

State Attorneys General: Big Tech Update

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As we've [previously reported](#), the fight against "big tech" remains a high priority for State Attorneys General on both sides of the aisle. A lot of activity took place over the summer that continues to reinforce the AGs' broad consumer protection and antitrust powers in this increasingly important area. As we move into the election season, we thought it a good time to highlight some of the recent developments, as they will no doubt set the trend for 2023.

Multistate Google Adtech Litigation Continues: A coalition of seventeen states, led by Texas Attorney General Ken Paxton, sued Google in December 2020 alleging antitrust and deceptive trade practice violations over the dominant role Google plays in the adtech market. That case was ultimately transferred to an MDL in New York along with other private actions brought against Google. On September 13, 2022 Judge Castel, who is overseeing the MDL, largely denied a motion to dismiss brought by Google, allowing all claims except one to continue. Attorney General Paxton declared a major victory with this continued case, claiming Google, "abused its monopoly power by harming consumers to reap billions in monopoly profits." A lot is at stake in this case – not just for Google but for the entire adtech market.

California Sues Amazon: On September 14, 2022, California Attorney General Rob Bonta sued Amazon alleging it abused its market dominance and violated California's Unfair Competition Law in its contracts with merchants selling on its platform. Specifically those agreements prohibit merchants from selling their goods through other channels at a lower price than on Amazon, and includes stiff penalties should a merchant do so. This case is similar to one brought by District of Columbia Attorney General Karl Racine – however that case was dismissed in early 2022. AG Racine has not given up the fight however, having filed a notice of appeal in August 2022.

Arizona Settles with Google: In very recent news, on October 4, 2022 Arizona Attorney General Mark Brnovich settled a 2020 lawsuit he brought against Google over its mobile geolocation tracking. In that suit, Arizona alleged that Google used "dark patterns" to make it difficult for consumers to turn off location tracking, and that even when settings were turned "off," they still were able to track a user's location. While there is no injunctive relief, the settlement requires Google to pay \$85 million, \$5 million of which is directed by the AG for educational purposes. This includes payment to "a bipartisan association or forum of state attorneys general that provides programming to current attorneys general regarding consumer protection issues, to develop programs to rectify alleged violations of consumer protection laws and, specifically, for programs to educate and assist state attorneys general regarding consumer fraud act cases and digital privacy" (an interesting component for those following several AGs' [recent criticism](#) of the National Association of Attorneys General). The settlement value sets a new standard for AG enforcement actions against the company, with General Brnovich noting it is the highest per capita settlement against Google for consumer protection or privacy violations. That number becomes even more daunting when you

consider that litigation continues in [several other states](#) against Google over similar allegations.

Content Moderation Laws Continue to be Subject of Legal Fights: We [previously discussed](#) the Texas and Florida laws that were designed to rein in the content moderation practices of large social media companies. In Texas the law broadly prohibits content moderation based on viewpoint, and in Florida the law prohibits deplatforming of political candidates. In May, the 11th Circuit Court of Appeals found the Florida law to be unconstitutional – as private actors, the State cannot tell companies what they must or can’t allow on their platform. In considering the Texas law however, the 5th Circuit reached a different conclusion in finding the law was constitutional and could be enforced, characterizing the social media companies’ conduct as censorship and noting there is no constitutional right to moderate content. The Supreme Court has already announced it will take up the boundaries of Section 230 immunity this term in the [Gonzalez v. Google](#) case, and it is likely that the Court, which has already expressed interest in these laws, will ultimately decide how to resolve these conflicting interpretations of the First Amendment.

AGs Focus on AI: State Attorneys General have made clear they intend to use their consumer protection authority to examine businesses’ use of automated decision making technology in delivering consumers goods and services. One area of focus especially for Democratic AGs is the potential for bias – for example California AG Bonta’s [recently announced initiative](#) in August to examine racial and ethnic bias in healthcare algorithms. Earlier in August, during a panel at the NAAG Presidential Initiative, AGs discussed other potential areas of concern, including the privacy implications of the collection and use of the data, and ensuring that consumers, and the companies themselves, understand how the technology works.

And these developments are all in addition to the ongoing work AGs have previously announced, including importantly investigations into Instagram and TikTok relating to potential harm to children using their platforms. All of these efforts will no doubt shape consumer protection priorities by the AGs for the rest of 2022 and for years to come, and we will keep you updated on their efforts.