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STRATEGIES OF PUBLIC UDAP ENFORCEMENT

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Abstract: Laws protecting consumers from unfair and deceptive acts and practices—commonly called "UDAP" laws—have played a stunning role in recent years. State and federal enforcers plied these laws more than any other to hold individuals and companies accountable for the Great Recession, while chalking up record payouts.

Given the outsized role these statutes play, critics have directed their sights on both the laws and the enforcers who wield them. Missing from this debate, however, is an account of the actual conduct of UDAP enforcement in America. How do public UDAP enforcers exercise their considerable discretion? This article examines every UDAP matter resolved by state and federal enforcers in 2014 and presents the initial results of the first comprehensive empirical study of public UDAP enforcement.

Across a range of attributes, public UDAP enforcement varies while also revealing clear patterns. We organize the data to show how enforcers employ distinct strategies. The two main federal enforcers adopt sharply different approaches, especially regarding targets and relief. The state enforcers divide into seven distinct strategies, distinguished not only by case variables, but also by case quantity and leadership in multi-enforcer actions. The picture that emerges should shape the policy and scholarly debate on public UDAP enforcement and help optimize the work of public enforcers.

TABLE OF CONTENTS

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I. Introduction

In the hands of public enforcers, laws protecting consumers from unfair and deceptive acts and practices—commonly called "UDAP" laws—have played a stunning role in recent years. State and federal enforcers plied these laws more than any other to hold individuals and companies accountable for the Great Recession.[1] When Congress created the Consumer Financial Protection Bureau ("CFPB") in 2010 to prevent future crises, the agency's single most important weapon was the power to prevent "unfair, deceptive, or abusive act[s] or practice[s]."[2] UDAP laws have chalked up record-setting payouts against some of the nation's most powerful companies, including the

[1] *See* Mark Totten, *The Enforcers & the Great Recession*, 36 Cardozo L. Rev. 1611, 1654 (2015).
[2] 12 U.S.C. § 5531(a) (2012).

$181 million Risperdal Settlement[3] and the $50 billion National Mortgage Settlement.[4] Moreover, as state attorneys general ("AGs") have ascended to national prominence in recent years, altering the balance of federalism in America, UDAP powers have arguably defined the role and reach of this office more than anything else.[5]

The spotlight on these laws shows no signs of dimming. The new Administration has promised to weaken, if not wipe out, the CFPB and its UDAP power, setting up a bitter contest between the agency's friends and foes.[6] As happened in the years leading up to the financial crisis, some state enforcers are banding together, using their UDAP laws to police the marketplace and fill the gaps left by waning federal enforcement.[7] Moreover, with growing constraints on the private consumer class action, public enforcement of UDAP laws may increase as a means of consumer redress.[8] These developments will fix a steady beam on public UDAP enforcement.

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[3] Press Release, Ariz. Att'y Gen., Horne Announces Largest Multi-State Pharmaceutical Settlement over Alleged Improper Marketing (Aug. 30, 2012), https://www.azag.gov/press-release/horne-announces-largest-multi-state-pharmaceutical-settlement-over-alleged-improper [https://perma.cc/MH37-V6KS].

[4] *See Settlement Documents*, JOINT STATE-FED. NAT'L MORTG. SERVICING SETTLEMENTS, http://www.nationalmortgagesettlement.com/settlement-documents [https://perma.cc/W8ZZ-5FRG] (collecting documents, including the complaint and the consent judgments).

[5] *See* PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 19–30 (2015); Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 535–36 (1994); Lynn Mather, *The Politics of Litigation by State Attorneys General: Introduction to Mini-Symposium*, 25 LAW & POL'Y 425, 425–26 (2003); Colin L. Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, 33 PUBLIUS 37, 43–44 (2003) [hereinafter Provost, *Entrepreneurship*]; Colin L. Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 POL. RES. Q. 609, 610–12 (2006) [hereinafter Provost, *Politics*].

[6] *See, e.g.*, Stacy Cowley, *Consumer Protection Bureau Chief Braces for a Reckoning*, N.Y. TIMES, Nov. 25, 2016, at B1, https://www.nytimes.com/2016/11/24/business/consumer-protection-bureau-chief-braces-for-a-reckoning.html [https://perma.cc/Z38S-UUS8]; Suzanne O'Halloran, *Consumer Financial Protection Bureau Fights to Stay Alive under Trump*, FOX BUS. (Jan. 29, 2017), http://www.foxbusiness.com/politics/2017/01/27/consumer-financial-protection-bureau-fights-to-stay-alive-under-trump.html [https://perma.cc/24PU-G8EG]; Lucinda Shen, *Donald Trump Is Targeting an Agency That Has Recovered $11.8 Billion for Consumers*, FORTUNE (Jan. 29, 2017), http://fortune.com/2017/01/27/donald-trump-cfpb-consumer-protection-financial-bureau-elizabeth-warren/ [https://perma.cc/V4AG-N3AN].

[7] *See* Alexander Burns, *How Attorneys General Became Democrats' Bulwark Against Trump*, N.Y. TIMES, Feb. 7, 2017, at A9, https://www.nytimes.com/2017/02/06/us/attorneys-general-democrats-trump-travel-ban.html [https://perma.cc/5W7R-DFKW]; Laura Krantz & Jim O'Sullivan, *Blue-state Attorneys General Lead Trump Resistance*, BOS. GLOBE (Feb. 7, 2017), https://www.bostonglobe.com/metro/massachusetts/2017/02/06/state-ags-lead-charge-against-trump/LCHc5CQrZMzV1JUd4c027M/story.html [https://perma.cc/YCT5-CNFL].

[8] *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 660 (2012) ("In our view, state attorneys general—alone among public enforcers—have the ability to fill the void left by class actions . . . ."); Deborah R. Hensler, *Goldilocks and the Class Action*, 126 HARV. L. REV. F. 56, 56–57 (2012) (describing the need for public enforcement to fill the gap left by the decline in private class actions). *See generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (surveying many ways courts and legislatures have weakened the private class action).

Given everything at stake, it comes as no surprise that critics have directed their sights on UDAP laws and the enforcers who wield them. The most outspoken critics are advocates for industries that public UDAP enforcers target.[9] According to them, state attorneys general employ these laws to achieve political goals, outsourcing public litigation to private plaintiffs' lawyers who fund their campaigns and then grabbing headlines with large monetary awards.[10] These enforcers, the critics allege, devise novel theories of liability that no target could anticipate.[11] Enforcers then coerce settlements and effectively serve as prosecutor, judge, and jury.[12] As a result, the critics charge, public enforcers usurp the legislative role with closed-door settlements that effectively regulate an entire industry and produce payouts that fund programs outside the appropriation process.[13] And to top it off, the enforcers pile on—a tactic the critics call "swarm litigation."[14]

More recently, scholars have voiced some of these concerns as well. Over the past several years, a distinct conversation on public civil enforcement has emerged.[15] The participants have often focused on UDAP laws to explore the contours of public enforcement. For example, some scholars have argued that state AGs are not adequate representatives when obtaining money for consumers in public UDAP enforcement because of conflicts of interest inherent in their office.[16] Strikingly absent, however, is real-world data to evaluate public UDAP enforcement. As Deborah Hensler observes, the scholarly arguments are often "heavy on theory and light on empirics."[17] The problem is not a missing footnote. Until now, wide-ranging data on public UDAP enforcement did not exist.

This data is critical, however, for at least two reasons. At a theoretical level, normative accounts of public enforcement that lack an accurate description of the activity they purport to expound risk irrelevance and invite error. At a practical level, achieving effective and efficient public enforcement demands first understanding how public enforcers use their powers.

This article presents the initial results of the first empirical study of public UDAP enforcement across state and federal governments. We ex-

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[9] *See, e.g.*, U.S. Chamber Inst. for Legal Reform, Unprincipled Prosecution: Abuse of Power and Profiteering in the New "Litigation Swarm" (2014) [hereinafter Unprincipled Prosecution]; U.S. Chamber Inst. for Legal Reform, Enforcement Slush Funds: Funding Federal and State Agencies with Enforcement Proceeds (2015).

[10] *See* Unprincipled Prosecution, *supra* note 9, at 7–11.

[11] *See id.* at 14–16.

[12] *See id.* at 17.

[13] *See id.* at 17–20.

[14] *See id.* at 3, 22.

[15] *See* Hensler, *supra* note 8, at 58; Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 512–18 (2012) [hereinafter Lemos, *Aggregate Litigation*]; Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698, 722–23 (2011) [hereinafter Lemos, *State Enforcement*].

[16] *See, e.g.*, Lemos, *Aggregate Litigation*, *supra* note 15, at 512–18; *see also* Lemos, *State Enforcement*, *supra* note 15, at 722–23.

[17] Hensler, *supra* note 8, at 58.

amine 798 cases: every UDAP matter resolved by the Federal Trade Commission ("FTC"), the CFPB, state attorneys general, and state consumer protection agencies in 2014, whether working alone or in cooperation with each other.[18] Our study covers cases resolved not only by formal administrative or judicial processes, but also by settlement. No previous study focused on UDAP, or any other area of public civil enforcement, has provided this comprehensive, national snapshot of state-level enforcement nor placed the state and federal data side-by-side. For each case we code for nearly 200 distinct variables that include, but are not limited to, the forum, the parties, the claims, the alleged harms, the product or service at issue, and the nature of the relief obtained.

Our aim is to describe public UDAP enforcement in the United States. We attempt to answer a single question: How do public enforcers exercise their considerable discretion to enforce UDAP laws? Although explaining the causes for different enforcement outcomes is an important next step, it is not our task here. No one has previously collected comprehensive state and federal data on public UDAP enforcement, so we focus in this paper on describing the enforcement landscape.

Across a range of attributes, UDAP enforcement by state and federal actors varies while also revealing clear patterns. We organize the data to show how enforcers employ distinct strategies. The two main federal enforcers adopt sharply different approaches, especially regarding targets and relief. The state enforcers divide into several groups, distinguished not only by these and other case variables, but also by case quantity and leadership in multi-enforcer actions.

In Part II we provide a brief overview of public UDAP enforcement, tracing its historical origins and explaining its structural features. We turn in Part III to review the relevant scholarship, locating our subject within a broader discussion on civil enforcement. Part IV outlines our study design, including our methodology and our rationales for drawing certain lines. In the final three parts we turn to the data. Part V summarizes our findings at the aggregate level. In Part VI we identify distinct enforcement strategies. And, finally, in Part VII we briefly examine the implications of this study for conceptions of public enforcement, the exercise of public UDAP authority, and further research.

II. UDAP Basics

While its fingerprints are everywhere, the basics of UDAP law are less familiar. This Part sketches the rise of UDAP law in America and reviews its key marks.

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[18] *See infra* Part IV, Methodology.

A. The Rise of UDAP Law

UDAP laws are a central component of state and federal consumer protection law. They arrived as an alternative to common law remedies in tort and contract, which proved inadequate for addressing fraud in a progressively more complex marketplace.[19] Congress passed the first UDAP statute in 1938, prohibiting "unfair or deceptive acts or practices in commerce"[20] and giving the FTC enforcement power.[21] Stakeholders commonly refer to the law as "Section 5." Although Congress never empowered the agency to enforce the prohibition against banks,[22] the FTC has authority over a broad range of markets.

Beginning in the 1960s, states began to adopt similar laws.[23] Worries about regulatory capture, limited agency capacity, a growing consumer movement, and the absence of a private right of action in Section 5 all fueled this development. By 1981 every state had a consumer protection act.[24] In the vast majority of states and the District of Columbia, the attorney general has exclusive public enforcement power under the state UDAP, although in a few states this authority resides in, or is shared with, another agency.[25] Un-

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[19] Common law remedies included breach of contract, unconscionability, fraud, and fraudulent misrepresentation. For analysis of these remedies and their limits, see Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 168–69 (2011); Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 KAN. L. REV. 1, 6–7 (2005); Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2226–27 (2012).

[20] Wheeler-Lea Act of 1938, Pub. L. No. 75-447, sec. 3, 52 Stat. 111, 111 (codified as amended at 15 U.S.C. § 45(a)(1) (2012)).

[21] *See* 52 Stat. at 111–12 (codified as amended at 15 U.S.C. § 45(a)(2) (2012)).

[22] For a summary of agency jurisdiction to enforce UDAP against banks, see Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General after Dodd-Frank*, 99 IOWA L. REV. 115, 120 (2013).

[23] *See* Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 674–77 (2008); Butler & Wright, *supra* note 19, at 167–73 (identifying different types of state consumer protection acts); Schwartz & Silverman, *supra* note 19, at 15–32.

[24] *See* MARY DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW app. 3A (2016) (listing state consumer protection statutes, including date of enactment and citation); Butler & Wright, *supra* note 19, at 169.

[25] Connecticut gives the Commissioner of the Department of Consumer Protection sole discretion to bring a UDAP action, although the state's AG litigates cases before the judiciary on behalf of the Commissioner. *See* CONN. GEN. STAT. ANN. § 42-110m(a) (West, Westlaw through the 2016 Sept. Special Sess.). Although Georgia previously granted the Georgia Office of Consumer Protection exclusive public enforcement power, the legislature transferred that power to the state AG in 2015. *See* 2015 Ga. Laws 187 (codified at GA. CODE ANN. §§ 10-1-390–408 (West, Westlaw through 2016 Legis. Sess.)) (effective July 1, 2015). Hawaii gives the state AG and a separate consumer protection agency concurrent jurisdiction to enforce the state UDAP. *See* HAW. REV. STAT. ANN. § 480-20(c) (West, Westlaw through Act 1 (end) of the 2016 Second Special Sess.). In practice, the agency handles most UDAP enforcement action and the state AG participates in a case-by-case basis. Letter from Deborah Day Demerson, Deputy Att'y Gen., State of Haw., to Prentiss Cox, Assoc. Professor, Univ. of Minn. Law Sch. (July 16, 2015) (on file with authors) (on file with the Harvard Law School Library). Utah places exclusive public enforcement power in the hands of the Utah Department of Commerce,

like Section 5, state UDAP statutes all create a private right of action and provide for attorneys' fees for prevailing plaintiffs.[26]

Congress expanded federal UDAP enforcement in 2010 with passage of the Dodd-Frank Act.[27] Among other reforms, Congress created the Consumer Financial Protection Bureau[28] and empowered the new agency to enforce a broad prohibition on "unfair, deceptive, or abusive act[s] or practice[s]" ("UDAAP").[29] The agency has enforcement power against any person or entity that offers or provides a consumer financial product or service.[30] While the UDAP language is familiar, Congress included the novel term "abusive,"[31] which the agency has cautiously applied.[32] Moreover, like Section 5, the new UDAAP provision lacks a private right of action.

In sum, UDAP law reflects nearly eighty years of evolution in American consumer protection. At least three distinct UDAP laws cover every consumer today: two federal statutes and at least one state statute. Moreover, as discussed below, these laws empower four types of public enforcers: the FTC; the CFPB; various state AGs; and, in a few states, a separate consumer protection agency.[33]

Division of Consumer Protection. *See* UTAH CODE ANN. § 13-11-3(3) (West, Westlaw through 2016 Fourth Special Sess.) (defining the "[e]nforcing authority" to mean the "Division of Consumer Protection"). Wisconsin is similar to Hawaii. Under the first of two UDAP statutes, the state AG and the Department of Agriculture, Trade and Consumer Protection have concurrent jurisdiction, with a requirement that the state AG "consult" with the agency before filing a judicial complaint. WIS. STAT. ANN. § 100.18(11)(a), (d), (e) (West, Westlaw through 2015 Act 392). This first statute prohibits "untrue, deceptive or misleading" representations. *Id.* § 100.18(1). Under the second UDAP statute, the agency has full enforcement power, *see id.* § 100.20(6), and the state AG can file an administrative complaint with the agency and later seek judicial review, *see id.* § 100.20(4). This second statute prohibits "unfair trade practices." *See id.* § 100.20(1).

[26] *See* Debra Pogrund Stark & Jessica M. Choplin, *Does Fraud Pay? An Empirical Analysis of Attorney's Fees Provisions in Consumer Fraud Statutes*, 56 CLEV. ST. L. REV. 483, 494–95 (2008). For this and other advantages, see Budnitz, *supra* note 23, at 674–77; Butler & Wright, *supra* note 19, at 167–73; Schwartz & Silverman, *supra* note 19, at 15–32.

[27] *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[28] *See* 12 U.S.C. § 5491 (2012).

[29] *Id.* § 5531(a). For an overview of CFPB enforcement power, see Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1064–73 (2016); Totten, *supra* note 22, at 125–28.

[30] *See* 12 U.S.C. § 5481(6) (2012). For a list of covered financial products and services, see *id*. § 5481(15).

[31] For the statutory definition of "abusive," see *id.* § 5531(d).

[32] *See* Peterson, *supra* note 29, at 1099–1101. Peterson notes that from 2010 to 2015, cases alleging "abusive" practices accounted for only 11.5% of the Bureau's docket and only 1% of total consumer relief. *See id.* at 1100.

[33] Two other public enforcers have limited power to enforce UDAP laws. Although not their primary mission, federal prudential bank regulators can enforce UDAP laws as part of their supervisory role. Among depositories with less than $10 billion in assets, the prudential regulator retains exclusive enforcement authority. *See* 12 U.S.C. § 5516(d) (2012). Moreover, a few state consumer protection acts grant enforcement power to cities, counties, or district attorneys. *See* Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1906 nn.9–10 (2013).

B. The Marks of UDAP Law

At least four attributes characterize this body of law. *First*, UDAP laws are generally applicable to personal consumer transactions involving products and services. These laws use various terms to designate the covered object of consumption, such as "goods," "services," "merchandise,"[34] or any acts or practices connected to "trade or commerce."[35] Most statutes generously define these terms,[36] giving enforcers broad powers to police the marketplace.[37]

Second, the central prohibition on unfair and deceptive acts or practices reflects the legislative choice of a principle (often called a standard) over a rule.[38] The fact that UDAP laws give rise to principle-based enforcement is central to this study, as explained in Part IV.[39] Although "unfair" and "deceptive" are the most recognizable terms, the various laws sometimes use related words to indicate the proscribed conduct, including acts or practices that are "unconscionable," "untrue," "misleading," "fraudulent," "false," "confusing," or "abusive."[40] These terms are classic examples of principle-based norms.

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[34] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 44-1521–22 (2016) (applying UDAP to "merchandise," defined to cover "any objects, wares, goods, commodities, intangibles, real estate or services"); OHIO REV. CODE ANN. § 4165.02 (West 2016) (prohibiting fraud "in the course of the person's business, vocation, or occupation" that relates to "goods or services").

[35] *See, e.g.*, 15 U.S.C. § 45(a)(1) (2012) (prohibiting "unfair or deceptive acts or practices *in or affecting commerce*" (emphasis added)); FLA. STAT. ANN. § 501.204(1) (West, Westlaw through 2016 Second Regular Session of the Twenty-Fourth Legislature) (prohibiting "unfair or deceptive acts or practices *in the conduct of any trade or commerce*" (emphasis added)); 815 ILL. COMP. STAT. ANN. 505/2 (West, Westlaw through P.A. 99-906 of the 2016 Reg. Sess.) (same).

[36] *See, e.g.*, 815 ILL. COMP. STAT. ANN. 505/1(f) (2016) (defining "trade" and "commerce").

[37] Many of these laws exempt certain areas of the market. *See* NAT'L CONSUMER LAW CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 2.1.1 (8th ed. 2012) [hereinafter NCLC, UDAP].

[38] We use the term *principle* to describe the type of legislative command that UDAP laws represent. Ronald Dworkin introduces a distinction between a *principle* and a *policy* as two types of standards. He explains:

> I shall call a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community . . . . I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness of some other dimension of morality.

Ronald M. Dworkin, *The Model of Rules*, 25 U. CHI. L. REV. 14, 22–23 (1967); *see also* James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115 (2012) (applying same distinction). This description of a principle as a broad "requirement of justice or fairness" accurately describes the prohibition at the center of UDAP laws.

[39] *See infra* III.A.1.

[40] *See, e.g.*, ALA. CODE § 8-19-5(27) (2016) (prohibiting "any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce"); KY. REV. STAT. ANN. § 367.170 (West 2017) (prohibiting "[u]nfair, false, misleading, or deceptive acts or practices," and defining "unfair" to mean "unconscionable"); 73 PA. CONS. STAT. ANN.

As Louis Kaplow explains, the difference between a principle (or what he calls a *standard*) and a rule turns on "the extent to which efforts to give content to the law are undertaken before or after individual acts."[41] A rule identifies specific conduct and leaves the enforcer little discretion as to what conduct the law covers. A principle, however, grants broad discretion to the enforcer (and ultimately, to the courts). As a result, UDAP enforcers can respond to ever-changing practices that may harm consumers, without returning to the legislature every time a new scheme hatches. While this flexibility is critical to consumer protection, principles can incur costs. Broad discretion can mean that enforcement of the law is less predictable and consistent, especially when the law empowers multiple enforcers.[42]

Understanding a law means understanding how enforcers exercise their discretion under that law. With few exceptions, both rules and principles leave the enforcer with discretion on *whether* to enforce. Principles, however, grant the enforcer considerable discretion on *how* to enforce. As a result, while there is always a difference between the "law on the books" and the "law in action" (to borrow Roscoe Pound's phrase),[43] the difference is more pronounced when the law on the books is a principle. As this study demonstrates with principle-based UDAP law, enforcer discretion profoundly shapes outcomes.

Third, all UDAP laws grant public enforcement authority to a particular government enforcer. Federal UDAP laws empower the FTC and the CFPB, while state UDAP laws typically designate the state attorney general. These UDAP enforcers sometimes cooperate with each other,[44] although multi-enforcer cases account for a relatively small percentage of UDAP actions.[45] States cooperate with other states, and one or more states cooperate with one or more federal agencies.

The UDAP enforcer can engage in pre-complaint discovery using a civil investigative demand ("CID").[46] Even when a UDAP statute does not grant this right, another statute[47] or the state's common law may create it.[48] Federal enforcers have a similar power.[49] This tool, held by the public but not the private enforcer, can prove critical for building a case and reaching a

§ 201-2(4)(xxi) (West 2016) (defining UDAP to include "any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding").

[41] Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557, 560 (1992).

[42] *See supra* text accompanying note 38.

[43] *See generally* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

[44] *See* Totten, *supra* note 1, at 1643–44 (describing the rise of multi-government actions in response to the Great Recession).

[45] *See infra* note 119 and accompanying text.

[46] *See* NCLC, UDAP, *supra* note 37, § 13.3.

[47] *See, e.g.*, CAL. GOV'T CODE § 11180 (West 2016).

[48] *See, e.g.*, People v. Crawford Distrib. Co., 291 N.E.2d 648, 656 (Ill. 1972).

[49] *See, e.g.*, 12 U.S.C. § 5562(c) (2012) (CFPB CIDs); 15 U.S.C. § 46(b) (2012) (FTC "6(b) orders"); 15 U.S.C. § 57b-1 (2012) (FTC CIDs).

settlement outside of court. Once the public enforcer is ready to proceed, UDAP laws typically permit multiple enforcement channels. Public enforcers can negotiate informal pre-complaint agreements, often called assurances of voluntary compliance ("AVCs"), which require judicial filing in some states and not others. In some cases, public enforcers can conduct formal administrative proceedings or issue cease and desist orders. In addition, public enforcers sometimes file a judicial complaint and consent judgment simultaneously, and sometimes proceed to litigate in a contested matter.

Fourth, and finally, UDAP laws allow public enforcers to seek multiple remedies. This study gives considerable attention to UDAP remedies, which accounted for more than 75% of the variables we coded. These remedies fall into three types: *injunctive relief*; *public compensation*; and *government money*. While, strictly speaking, injunctive relief is a remedy available only through the courts, we use the term broadly to mean any relief that prospectively regulates a defendant's conduct, whether issued by a court, an agency, or agreed upon in the terms of a settlement or AVC. Injunctive relief can take many forms, ranging from prohibiting certain representations to a ban on doing business in the jurisdiction.

Public compensation encompasses any relief provided to harmed consumers.[50] This relief, sometimes called restitution, includes both payments to consumers and non-money relief, such as contract rescission, amendment to a credit report, or an agreement to cease debt collection. For purposes of this study, injunctive relief aims to prevent future harms, while public compensation is remedial. Finally, government money includes any money payments that do not compensate harmed consumers. This relief can also take many forms, including a civil penalty, compensation for fees and costs, or a cy pres award, which typically involves the court distributing settlement funds to a charity that will advance the interests of the harmed consumers when individual compensation is not possible. In some cases, government money is imposed but the order or settlement does not designate a specific purpose.

With slight variations, state and federal enforcers have broad powers to mix and match these remedies. The state enforcer can always negotiate any type of relief for settlement and the courts generally have broad authority to issue an injunction, require public compensation, or impose some form of government money.[51] Outside of settlement negotiations, most state enforc-

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[50] For a taxonomy of state and federal public compensation schemes, see generally Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 MINN. L. REV. 2313 (2016).

[51] All state UDAP laws empower courts to grant injunctive relief. *See* NCLC, UDAP, *supra* note 37, § 13.5.1.1. Likewise, nearly all state UDAP laws permit public compensation. *See id.* § 13.5.4.1. Even if the statute is silent most courts nonetheless grant public compensation on the basis of their equitable powers. *See id.* § 13.5.4.1. n. A majority of state UDAP laws allow courts to impose civil penalties for initial violations, although some laws require a showing of purpose or knowledge. *See id.* §§ 13.5.3.1, 13.5.3.4. Although not every state UDAP law expressly allows for fees, the state can probably seek fees under a general statute. *See id.*

ers lack power to impose these forms of relief through an administrative process. A minority of states grant the enforcer power to issue cease and desist orders[52] and a few state enforcers can also require public compensation outside the courts, with the defendant having a right of judicial review.[53] Although the FTC can also negotiate settlements with any form of relief, the agency's administrative power is limited to injunctive relief through issuing an administrative order.[54] If the agency wants to compel public compensation or impose civil fines, it must petition a court.[55] The CFPB can seek all three types of relief, whether through an administrative process or through the courts.[56]

III. Scholarship Background

How the government enforces its laws is a critical question for any democracy. Legal scholars have long wrestled with theories of enforcement: goals, optimal levels, legitimizing principles, and mechanisms to control politicization. The wider literature often focuses on criminal enforcement,[57] but we focus on civil enforcement theory and its specific application to discussions of public enforcement.

A. Normative Discussion of Public Enforcement

Although the research in this area is limited, a few normative debates have emerged about the role and boundaries of public enforcement. In the past few years, there has been an increased focus on the office of the state attorney general, the most important public enforcer of consumer protection law at the state level.[58] The office itself has attracted both its defenders and its critics. Margaret Lemos and Max Minzner have questioned the efficiency

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[52] *See, e.g.,* Fla. Stat. Ann. § 501.208 (West 2016).

[53] *See*, *e.g.,* Md. Code Ann., Com. Law § 13-403(b)(1)(i) (West 2016).

[54] *See* 15 U.S.C. § 45(b) (2012) (power to issue cease and desist orders). The only appellate court to consider whether the FTC has administrative power to order public compensation rejected the idea. *See* Heater v. FTC, 503 F.2d 321, 323–24 (9th Cir. 1979).

[55] *See* 15 U.S.C. § 57b(b) (2012) (empowering judiciary to grant "such relief as the court finds necessary"). The court's power to levy a civil fine against non-rule violations of Section 5 is restricted to violations that occur "with actual knowledge that such act or practice is unfair or deceptive and is unlawful." *Id.* § 45(m)(1)(B)(2).

[56] *See* 12 U.S.C. § 5565(a)(2) (2012).

[57] *See, e.g.*, James Q. Wilson, Varieties of Police Behavior: The Management of Law and Order in Eight Communities 1–15 (1968).

[58] *See, e.g.*, Margaret H. Lemos & Max Minzner, *For Profit Public Enforcement*, 127 Harv. L. Rev. 853, 854 (2014); *see also* Margaret H. Lemos, *Privatizing Public Litigation*, 104 Geo. L.J. 515, 548–49 (2016) [hereinafter Lemos, *Privatizing*]. *But see* Lemos, *Aggregate Litigation*, *supra* note 15, at 512; Lemos, *State Enforcement*, *supra* note 16, at 722. For supportive examinations, see generally Prentiss Cox, *The Importance of Deceptive Practice Enforcement in Financial Institution Regulation*, 30 Pace L. Rev. 279 (2009) [hereinafter, Cox, *Deceptive Practice Enforcement*]; Hensler, *supra* note 8; Totten, *Credit Reform*, *supra* note 22.

of public enforcement actions through the state attorneys general due to perceived conflicts stemming from enforcer motivations and consequent remedial structures.[59] With respect to the perceived remedial functions of public enforcement of aggregate claims, there are calls for an expansion to the public realm of the many procedural reforms previously applied to the private class action.[60] Other scholars resist these reforms (1) because such reforms do not connect to the actual remedial functions of public enforcement[61] and (2) due to the structural need to maintain a robust role for public enforcers to obtain public compensation on behalf of harmed individuals in light of limited access to the private class action.[62]

Scholarly focus on distribution of enforcement powers goes beyond assessing the enforcement by state attorneys general. Recently, scholars have turned toward institutional arguments examining distribution of enforcement power within the larger public realm itself. This turn continues to assess normatively the efficiency of each enforcement model, and it also brings in more contextual and institutional theories focused on accountability and independence within the federalist system.

For example, scholars have examined the exercise of concurrent enforcement authority between state and federal enforcers, pointing out the accountability-forcing mechanisms such concurrent enforcement schemes might encourage, as well as other benefits like additional resources and the specific knowledge states can bring to enforcement decisions.[63] Concurrent enforcement of federal law is part of a series of legislative design choices to situate an agency within our federalist system. Rachel Barkow proposes "equalizing" factors that affect an agency's propensity for capture, which in turn can determine levels of enforcement.[64] One of these equalizing factors is the agency's enforcement interaction with other agencies, both federal and state.[65] Barkow writes that "[a] multiple enforcer model with an insulated

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[59] *See* Lemos & Minzner, *supra* note 58, at 854; *see also* Lemos, *Aggregate Litigation*, *supra* note 15, at 512–18; Lemos, *Privatizing*, *supra* note 58, at 548–49.

[60] *See* Lemos, *Aggregate Litigation*, *supra* note 16; *see also* Adam Zimmerman, *Distributing Justice*, 86 N.Y.U. L. Rev. 500, 555–56 (2011).

[61] *See* Cox, *supra* note 50.

[62] *See* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 Stan. L. Rev. 331, 331–34 (2015).

[63] *See* Lemos, *State Enforcement*, *supra* note 16; Amanda M. Rose, *State Enforcement of National Policy: A Contextualist Approach (with Evidence from the Securities Realm)*, 97 Minn. L. Rev. 1343, 1356–59 (2013) [hereinafter Rose, *State Enforcement*]; Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. Pa. L. Rev. 2173, 2204–05 (2010) [hereinafter Rose, *Multienforcer*]; Totten, *supra* note 22, at 122–25; Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 Yale L. & Pol'y Rev. 165, 171–72 (2010); Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 Cardozo L. Rev. 53, 64 (2011).

[64] Rachel Barkow, *Insulating Agencies: Avoiding Capture through Institutional Design*, 89 Tex. L. Rev. 15, 18 (2010).

[65] *See id.* at 55–58.

agency and state AGs is likely to be more effective than a multiple enforcer model involving only federal agencies because the federal agencies are all likely to ultimately fall in line with the President's priorities, and those priorities will frequently be dictated by powerful political interest groups."[66] Critics of concurrent enforcement schemes claim that such schemes create unpredictability and disunity, as well as creating the possibility for policy distortion and less accountability within particular jurisdictions.[67]

Beyond the vertical distribution of enforcement powers in our federalist system, scholars have also considered the horizontal distribution of enforcement authority. These scholars examine the effects of multiagency and multistate enforcement.[68] Relying on institutional theory to assess understudied issues of shared regulatory authority among multiple federal agencies, Catherine Sharkey focuses on the multiagency design of federal consumer protection regulation and the problems that arise when courts must consider deference to agencies that share interpretive authority.[69] Sharkey promotes greater deference by courts when overlapping agencies coordinate regulatory enforcement.[70] Max Minzner also examines the effects of decentralized enforcement among multiple specialized agencies and suggests that regulatory expertise does not necessarily translate to enforcement expertise.[71] Minzner proposes that legislatures pay more attention to agency design choice on enforcement and argues that centralized civil enforcement in one generalist agency might be an optimal design for many specialist agencies.[72]

In the wake of the economic crisis, scholars more directly addressed UDAP enforcement in consumer financial protection.[73] Prentiss Cox explains the critical role of UDAP enforcement in heading off economic crises, and seeks to promote more robust enforcement of UDAP as a first line of defense.[74] Describing the legal and historical events leading up to the economic crisis, Mark Totten expands on assessments of enforcement quality and argues in support of decentralized approaches to consumer protection enforcement.[75] Raymond Brescia engages in a micro-study of UDAP's applicability to the robo-sign scandal as a component of the larger crisis.[76] Dee Pridgen

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[66] *Id.* at 58.

[67] *See* Rose, *State Enforcement*, *supra* note 63, at 1351–54.

[68] *See, e.g.*, Barkow, *supra* note 64; Max Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2113, 2118–20 (2015); Rose, *Multienforcer*, *supra* note 63; Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 329–31 (2013).

[69] *See* Sharkey, *supra* note 68, at 353–56 (promoting the benefits of a judicial review coordination strategy that encourages agencies with overlapping authority to coordinate responses).

[70] *See id.*

[71] *See* Minzner, *supra* note 68, at 2121–35.

[72] *See id.*

[73] *See, e.g.*, Raymond H. Brescia, *Leverage: State Enforcement Actions in the Wake of the Robo-Sign Scandal*, 64 ME. L. REV. 17, 18 (2011); Cox, *Deceptive Practice Enforcement*, *supra* note 58, at 279; Totten, *supra* note 1, at 1611.

[74] *See* Cox, *Deceptive Practice Enforcement*, *supra* note 58, at 279.

[75] *See* Totten, *supra* note 1, at 1611.

[76] *See* Brescia, *supra* note 73, at 18.

evaluates the gaps in federal UDAP enforcement and explains how the CFPB's structure and UDAP enforcement authority is designed to fill in those gaps.[77]

B. Descriptive Discussions of Public Enforcement

The dominant literature debating enforcement uses an economic approach focused primarily on efficiency, and thus seeks to answer normative questions about the optimal quantity of enforcement.[78] Recently, however, the almost universal economic view of enforcement as driven primarily by a question of optimal quantity may be giving way to new questions addressing quality and texture of enforcement.[79] Scholars' empirical analysis of enforcement, institutional understandings of enforcement, and legitimizing theories for public enforcement[80] are all examples of scholars beginning to think about enforcement quality and relationships, rather than merely quantity. Beyond asking questions tied to efficiency, these scholars are thinking about enforcement behaviorally, and within a pragmatic context.[81] What does enforcement look like and how are the actors in a decentralized enforcement scheme interacting? For example, David Engstrom maps the different "pathways" that private enforcement can take and, in so doing, captures more distinctions of private enforcement.[82]

These empirically-based studies have examined enforcement with an eye toward capturing a more descriptive, and thus more contextual, assessment. Contextual empirical work shifts the debate about enforcement from an abstract one-size-fits-all discussion to a nuanced understanding of how enforcement looks in particular situations. Ideally, these descriptions can ground normative theories in an understanding of current practice.

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[77] *See* Dee Pridgen, *Sea Changes in Consumer Financial Protection: Stronger Agency and Stronger Laws*, 13 WYO. L. REV. 405, 407 (2013).

[78] *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968).

[79] *See* Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 61 (2009).

[80] *See* Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 929–30 (2017); Velikonja, *supra* note 62, at 331.

[81] *See* Nourse & Shaffer, *supra* note 79, at 107; *see also* David Engstrom, *Harnessing the Private Attorney General: Evidence for Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1256 (2012) (using empirical analysis of a particular private-public enforcement scheme to show that "an alternative to the above approaches to rationalizing private enforcement regimes focuses less on litigation quantity and more on its quality by shaping the identities and capacities of the private enforcers themselves").

[82] *See* Engstrom, *supra* note 81, at 1325 ("[C]laims about the virtues and vices of private enforcement—claims that echo across a range of regulatory regimes that deploy private litigation as a policy tool—cannot be understood solely by reference to the actions of decentralized, profit-motivated litigants. Rather, the challenges of deploying private enforcement as a regulatory tool begin well upstream and are endemic to delegation itself.").

Before turning to the scholarship on public UDAP enforcement, we pause to examine recent studies of securities enforcement that ask these sorts of contextual questions. James Park's examination of the decentralized landscape of SEC enforcement is indicative of the critical turn toward a richly descriptive assessment.[83] Park argues that existing normative analysis in the securities realm skews the discussion toward net efficiency without allowing for variations among enforcers in a multi-enforcer, decentralized landscape.[84] In other words, Park argues, when assessing enforcement outcomes, the quality of enforcement is more important than the quantity.[85] Therefore, Park argues, the economic-based enforcement scholarship has left a gap by focusing on efficiency only.[86] Moreover, Park points out that securities law (like consumer protection law) is not only decentralized by the enforcer, but is also an amalgam of rules and principles.[87] When a system has multiple enforcers and multiple schemes (along the rules versus principles spectrum), Park argues that any assessment of enforcement must include assessing the quality of enforcement and that requires understanding the substantive differences between legislative delegations.[88] Park concludes by stating,

> It is with principle-enforcement that we see the greatest variation in enforcement. The need for predictability and consistency can conflict with a desire to punish conduct that runs afoul of public value . . . . The key to defining an optimal system lies in understanding the dynamics of principle-enforcement and recognizing the benefits of multiple enforcers, while crafting a system that better defines the boundaries within which securities enforcers operate.[89]

Amanda Rose and Urska Velikonja echo this textural approach to understanding enforcement in the securities arena.[90] The empirical scholarship on

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[83] *See* Park, *supra* note 38, at 115–16.

[84] *See id.* at 118 ("The tendency in the literature surrounding this debate, which relies heavily on economic theories of enforcement, has been to focus on whether the right amount of enforcement is produced, without drawing distinctions between types of enforcement cases. The limit of this approach is the absence of a meaningful way of determining what level of enforcement is optimal.").

[85] *See id.*

[86] *See id.; see also* Dana Muir, *Decentralized Enforcement to Combat Financial Wrongdoing in Pensions: What Types of Watchdogs are Necessary to Keep the Foxes out of the Henhouse*, 53 Am. Bus. L.J. 33, 37 (2016) (applying Park's "values-based" analysis to pension law enforcement).

[87] *See* Park, *supra* note 38, at 115.

[88] *See id.* at 143 ("Finally, some enforcers may go through the motions of enforcing principles but in a way that treats principle violations as akin to rule violations that only merit nominal sanctions. While technically enforcing the principle, without significant sanctions, the action can be dismissed as a relatively trivial administrative cost. Even though such an enforcer is technically enforcing a principle, it cannot be considered a true enforcer of principles.").

[89] *Id.* at 181.

[90] *See* Rose, *State Enforcement*, *supra* note 63, at 1344; Velikonja, *supra* note 80, at 331.

public enforcement of consumer protection law in general, or UDAP laws in particular, is even more limited.[91] The main areas of empirical scholarship are focused on state attorney general participation in multistate lawsuits,[92] state enforcement of federal consumer protection law,[93] and agency-specific studies of enforcement.[94]

In a series of empirically-based articles, Colin Provost examines the role of multistate litigation as an enforcement choice among state attorneys general.[95] His data reveal a multistate enforcement model that is responsive to the electorate and effective in cases of severe infractions.[96] Paul Nolette is more critical of these types of coordinated litigation actions by state attorneys general.[97] Nolette relies on a dataset of all "coordinated AG litigation" that took place between 1980 and 2013.[98] Nolette concludes that coordinated litigation has grown over time, in both quantity and quality, and he warns that this type of activity can go beyond influencing a lax federal enforcement system and instead can "dictate the terms of national policy."[99] This, Nolette argues, upsets the federalism balance.[100] Amy Widman and Prentiss Cox empirically examine claims about concurrent enforcement strategies, specifically how states enforce federal consumer protection law.[101] Their findings "strongly suggest that fears about over-enforcement or inconsistent enforcement by the states have not been realized in actual practice."[102]

Descriptive studies of agency enforcement are by nature contextual and this type of work provides important contributions to greater understanding of the quality of enforcement of consumer protection.[103] Christopher Peter-

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[91] This section focuses on empirical studies of public enforcement, but we note recent empirical work examining private enforcement of consumer protection law as well. See, e.g., JOSHUA D. WRIGHT ET AL., SEARLE CIVIL JUSTICE INST.: STATE CONSUMER PROT. ACTS TASK FORCE, STATE CONSUMER PROTECTION ACTS: AN EMPIRICAL INVESTIGATION OF PRIVATE LITIGATION: PRELIMINARY REPORT, DECEMBER 2009 (2010), http://ssrn.com/abstract=1708175 [https://perma.cc/7V2X-MTH3]; Stephen Meili, *Collective Justice of Personal Gain? An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67 (2011) (analyzing qualitative data on the motivations of named plaintiffs and class action lawyers in consumer class actions).

[92] *See, e.g.*, NOLETTE, *supra* note 5; Colin L. Provost, *An Integrated Model of U.S. State AG Behavior in Multi-State Litigation*, 10 ST. POL. & POL'Y Q. 1 (2010); Provost, *Entrepreneurship*, *supra* note 5; Provost, *Politics*, *supra* note 5.

[93] *See, e.g.*, Widman & Cox, *supra* note 63.

[94] *See, e.g.*, Maureen K. Olhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMPETITION L. & ECON. 623, 625–28 (2016); Peterson, *supra* note 29.

[95] *See* Provost, *Politics*, *supra* note 5; Provost, *Entrepreneurship*, *supra* note 5.

[96] *See* Provost, *Politics*, *supra* note 5; Provost, *Entrepreneurship*, *supra* note 5.

[97] *See* NOLETTE, *supra* note 5.

[98] *See id.* at 21 (using data including antitrust, consumer protection, health care, and environmental litigation, broadly defined).

[99] *Id.* at 2.

[100] *See generally id.*

[101] *See* Widman & Cox, *supra* note 63, at 53–55.

[102] *Id.* at 55.

[103] *See, e.g.*, Olhausen, *supra* note 94, at 625–28 (conducting a review of administrative actions brought by the FTC to determine whether criticisms of being a "kangaroo court" are

son recently examined all CFPB enforcement actions between 2011 and 2015.[104] Peterson's study included all publicly announced enforcement actions (as opposed to focusing on the enforcement of the general UDAAP prohibition only).[105] Overall, Peterson's data reveal an investigative, collaborative, and efficient agency.[106] Moreover, within the time period he studied, all of the enforcement actions were uncontested and the controversial "abusive" standard was cautiously enforced.[107] Peterson's findings fill an important gap in understanding the quality of enforcement at this new agency, and many of his findings are contrary to claims made by those critical of the agency.[108]

Beyond these studies, however, the landscape is barren. Reviewing recent research in the area of consumer protection law, Stephen Meili lamented the lack of empirical work and concluded that "[t]his imbalance is both surprising and troubling, given that it is in the interests of all consumers, and society generally, for cash-strapped regulators to enforce the law as effectively and efficiently as possible."[109] Other scholars have openly called for empirical investigation of public enforcement of consumer protection law, especially given the important normative debates that lack empirical background.[110] This project aims to fill that void.

IV. Methodology

This Part explains the study design, including the scope of the cases studied, the methods of collecting case documents and data, the identity of the public enforcers, and the limitations imposed by the methodology.

A. Scope of Cases Studied

We collected and analyzed cases by a federal or state public enforcement entity ("enforcer") alleging violations of a principle-based UDAP stat-

upheld by the data and finding that the criticisms are not supported); Peterson, *supra* note 29, at 1063–64.

[104] *See* Peterson, *supra* note 29, at 1106–12.

[105] *See id.*

[106] *See id.*

[107] *See id.*

[108] *See id.* at 1104 ("The data reported in this Article should serve as an analytical benchmark against which future Bureau action can be measured and as a needle to deflate the absurdly overheated political rhetoric used to grandstand against the CFPB's mission and accomplishments. Vapid allegations that the new consumer protection agency is a 'Frankenstein monster,' based on 'the Stalin model,' or taking the first steps toward 'socialism' are thoughtlessly untethered from reality." (internal citations omitted)).

[109] *See* Stephen Meili, *Consumer Protection*, *in* The Oxford Handbook of Empirical Legal Research 176, 187 (Peter Cane & Herbert M. Kritzer eds., 2010).

[110] Deborah Hensler criticized Margaret Lemos's article, *Aggregate Litigation Goes Public*, saying her analysis is "heavy on theory and light on empirics—indeed, her article does not contain any empirical data about the nature and frequency of the litigation that concerns her." *See* Hensler, *supra* note 8, at 58.

ute resolved during the calendar year 2014. Cases were deemed to have been resolved in 2014 based on the date the final order was filed with the court or administrative agency, or on the latest date of execution by any party to a settlement agreement.[111] This subpart describes cases determined within the scope of the study with respect to two concerns: (1) which cases alleged principle-based UDAP violations; and (2) which cases were resolved in 2014, including cases with multiple resolving documents.

1. Public Enforcers and Principle-Based UDAP Statutes

We limited our study to enforcement of principles enunciated in UDAP laws rather than rule-based consumer protection. As discussed above, principle-based enforcement occurs where the legislature has provided a broad standard, and that standard is not tied to particular policy goals but rather broad norms, like fairness. This type of delegation, by its nature, is a conscious choice of the legislature to rely substantially on the enforcer's discretion. Our aim is to provide a snapshot of how UDAP enforcers use their discretion and to provide a typology of enforcement strategies.

All UDAP cases resolved by federal enforcers expressly identified that the enforcer was claiming a violation of either the unfair, deceptive, or abusive principles in the UDAP law. Therefore, every case by the FTC or CFPB alleging a UDAP violation was within the scope of the study because it included a principle-based UDAP claim.

UDAP claims by state enforcers were not always as clearly delineated as the principle-based claims. In two types of cases, state enforcement nominally pursued under a UDAP statute constitutes a rule-based action. First, some rule-based state consumer protection laws identify a violation of that law as a per se violation of the state UDAP as a means to provide enforcement remedies. For example, a failure to license or register a business can be a per se violation of a state UDAP law.[112] Second, some UDAP statutes go beyond an elaboration of UDAP principles and include rule-based provisions. For example, the Oregon UDAP statute contains extensive rule provisions, such as prohibiting the sale of "a motor vehicle manufactured after January 1, 2006, that contains mercury light switches."[113] Most cases that presented rule-based applications of a UDAP statute were patent, but a few required judgment calls. In these instances, all three researchers evaluated the case documents and reached consensus on whether to include the case.

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[111] For cases brought as a joint action by two or more enforcers, which we refer to as multi-enforcer cases, we modified the last date rule to be the year in which a majority of the participating states filed or executed the common settlement.

[112] *See, e.g.,* ARK. CODE ANN. § 4-28-416 (West 2017) (failure to register as a charity is a per se violation of the Arkansas Deceptive Trade Practices Act).

[113] *See* OR. REV. STAT. ANN. § 646.608(1)(z) (West 2016).

2. *Resolved Cases*

We measured resolution at the trial or administrative level without regard to appeal, although we tracked the outcomes of appeals in contested cases. When cases with more than one defendant resulted in more than one resolving document, we treated each resolving document as a separate case only if the resolving document met one of the following criteria: (1) it was a judicial proceeding with a final judgment under Rule 54(b); (2) it was an administrative proceeding that produced an order using the same principles as Rule 54(b); or (3) it was an assurance of voluntary compliance, which is a unique form of pre-complaint settlement available to state attorneys general by statute in most states.[114] Otherwise, we determined that a case with multiple resolving documents was in scope if the last order or settlement resolving all issues of liability and remedies occurred during 2014.

B. Data Collection and Coding

For each case within the study scope, we attempted to collect a resolving document, such as a final order or final settlement. When available, we also collected an initiating document, such as a judicial or administrative complaint. We obtained these documents through online searches of enforcer websites and electronic case data repositories, government open record requests, and direct requests to specific government officials. The FTC and the CFPB post all resolved enforcement actions on their websites.[115]

State enforcers do not routinely post on their websites copies of documents from resolved UDAP enforcement actions, although at least seven states make all or most of their UDAP enforcement actions available for download.[116] We sent requests under state open records laws to all state attorneys general, including the District of Columbia, and five state consumer agencies.[117] We obtained a 100% response rate with these requests.[118] Finally,

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[114] *See supra* part II.B.; *see also* Cox, *supra* note 50, at 2355 n.213 (2016).

[115] *See Cases & Proceedings*, U.S. FED. TRADE COMM'N, https://www.ftc.gov/enforcement/cases-proceedings [https://perma.cc/F6MJ-KHFW] (providing a database with "[a]ll FTC cases & proceedings" and noting that more recent cases "can be filtered by name and date."); *Enforcement Actions*, U.S. CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/policy-compliance/enforcement/actions [https://perma.cc/S5WY-XQAK] ("When we take an enforcement action against an entity or person we believe has violated the law, we will post court documents and other related materials here."). The CFPB also confirmed its 2014 cases through an informal information request. Email from Delicia Hand, Staff Dir., Consumer Fin. Prot. Bureau, to Prentiss Cox, Assoc. Professor, Univ. of Minn. Sch. of Law (July 23, 2015, 3:19 PM) (on file with author) (on file with the Harvard Law School Library).

[116] Colorado, Kansas, Maryland and Wyoming post resolving documents online for most of their 2014 UDAP cases. Idaho, New Jersey and Vermont made all of their 2014 UDAP enforcement actions available online.

[117] The state open records law requests sought the following documents: "(a) any action by [name of the enforcer] to enforce a violation or alleged violation of [name of state UDAP law], or any similar UDAP law of [name of state] that authorizes your office to bring actions

we sent informal requests to specific government officials for ancillary data related to specific cases, such as missing exhibits from orders, and to identity state leadership in multistate cases.

Figure 1 breaks down these cases by the type of enforcer alleging UDAP violations. We identified a total of 798 cases within the scope of the study. State enforcers brought a total of 671 cases when only one state was the enforcer, which we label as "individual state" cases.[119] The FTC brought ninety-four in-scope cases and the CFPB brought ten cases, for a total of 104 cases identified as "individual federal" cases in Figure 1. Finally, twenty-three cases were "multi-enforcer" actions, meaning they were cases brought as a joint action by two or more enforcers from different jurisdictions, with the noted various combinations of federal and state enforcers.

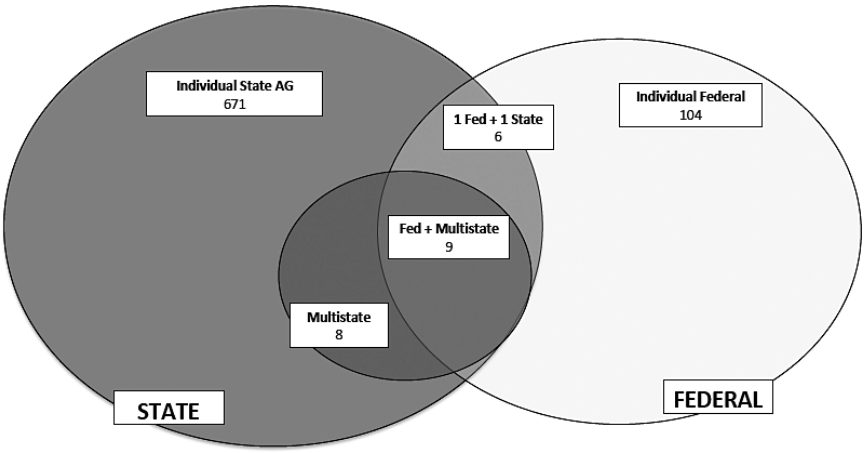

FIG. 1. NUMBER OF CASES BY ENFORCER TYPE [NOT TO SCALE]

For each case, we coded 147 fields of data about the allegations made in the case and the relief obtained. All of this data derived from the face of

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under statutes commonly known as consumer fraud or UDAP (unfair or deceptive acts and practices) laws, but not actions under these laws limited solely to antitrust or unfair competition claims; (b) for which a Final Order or other similar document was issued, or an Assurance, Consent Judgment or other form of final settlement was issued or obtained; and (c) that Final Order, Consent Judgment, Assurance or other similar document was obtained or issued during calendar year 2014 (January 1, 2014 through December 31, 2014)."

[118] The following states were particularly noteworthy for timely and clear communication and production regarding our requests for a large number of documents: Connecticut, Florida, Illinois, Indiana, Iowa, Missouri, New Mexico, Ohio, and Oregon. Although some states made it difficult to obtain requested records, the authors mostly encountered cooperation with their often onerous requests for production of state records, and they are grateful for the diligence and professionalism of the staff attorneys handling these requests.

[119] In ten individual state cases a state agency other than an attorney general or administrative agency joined the state UDAP enforcer in the action, including eight cases brought jointly by the Colorado Attorney General and the Colorado Uniform Credit Code Administrator.

the resolving document and, when available, the initiating document. All three researchers coded cases. Multiple test coding occurred to ensure the reliability of the process. After reducing variability among researchers, we evenly divided the cases for coding. To ensure uniformity of coding and prevent drift of coding over time, two researchers periodically blind-coded cases and compared results. We resolved discrepancies and discussed differences. These coding checks occurred with greater frequency at the beginning of the coding process, but continued until the end. On key coding variables reported here, including form of resolution, type of relief, and dollar amounts of relief, variance was minimal.

The cases included 1802 defendants in the 798 cases studied, or an average of 2.25 defendants per case. Entity defendants were more common than individual defendants, with actions against 1045 entities and 757 individuals. In addition to deriving information about defendants from the face of the collected documents, we searched databases for additional data about entity defendants. The Mergent Intellect database current in 2016 provided information for 653, or 62.5% of all entity defendants. For 311 entities, or 29.8% of the entity defendants, we identified defendant data from the Lexis "Company Profiles" multi-source database, including information from Experian through Lexis, and by searching state government websites containing corporation information for the state in which the entity was incorporated. We were unable to identify any external data on 81 entities, or 7.8% of all entity defendants.

These external databases provided six fields of data about each entity.[120] We used two of the fields—number of employees and annual revenue—to categorize the defendants by size in Parts V and VI. Of the 1045 entity defendants, we identified database information for one or both of these fields for 766 of these entities, or 73.3% of the defendants. For the 279 defendants with no size data, we determined that 100 of these entities, or 9.7% of all defendant entities, had their corporate status either revoked or dissolved in their state of incorporation.

C. Public UDAP Enforcers

Two concerns arose in compiling the data by enforcer. First, five states authorize an administrative agency to enforce their UDAP laws in addition to or instead of the state attorney general.[121] In three of those states—Georgia, Hawaii, and Utah—the state attorney general did not bring any UDAP cases. Therefore, our reference to enforcers in these states is to the administrative agency. In Connecticut, the agency has sole discretion to bring a

[120] The following data was collected from external databases on each entity defendant, when available: public or private company, subsidiary status, minority owned, NAICS code, number of employees at all sites, and annual revenue.

[121] *See supra* note 33.

UDAP case, although the state attorney general litigates the case. In Wisconsin, the Attorney General has independent authority to bring a UDAP case, but brought cases during 2014 only as an attorney for the administrative agency. For purposes of this study, we treat the agency and the state attorney general as one enforcer in these two states.[122] Because we considered the District of Columbia to be a state and treated states with an administrative agency as having only one enforcer, the data on states are reported for fifty-one enforcers.

Second, we divided cases in which multiple enforcers joined into small multi-enforcer actions and large multi-enforcer actions. *Small multi-enforcer actions* include either one federal and one state enforcer, or a group of up to twenty state enforcers, with or without a federal enforcer. These cases divide into the following two groups:[123]

1. *Joint Federal-State*. In ten cases, a federal enforcer, typically the FTC, paired with up to three states. The FTC joined only with Connecticut in three actions and only with Florida in three actions. The FTC joined with two states in two cases: once with Illinois and New York, and once with Illinois and Ohio. The FTC paired with three states—Illinois, North Carolina and Kentucky—in one case. The CFPB joined with two states, North Carolina and Virginia, in one case. In addition to these ten cases, the CFPB joined with thirteen states to pursue Colfax Capital Corporation and related entities in a bankruptcy proceeding following enforcement actions by the states.
2. *Multi-state Only*. In five cases, no federal enforcer participated. Only two states joined in two cases, but the remaining three cases involved a larger number of states (six, nine, and twenty, respectively).

Large multi-enforcer actions involved forty-two or more states joining in an action, often with a federal enforcer. These cases divide into the following three categories:

1. *NMS*. Two cases were part of the National Mortgage Settlement (NMS) cases.[124] The CFPB and fifty states joined in these two cases against large mortgage servicing entities resolved in 2014.[125]

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[122] *See supra* note 25.

[123] The one case outside this categorization was an unusual action in which the CFPB and thirteen states joined to protect their common interests against a group of defendants in a bankruptcy proceeding. *See* Settlement Agreement between Paul J. Mansdorf, Trustee of the Estate of Colfax Capital Corp., the CFPB & Thirteen States, *In Re* Colfax Capital Corp., No. 08-45902 (Bankr. N.D. Cal. July 10, 2014).

[124] *See supra* note 4.

[125] Only Oklahoma did not participate in this settlement. The U.S. Department of Justice joined one of these settlements.

2. *Telecom Cases*. Two cases were against telecommunications companies for unauthorized charges on cell phone bills. All fifty-one states joined the FTC and the FCC in these cases.
3. *Multi-State Only*. In three cases, groups of forty-two to forty-six states joined without a federal enforcer. Two of these cases were against pharmaceutical companies; the other case was against a satellite radio company.

D. Study Limitations

As with any empirical study, our methodology results in limitations imposed by the design of the study. One limitation is that we collected data only on cases resolved in one calendar year, 2014, even though many of those cases were initiated in years prior to 2014. We obtained a substantial number of cases for one year of enforcement, but it may result in problems from "small *n*" assessments when the data is applied at the level of individual enforcers with a smaller number of cases. For example, if a state attorney general had two UDAP cases in 2014, it may be that the same enforcer had no cases or five cases the previous or following year. The study also has jurisdictional limits. We examined federal and state actions, but not local public enforcement of UDAP law. California, in particular, has active enforcement of UDAP laws by local government entities.[126]

Moreover, our study looks only at principle-based UDAP enforcement, not all consumer protection public enforcement. Enforcers with UDAP authority could use non-UDAP consumer protection laws differently, quantitatively or qualitatively. However, we included in the database all cases with a single UDAP claim, even if non-UDAP claims predominated.[127] In 55.3% of cases enforcers asserted both types of claims, although this percentage varied by enforcer.[128] In addition, we identified state cases through a combination of means, but relied heavily on government open record requests for these cases, and thus the study's state case repository depended substantially on the accuracy of the open records responses.

Similarly, the data on entity defendants from external databases is limited in two ways. First, this data reflects the accuracy and reach of the external databases. Second, we collected this data during 2016 about cases resolved in 2014. One possible result is that an enforcement action might have substantially reduced the size of a company from 2014 to 2016.

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[126] Kathleen C. Engel, *Local Governments and Risky Home Loans*, 69 SMU L. Rev. 609, 620 (2016).

[127] We adjudged non-UDAP claims as primary in 53 of the 671 state cases, or 7.9%.

[128] *See infra* note 140 and accompanying text.

V. Aggregate Data

Before reviewing enforcement strategies in Part VI, we present aggregate level data for five categories of public enforcers: state enforcers, the CFPB, the FTC, small multi-enforcers, and large multi-enforcers. Subparts A-C provide data on the defendants[129] in public UDAP enforcement actions, the prosecution and form of resolution of cases, and the matters and claims at issue in the cases. Subpart D provides data on the relief obtained in the enforcement actions, including the frequency, types, and dollar amounts of relief.

A. Defendants

The type, number, and size of defendants varied by enforcer. Defendants in CFPB and large multi-enforcer actions were almost uniformly large entities. The FTC, the states and small multi-enforcer cases often were against both individual and entity defendants in the same case. State enforcers were most likely to pursue only individuals as defendants. Figure 2 shows the percentage of cases for each enforcer that have only individual defendants, only entity defendants, or both types of defendants.

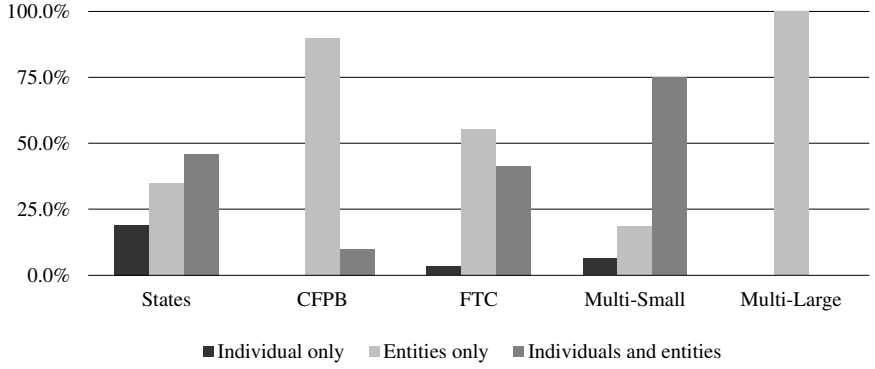

Fig. 2. Percentage of cases by type of defendant

The size of the entity defendants also varied substantially by enforcer. Table 1 provides data on the two measures of entity defendant size—annual revenue and number of employees. The mean and median numbers are provided for defendants for which this data was known.

[129] We use the term "defendants" to refer generally to the target of the action, whether a judicial defendant, an administrative respondent, or the person entering the AVC or settlement.

TABLE 1. Entity defendant size data by enforcer

	Entities (#)	Entities with known size (#)	Entities dissolved or unknown size (%)	Mean entity def. annual rev. (millions of $)	Median entity def. annual rev. (millions of $)	Mean entity def. employees (#)	Median entity def. employees (#)
States	789	596	24.5	2,053	0.46	6,670	5
FTC	184	122	33.7	3,029	2	2,253	15
CFPB	13	13	0.0	696	152	23,468	3,165
Multi-small	51	27	47.1	286	1	266	5
Multi-large	8	8	0.0	6,854	2,961	13,744	7,888

State enforcers routinely brought cases against small entity defendants, but the high mean suggests a number of cases against very large defendants. To better measure the range of defendant types and size in state cases, we excluded defendants with no known size data and then grouped state case defendants by the largest defendant in the action. We then determined quartiles and the 90% level for the median number of employees and median annual revenue of state entity defendants, and used these breakpoints to determine five categories for state case entity defendant size, as identified in Table 2.

TABLE 2. Explanation of defendant size measures for state enforcers

	Employees (#)		Annual revenue ($)
Tiny entity	< 3	and	< 151,000
Small entity	3-5	or	151,000 – 592,000
Medium entity	6-44	or	592,001 – 7,557,500
Large entity	45-400	or	7,557,500 – 166,380,000
Mega entity	> 400	or	> 166,380,000

For each case, we isolated the defendant in the case that was in the largest size category.[130] Table 3 shows the resulting distribution of state cases:

[130] When a defendant fell into different quartiles for employee numbers and for annual revenue, we used the higher measure to determine the largest defendant in the case.

TABLE 3. Frequency of state enforcer cases by largest size entity defendant in each case

	Cases (#)	Cases (%)	Cases when entity size known (%)
No entity defendant	127	18.9	n/a
Dissolved entity / no data	87	13.0	n/a
Tiny entity	92	13.7	20.1
Small entity	125	18.6	27.4
Medium entity	117	17.4	25.6
Large entity	76	11.3	16.6
Mega entity	47	7.0	10.3
Total	671	100.0*	100.0

* May not add up to 100.0 due to rounding

That state enforcers pursue smaller targets should not surprise, but the exceedingly small size of many such defendants is noteworthy. Over half of state enforcer UDAP cases, 51.2%, are either against individuals only or had a largest defendant entity with less than $592,000 in annual revenue or no more than 6 employees. That percentage rises to 64.2% when including entities now dissolved or for which no data was available. For comparison, a single-location children's bookstore near the home of one of the researchers easily exceeds both these annual revenue and employee size measures.

Finally, we looked at the location of defendants in state cases to determine how often state enforcers brought cases against in-state defendants. We were able to locate data on defendant location for 747 entities, or 94.7% of entity defendants, and 446 individuals, or 69.5% of individual defendants.[131] When the defendant's location was known, 66.1% of entity defendants and 59.7% of individual defendants resided in the same state as the enforcer.

B. Prosecution and Resolution of Cases

Like most civil litigation, public UDAP enforcement actions mostly settle.[132] Unlike most civil litigation, the prevailing party is rarely in doubt.

[131] Principal place of business (PPB) was used to identify location for entities, when that information was known; if unknown, we used state of incorporation. Of the 747 entities with known location, 673 (90.1%) were determined by entity PPB.

[132] *See* LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 1 (2008), https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf [https://perma.cc/6SYG-J5UM] ("Among jurisdictions that provided totals for both trial and non-trial general civil dispositions in 2005, trials collectively accounted for about 3% of all tort, contract, and real property dispositions in general jurisdiction courts."). However, empirical studies distinguishing non-tried cases that settle from those decided by dispositive motion are slender. A study of Hawaii state court cases in 1996 and 2007 found relatively low settlement rates, reporting that in 2007 settlement occurred in 70% of all cases, with tort cases settling more frequently (88%) and foreclosure cases least frequently (47%). *See* John Barkai & Elizabeth Kent, *Let's Stop Spreading Rumors About Settlement and Litigation: A Comparative Study of Settlement and Litigation in Hawaii Courts,* 29 OHIO ST. J. DISP. RESOL. 85, 109 (2014) (also observing that these findings are consistent with the few other studies examining settlement rates).

Defendants prevailed in only one contested case. This subpart presents data from our study on the form of case resolution, the duration of litigation and the use of outside counsel by state enforcers.

All of the CFPB and multi-enforcer actions completed in 2014 were settlements. The FTC and the state enforcers completed an almost identical percentage of cases through contested resolution. The FTC resolved four cases through judicial contest—two by trial and two by dispositive motion—which represented 4.3% of all FTC cases. Similarly, state enforcers resolved twenty-eight cases, or 3.7% of all cases, through a contested process. Almost two-thirds of these contested cases were resolved by dispositive motion. Six cases were decided by judicial trials and four by administrative hearing.[133] Of the thirty-two FTC and state cases decided by a contested decision, defendants prevailed in one state court bench trial.[134] In all other cases, the UDAP enforcer prevailed. No defendant successfully appealed in any of these contested cases.[135]

Overall, state enforcers resolved 104 cases by default, or 15.5% of the total number of cases. But eleven state enforcers, each of which is described in Part VI as employing a particular type of enforcement strategy, accounted for eighty-two, or 78.9%, of these default cases. The rate of default cases for the other forty-one state enforcers was 6.6%. The FTC default rate, six cases (6.4%), was almost identical to the rate for these state enforcers. These latter default rates are almost identical to estimated default rates in general civil litigation.[136]

Enforcers often engaged in litigation prior to resolution, as measured by the period between filing the initiating document and finalizing a settlement. It is difficult to measure definitively the duration of litigation in public UDAP enforcement because these enforcers have authority to obtain discovery prior to filing a complaint.[137] This pre-complaint discovery authority

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[133] All but one of the judicial trials were bench trials. The State of Wisconsin brought one case that was decided, in part, by a jury trial resulting in a special verdict. *See* Judgment, Wisconsin v. Going Places Travel Corp., Nos. 2010-CX-1-1D and 1G-1I (Wis. Outgamie Cty. Cir. Ct. July 7, 2014).

[134] The one contested loss by an enforcer was a case brought by the Indiana Attorney General. Indiana alleged a UDAP violation for a deceptive affiliation claim against an out of state company soliciting by mail under the names "Local Records Office" and "National Profile Document." *See* Indiana v. Juan Robert Romero Ascencio, No. 82C01-1305-PL-240 (Ind. Vanderburgh Cty. Cir. Ct. Oct. 13, 2014).

[135] None of the four FTC cases were appealed. Of the twenty-eight state cases in which the state enforcer prevailed, five cases were appealed, and the state prevailed as to liability in all cases. People v. Wunder, 371 P.3d 785 (Colo. App. 2016) (affirming summary judgment for state and remanding for further proceedings as to remedies); Law v. State, 163 So.3d 1196 (Fla. Dist. Ct. App. 2014) (appeal dismissed); State v. Dailey, 192 Wash. App. 1007 (Ct. App. 2016) (unpublished table decision) (lower court decision affirmed); State v. Going Places Travel Corp., 864 N.W.2d 885 (Wis. Ct. App. 2015) (lower court judgment affirmed); State v. Nelson Gamble & Assoc., No. 14AP-280 (Ohio Ct. App. July 17, 2014) (appeal dismissed).

[136] *See* Barkai & Kent, *supra* note 132, at 111 (finding a 6% default rate in all cases in study of Hawaii state court civil cases).

[137] *See supra* note 46 and accompanying text.

often shifts what would otherwise be the discovery portion of a lawsuit to an investigative period prior to initiation of the action. State enforcement is further complicated by the near universal authority of state attorneys general to enter into a pre-complaint AVC settlement that does not require filing a complaint.[138] Nonetheless, it is clear, as indicated in Figure 3, that FTC and state enforcers have comparable patterns as to the form and timing of resolution, and the CFPB and large multi-enforcer cases settle prior to or not long after initiation of the action.

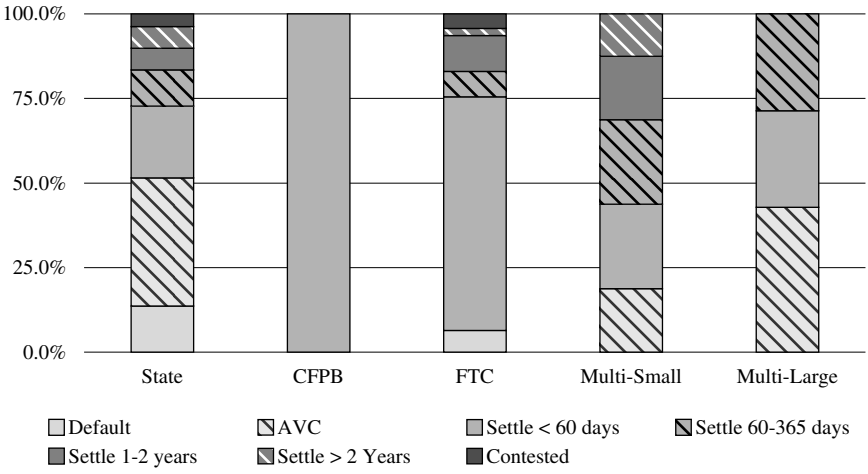

FIG. 3. PERCENTAGE OF CASES BY FORM OF RESOLUTION BY ENFORCER

Of the state cases lasting sixty days or more after filing, whether settled or contested, ninety-two (44.4%) cases resolved within a year of filing, fifty-seven (27.5%) cases resolved between one and two years of filing, and the remaining fifty-eight (28.0%) cases resolved two or more years after filing.

The aggregate data do not suggest widespread use of outside counsel in state public UDAP enforcement, at least as far as the pleadings reveal. Three states used outside counsel almost exclusively in a total of nine similarly structured enforcement actions and one state used outside counsel in a single case, as discussed more fully below.[139] Otherwise, outside counsel was not observable in state enforcer cases. Nor is there much evidence on the face of the documents we coded to suggest cooperation between public and private enforcers. Nine cases (six states, two FTC and one CFPB) mentioned related

[138] *See supra* part II.B.; *see also* Cox, *supra* note 50, at 2355 n.213. Depending on the state, either the AVC must be approved by the court without the filing of a complaint or all parties only need to execute the agreement for it to have the authority of a court-approved settlement. Of the 293 AVCs in our sample, 80 (27.3%) showed evidence of court filing.

[139] *See infra* Part VI.B.3.

private actions in settlement documents, but the data revealed no case where public and private enforcers joined as plaintiffs.

C. Matters and Claims

In this subpart, we present data on the goods or services at issue in public UDAP enforcement actions, the claims alleged by the enforcers (including both UDAP claims and, when joined to a UDAP claim, non-UDAP claims), and the sales channels that defendants used. We gathered data on the type of product at issue in a case in two ways—by categorizing the products described in the documents and by collecting information on the industry code of the entity defendants. We also gathered types of claims brought by enforcers in two ways—by categorizing the UDAP violations and by identifying the statute, rule, or other law violation alleged for non-UDAP claims joined to the UDAP claims. Finally, in many cases we identified a primary sales channel used by the defendants.

This data suggests that UDAP enforcers have a propensity for specializing in certain types of cases, at least in a given year. For the CFPB, this specialization is mandated by the Dodd-Frank Act. It brought cases only against sellers of credit or banking products, and joined only non-UDAP claims under federal consumer financial protection laws.[140] Unsurprisingly, large multi-enforcer actions involved products in industries dominated by large companies, with pharmaceuticals, mortgage origination and servicing, and telecommunications accounting for six of the seven cases.

State enforcers and the FTC had distinct patterns as to products, industries, and claims.[141] Cases against motor vehicle dealers were frequent for both types of enforcers, although to some extent they pursued different types of claims against these defendants.[142] Table 4 shows the ten most common categories of products at issue in cases brought by state enforcers and the five most common categories of products in FTC cases. State enforcer top categories are identified in blue; FTC top categories are identified in orange; and common top categories are identified in red. The percentage represents the share for that product compared to all product categories identified for that type of enforcer.[143]

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[140] The CFPB brought non-UDAP claims in six cases, including two cases with claims under the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601–2617 (2012), and two cases with claims under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, 1681x (2012).

[141] Small multi-enforcer actions involved a diversity of products and claims that reflected the approach of state enforcers and the FTC.

[142] The FTC brought almost exclusively price deception claims against motor vehicle dealers (eleven of twelve UDAP claims), and the sales channel for the price deception was typically the internet (five of eight cases in which the sales channel was identifiable). The FTC also used the Consumer Leasing Act (CLA), 15 U.S.C. §§ 1667, 1667f (2012), extensively against motor vehicle dealers, accounting for all five cases by the FTC with CLA claims. State claims varied.

[143] Comparison of product codes aligned with the defendant entity codes. Frequencies of industry codes by five-digit NAICS code reveals that the top industries represented by defend-

TABLE 4. Products at issue in state enforcer and FTC cases

	State cases (#)	States % of products	FTC cases (#)	FTC % of products
Construction/home repair	104	14.8	0	0.0
Motor vehicle sales/lease	85	12.1	11	10.7
Foreclosure rescue	36	5.1	1	1.0
Vacation/travel/lodging	24	3.4	0	0.0
Entertainment	18	2.6	3	2.9
Membership clubs	17	2.4	0	0.0
Debt settlement	17	2.4	0	0.0
Legal services	16	2.3	0	0.0
Debt collection	16	2.3	5	4.9
Gas/fuel/electricity	15	2.1	0	0.0
Medical or health services	11	1.6	13	12.6
Website/data services	5	0.7	12	11.7
Weight loss	3	0.4	9	8.7

The types of UDAP claims in state enforcer and FTC cases overlapped, but also differed in key respects. Claims of deception about price and product benefits were frequent for both enforcers. The FTC's greater use of product benefit deception claims was almost entirely attributable to its greater pursuit of misrepresentations concerning health benefits or weight loss, with 41.2% of product benefit deception claims consisting of health or weight loss claims for the FTC versus 7.5% for the state enforcers. The FTC also brought a large number of claims for UDAP violations in data privacy/use and a larger share of cases against website/data service providers, while the states were mostly quiescent in this area. The state enforcers commonly brought UDAP claims for the seller's failure to deliver a product and for misrepresentations about the seller's identity, including the seller's licensure status and qualifications. A disproportionate share of these claims were in cases against the most frequent type of state defendant, home construction, and repair contractors, with such cases accounting for 59.1% of "failure to deliver" claims and 36.2% of "seller/product identity" claims for state enforcers.

ants are legal services, consulting services, travel agencies, car dealers, consumer lending, commercial banking, and construction.

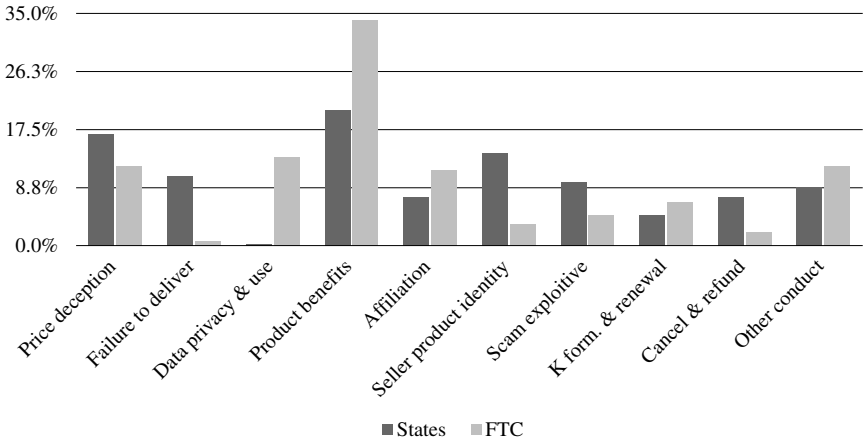

FIG. 4. PERCENTAGE OF UDAP CLAIMS BY TYPE IN STATE ENFORCER AND FTC CASES

The relatively high use of "affiliation" claims by both the FTC and the state enforcers was notable. These are claims that the defendants deceptively marketed their products as being associated with or approved by government or by another person or entity. For example, the Illinois Attorney General brought claims against defendants advertising immigration services under the name "U.S. Immigration Organization, Inc." and using the domain name "USAImmigrationSupport.com."[144] Similarly, the Alabama Attorney General brought a UDAP claim against a company sending out mailings and asking for forms to be filled out in accordance with state law and returned, along with a fee, to "Corporate Records Service."[145] Actions alleging this sort of UDAP violation comprised 7.4% of UDAP claims made by the state enforcers and 11.3% of UDAP claims by the FTC.

Public UDAP enforcers have moved with consumers to the internet marketplace. In 55.3% of FTC cases and 30.4% of state cases, we identified a primary sales channel for the conduct at issue in the case. As shown in Figure 5, the FTC overwhelmingly brought cases involving web conduct, but state enforcers also brought more cases involving web conduct than any other sales channel. Telemarketing, an area of traditional concern for both the FTC and the states, was high on the list for both types of enforcers, but only the states also brought a substantial share of cases involving home so-

[144] Complaint, Illinois v. Vytautas Lekorauskas, No. 11CH331114 (Ill. Cook Cty. Cir. Ct. Sept. 20, 2014).

[145] Complaint, Alabama v. Mandatory Poster Agency, No. 01-CV-2014-904234 (Ala. Jefferson Cty. Cir. Ct. Oct. 8, 2014).

licitation and direct mail, two other sales channels often subject to consumer protection concerns, especially with elderly consumers.[146]

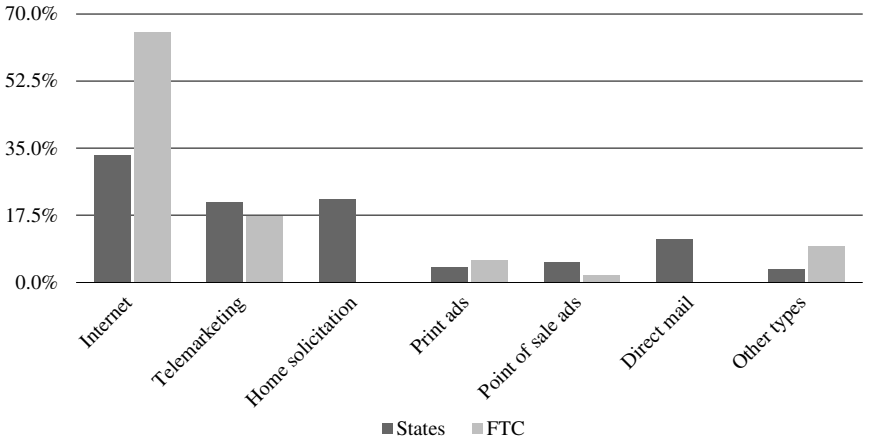

FIG. 5. PRIMARY SALES CHANNEL FOR CONDUCT AT ISSUE IN FTC AND STATE ENFORCER CASES

Non-UDAP claims were joined with UDAP claims more often in CFPB (60% of cases), state (59% of cases), and small multi-enforcer cases (69% of cases), and less often in FTC cases (35% of cases) and large multi-enforcer actions (14% of cases). The average number of non-UDAP claims per case was relatively similar for each enforcer. State enforcers brought 570 non-UDAP alleged violations in 396 cases, or an average of 1.4 non-UDAP claims per case when non-UDAP claims were joined. Other enforcers alleged a comparable number of non-UDAP claims per case, as follows: CFPB (1.3), FTC (1.2), small multi-enforcer (1.5), and large multi-enforcer (1.0).

The FTC brought thirty-nine claims using twelve different non-UDAP laws in thirty-three cases in which non-UDAP claims were joined with UDAP claims. The non-UDAP laws employed by state enforcers in conjunction with UDAP claims included a wide array of regulated conduct. State attorneys general are authorized to enforce violations of certain federal consumer protection laws, and use of this authority tracked closely with the same areas of concern as are evident in the types of UDAP claims and sales

[146] Data on sales channel in CFPB and multi-enforcer cases was not sufficiently complete to make meaningful descriptions.

channels at issue in state cases, including telemarketing,[147] foreclosure,[148] and debt collection.[149]

D. Relief Characteristics

Public enforcers obtain three types of relief in UDAP actions: injunctive relief, government money, and public compensation.[150] We examine the characteristics of this relief in four areas: an overview of the frequency, amount, and distribution among cases of the three forms of relief; the type of injunctive relief; the bases for recovering government money and the amounts of relief; and the amount of public compensation and how distribution of this relief is structured.

The data on relief are restricted to cases that resolved through settlement or contested decisions; in other words, we did not count default cases in the data on relief. This decision resulted in the exclusion of 110 of the 798 cases (104 state enforcer cases and 6 FTC cases), leaving a non-default case total of 688 cases. Default cases are excluded because the relief does not reflect the likely outcome if contested by the defendant, and presumably money relief usually is uncollected.

When reporting on the amount of money we use three terms that need explanation. First, *net government money* is government money exclusive of dollar amounts identified as suspended in the resolving document, which occurred with some frequency.[151] Second, dollar amounts for *public compensation* constitute known dollar amounts for this relief, exclusive of cases in which the dollar amount of relief was not identifiable from the resolving document.[152] Third, the term *total dollar relief* equals net government money plus public compensation dollar amounts.

1. Overview of Relief Obtained

A defining feature of public UDAP actions is that enforcers obtain injunctive relief. States resolved all but 4.2% of cases with this form of relief,

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[147] Consistent with long-term patterns, states and the FTC most heavily used the FTC Telemarketing Sales Rule (TSR), 16 C.F.R. § 310 (2016), with states bringing a TSR claim in thirteen individual state enforcer cases and three multi-enforcer cases, and the FTC asserting TSR violations in ten of the thirty-nine non-UDAP claims, *see also* Widman & Cox, *supra* note 63, at 53 (noting that telemarketing laws are by far the most frequently used federal law by state enforcers).

[148] State claims for violation of the FTC rule on foreclosure assistance, 12 C.F.R. § 1015 (2016), were brought in ten individual state cases, and one multi-enforcer case, while the FTC employed this rule in one case.

[149] Although not expressly authorized to enforce the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, 1692p (2012), state enforcers nonetheless brought claims alleging a violation of this law in ten individual state cases.

[150] *See supra* notes 50–56 and accompanying text.

[151] *See supra* note 51 and accompanying text.

[152] *See supra* note 50 and accompanying text.

while the other enforcers obtained it in every case. As shown in Figure 6, the five enforcer types obtained net government money and public compensation at different rates.

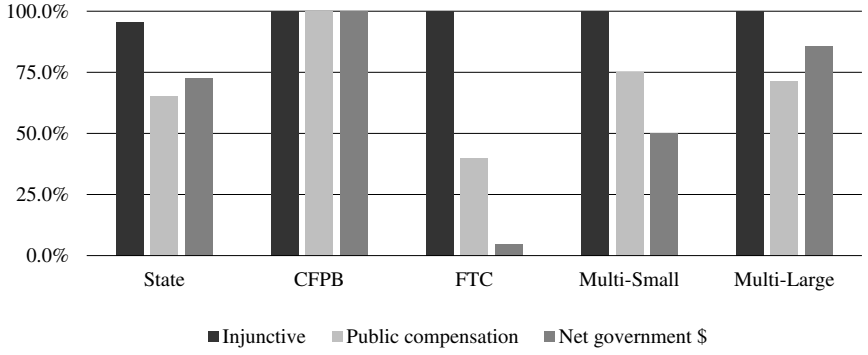

FIG. 6. PERCENTAGE OF CASES WITH RELIEF OBTAINED BY ENFORCER

Table 5 provides data on how enforcers combine these types of relief in enforcement actions. The CFPB employed a uniform approach, obtaining all forms of relief in all cases. The FTC almost never obtained all forms of relief, doing so in only two cases (2.3%), and was the only enforcer to rely predominantly on obtaining only injunctive relief in resolving cases. States obtained all three forms of relief in 45.7% of cases, but used a multiplicity of approaches in the remainder of their actions. Large multi-enforcers again resembled more closely the CFPB approach.

TABLE 5. Percentage of cases by combined forms of relief by enforcer type

	State	CFPB	FTC	Multi-small	Multi-large
All forms of relief	45.7	100.0	2.3	25.0	57.1
Gov't $ + PC	0.5	0.0	0.0	0.0	0.0
PC only	0.5	0.0	0.0	0.0	0.0
Gov't $ only	2.6	0.0	0.0	0.0	0.0
Injunctive + PC	18.5	0.0	37.5	50.0	14.3
Injunctive + gov't $	23.8	0.0	2.3	25.0	28.6
Injunctive only	7.8	0.0	58.0	0.0	0.0
No relief	0.5	0.0	0.0	0.0	0.0
Total	100.0	100.0	100.0*	100.0	100.0

* May not add up to 100.0 due to rounding

Public UDAP enforcers obtained a total of $4.155 billion in total dollar relief, with public compensation of $3.329 billion and net government money of $825.8 million. These sizeable numbers are qualified by the outsized impact of the two large multi-enforcer NMS cases, which accounted

for $3.140 billion of the total dollar relief.[153] Even excluding these two cases, however, large multi-enforcer cases resolved with the greatest total money recovery among public UDAP enforcers. Figure 7 shows the allocation between government money and public compensation by the various enforcers.

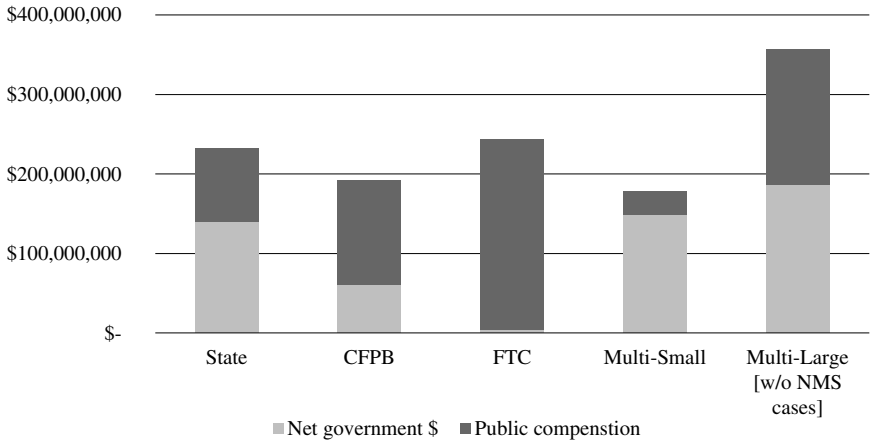

FIG. 7. TOTAL MONEY RELIEF BY ENFORCER (EXCLUSIVE OF LARGE MULTI-ENFORCER NMS CASES)

2. *Injunctive Relief*

While injunctive relief is almost universal in public UDAP enforcement, the restrictions imposed on defendants and other characteristics of the relief vary. We coded injunctive relief in nine categories, as shown in Table 6. Enforcers other than the CFPB obtained relief in two or more categories per case on average.[154]

Prohibiting specifically identified representations was commonly used by all enforcers and most enforcers enjoined the specific conduct at issue in the case. Otherwise, enforcers sought different types of injunctive relief. The subject matter of the alleged UDAP violation explains, in part, this diversity. For example, large multi-enforcers completed a higher percentage of cases alleging deception in billing consumers for unauthorized charges, and the injunctive relief obtained accords with these allegations.

[153] *Supra* note 4.

[154] Enforcers obtained relief in the following average number of categories per case: States (2.4), CFPB (1.7), FTC (2.5), small multi-enforcer (2.3) and large multi-enforcer (3.9).

TABLE 6. Percentage use of types of conduct restrictions by enforcer type

	State	CFPB	FTC	Multi-small	Multi-large
General prohibition of future UDAP violations	25.3	0.0	3.2	2.7	3.7
Certain representations prohibited	15.2	35.3	37.8	21.6	14.8
Certain disclosures required	11.9	5.9	23.5	32.4	14.8
Prohibited from specific conduct at issue in Suit	17.3	5.9	12.4	8.1	25.9
Requirements for contract consent	2.1	0.0	1.9	2.7	25.9
Ban on some form of conducting business	19.7	11.8	10.1	21.6	0.0
Service/contact or refund process requirements	4.5	17.6	0.9	2.7	11.1
Limits on gathering/selling information	1.5	0.0	8.3	8.1	0.0
Required training of employees	2.6	23.5	1.8	0.0	3.7

Yet enforcers clearly had preferences not driven by the subject matter of the action. States, for example, favored generally stated prohibitions on future violations of their UDAP laws. The CFPB, perhaps reflecting its role as a supervisory agency as well as a UDAP enforcer, was much more likely to obtain relief about consumer service requirements and training of employees. The FTC and small multi-enforcer injunctive relief pattern was similar, with more use of limits on gathering and using consumer information, perhaps reflecting the FTC's greater interest in data privacy issues.

For two of these categories—a ban on some form of conducting business and contractual consent requirements—we also coded for more detailed categorical descriptions. Large multi-enforcer cases focused on contractual consent restrictions. One of our sub-categories for contractual consent was a requirement that the defendant use a notice or form prescribed in the resolving document. This form appeared in only twelve cases across the 778 non-default cases, or 1.5%, but this form of injunction was issued in three of the seven large multi-enforcer cases.

Perhaps the most surprising result was the widespread use of a ban on certain forms of business conduct. Large multi-enforcer cases did not use this type of injunctive relief, but all other enforcer types obtained some form of business ban in a substantial number of cases. The CFPB and the FTC obtained a business ban in about 20% of cases, state enforcers obtained this relief in 38% of cases, and half of small multi-enforcer cases included some form of ban. Table 7 shows the breakdown of the various forms of this type of injunction for the states, the FTC, and the small multi-enforcers.[155]

[155] The CFPB obtained a business ban in two cases.

TABLE 7. Percentage use as of various forms of conduct ban by enforcer type

	States	FTC	Multi-Small
Any conduct in jurisdiction	9.3	0.0	7.1
Conduct in defined sector	50.6	63.6	42.9
Certain types of sales conduct	17.9	36.4	50.0
Surrender license or no conduct w/out license	12.5	0.0	0.0
Other conduct	9.7	0.0	0.0
Total	100.0	100.0	100.0

Finally, the enforcers also substantially differed in obtaining relief with or without an express time limit. The FTC and the CFPB strongly favored injunctive relief with an express duration. The FTC used a boilerplate twenty-year limit on injunctive relief in most of its administrative orders, accounting for 58.0% of all of FTC cases. Similarly, in 60.0% of the CFPB cases (all administrative orders), the agency made injunctive relief effective for a limited duration, with all but one of these cases establishing a five-year limit. State enforcers obtained time-limited injunctive relief in 6.3% of cases, with typical time limits of about five years. Small multi-enforcer cases did not appear to have duration limits on injunctive relief, while large multi-enforcer injunctive relief was time-limited in two of seven cases.

3. Government Money

Public UDAP enforcers have authority to seek civil penalties for violations, and also obtain government money as a remedy on other bases. We divided receipt of money by enforcers other than for public compensation into five categories: (1) civil penalty; (2) fees and costs of investigation or litigation, including attorney's fees ("fees"); (3) cy pres awards; (4) money for other designated purpose; and (5) money that is not designated as to its basis, or that mentions multiple of the above purposes without differentiation as to amount ("undesignated"). This subpart presents data on the allocation of government money relief between these categories, the dollar amounts of such relief by enforcer, the use of this money, and the suspension of defendants' obligations for government money relief.

For federal enforcers, government money relief is easy to describe. The CFPB obtained a civil penalty in every case and directed that money in each instance to the agency's Civil Penalty Fund.[156] The FTC rarely obtained money other than for public compensation, but when it did the agency deposited the funds into the U.S. Treasury. States obtained government money in 72.7% of cases, and the basis for doing so in these cases encompassed numerous combinations of the five categories for this relief, as shown in Table 8.

[156] *See* 12 C.F.R. § 1075.100–110 (2016).

TABLE 8. Percentage of state cases by type and amount of net government money

	Cases by type of net gov't money (%)	$ amt. by type of net gov't money (%)
Civil penalty only	17.0	27.4
Fees only	20.6	6.9
Cy pres+	1.5	6.0
Other designated only	9.2	9.6
Undesignated only	21.4	50.0
Fees + other	2.2	n/a
Civil penalty + other	3.6	n/a
Civil penalty + fees	20.4	n/a
Other combinations	4.1	n/a
Total	100.0	100.0*

May not add up to 100.0 due to rounding

Note that the picture of state government money relief changes when viewed by the percentage of dollars attributable to each category of government money instead of the percentage of cases in which the enforcer obtained that type of relief. Undesignated funds were obtained in 21.4% of cases, but accounted for half of the net government money relief. The vast majority of this undesignated money was of one of two types. Of the $70.1 million in undesignated government money obtained by the state enforcers, $35.8 million, or 51.1%, identified no discernible basis for the relief, and $30.3 million, or 43.2%, was money undifferentiated between fees/costs and other designated money.

Among the multi-enforcer cases, the parties rarely designate a specific use for government money. The typical language identifies several possible uses, all broadly stated, but expressly leaves the final decision to the enforcers' discretion.[157]

The amount of government money obtained per case in which net government money relief was awarded varied by enforcer. Large multi-enforcer cases obtained far greater recovery amounts than other enforcer cases, followed by CFPB and then FTC cases. The lower state enforcer amounts per case are predictable, but as with defendant size, the exceedingly small median amounts are noteworthy. Small multi-enforcer cases resolved with net government money relief amounts between the FTC and individual state cases.

[157] *See, e.g.*, AVC, Pointroll, Inc., A.G. Case No. OL14-3-1096, at ¶ 18 (Fla. Att'y Gen. Dec. 10, 2014) ("The Settlement payment may be used, to the extent permitted by law, for such purposes that may include, but are not limited to civil penalties, attorneys' fees, and other costs of investigation and litigation, or to be placed in, or applied to, the consumer protection law enforcement fund, including future consumer protection or privacy enforcement, consumer education, litigation or local consumer aid fund or revolving fund, used to defray the costs of the inquiry leading hereto, or for other uses permitted by state law, at the sole discretion of each State's Attorney General's Office.")

TABLE 9. Mean and median net government money relief by enforcer (millions of $)

	Mean net gov't money	Median net gov't money
States	0.34	0.012
CFPB	6.05	5.00
FTC	1.24	1.23
Small multi-enforcer	.64	.58
Large multi-enforcer	102.51	30.00

The above data includes only government money that was ordered and not suspended in any way. Neither the CFPB nor the large multi-enforcers agreed to suspended government money as part of resolving an enforcement action. The FTC and small multi-enforcers, however, employed this practice. In the six FTC cases with a nominal civil penalty award, two were fully suspended and one was partially suspended. In the nine small multi-enforcer cases with a nominal civil penalty award, two were fully suspended.

State enforcers employed suspension of awards extensively but unevenly across the different categories of government money. States were most likely to suspend government money relief with civil penalties, doing so in 103 of the 232 cases in which a civil penalty was nominally obtained, or 44.4% of cases with a nominal civil penalty award. In about half of the cases with a suspended civil penalty, the suspension was of the entire amount of the nominal award. The states were less likely to suspend fees, doing so in only 7.8% of cases.[158] State enforcers suspended all forms of government money more often when the award was smaller. Accordingly, the percentage of nominally awarded money suspended was much less than the percentage of cases in which suspensions were used. While 133 of the 454 state cases with some form of nominal government money, or 29.3%, had a full or partial suspension of that relief, only 9.1% of the dollar amount of government money relief was suspended. For example, state enforcers at least partially suspended an award of "other designated money" in 21.5% of cases, but suspended only 3.1% of the amount nominally awarded for that purpose.

When states obtained government money, it was most often without use designation (i.e., any form of check to the State of X, Office of AG, Treasurer of State of X, etc. that does not state specific use of the money). The other common use designation was a continuing fund. The continuing funds commonly stipulated that money in those funds was to be used for consumer education, outreach, or advocacy efforts by the AG. Of the 412 cases with some form of net government money, 183 cases (44.4%) directed at least some of the money to a continuing fund.[159]

[158] None of the six state cases with a cy pres award involved suspended obligations.

[159] States rarely directed government money to another government agency or, even less commonly, a non-government organization. Only the six cy pres cases involved use designations to a non-governmental entity.

4. Public Compensation

All public UDAP enforcers obtain public compensation in a significant share of cases. Overall, enforcers resolved cases with public compensation in 432 of the total 688 non-default cases, or 62.8%. Rates of public compensation ranged from 39.8% for the FTC to 100.0% for the CFPB. Our study sheds light on how enforcers structure public compensation and what is known about the type and amount of that relief.

Enforcers used four principal methods to determine eligibility for public compensation: (1) identifying specific consumers in the resolving document to receive compensation; (2) granting compensation to complainants, either past or future or both; (3) identifying purchasers or affected consumers and making some or all potentially eligible; and (4) giving the enforcer a sum of money and discretion to distribute that money to affected consumers. Table 10 shows that state enforcers used all these methods, and were alone in relying heavily on specific identification of consumers and relief to complainants. Over half, 51.5%, of state cases distributed public compensation through one of these types, or used both methods. Only one FTC case and one multi-enforcer case employed either of these methods to determine eligibility. The FTC had a consistent approach: obtaining a sum of money to distribute in its sole discretion. The agency used this method in 82.9% of cases with public compensation. The CFPB preferred distributing relief to all affected consumers, using this method in nine of its ten cases.

TABLE 10. Eligibility criteria for public compensation by percentage of cases by enforcer type

	State	CFPB	FTC	Multi-small	Multi-large
Complainants only	12.7%	0.0%	0.0%	0.0%	20.0%
Consumers identified	30.5%	0.0%	2.9%	0.0%	0.0%
Consumers identified + complainants	7.3%	0.0%	0.0%	0.0%	0.0%
Purchasers/affected consumers	26.5%	90.0%	14.3%	33.3%	40.0%
Discretionary decision of enf.	8.1%	10.0%	82.9%	41.7%	40.0%
Other	8.6%	0.0%	0.0%	25.0%	0.0%
Cannot be discerned	6.2%	0.0%	0.0%	0.0%	0.0%
Total	100.0%	100.0%	100.0%	100.0%	100.0%

Public enforcers generally eschewed requiring consumers to file a claim to obtain relief. Of the 432 individual state cases with public compensation relief, only 96, or 22.2%, required consumers to file a claim to be eligible.[160] Even in the 117 cases across state enforcers providing relief to all those

[160] The actual number of public compensation claims processes might be higher if enforcers with discretion over the distribution of funds later required consumers to submit claims.

purchasing or affected by conduct, only 32, or 27.4%, of cases required a claim by the consumer for eligibility.[161]

The resolving document mentions later private actions following public compensation in 175 individual state cases, 40.5% of cases with public compensation. In 168 cases, 96%, the resolving document expressly states that later private claims are not precluded. In the remaining 7 cases, 4%, a consumer was required to submit an opt-in claim form with release to obtain the public compensation. Other than the seven opt-in cases, no case in our database resulted in a final disposition stating that consumers would be precluded from bringing a later private claim. No multi-enforcer case required a release, and ten of seventeen multi-enforcer cases with public compensation expressly reserved all private claims. Similarly, no CFPB case required a release and eight of ten cases expressly reserved private claims.[162]

Unlike the recovery of government money, we could not establish the dollar amount of compensation in each case. In thirty-seven cases, or 8.6% of the 432 cases with public compensation, the enforcer obtained only non-monetary relief.[163] Such relief primarily consisted of contract rescission, amending of credit reports, and ceasing of debt collection. Of the remaining 395 cases of public compensation with money relief, we were able to determine a known dollar amount for all consumers receiving this compensation in 59.7% of cases, and were unable to determine any dollar amount in 25.1% of cases. In the remaining 15.2% of cases we were able to determine a dollar amount for some but not all consumers, or the data was otherwise incomplete, such as a known dollar amount for an initial fund but with a defendant obligation to replenish the fund if it proved inadequate for the planned public compensation. The percentage of known public compensation for all consumers was similar across enforcers, with the exception of small multi-enforcers.[164] In reporting public compensation dollars, we use here all known dollar amounts.[165]

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[161] One of ten CFPB cases required consumers to submit a claim form to be eligible for public compensation. Whether claim forms were required in FTC and multi-enforcer cases is difficult to discern because of the high percentage of cases distributing public compensation in the discretion of the enforcer. Four of seventeen multi-enforcer cases and three of thirty-five FTC cases indicated a claim form requirement.

[162] The FTC neither required a release nor mentioned preservation of private claims in any resolved case.

[163] In an additional fifty-nine cases, or 13.6% of all cases with public compensation, the enforcer obtained both monetary and non-monetary relief. For example, the CFPB required amending of credit reports in four cases in which it also obtained monetary relief for consumers.

[164] The percentage of cases with public compensation in which we determined a known dollar amount for all consumers was as follows: States (53.8%), CFPB (60.0%), FTC (68.6%), small multi-enforcer (33.3%) and large multi-enforcer (60.0%).

[165] Included in public compensation are three state cases in which we included as a known amount estimates of public compensation provided in the resolving document. One case had estimated relief of $4,000,000 and the other two cases totaled $85,625 in estimated relief.

The dollar amount of known public compensation per case broken down by enforcer is similar to the results for government money. The median recovery for state enforcers, again, is noticeably small.

TABLE 11. Mean and median known public compensation dollar relief by enforcer (millions of $)

	Mean Public Compensation $	Median Public Compensation $
States	.37	.015
CFPB	21.89	21.20
FTC	6.83	5.00
Multi-small	5.91	2.59
Multi-large	709.33	315.00

The number of consumers receiving public compensation and the dollar amount per consumer was not evident from the documents examined in substantial numbers of cases other than with state enforcers. In state cases, we were able to determine the number of consumers receiving relief in 141 cases, with 108 (or 76.6%) of those cases providing relief to consumers by specifically identifying them in the resolving document. The average number of consumers receiving relief in these 141 cases was 125 and the median number was 8.

We determined the dollar amount of relief per consumer in 128 state cases, again heavily weighted to cases providing relief to specifically identified consumers. In 42 of those cases, all consumers received the same fixed dollar amount of relief, with an average payment of $3010 and a median of $1000. In the remaining 86 cases, the amount per consumer varied. The mean and median for the consumer receiving the highest dollar amount in these 86 cases was $6030 and $2431, respectively, while the mean and median for the lowest dollar amount was $648 and $250, respectively. While these per consumer payment amounts are not typically large enough for an economically viable individual private right of action, these amounts are greater than one imagines when thinking of "small dollar" consumer cases. In 8 cases, at least some consumers received $20,000 or more.

Public enforcers do not often appear to settle for public compensation that is a partial amount of the consumer loss. We were able to form a judgment about the amount of public compensation as a percentage of either purchaser payment or consumer loss in 140 cases.[166] In only 2 of these 140 cases did the enforcer obtain less than 100% of the purchase price, while in 5 cases the recovery exceeded 100% of the consumer payment or loss.[167]

[166] We formed a judgment concerning the percentage recovery of payment or loss in the following number of cases by enforcer, which represented the indicted percentage of cases with public compensation by enforcer: States - 130 (35.1%), FTC - 3 (8.6%), CFPB - 3 (30.0%), Multi-Small - 1 (8.3%), and Multi-Large - 3 (60.0%).

[167] Consent Decree, Washington v. Dish Network LLC, No. 14-2-10401-4 (Wash. King Super. Ct. Apr. 4, 2014) (distributing $1 million to consumers after full refund contingent on

VI. Enforcement Strategies

While the data may have many uses, our focus is enforcement. How do the various public enforcers exercise their considerable discretion under state and federal UDAP laws? To answer this question we identify and describe different strategies of public UDAP enforcement, before turning in Part VII to implications of enforcers adopting multiple strategies for the enforcement of laws that are substantially similar. We employ the concept of an "enforcement strategy" to mean a distinct pattern of UDAP enforcement demonstrated by one or more enforcers who exercise their discretion to enforce a state or federal UDAP law. The enforcers, however, are not all similarly-situated. In particular, the two federal agencies differ in terms of both the scope of their jurisdiction and the scope of their UDAP authority from the state enforcers. Therefore, we take into account different factors to identify enforcement strategies among the federal enforcers than we do among the state enforcers. We begin with the two federal enforcers and then turn to the states.

A. Federal Enforcement Strategies

Among the federal enforcers, we look to a few case variables with power to draw meaningful distinctions among the cases and shed light on enforcement. We focus on six variables with federal enforcers: the *type of defendant*, whether an individual, an entity, or both; the *size of the largest entity defendant*; the *type of relief*, whether injunctive relief, public compensation, or some form of government money; the *size of monetary relief*, including both public compensation and government money; the *forum* in which the enforcer brings the case, whether judicial or administrative; and the *means of resolution*, such as a contractual settlement or a court order. Each variable reflects the enforcers' exercise of discretion and each illuminates something important about that exercise of discretion: the first two shed light on the targets; the next two shed light on the relief; and the last two shed light on the process for obtaining relief against the targets. Among the federal enforcers, consistency across these case variables was so high that the data allowed us to identify distinct case types.

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amount of total claims); Assurance of Discontinuance, New York v. Prestige Auto., Inc., No. 14-187 (Aug. 18, 2014) (consumers eligible for full refund plus 9% interest); Assurance of Voluntary Compliance, Michigan v. Ferrellgas, Inc., No. 14-1070 (Mich. Ingham County Cir. Ct. Sept. 18, 2014) (150% of payment refund); Settlement Agreement, Michigan v. Amerigas Partners, LP, No. 14-0248 (Mich. Berrien County Cir. Ct. Oct. 16, 2014) (150% of payment refund); Administrative Consent Order, Ace Cash Express, Inc., CFPB No. 2014-CFPB-0008 (consumers to receive 101.3% of payments made to defendant).

1. CFPB Strategy

The CFPB enforcement strategy is plain from the presentation of the aggregate data. Our data on the CFPB compared to other categories of enforcers was relatively thin—ten cases—but the case variables were so consistent across the ten cases that it seems fair to conclude that CFPB had a standard approach to UDAP enforcement represented by a single case type. Every CFPB UDAP action in 2014 was against a sizeable entity and resulted in an injunction, public compensation, and a civil penalty. In eight of the ten cases the amount of the civil penalty was $2.75 million or more, with a mean slightly over $6 million and a median at exactly $5 million. The civil penalty was deposited in the CFPB Civil Penalty Fund in every case. The CFPB also consistently obtained substantial public compensation. The public compensation often involved a massive return of money to consumers, with the CFPB using varied approaches to determine the type and distribution of this relief. Seven of the ten cases provided money relief for all affected consumers without any action on their part. This enforcement strategy is consistent with Peterson's recently published empirical review of all CFPB enforcement actions to date.[168]

2. FTC Strategy

Unlike the CFPB, which uniformly presented a single case type across all six variables, the FTC commonly brought two distinct case types in addition to an assortment of other cases with some similarities but considerable variation. We first summarize and then look at key case variables that distinguish these two case types.

The first category we call Type A, or Injunction Only, cases. The agency brought these actions against a single, often large, corporation for which the sole remedy was an administrative order designed to restrain the specific conduct at issue. These cases almost uniformly stated that the injunctive restrictions and reporting requirements continue for a period of twenty years. Type A cases were the most common, constituting forty-eight, or slightly more than half of the FTC cases resolved in 2014.[169]

A second category we call Type B, or Pervasive Fraud, cases. These thirty-four FTC actions targeted widespread fraud, often by a large number of smaller entity defendants and related individuals. These cases often resulted in a judicial injunction that banned the defendants from engaging in a

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[168] Peterson, *supra* note 29, at 1092. Also, consistent with Peterson's study is our finding that deception was often pleaded in conjunction with an unfairness pleading. Peterson's data also matches our findings that the enforcement actions under UDAAP resulted in both public compensation and civil penalty money.

[169] The Type A cases included a series of thirteen cases with one pattern, which were enforcement actions filed on the same day alleging deceptive website pledges by companies to comply with U.S.-E.U. Safe Harbor Framework for ensuring the protection of personal data transferred outside the European Union.

certain business sector, and often froze the defendants' assets, with the money obtained typically directed to the FTC for public compensation at the agency's discretion.[170]

The agency's action against Finmaestros, a Florida-based company that claimed to provide computer security and technical support services, and several related individuals and entities, is representative of Type B. In its complaint, the agency alleged that defendants would cold-call consumers, often falsely claiming affiliation with a well-known firm such as Microsoft, and persuade the consumers to purchase computer security software, otherwise available free on the internet, to address non-existent threats.[171] As a result, the agency obtained a default judgment permanently banning the defendants from the marketing or sale of computer security and computer-related technical support services.[172] In addition, the agency also obtained a judgment for nearly $1.4 million for public compensation at the agency's discretion and a freeze on the defendants' assets.[173]

A small number of other FTC enforcement actions, twelve cases, rounded out the 2014 data. These cases involved some form of monetary relief, did not target pervasive fraud, and sometimes involved larger companies than FTC Type B Cases. For example, the agency obtained orders prohibiting both Apple[174] and Google[175] from allowing children to make in-app purchases without parental consent and requiring the firms to reimburse harmed consumers. As detailed below, Type A and Type B cases consistently differ across several key variables.

Defendants. 94.4% of Type A defendants were entities, while 64.5% of Type B defendants were entities. The FTC brought Type A cases against larger entities, with the highest medians for annual revenue and employee numbers. In contrast, Type B cases mostly involved small targets, with defendant size similar to the most common state enforcement actions. These cases also were characterized by a disproportionately large number of defendants per case, reflecting the FTC's effort in many of these cases to restrain a fraud coordinated among numerous individuals and entities. Table 12 shows defendant numbers and size by these two case types.

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[170] Six of the Type B cases involved pattern case default judgments obtained on the same day.

[171] Complaint at 6–9, FTC v. Finmaestros, LLC, No. 12-7195 (S.D.N.Y. Oct. 3, 2012).

[172] FTC v. Finmaestros, LLC, No. 12-7195, 2014 WL 3743964, at *3 (S.D.N.Y. July 10, 2014).

[173] *Id.* at *5.

[174] Apple, Inc., FTC File No. 112-3108, 2014 WL 1330287, at *7–*9 (F.T.C. Mar. 25, 2014).

[175] Google, Inc., FTC File No. 122-3237, 2014 WL 6984156, at *8–*10 (F.T.C. Dec. 2, 2014).

TABLE 12. Defendant data for FTC Type A and Type B cases

	Type A	Type B
# of cases	48	34
Mean # of entity defendants / case	1.2	3.3
Mean # of individual defendants / case	0.1	2.0
Mean # of total defendants / case	1.3	5.3
% of largest entity defendants with no known size data or dissolved	6.2%	14.7%
Largest entity defendant in case annual revenue – mean	788.2 million	3.93 million
Largest entity defendant in case annual revenue – median	17.8 million	0.64 million
Largest entity defendant in case # employees – mean	2,017	34
Largest entity defendant in case # employees – median	66	12

Litigation and Forum. Type B cases required litigation in federal court. Of the thirty-four Type B cases, twenty-three (67.6%) were in litigation for more than 180 days. The median time from filing to resolution was 395 days in Type B cases. All but one Type B case was filed and resolved in federal court. Type A cases were exactly the opposite. All but one Type A case was settled prior to filing, and all but two were administrative actions before the FTC.

Injunctive Relief.[176] Reliance on injunctive relief as the primary remedy perhaps most distinguishes FTC enforcement from the other UDAP enforcers. Over half of FTC cases obtained only injunctive relief and are therefore Type A cases. Only one other UDAP enforcer, a state administrative agency, so eschewed money relief.[177] In Type B cases, the FTC obtained a ban on conduct in twenty of the twenty-eight non-default cases. The FTC obtained a ban on Type B defendants engaging in any business conduct in that sector in thirteen cases, a ban on using a certain form of sales conduct in five cases and both types of bans in two cases.[178] No injunctive ban was issued in a Type A case or any of the twelve cases not defined by either Types A or B.

Money Relief. By definition, the FTC did not obtain any money relief in Type A cases.[179] Only three Type B cases resulted in net government money. The amount of net penalties ranged from $490,000 to $1.5 million.[180] The agency obtained public compensation in every Type B case. Table 13 shows the amount of public compensation in Type B cases and in the twelve cases that were neither Type A nor Type B, all of which also resulted in public compensation. As with all FTC public compensation, this relief was almost exclusively in the form of a lump sum to be distributed at the agency's discretion. The primary difference between Type B public compensation and the remaining cases is that in Type B cases the FTC frequently obtained a

[176] Data for relief in FTC cases is reported only for non-default cases. *See supra* Part V.D.

[177] *See infra* Part VI.B.6.

[178] The FTC also obtained a ban on any business conduct in a defined sector in the six Type B default cases.

[179] In two Type A cases, the FTC assessed and fully suspended a civil penalty.

[180] In one Type B case, the FTC suspended $710,000 of a $1.2 million civil penalty, resulting in the $490,000 net penalty. The agency did not obtain net government money in non-typed cases, although one case assessed and fully suspended a $2 million penalty.

comprehensive asset freeze, appointed a receiver, or the settlement included a provision requiring defendants to identify all assets and making the release from prosecution dependent on the accuracy of this disclosure. This structure of relief reflects a broad and forceful movement by the FTC to shut down a fraudulent scheme. In fourteen Type B cases, the FTC relied partially or solely on the asset freeze to fund public compensation in that case, sometimes suspending an otherwise nominal amount of public compensation. In eleven of these cases, the FTC established a much smaller known amount for public compensation and supplemented this amount with money recovered by the asset freeze. The small size of Type B defendants, and the high percentage of entity defendants either dissolved or of unknown size, render dollar numbers for public compensation less meaningful than the asset freeze.

TABLE 13. Public compensation data for FTC Type B and non-typed cases

	Type B	Non-Typed Cases
# of cases (non-default) w/ public compensation	28	12
# of cases w/ known amount of public compensation	18	10
Known mean amount of public compensation	8.76 million	8.14 million
Known median amount of public compensation	560,000	1.75 million
Known minimum amount of public compensation	12,675	230,000
Known maximum amount of public compensation	90.51 million	32.50 million
# of cases with asset freeze	13	0
% of cases with asset freeze	46.4%	0.0%
# of cases with receiver appointed	10	0
% of cases with receiver appointed	35.7%	0.0%
# of cases with defendant asset statement	19	0
% of cases with defendant asset statement	67.8%	0.0%

B. State Enforcement Strategies

The aggregate data make clear that state enforcers pursue cases against a large number of very small actors, yet also bring actions against some of the nation's largest companies. Less apparent in the overall data are the starkly different approaches to enforcement among the states, and the often surprising consistency among states that adopt the same enforcement strategy. This section begins with a brief explanation of how we identify enforcement strategies among the states followed by an overview of seven state strategies. We then disaggregate the state data to show the salient characteristics of each strategy.

1. Explanation and Overview of the State Strategies

While we identified federal enforcement strategies based only on the exercise of discretion as reflected in case variables, we look to three factors to identify state enforcement strategies. In addition to *case variables*, we

also take into account the *volume of cases* an enforcer decides to bring and an enforcer's participation in *leadership of multi-enforcer actions*. The first factor, case volume, measures the total number of cases an enforcer resolved in 2014. This factor alone draws a line nearly down the middle of the state enforcers, separating no-volume and low-volume enforcers on the one hand from high-volume enforcers on the other hand.

As with the federal enforcers, we also look to case variables, including the *type of defendant*, the *size of the largest entity defendant*, the *type of relief* obtained by the enforcers, the *size of monetary relief,* the *use of government money*, the *structure of public compensation*, and sometimes a few other variables, such as the use of *outside counsel*. Our application of these variables to the cases, however, is different with the state enforcers than the federal enforcers. Federal enforcement readily demonstrated distinct case types. For the state enforcers, we identified similarities between enforcers, rather than within cases brought by the same enforcer, in discerning patterns in the case variables.

In addition to case volume and the case variables, the third and final factor that informs our state enforcement strategies is leadership in multi-enforcer actions. As explained earlier, multi-enforcer actions have become a dominant feature on the landscape of public enforcement.[181] These cases are often highly consequential, achieving remedies that shape conduct and compensate consumers across the nation. Mere participation in these actions, however, reveals little about how enforcers use their powers. Participants may lend nothing more than a signature to a settlement agreement while the cost of failing to sign-on may mean the loss of millions of dollars. More illuminating is leadership in multi-enforcer actions as measured by membership in the executive or monitoring committee. The enforcers who fill this role are sometimes the leaders who bring the case and always the leaders who move it forward and bring it to a close.[182]

The state enforcement strategies divide into two groups based on case volume. The four low-volume strategies are as follows:

> *Strategy 1: Non-Enforcers*. Nine state enforcers made little or no use of their UDAP authority during the study period.
>
> *Strategy 2: Low-Volume Enforcers*. Another nine states resolved at least two but no more than five cases, with at least one case resulting in total monetary relief greater than the median.

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[181] *See supra* notes 147, 161, and 164, and accompanying text.

[182] These three factors do not always have equal weight in defining our enforcement strategies. For example, sometimes the mere volume of cases is determinative and the case variables inconsequential. The defining characteristics reflected in case variables have less relevance among enforcers who are not exercising their UDAP authority in a significant number of cases.

Strategy 3: Low-Volume Plus Enforcers. An additional four states also resolved at least two but no more than ten cases, with one (but only one) quite large case resulting in total money relief greater than $1 million, which is at the 92.5% level for all cases.

Strategy 4: Outsourcers. The most distinctive enforcement strategy was adopted by three states with a small number of cases heavily relying on outside counsel to sue very large companies for sizeable awards of "undesignated" government money, along with two other states employing a similar approach.

The three higher case volume strategies are as follows:

Strategy 5: Street Cops. These six states completed a much larger number of cases, mainly against individuals or tiny businesses, and obtained small money awards, often dedicating amounts to specific consumers identified in the resolving document.

Strategy 6: Street Cops Plus. A group of five states similarly resolved a large number of cases with the same characteristics as the Street Cops, but also had a set of actions against larger defendants with greater money relief, and were more likely than any group except Strategy 7 enforcers to lead multi-enforcer actions.

Strategy 7: Heavies. Nine states resolved a high volume of cases disproportionally against larger entities for larger money relief, and dominated leadership of multi-enforcer cases.

Lastly, four states were outliers and did not fit any strategy, although these states shared some common characteristics. Case volume for these states was mid-range (nine to twelve). Three of the four states relied predominantly on one form of relief, with each of the three states relying on a different form of relief than the other two states.

Figure 8 underscores the breakdown of the enforcers into strategies relating to the volume of cases. The total number of cases by each strategy is measured by the bar graph associated with the left scale of Figure 8, while the line and right scale identify the number of cases per enforcer using each enforcement strategy. Throughout this subpart, we designate the colors used in Figure 8 for each strategy.

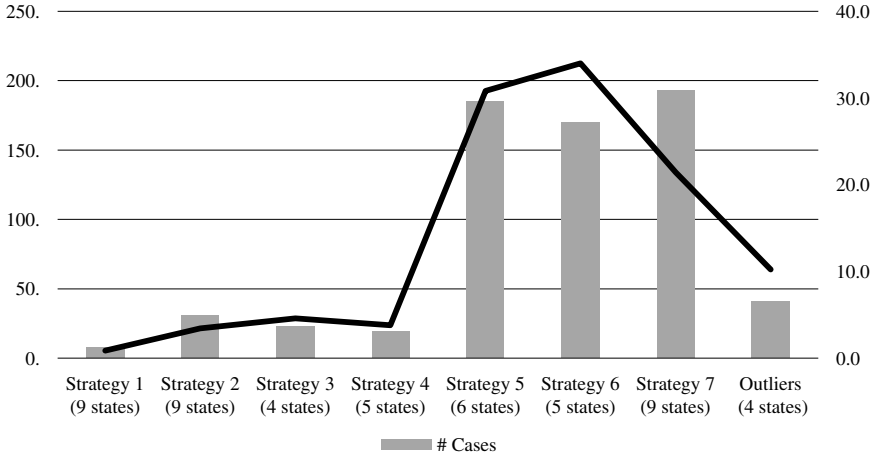

FIG. 8. TOTAL NUMBER OF CASES BY ENFORCEMENT STRATEGY AND MEAN NUMBER OF CASES PER ENFORCER FOR EACH ENFORCEMENT STRATEGY

Figure 9 arrays the states on a map by enforcement strategy. The geographic distribution of states among the enforcement strategies suggests that population size matters, but it clearly is not determinative. Numerous states defy the overall correlation between higher population and higher case volume and recoveries. Most striking, California resolved only two cases in 2014, placing the nation's largest attorney general office among the Low-Volume Plus Enforcers. Similarly, Virginia (12th largest state) is listed as a Non-Enforcer, and Michigan (9th largest state) is a Low-Volume Enforcer that resolved only two similar cases against heating oil companies. Conversely, Vermont (49th largest state), Iowa (30th largest state), and Colorado (22nd largest state) are among the Heavies, while Pennsylvania (6th largest state) and Ohio (7th largest state) are Strategy 5 Street Cops with very small money relief recoveries.[183]

[183] We did, however, give some weight to population size in assigning states among the strategies where the state reasonably could fall in more than one category. The most obvious example is Idaho. Its six cases are more than any Strategy 2 enforcer and far less than the typical Strategy 5 state, but the small population of the state combined with the case variable profile made a better fit as a "Street Cop" state.

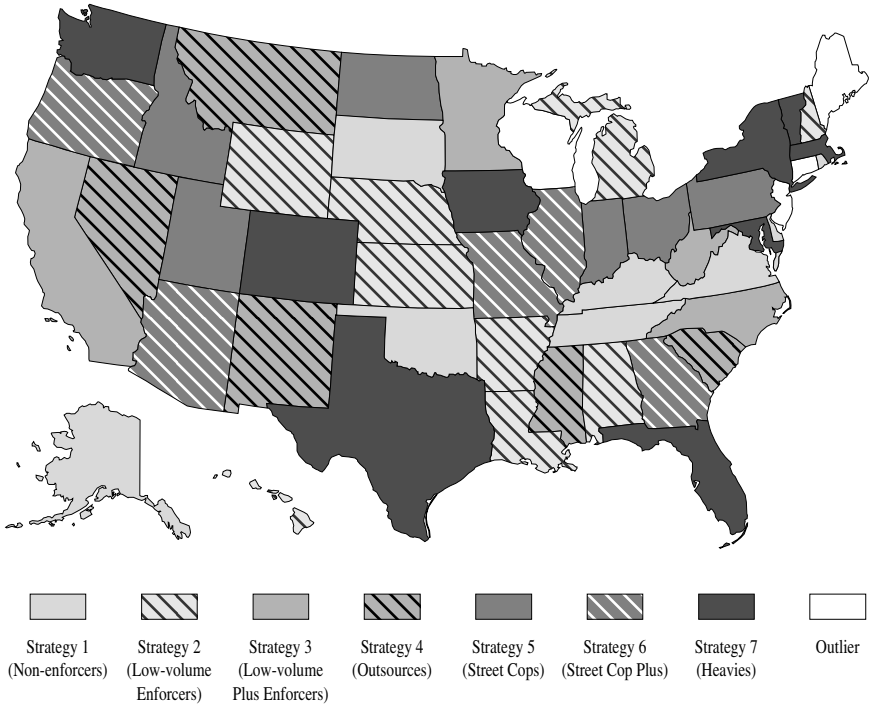

FIG. 9. MAP OF STATES BY ENFORCEMENT STRATEGY

Dollar recoveries by enforcement strategy for non-default cases is presented in Table 14. Each of these enforcement strategies is discussed in more detail in subparts 2–5.

TABLE 14. Total, mean, and median total dollar relief by enforcement strategy

	Number of State Enforcers	Total relief	Mean total relief/case	Median total relief/case
Strategy 1: Non-enforcer	9	110,363	18,394	12,951
Strategy 2: Low-volume	9	2,200,000	86,489	25,000
Strategy 3: Low-volume +	4	37,700,000	2,000,000	60,000
Strategy 4: Outsourcers	5	53,200,000	2,800,000	2,200,000
Strategy 5: Street Cops	6	1,200,000	10,742	5,150
Strategy 6: Street Cops +	5	17,100,000	133,788	12,013
Strategy 7: Heavies	9	113,800,000	685,790	50,000
Outliers	4	7.3 Million	564,671	60,000
All states	51	232.7 Million	476,828	19,356

2. Strategies 1–3: Low-Volume Enforcers

Strategies 1–3 are twenty-five states that resolved a small number of cases; an average of less than three and with only two of the states (North Carolina and West Virginia) completing more than five cases in 2014. The twenty-five states constituting the three lower-volume strategies accounted for almost half of the state enforcers and resolved almost exactly 10% of the cases.

Nine state enforcers make little use of their state UDAP laws, and these nine states are classified in Strategy 1 as Non-Enforcers. Four of these states (District of Columbia, Kentucky, South Dakota, and Tennessee) resolved no UDAP cases in 2014. Three of these states had only one case, and two states had two or three cases that resolved with dollar recoveries less than half the mean and median for all state enforcers. Strategy 2 consists of another nine states with slightly higher case volume and at least one case with total money recovery greater than the median. Three of these low-volume states (Alabama, Nebraska, and Hawaii) obtained money recoveries at or near the 90% decile, ranging from $246,000 to $510,000.[184]

The third low-volume strategy was employed by four state enforcers, each resolving only one case with a dollar recovery in excess of $1 million. California's large case resulted in 28.4 million in public compensation. Exclude this case and the four Strategy 3 enforcers nonetheless recovered total money as a result of the big cases more than four times greater than the other eighteen low-volume enforcers.[185]

Leadership in multi-enforcer cases tracks well with the identified state enforcement strategies. Figure 10 shows multi-enforcer leadership as measured by the average number of leadership positions per state in each enforcer strategy.[186] These measures are consistent with substantially less engagement in UDAP enforcement by low-volume states.

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[184] We placed Michigan in Strategy 2 rather than in Strategy 1 because its two cases obtained public compensation in an unknown amount but which required broad-based relief to gas customers that plainly would exceed the median total dollar recovery for all state enforcer cases.

[185] One of the Strategy 3 enforcers, North Carolina, is an uneasy fit in the low enforcement categories, and is best described as falling between a Strategy 3 and Strategy 7 enforcer. The attorney general resolved ten cases in 2014, twice as many cases as any other Strategy 1–3 enforcer other than West Virginia. Four of these cases, however, were default judgments, accounting for more than one-third of the eleven default cases with Strategy 1–3 enforcers. In addition to being the most active of the low-volume enforcers in multi-enforcer leadership, it also paired with the FTC and two other states in a small multi-enforcer case, and with the CFPB and one other state in another small multi-enforcer case.

[186] Two of the Strategy 3 enforcers, California and North Carolina, each participated in the leadership of three multi-enforcer cases, accounting for the total participation of Strategy 3 enforcers in multi-enforcer leadership and 60% of the total leadership for all Strategy 1–3 enforcers. The percentage of states in each enforcement strategy that assumed leadership in two or more multi-enforcer cases shows almost an identical distribution across the enforcement strategies.

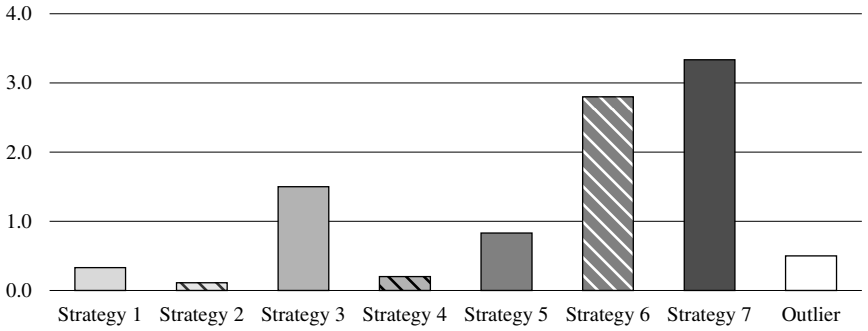

FIG. 10. MEAN NUMBER OF MULTI-ENFORCER LEADERSHIP ROLES PER ENFORCER BY ENFORCEMENT STRATEGY

3. Strategy 4: Outsourcers

Five low-volume states employed a sharply different enforcement strategy than the other state enforcers. Three of these states predominantly used outside counsel to bring UDAP actions resulting in a large recovery of government money. These nine cases were divided among the states as follows: Mississippi (5 cases), Nevada (3 cases), and Montana (1 case). These three states also brought three cases—two by Mississippi and one by Nevada—by using in-house counsel, and the relief obtained in these cases was typical of state enforcer recoveries.

We include in Strategy 4 two other states—New Mexico and South Carolina. New Mexico used outside counsel in one case to obtain a large award of government money, but also brought four other cases with in-house staff resolving with typical state enforcer relief. South Carolina is identified as a Strategy 4 enforcer because its two cases were settlements with similarity to the unique case variables applicable to this enforcement strategy, although it did not employ outside counsel. Both of the South Carolina cases mirror earlier multistate actions against pharmaceutical companies in which South Carolina did not join, thus reflecting an outsourcing of the case theory and development, if not the representation.[187]

[187] South Carolina settled a case against Allergan on January 23, 2014 for the unapproved use of Botox, and against Wyeth/Pfizer on October 23, 2014 for the unapproved use of Rapamune. The U.S. Department of Justice and multiple state agencies resolved a similar case against Allergan in 2010. *See* Press Release, U.S. Dep't. of Justice, Allergan Agrees to Plead Guilty and Pay $600 Million to Resolve Allegations of Off-Label Promotion of Botox (Sept. 1, 2010), https://www.justice.gov/opa/pr/allergan-agrees-plead-guilty-and-pay-600-million-resolve-allegations-label-promotion-botox [https://perma.cc/B3FV-ET49]. A similar case against Wyeth/Pfizer was settled by Consent Orders in forty-two states entered no later than October 3, 2014 and appears in our data for large multi-enforcer actions.

Strategy 4 Outsourcer cases share a number of striking differences with other state UDAP enforcement actions across five case variables, as described below.[188]

Exceptionally and consistently large money awards. The money recovery in Outsourcer cases was far greater than in any other strategy. The $53.2 million in total money relief by these enforcers amounted to 22.9% of all money relief in state UDAP enforcement. The median total money relief of $2.2 million was more than 100 times the median in all state cases. Outsourcer states used outside counsel to obtain very large awards, but with the exception of New Mexico, did not substantially undertake the more routine enforcement work common among state enforcers.

Focus on government money relief to the neglect of other forms of relief. Unlike other state enforcers, Strategy 4 enforcers relied almost exclusively on government money as a remedy. Government money was obtained in all cases, but government money was the only remedy in nine of the nineteen Outsourcer cases. Relief was limited to just government money in only six other state enforcers cases across the entire database. Of the ten Outsourcer cases using outside counsel and the two similar South Carolina cases, injunctive relief was a remedy in just three cases, or 25.0%, compared to the average of 95.8% in all state cases.

Government money recovery was largely undesignated. Unlike other enforcers, most of the government money recovered in Strategy 4 cases was a lump sum with undesignated basis for recovery. Moreover, the government money recovered by Strategy 4 enforcers was overwhelmingly given to the state attorney general for discretionary use. The remaining government money was applied to a continuing fund held by the state.

Large, entity defendants. Large money awards flow from large defendants, so unsurprisingly the defendants in Strategy 4 cases were generally much larger than defendants in any other strategy. Table 15 compares Outsourcer defendant size to numbers for all state cases.

[188] We provide data on all nineteen cases for this group of enforcers. The differences between case variables for these enforcers and all other state enforcers would be even starker if we excluded the seven cases (mostly from New Mexico) brought by staff attorneys.

TABLE 15. Defendant size (when known) – Strategy 4 (Outsourcers) compared to all cases

	All Cases	Strategy 4
% of defendants that are entities	55.0%	87.3%
Largest entity defendant annual revenue – mean	$2,622,362,000	$21,942,000,000
Largest entity defendant annual revenue – median	$592,000	$4,348,250,000
Largest entity defendant # employees – mean	8,543	50,249
Largest entity defendant # employees – median	6	8,660

Other attributes. Several other Outsourcers attributes were also distinctive. Six of the fourteen cases, including both of the South Carolina cases, were against pharmaceutical companies. Across the state enforcement cases, settlement was almost always effected by an AVC or a Consent Order, either judicial or administrative. Strategy 4 cases, however, were resolved by contractual settlement in eleven of nineteen cases, compared to just 3.0% of all state cases.[189]

4. Strategies 5–6: Street Cops and Street Cops (Plus)

Street Cops are the antithesis of the Outsourcers. They are high volume, small target enforcers. The eleven state enforcers in Strategies 5 and 6 accounted for 355 of the resolved cases, or 52.9% of the state case total. Yet these two enforcement strategies recovered only $11.3 million in total net government money, 8.7% of the total state recovery, and $85.0 million in known amounts of public compensation, or 8.3% of the total state recovery. The lower known dollar recovery for public compensation came despite these states having a lower rate of obtaining public compensation in unknown amounts—15.4% compared to an overall rate of 22.7%. As a result, the mean and median recoveries of these enforcers were much lower, as shown in Figures 11 and 12.

[189] One contract term, appearing in a South Carolina settlement, is noteworthy: "the State or its attorneys agree to give counsel for Allergan at least ten (10) days written notice of any such request, along with a copy of the request, to afford Allergan the ability to take steps it deems appropriate to resist disclosure. The State or its attorneys will not produce the Settlement Agreement prior to the return date of the request, unless otherwise required by state law or court order, in order to provide Allergan an opportunity to challenge the request." Settlement Agreement between South Carolina, Allergan, Inc. & Allergan USA, Inc. (Jan. 23, 2014).

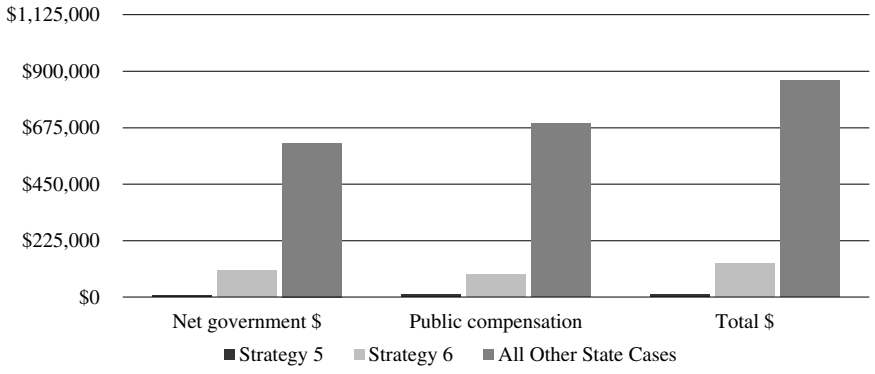

FIG. 11. MEAN MONEY RELIEF FOR STRATEGIES 5–6 COMPARED TO ALL OTHER STATE CASES

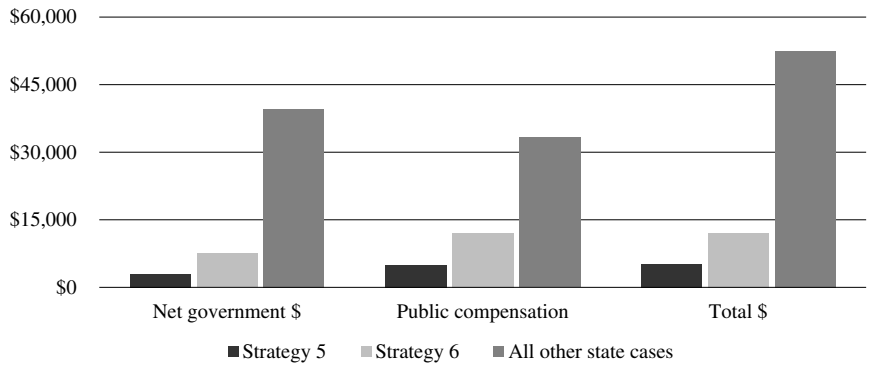

FIG. 12. MEDIAN MONEY RELIEF FOR STRATEGIES 5–6 COMPARED TO ALL OTHER STATE CASES

These smaller recoveries occur in cases against smaller defendants. As indicated in Figure 13, both Strategy 5 and Strategy 6 enforcers resolved more cases against only individuals and against small entities, and resolved fewer cases against large entities, than other state enforcers. Strategy 5 states completed no cases against the largest size category of entity defendant.

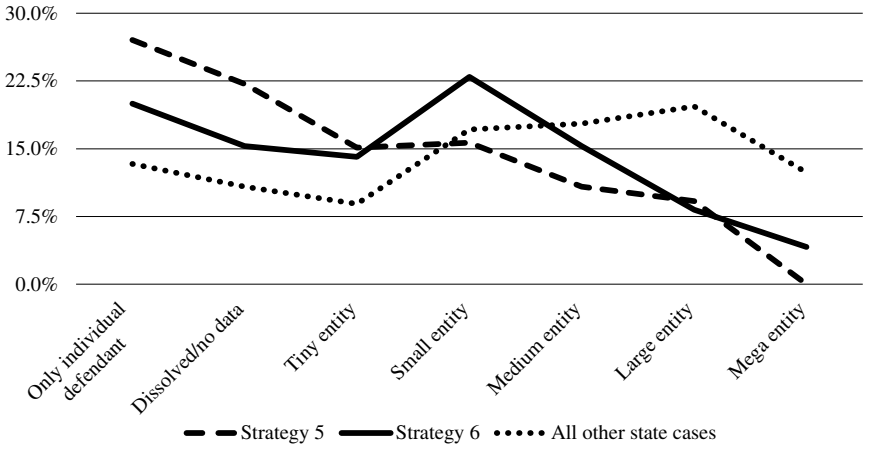

FIG. 13. PERCENTAGE OF CASES BY DEFENDANT SIZE FOR STRATEGIES 5–6 COMPARED TO ALL OTHER STATE CASES[190]

Street Cop states also used different criteria for determining eligibility for public compensation. In over 75% of cases resolved by Street Cop states, consumers obtained public compensation when the enforcer specifically identified the consumers in the resolving document or by filing a complaint with the enforcer or defendant. Other state enforcers more often distributed public compensation to any consumer who either purchased the product or service or whom the defendant harmed.

[190] For a description of defendant size categories, see *supra* Table 2.

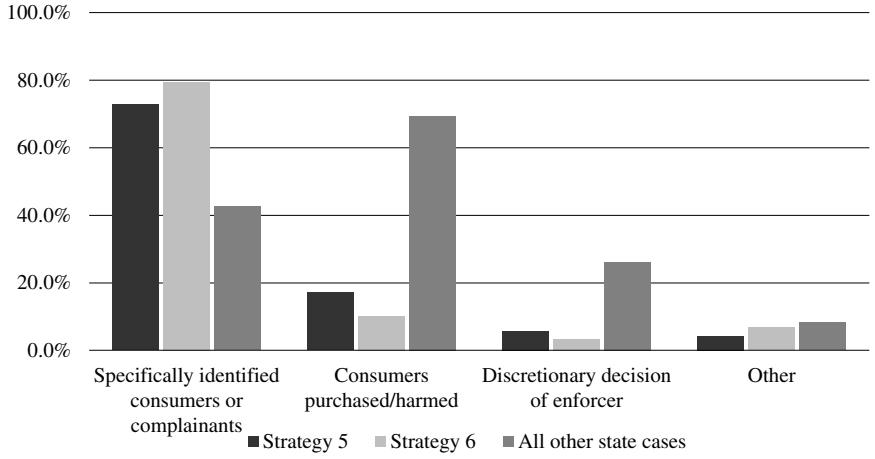

FIG. 14. PERCENTAGE OF CASES BY FORM OF PUBLIC COMPENSATION ELIGIBILITY FOR STRATEGIES 5–6 COMPARED TO ALL OTHER STATE CASES

Consistent with the pursuit of individuals and tiny entity defendants for smaller recoveries, Street Cop states accounted for a disproportionate share, 78.8%, of the default cases. In Figure 15, the number of default cases by strategy is on the left and the percentage of default cases by strategy is on the right. The percentage default rate was 32.2% for Strategy 5, 14.1% for Strategy 6, but only 6.6% for all other cases.

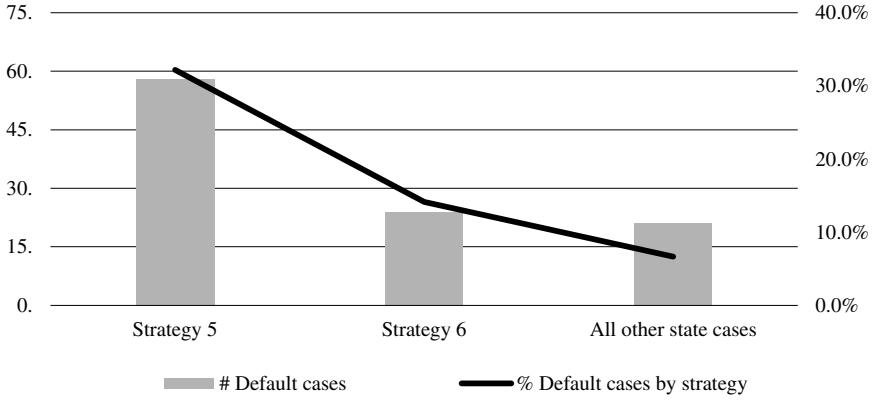

FIG. 15. DEFAULT CASES FOR STRATEGIES 5–6 COMPARED TO ALL OTHER CASES

By nearly all the above measures, the results for Strategy 6 enforcers lie close to the results for Strategy 5 enforcers, and between the results for

Strategy 5 enforcers and for all other state enforcers. But Street Cop Plus enforcers sometimes engage in enforcement activity or achieve results that more closely parallel Strategy 7 Heavies. For example, when the number of consumers receiving public compensation was identifiable, Strategy 5 enforcers obtained compensation for a median of three consumers, Strategy 6 for a median of thirteen consumers, and the median number of consumers in all other cases was sixteen.

Most importantly, Strategy 6 enforcers had frequency of multi-enforcer leadership close to the dominant role of Strategy 7 enforcers. As shown in Figure 10 above, the Strategy 6 Street Cop Plus enforcers participated in multi-enforcer leadership an average of slightly less than three times per enforcer, compared with slightly more than three times per enforcer for the Strategy 7 enforcers. Strategy 5 Street Cops averaged less than one leadership role per enforcer, similar to the low volume enforcers. Furthermore, Strategy 6 enforcers sometimes engage in specific enforcement activity that more closely parallels Strategy 7. For instance, although states generally obtained a freeze on defendant assets at a much lower rate than the FTC, Strategy 7 enforcers (particularly New York) and Strategy 6 enforcers (particularly Arizona) accounted for a substantial proportion of state asset freezes. Of the sixteen cases in which states froze assets in some form, eight (50.0%) were Strategy 7 enforcers and six (37.5%) were Strategy 6 enforcers.

5. Strategy 7: Heavies

The Heavies and Street Cops both have high case volumes, but the former has larger recoveries per case and larger defendants. Strategy 7 enforcers obtained $113.8 million in total money recovery. This amount constitutes 49.0% of the known money recovery by state enforcers. Strategy 7 median recoveries were four to five times the corresponding level for all other cases, and the means were also higher.

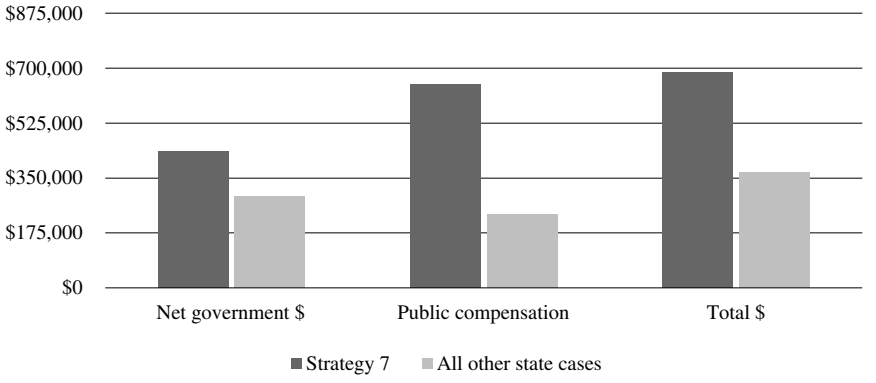

FIG. 16. MEAN MONEY RELIEF FOR STRATEGY 7 COMPARED TO ALL OTHER STATE CASES

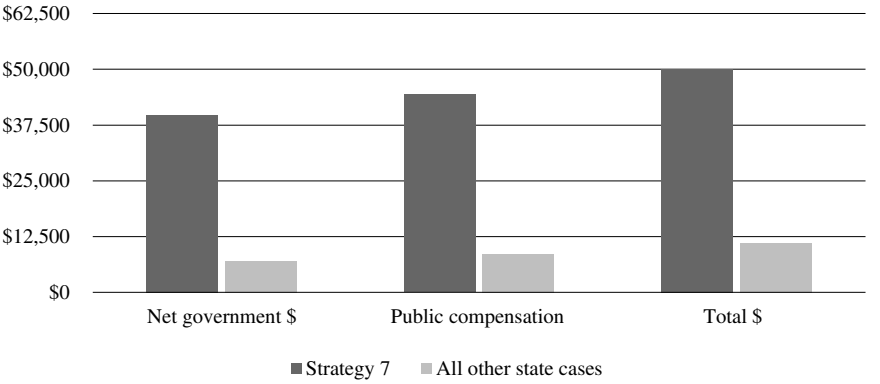

FIG. 17. MEDIAN MONEY RELIEF FOR STRATEGY 7 COMPARED TO ALL OTHER STATE CASES

Strategy 7 enforcers pursue larger-sized defendants, although these enforcers also resolved a substantial number of cases against small defendants.

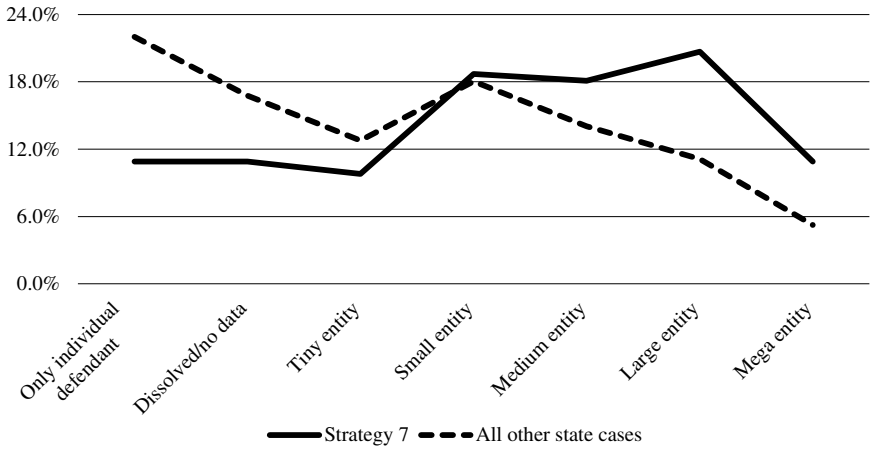

FIG. 18. PERCENTAGE OF CASES BY DEFENDANT SIZE CATEGORY FOR STRATEGY 7 COMPARED TO ALL CASES[191]

As noted earlier, these enforcers also dominate leadership in multi-enforcer cases. All but one of the Strategy 7 states assumed a leadership role in two or more multi-enforcer cases. Overall, the nine Heavies accounted for 48.4% of multi-enforcer leadership.

6. Outliers

The outliers all had mid-range case volume, from nine to twelve cases. Three of the four outlier states predominantly obtained a single type of relief, although favoring different types. These three outliers include New Jersey, Maine, and Wisconsin. The Maine Attorney General obtained only public compensation with an injunction in all cases. Moreover, the state distributed public compensation to all harmed consumers in nearly all cases.

The New Jersey Attorney General focused on government money in all cases. New Jersey obtained public compensation in addition to government money in eight of its ten cases, but it clearly emphasized government money in its UDAP enforcement. It obtained known amounts of public compensation in five of its ten cases, with a mean amount of $10,337 and a median of $5932, compared to substantial government monetary recoveries averaging $222,274 with a median of $39,326. In contrast, state enforcers overall obtained more money per case in public compensation than in government money.

Wisconsin's administrative agency obtained only injunctive relief in the ten cases it handled through an AVC. No enforcer other than the FTC relied so heavily on solely injunctive relief. Two cases were brought by the Wis-

[191] For a description of defendant size categories, see *supra* Table 2.

consin Attorney General on behalf of the state administrative agency, with one case resolving through trial and resulting in over $1 million of government money and almost $4 million of public compensation.

The fourth outlier is Connecticut. Under Connecticut UDAP law, an administrative agency has sole discretion to bring actions, which the state Attorney General litigates.[192] In 2014, the state resolved nine cases, obtaining injunctive relief in every case and frequently imposing a complete ban on business in a given sector. The state also obtained public compensation in about half the individual cases in relatively small amounts. Most notable, the state was a frequent participant in small multi-enforcer litigation, including three cases in which the FTC paired solely with Connecticut.

VII. Implications

This descriptive account of public UDAP enforcement in the United States has implications for conceptions of public enforcement, the exercise of public UDAP authority, and further research.

A. Conceptions of Public Enforcement

Our project captures a snapshot of public UDAP enforcement. The enforcement strategies we identify provide a new framework for thinking about public enforcement. In so doing, we uncover what public UDAP enforcement is, and we also begin to bring data to bear on what that enforcement is not. Scholarship cannot treat public enforcement as a unitary or abstract concept, but must take into account the multiplicity of actual enforcement conduct.

1. Different Enforcers Apply the Same Law with Different Results

The data we present leads to one overarching conclusion: public UDAP enforcement by multiple enforcers leads to different strategies to enforce very similar laws.[193] As discussed above, scholars have debated whether diversity of enforcement provides a check against non-efficient enforce-

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[192] *See supra* note 25 and accompanying text.

[193] One could argue that at least some of the differences in enforcement conduct stems from a factor beyond the control of the enforcer: the limits on the enforcer's legal authority. For example, the FTC rarely uses its civil penalty authority, *see supra* note 179, which Congress limited by statute. Nonetheless, the FTC suspended penalties in half the cases in which the agency imposed them, and the agency obtained only injunctive relief in a large number of cases when it also had public compensation authority. Although future research will need to examine the role that slight differences in legal authority play, *see infra* Part VII.C, at first glance the data does not suggest a correlation between difference in strategies and variations in UDAP statutes.

ment.[194] The enforcement strategies catalogued above seem to promote an environment that takes aim at different types of fraud and different types of actors and seeks different remedies. In other words, diversity of enforcers does provide diverse strategies even within similar legal authority.

Even so, the variety of approaches employed is not infinite. The data sorted into a handful of enforcement strategies. If groups of enforcers have similar patterns as to the volume and type of cases resolved, as our strategies tend to show, then we have a new starting point for scholars considering normative implications of those different patterns. We can better understand UDAP enforcement, and perhaps other principle-based enforcement, as a set of options that can and often will produce different results depending on the desired outcome or point of evaluation.

2. *Public Enforcement Does Not Mirror the Assumptions Underlying Much of the Debate*

Deborah Hensler called for empirical data that might tend to prove or disprove the assumptions underlying many of the normative claims made about state AG enforcement, specifically in consumer protection.[195] She poses a series of questions that are unanswered by the current scholarship. We have begun to answer some of these questions. We also can evaluate some of the claims that have animated the normative scholarship on public enforcement, at least as those claims apply to UDAP enforcement.

First, the data on public UDAP enforcement suggests that the analogy between private class actions and public enforcement actions that result in public compensation is flawed. The scholarly debate about whether to import procedural reforms originally applied to class actions depends on this analogy. The reality of public compensation in UDAP cases, however, does not align with private consumer class actions. A typical consumer class action involves thousands of people offered the opportunity to receive money, often through a process that requires responding to a notice and submitting a claim to receive a set amount of money that represents a small percentage of

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[194] *See* Barkow, *supra* note 64, at 15. *But see* Minzner, *supra* note 68, at 2118–19. *See generally supra* Part III.A.

[195] Hensler, supra note 8, at 58–59 ("Lemos's analysis is similarly heavy on theory and light on empirics—indeed, her article does not contain any empirical data about the nature and frequency of the litigation that concerns her. How many state attorney general suits are there and what proportion seek individual monetary remedies (as contrasted with reimbursement for state expenses or contributions to state activities)? In suits in which state attorneys general pursue individual remedies, is the typical value of individual class members' claims large enough to make individual litigation practical, or could such claims only be pursued otherwise in much-castigated and increasingly endangered private class actions? Do empirical data support the proposition that state citizens' and class members' interests frequently diverge? How often do federal agencies and private class representatives join state attorney general actions? Are there differences in outcomes when state attorneys general act alone rather than with others?").

the purchase price or loss.[196] Only a small portion of UDAP cases brought by public enforcers fits this description. Instead, public UDAP enforcement is best characterized by a multiplicity of approaches to determining eligibility, usually with no requirement of a claim, and routinely with full compensation for loss.

Likewise, our data presented no evidence that preclusion of private claims following public compensation is a concern. No case resolved with the court or by settlement indicated preclusion of private claims without the consumer executing a release. And the number of cases in which consumers were asked to release claims as the price of obtaining public compensation was tiny—only seven individual state cases. Setting aside the legal accuracy of the claim that class procedures should be imposed on public enforcement because of later preclusion of private claims for money damages,[197] our data shows this concern is merely theoretical.[198]

Second, the fervor about outside counsel needs re-evaluation, at least as applied to public UDAP enforcement. Many scholars assume or imply that use of outside counsel is a common practice.[199] Outsourced UDAP enforcement, however, appears rare. Only ten cases, representing 1.5% of state UDAP cases in our dataset, evidenced outside counsel. Moreover, two states—Mississippi and Nevada—brought eight of these ten cases. The evidence supports that outsourced cases are different in kind than most state cases, yielding larger money results from larger defendants. The evidence does not support, however, that outsourcing is common.

Third, our data complicates claims about the motivations of public enforcers, the claim that state AGs make enforcement decisions based on political gain or supplementing state coffers. An attorney general motivated in this manner would presumably enforce against large companies, but our data suggests that almost all AGs, even the Heavies, bring a significant number of cases against tiny entities. Public enforcers can "trumpet" large money recoveries,[200] especially money distributed to voters in the form of public compensation. But AGs are at least, if not more, concerned about injunctive

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[196] *See* Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 418–20 (2014).

[197] *Compare* Lemos, *Aggregate Litigation*, *supra* note 15, at 531–42 *with* Cox, *Public Enforcement, supra* note 50, at 2336–49.

[198] *See supra* Part V.D.4.

[199] *See, e.g.*, Lemos, *Privatizing*, *supra* note 58, at 532 ("State attorneys general routinely hire outside counsel to handle aspects of the state's litigation work"); Lemos, *State Enforcement*, *supra* note 15, at 735 ("State attorneys general frequently reach out to private counsel to assist with the state's business"); Lemos & Minzner, *supra* note 58, at 862–63 ("Complicating matters further, public and private enforcers increasingly work together . . . where public enforcement agencies rely on private contingency-fee lawyers to litigate their cases.").

[200] *See* Lemos & Minzner, *supra* note 58, at 857.

relief, which is the one form of relief all public enforcers consistently obtain.[201]

Fourth, Lemos and Minzner describe a "puzzling pattern in public enforcement: the tendency of many agencies to announce large financial recoveries while failing to collect them" and to bring cases against "judgment-proof" defendants.[202] Our data generally reflect the opposite in public UDAP enforcement. The FTC routinely engages in broad asset freezes and imposes receiverships. State AGs frequently have complicated payment schedules requiring partial payments over time. Default judgment rates are low, generally around 6%, with only a handful of Strategy 5 Street Cop enforcers with high rates.[203]

Fifth, and finally, at least one claim pressed by the critics finds support in our data: that enforcers use continuing funds. Over 44% of state cases with net government money deposited at least some money in a continuing fund. It is unclear whether use of those funds aligns with other conduct as neatly as the scholarship implies, however. Our data do not show obvious support for the notion that use of continuing funds by a state AG substantially impacts enforcement work.[204]

As these five observations suggest, the data must shape our conceptions of public enforcement. Only by first recognizing what public UDAP enforcement is (and what it is not), can we begin to address secondary questions regarding (1) why it is what it is and (2) whether it should be what it is.

B. The Exercise of Public UDAP Authority

This study also has implications for the exercise of public UDAP authority: namely, it provides a footing for assessment and accountability. Some enforcers may conduct regular evaluations of their enforcement practices. Many enforcers, however, are likely not identifying goals, implementing a strategy, or assessing their work to determine if they are achieving their goals. Our study can provide a means of assessment or further data to enrich ongoing evaluations.

In addition to identifying what strategy a particular enforcer reflects and how that strategy compares to others, an enforcer can also identify spe-

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[201] *Cf. id.* at 857 ("[F]inancially motivated agencies are apt to . . . reduce their focus on nonmonetary remedies . . . ."); *see also id.* at 899 (claiming that public enforcers will readily settle for higher damage awards rather than injunctions banning defendant's practices).

[202] Lemos & Minzner, *supra* note 58, at 875, 884.

[203] Indiana, North Dakota, Ohio, Pennsylvania, and Utah have the highest rate of default judgments.

[204] For instance, Low-Volume Enforcers use continuing funds at a much lower rate, but so do the Heavies. One would suspect total government money recoveries would be higher when the enforcer was obtaining money for a continuing fund, but the mean in such cases was almost identical and the median was slightly lower than that for all non-default cases by state enforcers: $10,097 for continuing fund cases and $11,985 for all non-default state cases. Nonetheless, this is a causative question needing careful analysis, including a distinction between types of continuing funds.

cific practices employed by others that might prove valuable. For example, a number of state enforcers suspend government money awards, which come due if the defendant breaches the agreement.[205] The FTC makes expansive use of asset freezes, while the state enforcers almost ignore this option.[206] Some state enforcers provide public compensation only for individuals who file a complaint with the enforcer's office, while other states broadly compensate all harmed consumers.[207] CFPB obtains all forms of relief in all cases.[208] While the United States' disaggregated system of consumer protection allows for wide innovation, the laboratory of democracy only functions if other enforcers are watching and aware.

Furthermore, this study provides at least the initial means to hold public enforcers accountable. As stated earlier, many state enforcers are doing little to enforce their UDAP law – including, at least in 2014, some of the largest states in the nation, such as California, Michigan, and Virginia.[209] Some AGs who tout large multi-state monetary awards to the media may do nothing more than offer a signature, while a mere handful of state enforcers shoulder the difficult and critical work. A robust accountability tool would require data over multiple years, but this study is a start.

C. Further Research

This study opens multiple avenues for further research. As stated in the Introduction, our goal in this paper is descriptive: to identify the many ways public UDAP enforcers exercise their considerable discretion. Questions quickly arise, however, that move beyond description to causation: what factors explain the various enforcement outcomes?[210] Some factors, such as legal authority and perhaps agency funding, may act outside the enforcer's discretion.[211] A longer list of factors may explain outcomes by acting upon the enforcer's discretion, such as citizen ideology; electoral pressures; agency culture; partisan affiliation; campaign contributions; the means by which the chief enforcer secures his or her job; and levels of private enforcement, local public enforcement, and consumer protection advocacy. These questions await further investigation.

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[205] *See supra* Part V.D.4.

[206] *See supra* Part VI.

[207] *See* Cox *supra*, note 50, at 2354–59, and accompanying text.

[208] *See* 12 U.S.C. § 5565(a)(2)(C) (2012).

[209] *See supra* Part VI.B.1.

[210] Colin Provost has explored similar questions with regard to multi-state actions. *See* Provost, *An Integrated Model of U.S. State AG Behavior in Multi-State Litigation*, *supra* note 92; Provost, *Entrepreneurship*, *supra* note 592.

[211] The obvious example here is that the FTC rarely uses its civil penalty authority, *see supra* note 179, and has restricted authority to impose such penalties. Nonetheless, the FTC suspended penalties in half the cases where the agency imposed them, and it obtained only injunctive relief in more than half its cases when the agency also had public compensation authority. *See id.*; *see also supra* note 180.

In addition, this study raises important normative questions. How should a public UDAP enforcer exercise discretion given limited public resources? What cases should UDAP enforcers bring and what factors should shape case selection? As this study suggests, multi-enforcer cases have outsized influence, at least in terms of compensating harmed consumers and obtaining government money. Should state enforcers focus on larger targets? If so, what happens to the fraud and deception furthered by individuals and small entities that the Street Cops target? Is anyone left to enforce the law here if state enforcers set their sights elsewhere? Might less expensive, more efficient means of enforcement develop to address these harms? Further research must explore these and other questions, always tethered to a data-informed account of how, in fact, enforcers exercise their powers.