paid for expedited COVID-19 tests but received results later than promised.[59]

Finally, after a draft Supreme Court opinion in *Dobbs v. Jackson Health Women's Health Organization* was leaked to the press in May 2022, AG James quickly mobilized around women's reproductive health issues. AG James and Assembly Member Jessica González-Rojas announced a bill to establish a state program to provide financial resources to abortion providers, which is currently in committee, and offered guidance to protect the privacy of individuals seeking abortions.[60] Following the publication of the Supreme Court's decision in *Dobbs*, AG James vowed to keep New York a "safe haven" for those seeking an abortion.[61]

V. Environmental Protection

AG James's Office continued its environmental activism over the past year, leading other state attorneys general in urging federal agencies to take more aggressive stances on environmental issues, particularly climate change.

The majority of AG James's actions directed at federal regulations came in the form of letters to various federal actors urging progressive rules and regulations concerning climate and pollution-related topics. For example, on September 14, 2021, AG James, along with 20 state attorneys general, asked Congress to respond to the climate crisis and support environmental justice by funding programs in budget reconciliation legislation.[62] In December 2021, AG James and 15 other Democratic state attorneys general also filed comments in support of the Pipeline and Hazardous Materials Safety Administration's proposal to suspend a Trump-era rule allowing liquefied natural gas to be shipped in rail tank cars, arguing, in part, that the environmental assessment of the rule "did not adequately consider upstream and downstream effects on greenhouse gas emissions."[63] On June 30, 2022, in response to the Supreme Court ruling in *West Virginia v. EPA*, which ruled that the EPA lacked authority to restructure the electric power industry, AG James issued a statement saying that her Office "will continue to be a champion for our environment, our future, and the health of New Yorkers" and "will work to end our nation's reliance on fossil-fuel power plants that pollute our environment, and move towards clean, renewable, and affordable electricity."[64] Most recently, on September 20, 2022, AG James announced an agreement with the U.S. Department of Energy ("DOE") committing DOE to a new timetable for updating energy efficiency standards for 20 categories of common consumer products and commercial equipment, ranging from residential furnaces to laundry machines to electric motors.[65] This agreement resolved a complaint against the DOE filed by the NYAG and a coalition of 17 states in 2020 alleging that the DOE failed to comply with certain deadlines for updating energy efficiency standards set by the Energy Policy and Conservation Act of 1975.[66]

In addition to regulatory advocacy, AG James also filed lawsuits related to environmental protection. On April 28, 2022, AG James and California Attorney General Rob Bonta led a multistate coalition in suing the United States Postal Service for allegedly failing to consider the environmental impact of its new fleet of mail trucks.[67] The lawsuit is currently pending before the Judicial Panel on Multidistrict Litigation, and oral argument the motion to transfer for coordinated pretrial proceedings was denied on October 7, 2022.[68] On March 31, 2022, the offices of AG James and Department of Environmental Conservation Commissioner Basil Seggos announced the indictment of a Kentucky-based freight shipping and trucking company and its Vice President for allegedly dumping hazardous materials in Chenango County and creating fake scale tickets to conceal the alleged disposal.[69]

VI. Labor and Employment

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This year, as labor organizing efforts generally have picked up around the state, AG James turned to support local unions. In August 2021, AG James announced that she, along with 16 other attorneys general, asked the U.S. Senate to pass the Protecting the Right to Organize Act of 2021 ("PRO Act").[70] The bill would allow unions to override "right-to-work" laws in more than two-dozen states, curtail employer intervention in union elections, and introduce new monetary penalties for certain retaliatory actions, among several other labor-friendly reforms.[71] Although unlikely to pass the Senate this year, AG James's support for the bill indicates her enthusiasm for expanding workers' rights and union membership.[72] Throughout the past year, AG James has met with young organizers and made several statements in support of a coffeehouse chain's employees' ultimately successful union campaign in Buffalo.[73] She also expressed support for a health system's employees' decision to strike in late 2021.[74] Looking ahead, AG James has indicated that she plans to work alongside the Service Employees International Union ("SEIU") to seek stronger protections for nursing home workers in light of staffing, wage, and operations issues that were brought to light during the COVID-19 pandemic.[75]

AG James has been active across the labor and employment area. These efforts include the following:

- After settling allegations of sexual harassment, unlawful sex discrimination, and retaliation against a celebrity chef in 2021, AG James's Office has continued to investigate sexual harassment and discrimination in the entertainment and hospitality industries.[76] Following a 16-month investigation, on July 13, 2022, AG James's Office announced a $500,000 settlement with the owner of a Manhattan bar on behalf of sixteen former employees. The settlement also requires the bar to update its training materials, post notices regarding anti-discrimination rights, and submit to periodic monitoring.[77] This spring, AG James also joined other attorneys general in issuing a warning to NFL Commissioner Roger Goodell that gender discrimination and sexual harassment would not be tolerated in any workplace.[78]
- AG James's lawsuit against an American multinational technology company over the company's COVID-19 protocols was dismissed with finality this year when, after the First Department unanimously dismissed all of the Office's claims in May, the court denied the Office's motion for re-argument or, in the alternative, for leave to appeal, on September 13, 2022.[79] The court had previously found that the NYAG's retaliation claims were federally preempted and that the workplace-safety claims were based on withdrawn guidance and, therefore, moot.[80]
- As COVID-19 restrictions were lifted, AG James broadened her efforts related to workplace health and safety. Her Office continued to negotiate settlements related to COVID-19 safety issues, including a $400,000 settlement with a healthcare services company related to allegations of improper termination and denials of sick leave during the pandemic.[81]
- The Office's attention also shifted to a relatively novel employment issue: climate change. On January 27, 2022, AG James, along with other states attorneys general, asked the Occupational Safety and Health Administration to implement national standards to protect outdoor and indoor workers from occupational exposure to extreme heat. The suggested regulations would require employers to develop acclimatization plans; offer mandatory hydration and rest breaks in shaded or cool areas; and provide personal protective equipment, heat alert plans, and worker training and monitoring. The regulations would also require employers to keep records related to heat-related injuries and submit to more frequent workplace inspections. This new climate-focused regulatory push signals a potential new workplace safety focus for AG James as COVID-19 restrictions lift.[82]

AG James has also focused on the rights of terminated employees. For example, in October 2021, AG James announced a $2.7 million settlement on behalf of 250

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employees of a hotel and conference center after they were allegedly denied wages and terminated without sufficient legal notice under the New York Worker Adjustment and Retraining Notification Act.[83] In May 2022, AG James announced an agreement with a hotel company that would collectively provide 500 previously terminated workers with $2.95 million in severance pay following allegations that non-unionized workers had been promised, but not provided, the same or better benefits as unionized hotel workers, in violation of Section 63(12) of the Executive Law.[84] This year, AG James also brought suit against a religious diocese for allegedly depriving more than 1,100 former employees of pensions through various alleged violations of the New York Not-for-Profit Corporations Law and New York Estates, Powers & Trusts Law.[85] This lawsuit is currently pending.[86]

AG James also settled several wage-and-hour cases this year, including two particularly large settlements in the home healthcare industry:

- First, in November 2021, AG James entered into an $18.8 million-dollar settlement with two home healthcare agencies that allegedly violated the New York Labor Law and NYC Paid Safe and Sick Leave Law. In addition to the payout to 12,000 former employees, the two companies are also required to update their handbooks and leave processes and submit to monitoring by the Office and the New York City Department of Consumer and Worker Protection.[87]
- Then, in March 2022, AG James announced the largest settlement to date for alleged violations of the Wage Parity Act. The combined $5.5 million-dollar settlement requires the two subject home healthcare agencies to revise company policies, retrain personnel, and report staff wages to the Office for six years.[88]

This year, AG James also reached several smaller settlements related to alleged unpaid wages for apartment building superintendents ($130,000), restaurant workers ($175,000), and construction workers on certain public works contracts ($930,000).[89]

We expect AG James will continue to advance the rights of and protections for workers in New York, as this has consistently been a primary focus for the Office.

* * *

We expect that AG James will continue to pursue an active and progressive agenda in the remainder of 2022. We also anticipate that AG James will continue to work alongside state attorneys general around the country—forming coalitions with Democrats and Republicans alike—on matters of national import, including antitrust, the environment, consumer protection, data privacy, and financial fraud investigations and litigation. Gibson Dunn will continue to monitor the actions of the Office.

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