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Protecting Consumer Protection: Filling the Federal Enforcement Gap

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ABSTRACT

Since 2014, when a first-of-its-kind empirical study looked at how public enforcers use their authority under unfair and deceptive acts and practices (“UDAP”) laws, the enforcement landscape has changed. Most notably, the Trump Administration weakened enforcement on the federal level. In the wake of this political shift, many state enforcers rushed to fill the gap left by weak federal enforcement. At the same time, the state enforcers themselves experienced changes both internal (including changes to budgets and stated policy priorities) and external (electoral changes regarding state Attorneys General, changes to statutory authority, and other changes governing the enforcer’s authority).

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This article presents findings from a follow-up study examining the public UDAP enforcement landscape in 2018. The principal finding is that states employed substantially the same strategies toward UDAP enforcement in 2018 as they did in 2014. This finding validates the central observation of both years' studies of state UDAP enforcement: states can be characterized by distinct strategies of consumer protection enforcement.

This information alone offers insight into the remarkable stability of state UDAP enforcement, even across varied strategies and a changing landscape. Other findings also begin to shed light on how states might react to extreme changes in enforcement on the federal level. For example, even though six states have made public statements backed by concrete actions to attempt to fill an enforcement gap left by the absence of federal action, state enforcement case volumes were up among all states. Public compensation, however, was down among all types of enforcement actions in 2018.

Finally, comparisons of enforcement case volumes and strategies across states that experienced other changes over the time period—changes in leadership and statutory authority, for example—mirrored the overall trend of an increase in enforcement coupled with general strategic stability. Strategies as a whole do not seem closely aligned with partisan politics.

This study creates a needed point of comparison to the 2014 data, allowing stakeholders to ask deeper questions about how public enforcers should wield their discretion and authority to resolve consumer protection cases. With debt levels in America at an all-time high, and federal enforcement of consumer law at an all-time low, research-based action is urgently needed to sharpen our understanding of the role and potential effectiveness of institutions tasked with protecting consumers from fraudulent lending schemes and oppressive debt collection strategies as well as the myriad other types of consumer scams that lead Americans toward more debt. The data here give state officials and state-based reformers the

information needed to maximize enforcement in a way that improves consumers' lives.

INTRODUCTION

Americans are drowning in debt.

A report from the Pew Charitable Trust has observed that “[d]ebt is particularly problematic for low-income households, whose liabilities grew far faster than their income in the aftermath of the recession: [t]heir debt was equal to just one-fifth of their income in 2007, but that proportion had ballooned to half by 2013.”¹ In a 2017 Harris Poll survey of adults in the United States regarding the factors that led them to credit card debt, a third of respondents pointed to costs of necessities not covered by household income.² Individuals, families, and communities of color carry disproportionately large amounts of debt relative to other segments of the population.³

In our modern society, debt stems from many causes, including home mortgages, medical emergencies, school loans, automobile and other commercial purpose loans, credit card accruals, and more.⁴ The necessities that people must pay for, but cannot afford to buy outright, create specific vulnerability. People in desperate circumstances due to pressing needs, often already in debt from past choices, are routinely targeted by companies who promote additional debt through payday loans, foreclosure mortgages, debt consolidation services, and other strategies. These structures

1. THE PEW CHARITABLE TRS., *THE COMPLEX STORY OF AMERICAN DEBT: LIABILITIES IN FAMILY BALANCE SHEETS 1* (2015), https://www.pewtrusts.org/-/media/assets/2015/07/reach-of-debt-report_artfinal.pdf?la=en.

2. Erin El Issa, *2017 American Household Credit Card Debt Study*, NERDWALLET, <https://www.nerdwallet.com/blog/credit-card-data/household-credit-card-debt-study-2017/> (last visited Aug. 18, 2020).

3. See GOVERNOR ANDREW M. CUOMO, *NEW YORK STATE: MAKING PROGRESS HAPPEN* 130–31 (2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2020StateoftheStateBook.pdf>.

4. See THE PEW CHARITABLE TRS., *supra* note 1, at 2.

often rely on high interest rates that only the desperate would agree to pay and on incrementally timed repayment obligations that, because they are hard to discern or seem distant in effect, will typically cost borrowers far more than they anticipated at the time of the loan.⁵ These circumstances are only being amplified by the COVID-19 pandemic.⁶

Public enforcement of laws against fraudulent practices should be a crucial tool to help people contend with the scammers. Shutting down fraudulent practices and returning consumer money, especially when defendants prey on people already in debt or catapult people into debt through unfair, deceptive, and abusive practices, is a primary activity of government.⁷ Laws protecting consumers from this type of fraudulent behavior have been codified for close to 100 years.⁸

The federal government, however, abandoned its enforcement role under the Trump Administration. In the traditional consumer protection regulatory scheme, federal agencies enforce federal laws and work concurrently with states on enforcement of federal laws.⁹ States also have their

5. See, e.g., *What to Know About Payday and Car Title Loans*, FED. TRADE COMM'N, <https://www.consumer.ftc.gov/articles/0097-payday-loans> (last visited June 27, 2021).

6. See, e.g., Rich Cordray, *White Paper: Immediate Actions for CFPB to Address COVID-19 Crisis* (Apr. 6, 2020), <https://medium.com/@RichCordray/cfpbwhitepaper-193a5aed0d75> ("Scams are already popping up around testing and treatment; financial scams will shortly follow, such as phishing scams demanding sensitive banking and financial information to get stimulus funds, or phony offers of loss mitigation or credit repair assistance.").

7. See Craig Cowie, *Putting Money Back into Consumers' Pockets: An Empirical Study of the CFPB's Civil Penalty Fund*, 2021 ILL. L. REV. 1417, 1424–27 (2021).

8. See Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58); Prentiss Cox et al., *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 42–43 (2018).

9. Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 53–58 (2011).

own state consumer protection laws and enforcement practices that are, in many cases, modeled on federal laws.¹⁰ Acting Director of the Consumer Financial Protection Bureau (“CFPB”) Mick Mulvaney, appointed in November 2017, immediately stepped back from enforcement and announced the agency would leave it up to state entities to fill the gap.¹¹ The CFPB is one of two federal agencies charged with protecting consumers from unfair, deceptive, or abusive practices; the other is the Federal Trade Commission (“FTC”).¹² Though the FTC has played a vital enforcement role, its ability to receive monetary compensation for consumers through its enforcement actions was recently curtailed by the Supreme Court.¹³

10. See CAROLYN CARTER, NAT’L. CONSUMER L. CTR., *CONSUMER PROTECTION IN THE STATES* 10 (2018), <https://www.nclc.org/images/pdf/udap/udap-report.pdf>.

11. See Allison Schoenthal, *Insight: A Shift in Regulation from the CFPB to the States*, BLOOMBERG LAW (Aug. 24, 2018, 9:33 AM), <https://news.bloomberglaw.com/banking-law/insight-a-shift-in-regulation-from-the-cfpb-to-the-states>; see also Mick Mulvaney, *The CFPB has Pushed Its Last Envelope*, WALL ST. J. (Jan. 23, 2018, 7:40 PM), <https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561> (“We will exercise . . . the almost unparalleled power Congress has bestowed on us to enforce the law faithfully in furtherance of our mandate. But we go no further. The days of aggressively ‘pushing the envelope’ are over.”); Pamela Banks, *Actions Taken by Acting CFPB Director Mick Mulvaney that Undermine the CFPB’s Ability to Protect Consumers*, CONSUMER REPORTS (Apr. 10, 2018), <https://advocacy.consumerreports.org/research/actions-taken-by-acting-cfpb-director-mick-mulvaney-that-undermine-the-cfpbs-ability-to-protect-consumers/>.

12. See FED. TRADE COMM’N, *MEMORANDUM OF UNDERSTANDING BETWEEN THE CONSUMER FINANCIAL PROTECTION BUREAU AND THE FEDERAL TRADE COMMISSION* 1 (Feb. 25, 2019), https://www.ftc.gov/system/files/documents/cooperation_agreements/ftc-cfpb_mou_225_0.pdf.

13. See *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1344 (2021). Congress is currently considering legislation to reinstate these powers. See, e.g., *Consumer Protection and Recovery Act*, H.R. 2668, 117th Cong. (2021). *FTC Testifies at an Oversight Hearing Before the Senate Commerce Committee*, FED. TRADE COMM’N (Aug. 5, 2020), <https://www.ftc.gov/news-events/press-releases/2020/08/ftc-testifies-oversight-hearing-senate-commerce-committee> (“Over the past four fiscal years, pursuant to section 13(b) of the FTC Act, the FTC has returned more than \$975 million directly to consumers and won judgments under which consumers received nearly \$10 billion more through defendant-administered redress programs. However, the Commission’s ability to keep getting such results for consumers has been threatened or curtailed by recent judicial decisions.”).

States are not particularly well-suited to fill the consumer protection gap that is being created by the current CFPB's change in strategy and compounded by threats to the FTC's authority. Enforcement levels among the states vary, and roughly a third of states bring few or no consumer enforcement actions.¹⁴ Moreover, state resources are not as deep as federal coffers. Going forward, the problem could be additionally compounded by new laws that might preempt states from enforcing federal consumer laws at all.¹⁵

Even if state enforcers might not be particularly well-suited to fill the gap, they remain the best option. The weakening of federal enforcement brought on by the Trump Administration combines with the uneven nature of state enforcement to bad effect. Deceptive actors flourish in this environment, entangling people in a cycle of debt in which they borrow more money to pay what they already owe.¹⁶ This cycle pushes increasing numbers of people into poverty. The solution is plain: we must deepen the engagement of federal enforcement authorities and strengthen state enforcement authorities. Data are essential to both these goals.

I. WHY IS UDAP SO IMPORTANT?

Laws that hold bad actors accountable for fraudulent behavior in the marketplace should be potent weapons in the fight against poverty. Laws focused on unfair and deceptive

14. See Cox et al., *supra* note 8, at 88.

15. For example, during the Trump Administration, Justice Department officials and former Education Secretary Betsy DeVos asserted that states are preempted from enforcing federal consumer protection laws that would protect individuals against agencies seeking to collect on federal student loans. See Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 48, 10619 (Mar. 12, 2018).

16. See, e.g., THE PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 17 (May 6, 2020), <https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf>.

acts have been pillars of consumer protection strategies for close to 100 years. These UDAP laws provide a key regulatory structure to keep the marketplace fair. But laws themselves do not fix the problem. Effective enforcement of those laws is the key.

For purposes of this study, and the previous 2014 study it draws on for comparison, the focus is narrowly drawn on the main federal and state laws governing unfair, deceptive, and abusive practices. UDAP laws are predominantly “principles-based” laws.¹⁷ Such laws are meant to be flexible in order to adapt to new scams and, in theory, give enforcers broad discretion to enforce the laws against ever-changing fraudulent schemes. This discretion, however, can undermine uniformity, and this potential for variation forms the crux of the criticism against UDAP laws: critics charge that the economic marketplace isn’t provided adequate notice as to which actions will be deemed “unfair” or “deceptive” (or, in some cases, “abusive”).¹⁸ This criticism is, at best, overly simplistic, or worse, deliberately misleading. There is quite a bit of consistency in the types of scams that are prosecuted.¹⁹ The discretion, as it is applied, seems to be about whether or not to deploy resources for any particular enforcement and, if so, which violations to prioritize. Part of this choice seems dependent on the larger enforcement landscape and whether other enforcers might be better suited to target certain defendants. The data described below sketch that larger landscape to provide more context to any

17. See Cox et al., *supra* note 8, at 44 (citing Ronald M. Dworkin, *The Model of Rules*, 25 U. CHI. L. REV. 14, 22–23 (1967)) (using the term “principles-based” to describe a more flexible type of legislative command or “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”).

18. See, e.g., U.S. CHAMBER INST. FOR LEGAL REFORM, UNPRINCIPLED PROSECUTION: ABUSE OF POWER AND PROFITEERING IN THE NEW “LITIGATION SWARM” 1–2 (2014), <https://instituteforlegalreform.com/wp-content/uploads/media/unprincipled-prosecution.pdf>.

19. See Cox et al. *supra* note 8, at 65–66.

study of enforcement.

A. *The Federal Laws*

There are many federal consumer protection-focused laws and regulations, and the legislative framework reveals an intricate relationship among these laws. The main federal laws regulating unfair and deceptive practices are the Federal Trade Commission Act and Consumer Financial Protection Act, otherwise known as “Dodd-Frank.”²⁰

The Federal Trade Commission Act created the Federal Trade Commission.²¹ Section 45(a) of this Act (known as “section 5”) provides that “[u]nfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful.”²² It is under this authority that the FTC enforces UDAP violations, within the statutory boundaries around the types of industries covered. The FTC Act authorizes enforcement against mortgage companies, mortgage brokers, debt collectors, and creditors.²³ Importantly though, the FTC is not authorized to enforce the FTC Act against banks, federal credit unions, and savings and loan institutions.²⁴ The FTC is authorized to seek a variety of remedies through settlement, but its administrative powers are restricted to injunctive relief only.²⁵

The Consumer Financial Protection Act (“CFPA”) created the Consumer Financial Protection Bureau and

20. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2018); Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301–5641 (2018).

21. 15 U.S.C. § 41.

22. 15 U.S.C. § 45(a).

23. *See id.*

24. 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).

25. 15 U.S.C. § 45(b), (m); 15 U.S.C. § 53(b). *But see FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019) (holding that “[s]ection 13(b)’s grant of authority to order injunctive relief does not implicitly authorize an award of restitution”).

authorized the new agency to enforce multiple federal consumer protection laws in addition to the expanded “unfair, deceptive, or abusive act[s] or practice[s]” (“UDAAP”) prohibition within the CFPA itself. The Bureau is also authorized to issue regulations under this authority.²⁶

While the CFPB and the FTC share enforcement powers in many of these areas, the CFPB has a wider reach than the FTC. The CFPB is authorized to enforce prohibitions against banking institutions.²⁷ Moreover, the CFPB’s enforcement authority goes beyond deceptive and unfair practices, to also include a newer category of abusive practices.²⁸ The CFPB is authorized to seek a variety of remedies through both administrative and judicial action, including injunctions, public compensation, and civil penalties.²⁹ Like section 5 of the FTC Act, however, there is no concurrent private right of action.

B. *The State Laws*

Consumer protection standard-setting and enforcement contains multiple vertical layers and a history of both concurrent and collegial federalism. As in the federal system, states also have a variety of consumer protection laws and regulations at their disposal. The two studies compared here relied on data drawn from enforcement of the main state UDAP laws. These laws have various informal names, but all are modeled in part after section 5 of the FTC Act.³⁰

26. 12 U.S.C. § 5511(a); 12 U.S.C. § 5531(a)–(b).

27. 12 U.S.C. § 5515.

28. 12 U.S.C. § 5531(a), (d). For more on how the CFPB has used its expanded authority to target abusive acts, see Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1099–1101 (2016).

29. 12 U.S.C. § 5565(a)(2).

30. See Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L. J. 911, 912 (2017); see generally CARTER, *supra* note 10.

The main shared features of the state consumer protection acts include prohibitions against deceptive practices in consumer transactions and authority vested in the state to enforce violations,³¹ coupled with authority for a private right of action.³² Each state statute also provides a remedial structure that includes injunctive relief, public compensation, and, in all but Rhode Island, civil penalties.³³

Beyond that shared framework, there are variations in both the statutory and common law interpretations of the statutes that create boundaries around the authority.³⁴ These variations include substantive differences such as the definitions of covered industries or the types of practices that are considered deceptive.³⁵ Other substantive variations include whether a plaintiff must meet higher thresholds of reliance or a heightened burden of proof that the defendant

31. The vast majority of states locate this authority within the State Attorneys General's office; however, a few states, including Hawaii, Utah, Wisconsin, and Connecticut, vest authority in a state consumer agency, either alongside or in lieu of the state attorney general ("AG"). *See generally* NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50 STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS app. C (2018), <https://www.nclc.org/images/pdf/udap/udap-appC.pdf>. However, a few states, including Hawaii, Utah, Wisconsin, and Connecticut, vest authority in a state consumer agency, either alongside or in lieu of the state attorney general ("AG"). *See* HAW. REV. STAT. § 480-15 (2020); UTAH CODE ANN. § 13-2-1 (West 2020); WIS. STAT. § 93.06 (2019); CONN. GEN. STAT. § 42-110d (2015).

32. *See generally* NAT'L CONSUMER L. CTR., *supra* note 31.

33. CARTER, *supra* note 10, at 11, 28.

34. For a list of recommendations as to model state legislation that would strengthen the scope of state enforcement, see generally CARTER, *supra* note 10, at 48–49 (recommending, for example, that states define unfair and deceptive acts broadly, give states rule-making power, expand the industries that are covered, remove intent or knowledge requirements, clarify presumptions on reliance, increase civil penalty size, allow attorneys' fees, give states more investigatory powers, and adequately fund the state consumer protection priorities).

35. *Compare, e.g.*, IND. CODE § 24-5-0.5-2(a)(1) (2019) (explicitly exempting insurance companies from UDAP enforcement), *with* TEX. BUS. & COM. CODE ANN. § 17.46 (West 2019) (explicitly stating that a violation of state unfair insurance practices act is a UDAP violation).

acted knowingly or intentionally.³⁶ Procedural variations also exist. These obstacles, for example, require advance notice to defendants, proof of tangible injury, and cap the amount of any civil penalties.³⁷

II. THE 2014 FINDINGS

A. *The Federal Enforcers*

The newly constituted CFPB resolved a total of ten UDAAP-based enforcement actions in 2014.³⁸ The agency focused on sellers of credit/banking products.³⁹ That year, the CFPB received all forms of relief in each case.⁴⁰ Strikingly, this means that the CFPB received public compensation in 100% of its resolved cases in 2014.⁴¹ The compensation was typically distributed to all affected consumers.⁴² The CFPB tended to focus its injunctive relief on customer service/employee training provisions.⁴³ Every case also resulted in a civil penalty, directed to the Bureau's Civil Penalty Fund.⁴⁴ The amount of money collected in civil penalties by the CFPB was greater than that collected by any other single enforcer—the only greater collection resulted from large, multi-enforcer actions.⁴⁵

36. Compare, e.g., N.D. CENT. CODE § 51-15-02 (2015) (forbidding practices regardless of actual reliance), with IND. CODE § 24-5-0.5-4(a) (2020) (authorizing private right of action only for “[a] person relying upon an uncured or incurable deceptive act.”).

37. See CARTER, *supra* note 10, at 40–43.

38. *Id.* at 80.

39. Cox et al., *supra* note 8, at 65.

40. *Id.* at 70.

41. See *id.*

42. *Id.* at 76.

43. *Id.* at 72.

44. *Id.* at 73.

45. See *id.* at 74. As Craig Cowie points out in his study of the CFPB Civil Penalty Fund, this money is mostly paid out to harmed consumers. See Cowie,

The FTC resolved a total of ninety-four UDAP-based enforcement actions in 2014.⁴⁶ The FTC employed two distinct strategies.⁴⁷ The first, Type A, was the most common.⁴⁸ These actions were administrative enforcement actions for injunctive relief brought against large companies.⁴⁹ Type B actions were initiated in a judicial forum against multiple, smaller defendants and aimed toward stopping a widespread fraudulent practice.⁵⁰ In these cases, the FTC was able to obtain monetary relief in addition to injunctive relief.⁵¹ The most notable FTC remedy in the Type B cases was some form of asset freeze that would dismantle the fraudulent scheme.⁵² The FTC injunctions repeatedly focused on limiting the gathering and using of customer data.⁵³

As described above, federal enforcers played a key role in the larger enforcement landscape. Each federal enforcer has a slightly different statutory reach and focus, and the CFPB was designed to expand and strengthen federal enforcement in areas beyond the FTC's powers.⁵⁴ The CFPB's powers were clearly effective: no other enforcer was able to stop the fraudulent practice, punish the fraudulent actor, and return

supra note 7, at 1424–27.

46. *See id.* at 80–81.

47. *Id.* at 80.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 80–81. In its most recent term, the Supreme Court declared decades of FTC practice as contrary to statutory authority and held section 13(b) of the Federal Trade Commission Act does not “authorize[] the [Federal Trade] Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement.” *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1344 (2021). This ruling effectively bars the FTC from the remedy noted in the above text.

52. Cox et al., *supra* note 8, at 82–83.

53. *See id.* at 72.

54. This Article's 2018 study only addresses the CFPB.

money to affected consumers in each case.⁵⁵ Moreover, the statutory authority to enforce against banks and other sellers of credit filled a unique gap. The large size of defendants and the scale of the fraudulent practices that the CFPB targeted, seen in the data by the large civil penalty awards, show an enforcement strategy able to stop the biggest and most disruptive—and therefore most dangerous—frauds.⁵⁶

The only other structure or entity able to marshal the resources and extend its reach on a scale similar to that of the CFPB is the large multi-enforcer action. In 2014, there were seven large multi-enforcer cases and another sixteen mid-sized multi-enforcer actions resolved by coalitions of state and federal enforcers.⁵⁷ A federal enforcer (either the FTC or the CFPB) joined the states in a majority of these cases.⁵⁸ The large multi-enforcer cases were brought against very large entity defendants only, including large mortgage, telecom, pharmaceutical, and satellite radio companies.⁵⁹ While the large multi-enforcer actions most closely align with the CFPB strategy, these actions received public compensation only about 71% of the time.⁶⁰ These cases also brought in the largest civil penalty amounts of all enforcement actions, but only about 85% of the actions generated civil penalties.⁶¹

55. See Cox et al., *supra* note 8, at 69–70.

56. See *id.* at 80.

57. See *id.* at 58–59.

58. See *id.*

59. See *id.*

60. See *id.* at 70.

61. *Id.*

B. *The State Enforcers*

In 2014, the fifty-one state enforcers (including Washington, DC) resolved a total of 671 UDAP-based enforcement actions.⁶² These actions tended to focus on the following industries: construction, motor vehicles, foreclosure, and vacation/entertainment.⁶³

While states tended to bring a large volume of cases against smaller defendants as compared with the FTC and the CFPB, states did target larger defendants at times.⁶⁴ Aggregate state enforcement data from 2014 reveals that states received injunctions 95% of the time, civil penalties roughly 73% of the time, and public compensation roughly 65% of the time.⁶⁵

The 2014 data yielded seven distinct state enforcement strategies.⁶⁶ The first three strategies can be described as gradations of no- or low-enforcement. Non-enforcers resolved no UDAP cases in 2014, naturally.⁶⁷ Low-volume enforcement states resolved two to five cases.⁶⁸ This strategy resulted in at least one case with monetary relief greater than the median level of relief seen among all 671 cases studied.⁶⁹ A few low-volume enforcers earned the title “low-volume plus” because they resolved between two and ten

62. Cox et al., *supra* note 8, at 55–56. Also, note that “states” and “state enforcers” throughout this paper will continue to include Washington, DC, as a state unless otherwise noted.

63. *Id.* at 66.

64. *Id.* at 61.

65. *See id.* at 70.

66. An eighth strategy, which was really not a discernible strategy, was labeled an “outsider.” These four states did not fit neatly into any of the seven more clearly observable strategies, though each of these four states had their own distinct strategic characteristics. For the most part, those unique strategic markers also held true in 2018. *Id.* at 85–86.

67. *See id.* at 84.

68. *Id.*

69. *Id.*

cases, but states in this strategy cohort closed at least one large case resulting in monetary relief greater than \$1 million.⁷⁰ A fourth strategy group of states, “the outsourcers,” was also low-volume but shared a couple of distinct characteristics: they targeted large companies and received only undesignated government money,⁷¹ and they were the only states that appeared to sometimes incorporate the use of outside counsel.⁷²

The three remaining strategies had larger levels of enforcement but different targets, relief, and roles in multistate enforcement. The “street cops” brought a large number of cases against individuals and small businesses, and their cases were characterized by small monetary awards to specific consumers or to consumers who filed a complaint.⁷³ A subset of street cop enforcers also resolved some actions against large defendants with greater monetary awards and sometimes froze assets.⁷⁴ These states, “street cop plus” states, also appeared on multistate leadership panels.⁷⁵ Finally, the “heavies” had a high volume of cases against both the smaller, localized fraudulent actors and also large entities.⁷⁶ These states also sometimes froze assets as a remedy, and they participated in the highest percentage of multistate leadership panels.⁷⁷

70. *Id.* at 85.

71. *Id.*

72. *Id.*

73. *See id.*

74. *See id.* at 85, 95.

75. *See id.* at 95.

76. *Id.* at 85, 96.

77. *See id.* at 95, 97.

III. METHODOLOGY

This new study of cases resolved in 2018 was designed to follow up on the results from the 2014 study. Given this purpose, the methodology followed a similar structure, although the number of data points coded was reduced and simplified.

A. *Data Collection*

As with the 2014 study, open records requests were sent to all state enforcers of UDAP-based consumer protection laws. These requests yielded documents for thirty-eight states. The remaining thirteen state enforcers (including Washington, DC) statutorily limited their production of documents to in-state residents, charged a high fee for production, or otherwise rendered the documents inaccessible.

Once the documents were gathered, a team of four researchers determined which documents were in scope. Scope was defined as a judicial or administrative resolution of a UDAP claim dated between January 1, 2018, and December 31, 2018. Further, scope included only those claims involving a principles-based violation of an unfair, deceptive, or abusive practice. This means that a state enforcement action based on a purely rule-based violation of a regulation promulgated under authority granted in the state's UDAP law was considered a "per se" UDAP violation and therefore out of scope for this study.⁷⁸ Any action that included an in-scope UDAP claim, regardless of the presence of additional claims and even if the additional claims were rule-based, was in scope.

The state data collection period produced a total of 604 state enforcement actions resolved in 2018 among thirty-eight states. The Consumer Financial Protection Board

78. For more on determinations of a "per se" case and typical examples, see *id.* at 54.

enforcement actions were located on the agency website.⁷⁹ In 2018, the CFPB resolved nine UDAP-based violations.

B. *Study Design and Coding*

As with the 2014 study, the 2018 data was gathered from the face of the resolving documents. The information has some built-in temporal lags, as the enforcement actions included could have been initiated in any prior year. Actions initiated in the year of study were not included in the data if the action did not also resolve in that calendar year. This design allows for a greater understanding of enforcement levels and allows for some variation across years.

The primary research question was whether the strategies identified in 2014 held constant. A secondary research question was whether having two years of data allowed for greater understanding of how internal and external changes might affect enforcement strategy.

A team of three student researchers plus the author coded the following information from the face of these resolving documents:

- the form and forum of the resolution;
- any outside counsel for the enforcement;
- the unfair or deceptive conduct;
- the type of product;
- the presence of other claims;
- whether injunctive relief was granted and, if so, what type of conduct-resolving relief;
- whether public compensation was obtained and, if so, the type, eligibility, and amount; and
- whether a government money in the form of civil penalty, fees/costs, cy pres award, or other government money was obtained and, if so, the

79. See *Enforcement Actions*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/> (last visited June 27, 2021).

amounts and use of that money.

The coding followed a detailed code book, originally designed and tested to reduce variations among coders in the original 2014 data collection.⁸⁰ Any coding questions were discussed and resolved. Coding results were periodically checked to control for any variation throughout the coding period. Variance was minimal throughout. Cases were coded between February and August 2020.

For each case, researchers coded roughly fifty points of information about the case from information on the face of the resolving document itself. The researchers also recorded roughly fifteen additional points of information on the defendants from information in the resolving document, and outside databases containing company information, including Mergent Intellect, Lexis Company Profiles, and Google. Researchers were able to confirm the entity defendant company information for roughly half of the resolved cases. Indications on the face of the resolving document, however, strongly suggested the general size of defendant entities clearly enough that it was possible to estimate whether target entities tended to be large or small.

C. Study Limitations

As with the previous study, there are limitations to the data. Ultimately, the data represent a snapshot in time, and it is, statistically speaking, a small set of data points. Since our study scope only included resolved documents during one calendar year, actions that began in 2018 but were not resolved would not be included. Thus, part of any particular office's strategy might not necessarily be fully captured, especially in times of great flux. This limitation is mitigated, however, since we have a snapshot of 2014 for comparison, and each single year snapshot actually represents multiple years' work product from the offices studied, because they

80. Cox et al., *supra* note 8, at 56–57.

are snapshots not only in time but also through time.

Another limitation is that the study is not designed to capture local enforcement of UDAP violations. Local municipalities are a growing source of enforcement, and this could very well alter a state strategy and thus affect the overall landscape.⁸¹ In states with robust local enforcement, the state enforcer might reasonably want to encourage this vertical enforcement diversity and prioritize accordingly.⁸²

Finally, a major limitation to the 2018 data is the absence of documents from thirteen state enforcers.⁸³ The proliferation of limitations on the scope of state freedom of information laws made it harder, even from 2014, to gather a national picture of enforcement.⁸⁴ Moreover, the lack of freely granted fee waivers for academic researchers compounded this problem. The result is a study from a majority of states but not all.

IV. THE 2018 LANDSCAPE

Since 2014, the enforcement landscape has shifted in both major and minor ways. The most obvious and impactful shift was the change in federal administration in 2016. For purposes of the CFPB, this change took root in late 2017 when the White House replaced Director Cordray with

81. See, e.g., Eli Savit, *States Empowering Plaintiff Cities*, 52 U. MICH. J.L. REFORM 581, 583 (2019); Kathleen Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L. J. 1903, 1906 (2013).

82. See e.g., ALA. CODE § 8-19-4(a)(1)–(3) (2002); CAL. BUS. & PROF. CODE §§ 17203–06 (West 2014); 815 ILL. COMP. STAT. ANN. 505/7(a)–(b) (West 2008); MISS. CODE ANN. § 75-24-21 (West 1999); MO. ANN. STAT. § 407.020(4) (West 2016); S.C. CODE ANN. § 39-5-130 (1985); TEX. BUS. & COM. CODE ANN. § 17.48 (West 2011); VA. CODE ANN. §§ 59.1-201(A), 59.1-201.1 (West 2011).

83. Eight of the non-responding states were also low or non-enforcers in 2014. Because of this, it is unlikely that the number of cases they would have produced would have been significant.

84. The following states require requesters to be state citizens: Alabama, Arkansas, Delaware, New Jersey, Tennessee, and Virginia. See also *McBurney v. Young*, 569 U.S. 221, 222–23 (2013) (upholding Virginia’s resident requirement).

Interim Director Mick Mulvaney.⁸⁵ Director Kathy Kraninger replaced Interim Director Mulvaney in December 2018.⁸⁶

Since Director Cordray left his post, there is mounting evidence that the agency fundamentally altered its enforcement strategies across all its potential enforcement actions.⁸⁷ For example, Chris Peterson points out that the CFPB under Trump-appointed leadership quite substantially reduced its level of enforcement despite the great need expressed through its consumer complaint data.⁸⁸ Furthermore, scrutiny of what little enforcement remained shows that fewer dollars went to consumers generally throughout 2018.⁸⁹ Although Professor Peterson analyzed all enforcement actions, including substantive areas covered by federal laws beyond the unfair, deceptive, and abusive practices in the CFPB itself, this same pattern holds true for its UDAAP enforcement.⁹⁰ The United States House of Representatives Financial Services Committee reported

85. Pete Schroeder, *Trump Names Interim Consumer Agency Head, Likely Sparking Showdown*, REUTERS (Nov. 24, 2017, 4:25 PM), <https://www.reuters.com/article/us-cfpb-cordray/trump-names-interim-consumer-agency-head-likely-sparking-showdown-idUSKBN1DO2KQ>.

86. Emily Sullivan, *Senate Confirms Kathy Kraninger as CFPB Director*, NPR (Dec. 6, 2018, 2:17 PM), <https://www.npr.org/2018/12/06/673222706/senate-confirms-kathy-kraninger-as-cfpb-director>.

87. See, e.g., CHRISTOPHER L. PETERSON, CONSUMER FED'N OF AM., DORMANT: THE CONSUMER FINANCIAL PROTECTION BUREAU'S LAW ENFORCEMENT PROGRAM IN DECLINE 27–28 (2019), <https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Divine.pdf>. See generally STAFF OF H. COMM. ON FINANCIAL SERVICES, 116TH CONG., SETTLING FOR NOTHING: HOW KRANINGER'S CFPB LEAVES CONSUMERS HIGH AND DRY (Comm. Print 2019). This article was written before the Biden Administration took office. Since then, leadership and staff changes at the CFPB have focused on building back to pre-Trump Administration enforcement level and strategy.

88. PETERSON, *supra* note 87, at 7–10. Beyond the numbers, it is important to stress the toll these violations take on consumers. *Id.* at 8 (“An independent textual analysis of the Bureau’s published complaints found that the complaints of many consumers contained “markers of anger, fear, frustration, and sadness.”).

89. See *id.*

90. Peterson, *supra* note 28, at 1075.

similarly that Trump appointees repeatedly diverged from both agency precedent and career lawyer recommendations to avoid requiring defendants to reimburse consumers for fraudulent acts.⁹¹ The data examined in this study continues to bear this out.

The agency's interim and current directors portrayed the shift in enforcement strategy as reigning in an agency that had "aggressively 'push[ed] the envelope'" on enforcement.⁹² But a closer look into the details of the shift in strategy reveals something altogether different: a change in philosophy about whether there should be enforcement at all against the particular targets that the CFPB is best-suited to address and, if so, whether consumers should be directly reimbursed by those who perpetrated the frauds that harmed them.

A. *General Findings 2018*

1. The CFPB

There are some similarities in the data tracking CFPB enforcement strategy between 2014 and 2018. In both years, cases were resolved against sizable entities, and all cases resulted in injunctive relief. In 2014, the CFPB resolved ten cases. In 2018, there were nine cases. The similarities, however, end there.⁹³ Even though at first glance the level of

91. See generally STAFF OF H. COMM. ON FINANCIAL SERVICES, 116TH CONG., *SETTLING FOR NOTHING: HOW KRANINGER'S CFPB LEAVES CONSUMERS HIGH AND DRY* (Comm. Print 2019).

92. Mulvaney, *supra* note 11 ("We will exercise . . . the almost unparalleled power Congress has bestowed on us to enforce the law faithfully in furtherance of our mandate. But we go no further. The days of aggressively 'pushing the envelope' are over.").

93. Multiple accounts portray an agency pursuing a political strategy over all else. See, e.g., Robert O'Harrow Jr. et al., *How Trump Appointees Curbed a Consumer Protection Agency Loathed by the GOP*, WASH. POST (Dec. 4, 2018, 4:16 PM), https://www.washingtonpost.com/investigations/how-trump-appointees-curbed-a-consumer-protection-agency-loathed-by-the-gop/2018/12/04/3cb6cd56-de20-11e8-aa33-53bad9a881e8_story.html ("Some of the cases that did go

enforcement looks similar, this is not the case once one takes the view from the overall timeline of the agency.⁹⁴ And, while the 2014 CFPB strategy was characterized by the agency receiving all forms of relief provided under Dodd-Frank for 100% of resolved cases, the agency pursued public compensation and civil penalties in fewer cases in 2018. Only 56% of resolved cases in 2018 resulted in any public compensation, and the amounts were significantly lower.⁹⁵ The mean amount of public compensation earned through UDAAP enforcement in 2014 was roughly \$21 million;⁹⁶ but, in 2018, the mean dropped to just over \$1 million.

Beyond public compensation, the 2018 enforcement actions realized civil penalties only 89% of the time, and those penalty amounts tended to be lower as well.⁹⁷ Excluding one extreme outlier—one case in 2018, against Wells Fargo, received a civil penalty of \$500 million—the mean UDAAP civil penalty dropped from roughly \$6 million in 2014 to \$1 million in 2018.⁹⁸

2. The States

Comparing the enforcement levels for the thirty-eight states for which there was available data for both 2014 and

forward were drained of vigor, with penalties that fell far below what career regulators recommended, employees said. The new pattern gave rise to a phrase among staff: “The Mulvaney Discount.”).

94. Looking at CFPB enforcement over the trajectory of the Bureau’s lifespan, a bell curve emerges where cases resolved in 2014 were smaller due to the Bureau’s recent formation. The bell curve peaks in 2015–2016 before beginning a downward curve. *See generally* Peterson, *supra* note 28; PETERSON, *supra* note 87.

95. Only one case resolved in 2018 earned over \$1 million for consumers. *See Santander Consumer USA, Inc.*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/enforcement/actions/santander-consumer-usa-inc/> (last visited June 27, 2021).

96. Cox et al., *supra* note 8, at 56–57.

97. Dodd-Frank directs all civil penalties to be deposited in the Civil Penalty Fund. *See* 12 C.F.R. § 1075.100–110 (2016).

98. Cox et al., *supra* note 8, at 75 (showing CFPB’s mean net government money was roughly \$6 million).

2018, enforcement levels stayed relatively the same. Using data from just these thirty-eight states, there were 555 enforcement actions resolved in 2014 as compared to 604 enforcement actions resolved in 2018, for an overall increase of 9%. On average, enforcement case volume change per state was up 23%, but this includes a wide range of variances among the states.⁹⁹ The largest percentage enforcement increase was 509%, which increased enforcement by fifty-six cases (from eleven cases in 2014 to sixty-seven cases in 2018).¹⁰⁰ The largest percentage enforcement decrease was seen in three low enforcement states that went from one or two enforcement actions in 2014 to no enforcement actions in 2018.¹⁰¹ Within these thirty-eight states, enforcement case volume levels were the same or up in nineteen states. Of the remaining nineteen states, enforcement levels were down by two or fewer actions in eight states.

The types of relief states pursued in 2018 show some slight differences from 2014. Injunctions were slightly more prevalent, the number of cases receiving public compensation was down, and government money was received slightly more often in 2018.

States received all three forms of relief in 36% of cases, compared to 46% in 2014. Injunctive relief remained overwhelmingly common, increasing even more in 2018 to over 99% of cases resulting in some form of injunctive relief, compared to 95% in 2014. The type of injunctive relief preferred by states overall remained similar: general prohibitions on violating UDAP laws and some form of business ban were the most common forms of injunctive relief in both years studied.¹⁰²

99. This calculation also does not include the percentage increase for two states (DC and Kentucky) that had zero enforcement actions in 2014 but five to six in 2018. *See id.* at 88.

100. This state was New Jersey. *See also* discussion *infra* Section IV.A.2.b.i.

101. Louisiana, Oklahoma, and South Carolina each had a 100% decrease in enforcement.

102. Cox et al., *supra* note 8, at 72.

In the 2018 data, public compensation was awarded in 51% of non-default cases, down from the 2014 percentage of 65%.¹⁰³ Although acknowledging public compensation awarded, the resolving documents did not always specify a dollar amount. Of the documents with a specified dollar amount for public compensation in non-default cases, the mean amount in 2018 was \$560,219, compared to \$370,000 in 2014.¹⁰⁴

Cases in 2018 resulted in money awarded to the government 77% of the time, up slightly from 73% in 2014.¹⁰⁵ Variations among state statutes in civil penalty amounts and provisions for awarding fees/costs, however, make this a difficult area in which to compare dollar amounts among states meaningfully.¹⁰⁶

Most strikingly, the overall enforcement strategies displayed in 2014 remained the same in 2018. Enforcement levels were up overall, which bumped some states into a slightly higher enforcement strategy band. And the use of outside counsel, as observable from the resolving documents, also decreased overall. Although nine total cases evidenced outside counsel in the resolving documents in 2014, only one case in 2018 appeared to incorporate the use of outside counsel for the state. Three states formerly in the “outsourcer” strategy therefore changed to a new strategy, either as a non-enforcer or a low-volume enforcer. Generally, however, strategy type—which is a function of not only level of enforcement but also size of defendant, types of relief

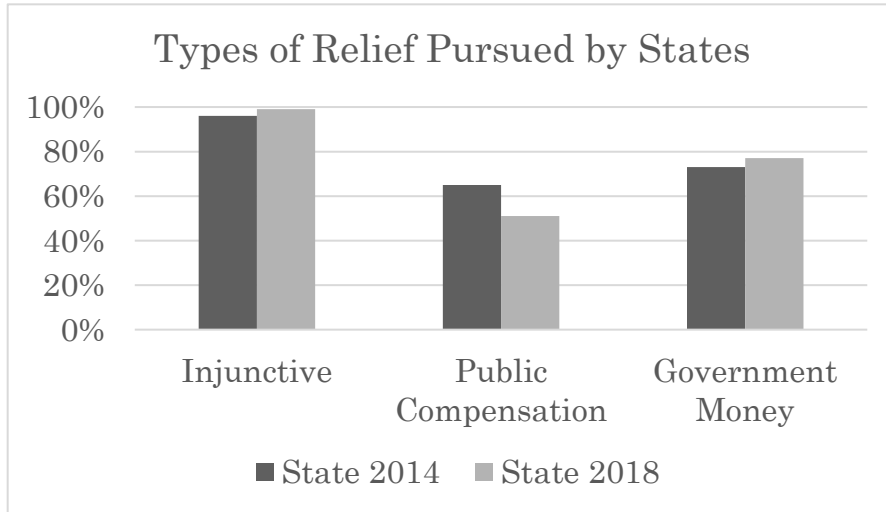
103. *Id.* at 70–73. As with the 2014 data, the public compensation calculations are made from the non-default cases only. This is because default cases are unlikely to produce that money, and the concern here is how many dollars are going back to consumers.

104. *Id.* at 78. As with the 2014 data, often resolving documents specify that public compensation is obtained but do not list a dollar amount, either because the total compensation amount is unknown or variable among consumers. The percentage of cases with a known, specified dollar amount of public compensation is 66% of public compensation cases.

105. *Id.* at 73.

106. See CARTER, *supra* note 10, at 16–22.

sought, and leadership in multistate cases—remained remarkably consistent.



a. Control Group States

For a baseline comparison between 2014 and 2018, the current study further compared the results for each year in states, representing all strategies, where there were no discernible internal or external changes between the two study periods. For these control group states, fourteen in all, there was no change in state Attorney General (“AG”) leadership (even if a new term), no changes to statutory authority (either through legislative or common law developments), no structural changes as to the authority of the enforcer, and no public announcement of internal prioritizing or restructuring to fill the gap created by federal under-enforcement.

Enforcement level among these states as a group was down. These fourteen states with no discernible changes between 2014 and 2018 had a 16% decrease overall in the number of enforcement actions resolved. The states in the control group employed almost the exact same strategies across the board. The few changes were mostly where a state saw a slight uptick in enforcement or a larger monetary award. One state, South Carolina, went from being an

“outsourcer” with two enforcement actions modeled after multistate cases that South Carolina did not join in 2014 to a non-enforcer with no enforcement actions in 2018. But even with the level of enforcement changing slightly, the strategy there remained consistent in that the state itself was not enforcing UDAP cases.¹⁰⁷

b. Breaking Down the States by Interruptions

Given that the level of enforcement was up overall but down in the states with no discernible changes, the next question is which changes had the greatest effect on level of enforcement. Authors of the 2014 study, including the author of this study, suggested that certain internal or external factors might drive enforcement strategy, for example, budgets, statutory variances and changes, or the structure of the body charged with enforcement.¹⁰⁸ Now that there are two years of data over a span of time, we can begin to analyze that data by comparing it as organized by some of the postulated factors. This section compares the data for states that encountered some form of interruption between 2014 and 2018 to analyze whether certain types of interruptions tend to affect case volumes or strategies of enforcement.

i. Internal Interruptions

Two categories of change agents or interruptions occurred among the states since 2014. The first category is best described as internally driven interruptions (internal, that is, with respect to the state’s enforcement office; interruptions possibly influenced by outside factors but intentionally, affirmatively affected from within the office). This category applied to the subset of states with enforcers that made strong public pronouncements and otherwise took steps to shift priorities, increase budgets, or restructure internal departments to prioritize consumer protection in

107. See Cox et al., *supra* note 8, at 89 (describing South Carolina as “[o]utsourcing . . . the case theory and development if not the representation”).

108. *Id.* at 102–03.

order to fill the gap created by the Trump Administration’s CFPB.¹⁰⁹ These states include Pennsylvania, New Jersey, Virginia, Maryland, California, and New York.¹¹⁰ Within this subset of states, overall enforcement levels were up 171%: higher than the overall data (9%) and directionally different than the control group as a whole.

In 2017, Pennsylvania announced its new consumer protection unit, headed by a former CFPB attorney.¹¹¹ The unit remains within the AG’s office, but focuses on enforcement against “lenders that prey on seniors, families with students, and military service members, including for-profit colleges and mortgage and student loan servicers.”¹¹² The 2018 data reflects this new priority, showing a 145% increase in case volume and a move from a “street cop” strategy to a “heavy” strategy.¹¹³

In 2018, New Jersey launched a similar internally focused “state level CFPB.”¹¹⁴ That year, New Jersey

109. See Letter from Eric T. Schneiderman, Att’y Gen., State of New York, to Donald J. Trump, President, United States (Dec. 12, 2017), https://www.consumerfinance.com/wp-content/uploads/sites/14/2017/12/sign_on_letter_re_cfpb.pdf (signed by fifteen additional state Attorneys General and DC’s Attorney General) [hereinafter Attorneys General Letter]; see also *Attorney General Grewal Announces New Leadership at the Division of Consumer Affairs*, N.J. OFF. OF THE ATT’Y GEN. (Mar. 27, 2018), https://www.nj.gov/governor/news/news/562018/approved/20180327c_newleadership.shtml (describing steps taken to create state level CFPB) [hereinafter *Grewal Press Release*]; *Attorney General Herring Expresses Unwavering Support for Consumer Financial Protection Bureau*, VA. OFF. OF THE ATT’Y GEN. (Dec. 12, 2017), <https://www.oag.state.va.us/media-center/news-releases/1101-december-12-2017-ag-herring-expresses-unwavering-support-for-consumer-financial-protection-bureau>.

110. See sources cited *supra* note 109.

111. *E.g.*, Ben Lane, *Mini-CFPB? Pennsylvania Attorney General Launches Consumer Financial Protection Unit*, HOUSINGWIRE (July 21, 2017, 5:31 PM), <https://www.housingwire.com/articles/40758-mini-cfpb-pennsylvania-attorney-general-launches-consumer-financial-protection-unit/>.

112. *Id.*

113. See *supra* Section II.B (defining these strategies).

114. See *Grewal Press Release*, *supra* note 109.

increased its level of enforcement by 509%.¹¹⁵ New Jersey also continued to employ a similar strategy even while launching a new priority. The strategy employed by New Jersey does not, however, mimic the former CFPB enforcement strategy. Formerly grouped in the “outsider” strategy, New Jersey tended to prioritize government money over public compensation.¹¹⁶ True to this strategy, New Jersey received public compensation in only 20% of resolved cases, comparatively low for overall cases in 2018 (51%).¹¹⁷

Virginia also took steps to prioritize consumer protection enforcement by establishing a predatory lending enforcement unit in 2016.¹¹⁸ Virginia likewise showed an increase in its level of enforcement in 2018, up 333%. Notably, Virginia seemed to target payday lending and other credit services, presumably a result of its newly established predatory lending enforcement unit. Virginia also behaved most in line with the original CFPB strategy, with injunctive relief focused on training, strong public compensation, and high amounts of government money.

The Maryland AG’s office also prioritized filling the gap created by federal under-enforcement. Here, the office led efforts to amend its consumer protection statute to incorporate many changes designed to strengthen the ability of the state enforcer to fill the enforcement gap.¹¹⁹ Notably,

115. New Jersey resolved eleven UDAP enforcement cases in 2014. The number of resolved cases rose to sixty-seven in 2018. That number may have been artificially high, as the number of resolved cases then decreased to twenty-six in 2019.

116. Cox et al., *supra* note 8, at 97.

117. Researchers coded New Jersey cases for both years since the mini-CFPB initiative was announced mid-2018. In 2018, New Jersey received public compensation in 20% of its resolved cases. In 2019, that rate climbed slightly to 27%.

118. *OAG Completes Reorganization and Expansion of Consumer Protection Operation*, VA. OFF. OF THE ATT’Y GEN. (Nov. 21, 2016), <https://oag.state.va.us/media-center/news-releases/842-november-21-2016-oag-completes-reorganization-and-expansion-of-consumer-protection-operation>.

119. See S.B. 1068, 2018 Leg., Reg. Sess. (Md. 2018).

Maryland codified the expansion of UDAP protection to include abusive practices, remedied some common UDAP weaknesses, introduced a priority on student loans, and incorporated a research and education component to increase data collection toward improving outcomes.¹²⁰ Maryland's legislative changes go beyond the internal staffing and priority-setting and attempt to bring Maryland's statutory authority to the level of the cohesive approach to consumer protection seen in Dodd-Frank. These legislative changes did not take effect until October 2018, however, so they are not entirely reflected in the 2018 resolved cases. Even so, Maryland increased its level of enforcement 100% in 2018, and it continued to employ a strategy aligned with the "heavy" category.

California and New York enforcers have worked with their governors to focus on budgetary increases that would take effect in 2020 or beyond.¹²¹ These budgetary increases are not reflected in the 2018 data, but they are noteworthy in that these proposals reflect concrete attempts to restructure the state enforcer's authority to be able to act more like the CFPB.¹²² California's legislative proposal, the California Consumer Financial Protection Law, passed on August 31, 2020.¹²³ California's law is the most thorough of the state CFPB plans to date. The law creates a new agency, the Department of Financial Protection and Innovation,

120. *Id.*

121. Suzanne Martindale & Michael McCauley, *California Lawmakers Approve Budget Proposal to Create Financial Watchdog for Consumers*, CONSUMER REPORTS (Sept. 1, 2020), https://advocacy.consumerreports.org/press_release/california-lawmakers-approve-budget-proposal-to-create-financial-watchdog-for-consumers/; see also Corinne Ramey, *New York, California Want More Power Over the Financial Sector*, WALL ST. J. (Mar. 16, 2020, 5:30 AM), <https://www.wsj.com/articles/new-york-california-want-more-power-over-the-financial-sector-11584351002>; GOVERNOR GAVIN NEWSOM, GOVERNOR'S BUDGET SUMMARY 2020–21, at 173–74 (2020), <http://www.ebudget.ca.gov/2020-21/pdf/BudgetSummary/FullBudgetSummary.pdf>.

122. See GOVERNOR GAVIN NEWSOM, *supra* note 121, at 173–74; see also Ramey, *supra* note 121.

123. H.R. 1864, Gen. Assemb., Reg. Sess. (Cal. 2020).

which will have the same UDAP authority that Dodd-Frank delegates to the CFPB, including the full array of remedies and rule-making authority. New York's legislative proposal ultimately did not pass in the 2020-2021 budget.¹²⁴ Neither California nor New York increased their level of enforcement in 2018.

Overall, these states have all taken steps to prioritize consumer enforcement and the result shows that the majority of these states greatly increased their enforcement level since 2014 even as they remained in line with their same strategies from 2014. Thus, these states continued to act in many ways as they did in 2014, bringing cases typical of state enforcement: smaller-dollar defendants with the typical injunctions received by states,¹²⁵ variable public compensation,¹²⁶ and, generally, a high percentage of civil penalties.¹²⁷ The industries and types of scams targeted also appear to be consistent with general state enforcement strategies seen previously, including many smaller defendants in areas like construction, auto sales, and gyms.

While any enforcement increase is undoubtedly a positive thing for a state's consumers, a simple increase in the type of actions typical of state enforcers does not necessarily fill the unique gap created by the CFPB's withdrawal from the consumer protection field. The original

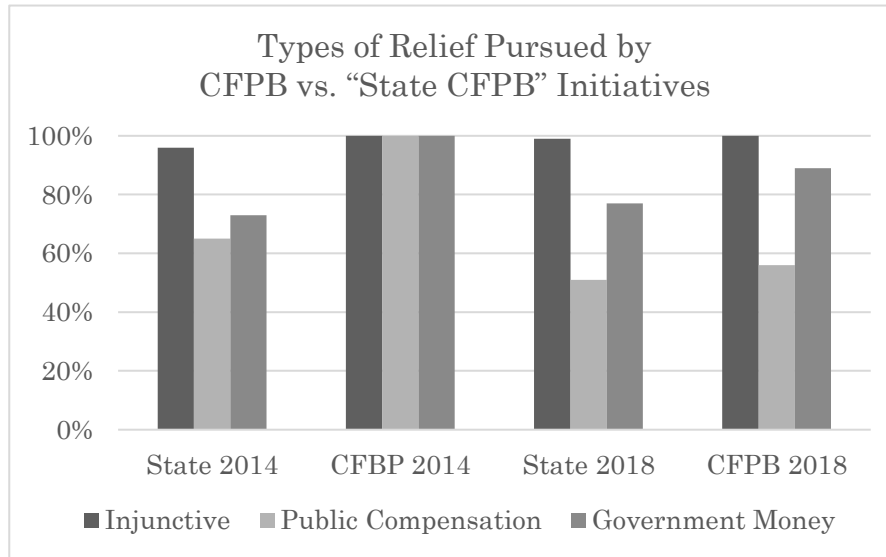
124. See S.B. 7508B, 2020 Leg., Reg. Sess. (N.Y. 2020).

125. New Jersey and New York stand out here for their strong injunctive relief. New Jersey received a business ban in almost all cases, while New York received multiple types of injunctive relief in each case, focusing most on stopping the fraudulent practice.

126. While Maryland, Virginia, and Pennsylvania remained in the street cop plus or heavy strategy and received public compensation in a majority of cases, New Jersey continued its outlier strategy that prioritizes government money. New Jersey received public compensation in roughly 20% of cases in 2018 and 27% of cases in 2019. This remains an outlier among the states, and especially among the "mini-CFPB" states. New York also had a slightly lower public compensation rate of 36% of cases.

127. New York was a bit of an outlier among this subgroup, receiving civil penalties in only 29% of cases.

CFPB strategy was a clear one: enforcement against large banking and credit entities with the full arsenal of relief. That is a powerful strategy and one that states are not as equipped to fill on their own, no matter how many actions they bring. However, the state legislative and budgetary changes in the pipeline hold great potential.



ii. External Interruptions

In addition to internally driven interruptions, the other type of change agent or interruption that we might expect to have an effect on state enforcement strategy is characterized by external elements changing the authority or characteristics of the enforcer, for example, a new AG taking office, a change in statutory authority, or a change in the institutional authority of the primary enforcer. Between 2014 and 2018, all of these changes occurred. The effects of such changes on UDAP enforcement, however, were mixed.

Leadership changes were the most common external interruption. Of the thirty-eight states in the 2018 data, twenty-one states had an AG change between study periods. Of those twenty-one new AGs, six also brought a partisan change to the office. Among all twenty-one states in this

subset, enforcement levels were up 26%. Strategies, however, remained similar, even with a change in party.

Three states had changes to their statutory authority between 2014 and 2018.¹²⁸ Maryland's statutory change was discussed above, as it was instituted in conjunction with the internal policy-setting of the AG's office. The Arkansas legislature made a series of changes to its UDAP law specifically seeming to target private rights of action.¹²⁹ Consumer protection advocates rightly characterized these changes as anti-consumer.¹³⁰ Public enforcement in Arkansas, however, was up 200% in 2018, from three resolved cases in 2014 to nine resolved cases in 2018. This finding introduces yet another indication of the complex ecosystem of UDAP enforcement beyond public enforcement, that is, the role and influence of the private enforcers. This influence, however, is beyond the scope of this data.

In Georgia, the primary enforcer for UDAP claims in 2014 was the Georgia Office of Consumer Protection. In 2016, authority shifted to the AG's office through legislative amendment.¹³¹ In this case, the level of enforcement remained the same, but the strategy changed slightly. In 2018, Georgia received public compensation in only 33% of

128. The Maryland legislature amended the statute in the middle of 2018, so is not referenced specifically for statutory change in terms of the 2018 data. However, the Maryland changes were legislative codifications of a professed policy to fill the gap created by the under-enforcement of the CFPB, so this priority-shifting of the office is captured in the internal changes described above. See *AG Frosh to President Trump: Mulvaney's Attacks on CFPB Should Disqualify Him from Leading Agency*, MD. OFF. OF THE ATT'Y GEN. (Dec. 12, 2017), <https://www.marylandattorneygeneral.gov/press/2017/121217.pdf>.

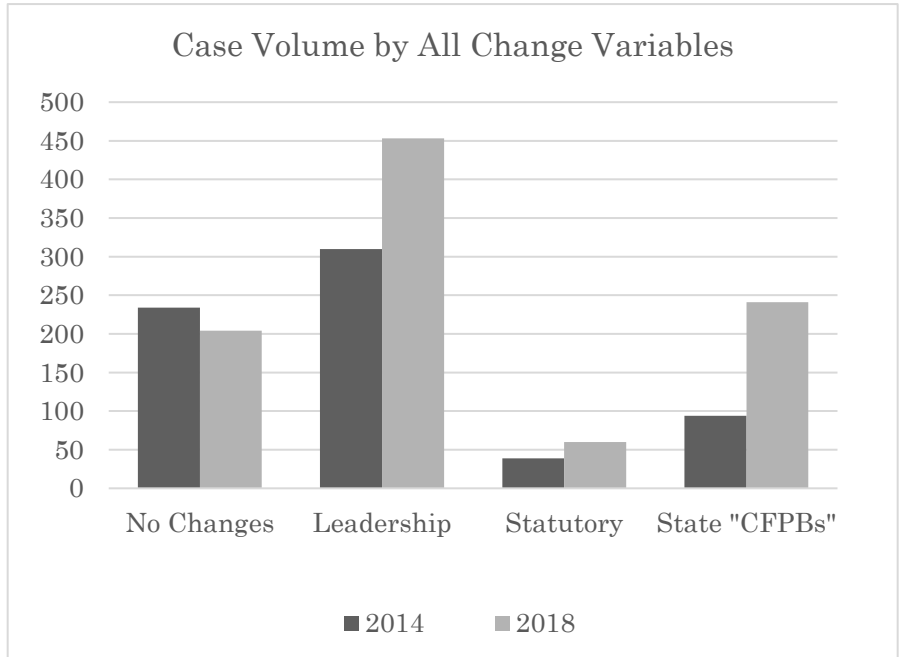
129. In 2017, Arkansas amended its UDAP statute to require a showing of reliance in order to bring a private cause of action. See ARK. CODE ANN. § 4-88-113(f) (2017).

130. See Allen H. Denson & Latif Zaman, *States' Divergent Approaches to Unfair, Deceptive, and Abusive Acts and Practices Reveal Consumer Protection Priorities*, AM. BAR ASS'N (Aug. 22, 2019), https://www.americanbar.org/groups/business_law/publications/blt/2019/09/abusive-acts/.

131. See S.B. 148, 2015 Leg., Reg. Sess. (Ga. 2015).

its resolved cases. This is a low rate of public compensation for a “street cop plus,” and indicates a slight shift in strategy.

Washington, DC, poses a curious example. In 2014, DC amended the structure of how its AG is chosen. In 2014, the AG had been appointed by the mayor. In 2018, the AG was an elected position. In this case, the AG himself did not change, but how he was installed changed. The DC AG’s office went from resolving zero enforcement actions in 2014 to resolving six actions in 2018. Since the leadership did not change, only the mechanism by which he gained office, it raises a question about the role that the AG selection method plays in setting enforcement priorities.



c. Multi-Enforcers

One last subset of the state data more directly addresses the complex dynamics of UDAP enforcement: multi-enforcer actions. In 2014, there were fifteen actions resolved by states in conjunction with a federal enforcer, either the FTC or the

CFPB.¹³² Ten of these were small, multi-enforcer actions made up of one to three states and a federal enforcer.¹³³ The remaining five cases with federal involvement were joined with the larger multistate actions.¹³⁴

In 2018, there was noticeably less federal involvement in all levels of multi-enforcer actions. The FTC resolved eight small multi-enforcer UDAP cases in conjunction with one state. The CFPB had no multi-enforcer involvement whatsoever. Federal enforcers did not join in any large multistate actions in 2018.

There were twelve multistate actions with no federal involvement resolved in 2018, up from eight in 2014. However, more of these cases, 72%, were large multistate actions, involving forty or more states. In 2014 only 38% of the multistate actions were large.¹³⁵ An increase in cases, however, does not necessarily mean more money back to consumers. As with the single-state actions in 2018, the percentage of cases receiving public compensation decreased. While 71% of the large multistate cases resolved in 2014 received public compensation, only 44% of these cases received public compensation in 2018.¹³⁶

V. IMPLICATIONS

Data matter. We need to understand how the primary consumer protection laws are being enforced in order to target solutions that will hold bad actors accountable and, by so doing, create an economy where consumers can begin to rise out of debt. Research—on the nature of the problem and on the viability of strategies for solving it—relies on data to form and test interventions.

132. Cox et al., *supra* note 8, at 58–59.

133. *Id.*

134. *Id.*

135. *See id.*

136. *See id.* at 70.

The data reveal that, in some instances, we must focus on increasing the case volume of enforcement. This is particularly true for the federal enforcers and the state non-enforcers. We need a strong CFPB.

But even among the state enforcers expanding their enforcement efforts, attention is needed. For example, the states attempting to marshal their resources in such a way that might fill the gap left by federal non-enforcement are clearly taking steps to increase enforcement. UDAP laws and the history of their enforcement are grounded in two goals: stopping the fraudulent act and returning money to consumers. The current landscape is trending toward fewer actions resulting in money to consumers overall, even with ramped-up enforcement levels. The data reveal we need to focus attention on increasing the percentage of cases receiving public compensation. This was down across all enforcers in 2018.

The data also continue to discredit some of the common attacks against public UDAP enforcement. For example, critics continue to claim that outside counsel is a major problem in UDAP enforcement, even in the face of data showing otherwise.¹³⁷ Another repeated criticism of state AGs is that they are primarily motivated by personal political concerns. As the comparative data reveal, a state AG's strategy of UDAP enforcement tends to hold steady even through leadership and party changes. While the newer focus from some state AGs on filling the gap of federal under- or non-enforcement might be cast as having some political valance, it is not indicative of the general criticism of a more personal, transactional type politics.¹³⁸

137. See generally Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 KAN. L. REV. 209 (2016).

138. See Cox et al., *supra* note 8, at 40 (describing criticism of state AG enforcement as driven by personal gain).

Further, it does not appear in the data that UDAP enforcement at the state level is driven by partisan politics. We see from both sets of data that the strategies do not neatly sort themselves into traditional red state/blue state divides.¹³⁹ The states reflect less partisanship overall. States that saw a change in AG political party between 2014 and 2018 saw changes, and sometimes dramatic changes. But there was not any clear ideological pattern. This agrees with—and validates—the 2014 data. Protecting consumers from scams does not seem to be an overwhelmingly ideological point at the state level.

At the same time, there are ideological and partisan dynamic effects throughout the larger enforcement landscape. For example, the Trump Administration campaigned on loosening regulations and relaxing enforcement on banks. At the federal level, clashing ideologies between the Obama CFPB and the Trump CFPB are stark. This ideological divide had ripple effects throughout the system, likely driving the general increase in state enforcement that we see in 2018 and certainly driving the actions of the state AGs that are prioritizing filling the enforcement gap. We also see a retrenchment from federal involvement in multi-enforcer enforcement actions.

Finally, a recent criticism emerging as AGs shine a light on federal under-enforcement is that AGs will prioritize large nationally focused cases to the detriment of their state consumers who are being harmed by the smaller-dollar, local fraud that is so pervasive.¹⁴⁰ Again, the data directly refute this concern. The states that are most vocal about filling in

139. *See id.* at 65–66.

140. Elysa M. Dishman, *Enforcement Piggybacking and Multistate Actions*, 2019 B.Y.U. L. REV. 421, 443 (“While it may be necessary in some instances to have overlapping actions, more often in the context of major corporate fraud, there is a danger of over-enforcing these types of actions at the expense of pursuing other actions. The overenforcement in this category of actions means that, with scarce enforcement resources, other types of actions will go under-enforced, such as small-scale fraudsters, Ponzi schemes, and other less splashy but important enforcement areas.”).

the gap are instead increasing enforcement across the board, both the localized smaller dollar fraud as well as the larger national fraudulent schemes.

CONCLUSION

This study is meant to provide comparative data to build on and contextualize the findings from the 2014 data. With two years of data, separated by a major federal change in priorities, we can begin to understand some of the complex strands of influence and policy that might underlie UDAP enforcement. The data clarify that many criticisms of state AG enforcement, often framed in terms of corruption and political ambition, do not seem to reflect the actual enforcement practices of the states. The debate over public enforcement instead needs to be re-centered on the vital consumer protection role UDAP statutes play in people's lives and well-being, how to encourage a robust and accountable diverse uniformity of state enforcement, and the continuity of relationship between the federal and state enforcers. The data presented here will allow stakeholders to implement strategies that will strengthen UDAP protection and, most importantly, continue to return money to defrauded consumers. As it was a decade ago when then-Professor Elizabeth Warren was writing about the need for a unified federal enforcement strategy, enforcement effectiveness must be judged at least in part based on how well it stops the most disruptive defendants and makes a difference in people's lives.¹⁴¹

141. Elizabeth Warren, *Warren Outlines CFPB's Mission for Consumers*, AM. BANKR. INST. J., Apr. 2011, at 10, 103.