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## *The Life Sciences & Healthcare Industry: The State AG Perspective*

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The legal landscape is changing through heightened investigation and enforcement activity by state Attorneys General in the life sciences and healthcare industry. State Attorneys General have committed to diving even deeper into the space, focusing their efforts on prosecuting and taking to task companies—and executives—that commit violations of state law. To provide insight into the expanding role the AG enforcers play, Ohio Attorney General Dave Yost, Delaware Attorney General Kathleen Jennings, and North Carolina Attorney General Josh Stein joined Paul Hastings to reflect on the past and discuss how they see the future shaping up for enforcement in this critical sector.<sup>1</sup> These three Attorneys General are national leaders—active in the life sciences and healthcare industry, occupying influential roles in multi-state investigations and settlements with companies maximizing profits through opioid sales, marketing, and distribution.

Below, we outline and highlight helpful guidelines and best practices for companies facing investigation following the discussion with these leading state Attorneys General.

### **Timing of Engagement is Critical**

Establishing a direct line of communication with the office and the state Attorney General is critical. General Stein emphasized that companies facing investigation should “come in early and come in often.” Although “the natural human reaction is to want to stick your head in the ground,” General Stein warned, that is “absolutely the worst tactic a company can take.” General Stein even lauded the efforts of a company that improperly billed customers for months because once the company discovered the error, it began refunding customers, changed its computer system, instituted controls to ensure the error would not happen again, and “came forward with a sense of openness and regret.” General Stein explained that the result was a letter agreement without any fine.

Indeed, delay tactics “almost always” work against a company according to General Yost. Although a company may have pre-trial arguments at its disposal. General Yost indicated, “the more fighting that goes on, the more attention it attracts,” further complicating the dispute. Ultimately, companies benefit from being “open” and not “hid[ing] the ball” when seeking resolution to disputes that cut across state and national lines.

In making the decision to come forward, companies should consider how the nature and extent of the disclosure will affect the state Attorney General’s mindset. General Jennings warned that the “most harmful” stance for a company to take “is arrogance.” Even if a company believes it is in the right, General Jennings encouraged companies and their counsel to “come to the table with open minds.” A

company facing regulatory scrutiny cannot expect the regulator investigating its practices to maintain an open mind when the company refuses to do the same. Too often, that fundamental point is lost in a defense strategy seeking positive results for the company and its brand.

### **Attorneys General View the Healthcare Space as a Cornerstone of Consumer Protection**

Although state Attorneys General have for decades brought numerous and significant enforcement actions against pharmaceutical and other related companies, they have successfully expanded their reach by venturing into new and uncharted waters in the broader life sciences arena, and are committed to exploring novel opportunities for enforcement across the healthcare industry.

General Stein explained that his interest in healthcare stems from the industry's enormous economic impact and capacity to harm individuals. To tackle the issue, General Stein outlined the kinds of cases he expects to be most active in, which include, among others:

- access to healthcare;
- the cost of healthcare;
- pricing transparency;
- antitrust cases against generic drug manufacturers;
- how health is affected, such as through cancer-causing chemicals in tap water; and
- addiction.

Regarding addiction, a first-in-the-nation settlement was announced in late June, when General Stein reached a \$40 million dollar resolution with electronic cigarette company, Juul, to prevent the company from marketing its products to customers under the age of 21.<sup>2</sup> A separate multistate investigation and single-state lawsuits against the company remain active and ongoing.

We also expect state Attorneys General to continue to protect their state's right to regulate pharmacy benefits managers in a push to lower the cost of prescription drugs and increase access.<sup>3</sup> Just last month, General Yost secured the first and largest settlement in the nation by a state attorney general with pharmacy benefits manager Centene, for \$88 million.<sup>4</sup>

### **Let the Opioid Cases Be a Cautionary Guidepost.**

As a major national settlement has been announced, trials remain actively underway, and lawsuits against drugmakers continue to dominate the headlines, there are lessons to be learned from the emergence of the multistate opioid settlements. General Yost discussed the entrance of local jurisdictions and political subdivisions into litigation and settlement discussions noting that "thousands" of players, "each with their respective counsel," have become involved with these cases and related litigation. Reflecting on the impact of this trend, General Yost revealed his concern: "[i]t's hard enough to get fifty attorneys general to agree on anything, much less a geometrically larger number of city council people, mayors, and county commissioners...." As an additional complication, General Yost explained that the plaintiffs' bar has sometimes "oversold the case to some of these subdivisions," leading them to expect "very unrealistic settlement numbers." For these reasons, the lesson to be learned is that multi-jurisdictional cases can take years longer than their single-state counterparts. And

we do not expect this trend to change, as new stakeholders, such as local governments, have found their role and voice in settlement discussions and litigation.

### Know Your State Attorney General

Given the most recent spate of successful settlements and prosecutions, state Attorneys General remain motivated to build on their momentum to further enhance their position as the peoples' lawyer. General Stein explained that each attorney general has "their own perspective," "their own constraints," "their own political dynamics," and "their own legal framework." As these differences can greatly impact litigation or the settlement process, it is best to know what specific harms or public safety objectives are driving your particular attorney general, including what may be perceived as a realistic settlement outcome.

In order to navigate a successful resolution of increasingly complex and risky matters before state AGs—rather than increasing those risks and driving costly protracted investigations and likely high-profile brand damaging litigation—companies should, and their trusted counsel must, make certain that they know the AG space and work with credibility and open minds to explore settlement on mutually acceptable terms.

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<sup>1</sup> <https://www.paulhastings.com/events/the-life-sciences-and-healthcare-industry-the-state-ag-perspective>

<sup>2</sup> <https://www.cbsnews.com/news/juul-north-carolina-settlement-40-million-e-cigarettes/>

<sup>3</sup> <https://oag.ca.gov/news/press-releases/attorney-general-bonta-defends-rights-states-regulate-rising-cost-prescription>

<sup>4</sup> <https://www.healthcaredive.com/news/centene-shells-out-143m-to-settle-pbm-disputes-in-ohio-mississippi/601773/>

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