

STATE ATTORNEYS GENERAL'S USE OF CONCURRENT PUBLIC ENFORCEMENT AUTHORITY IN FEDERAL CONSUMER PROTECTION LAWS

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ABSTRACT

Recent scholarly and legislative interest in state enforcement of federal law has led to the need for an empirical understanding of how and when these enforcement powers are used. This Article reports on an examination of the use by state attorneys general of sixteen federal consumer protection laws that expressly allow for state enforcement. The data are sorted and analyzed by both single state actions and multi-state actions over time, and by the involvement of federal agencies in the state cases. The data reveal a measured use of such powers by state attorneys general and robust state and federal cooperation in the enforcement of the statutes. This study should be useful for future legislative and scholarly examinations of federalism, enforcement powers, and consumer protection.

INTRODUCTION

States enforce federal law in a variety of contexts. Each type of dual enforcement raises issues of federalism and jurisdiction. Drawing from recent federalism debates on the role of states in federal civil law enforcement, this Article examines the use by state attorneys general of express authority to enforce federal consumer protection laws. Currently, twenty-four federal laws explicitly provide for concurrent federal and state public enforcement authority.¹ The project reported here is an

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¹ See *infra* Part II.A.

empirical analysis of state use of concurrent public enforcement authority in sixteen federal consumer protection statutes.

Concurrent public enforcement of federal law has become increasingly contentious in the U.S. Congress and is the subject of recent scholarly attention. How enforcement is ultimately authorized is both a practical and political issue. Especially in the area of consumer protection, where federal agencies oversee the federal laws and are subject to bureaucratic, budgetary, and ideological constraints, concurrent enforcement offers an expanded arsenal for public enforcement of these laws. Due to the power that inherently comes with enforcement authority, interested parties lobby for or against such legislative grants routinely. Yet legislators and scholars have no formal data or even a clear understanding of how and when such enforcement powers are used by states, either alone or in combination with other states. Nor is there reliable information on cooperation or disagreement between states and federal agencies with the concurrent enforcement power. The data we present are designed to add real-world context to a debate that is often couched in rhetoric without grounding in the actual use of this authority.

Part I examines the twenty-four federal laws with clear state enforcement provisions. This Part first describes the development of these laws, then analyzes relevant legislative histories for patterns, explores common features of these types of grants of enforcement, and reviews the existing scholarship of state enforcement of federal law.

Part II explains the structure of the empirical study by classifying the laws and the agencies involved in overseeing these laws. This Part details our process of compiling data about state actions using concurrent enforcement authority in sixteen identified federal consumer protection statutes. This Part also has a short discussion of types of cases we encountered but excluded. This Article does not examine implied enforcement power² or, more generally, cooperative forms of enforcement power,³ but instead focuses on explicit legislative grants of authority to state attorneys general to enforce federal civil law.

² See, e.g., Employment Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1132 (2006); Fair Housing Act, 42 U.S.C. § 3613 (2006).

³ See, e.g., Occupational Safety and Health Act of 1970, 29 U.S.C. § 667 (2006) (permitting and encouraging states to adopt their own occupational safety and health plans, so long as the state standards and enforcement “are or will be at least as effective in providing safe and healthful employment” as the federal Act); Federal Water Pollution Control (Clean Water) Act of 1972, 33 U.S.C. § 1342 (2006) (creating the National Pollutant Discharge Elimination System permit program to control water pollution by regulating point sources that discharge pollutants into United States waters. In most cases, the permit program is administered by authorized states); Title XIX of the Social Security Act, 42 U.S.C. §§ 1396–1396w-5 (2006) (creating grants to states for medical assistance programs created Medicaid framework where each state administers its own Medicaid program while the federal government monitors these state-run programs and establishes requirements for service delivery, quality, funding and eligibility standards); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6941–6949a (2006) (authorizing states to carry out many of the functions of the federal law through their own hazardous waste programs, which are

Given this history of the evolution of explicit legislative grants of authority for state enforcement of federal law, our study aims to establish the actual use of these grants of enforcement power. Part III compiles the data on cases brought by state attorneys general into three categories—by type of statute, by state, and by year. We modified results in some circumstances to further break down whether the cases were brought by a single state, a small group of states, or a large group of states. Part IV presents the collected data on federal agency involvement in state cases using concurrent enforcement authority.

The study results strongly suggest that fears about over-enforcement or inconsistent enforcement by the states have not been realized in actual practice. Part V analyzes the data and summarizes the modest use of these statutes by state attorneys general in relation to the criticism of the statutes. This Part also explores some of the reasons states have not used this authority more extensively and the ways that states appear to be strategic in their use of the statutes. Part VI then analyzes the data on federal–state interaction when states use concurrent enforcement authority and again concludes that there is no evidence validating the fear that state use of such authority leads to inconsistent application of the statutes.

Our study is designed to provide the empirical data that will address questions raised by the spike of scholarly interest and the escalated political rhetoric surrounding the particular federal legislative tool of concurrent state enforcement. The study data are meant to illuminate exactly where and how state enforcement of federal law takes place. We intend this information to be a resource for future legislative debates and theoretical work.

I. DEVELOPMENT OF FEDERAL STATUTES AUTHORIZING CONCURRENT STATE ENFORCEMENT

There are currently twenty-four federal laws that explicitly grant enforcement power to the state, or more specifically, state attorneys general.⁴ These laws primarily focus on consumer protection and anti-trust areas and the enforcement powers provided are generally quite specific. The antitrust provisions have generated a separate body of scholarly analysis,⁵ as have the telecommunications provisions.⁶ Re-

authorized and approved by the federal government); Clean Air Act, 42 U.S.C. § 7410 (2006) (authorizing states to take over compliance with the Act by writing and submitting a state implementation plan (SIP) to the EPA for approval, where the SIP would become the state's legal guide for local enforcement of the Clean Air Act).

⁴ See *infra* notes 8–27.

⁵ See, e.g., Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53

cently, scholars have turned toward the consumer protection laws more generally.⁷ This Part provides a necessary context to our study by exploring the statutory language, legislative history, and scholarly attention to the concurrent enforcement provisions in these laws.

A. *Enactment of Concurrent State Enforcement of Federal Laws (1976–2010)*

The first statute to provide enforcement authority to state attorneys general was the Clayton Act, as amended by the Hart-Scott-Rodino Act of 1976.⁸ The next instance of an explicit grant of authority to the states appears in a 1983 amendment to the Real Estate Settlement Procedures Act (RESPA).⁹ This grant provides authority to state attorneys general, as well as state insurance commissioners, to enjoin real estate settlement service providers from providing kickbacks as a means of obtaining customers.

Congress inserted explicit grants of state enforcement authority into a wave of consumer protection laws in the 1990s, as follows: the Nutrition Labeling and Education Act (Nutrition Labeling Act) of 1990;¹⁰ the Telephone Consumer Protection Act (TCPA) of 1991;¹¹ the Telephone Disclosure and Dispute Resolution Act (TDDR) of 1992;¹² the Home Ownership and Equity Protection Act (HOEPA) of 1994;¹³ the Telemarketing and Consumer Fraud and Abuse Prevention Act

DUKE L.J. 673 (2003); Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99 (2005).

⁶ Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1693 (2001).

⁷ Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1685458; Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of Enforcement Powers: A Case Study of the Consumer Product Safety Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165 (2010).

⁸ 15 U.S.C. § 15(c) (2006).

⁹ Act of Nov. 30, 1983, Pub. L. No. 98-181, § 461(c), 97 Stat. 1153, 1231 (codified at 12 U.S.C. § 2607(d)(4) (2006)) (“The Secretary, the Attorney General of any State, or the insurance commissioner of any state may bring an action to enjoin the giving of kickbacks.”). This provision changed slightly on July 1, 2011. Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act, Pub. L. No. 111-203, § 1098(7), 124 Stat. 1376, 2104 (2010) (allowing the Bureau of Consumer Financial Protection to “bring an action to enjoin violations” of RESPA and giving the Bureau “primary authority to enforce or administer” RESPA); Designated Transfer Date, 75 Fed. Reg. 57,252 (Sept. 20, 2010) (deciding that certain authority will transfer to the Bureau of Consumer Financial Protection on July 21, 2011, triggering the effective date of the Dodd-Frank amendment to 12 U.S.C. § 2607).

¹⁰ Nutrition Labeling and Education Act of 1990, 21 U.S.C. § 337(b) (2006).

¹¹ Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(f) (2006).

¹² Telephone Disclosure and Dispute Resolution Act, 15 U.S.C. § 5712 (2006).

¹³ Home Ownership and Equity Protection Act, 15 U.S.C. § 1640(e) (2006).

(TFCAP) of 1994, which authorized the promulgation of the Telemarketing Sales Rule (TSR);¹⁴ the Freedom of Access to Clinic Entrances Act (FACE) of 1994;¹⁵ the Odometer Disclosure Act (Odometer Act) of 1994;¹⁶ the Credit Repair Organizations Act (CROA) of 1996;¹⁷ the Professional Boxing Safety Act (Boxing Safety) of 1996;¹⁸ the Consumer Credit Reporting Reform Act of 1996, amending the Fair Credit Reporting Act (FCRA);¹⁹ and the Children's Online Privacy Protection Act (COPPA) of 1998.²⁰ After a five year lull, Congress provided express authority for state enforcement of federal law in seven more statutes enacted from 2003–2010, as follows: the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) of 2003;²¹ the Sports Agent Responsibility and Trust Act (SPARTA) of 2004;²² the Household Goods Mover Oversight Enforcement and Reform Act of 2005 (part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU));²³ the Consumer Product Safety Improvement Act (CPSIA) of 2008;²⁴ the Health Insurance Portability and Accountability Act (as amended in 2009) (HIPAA);²⁵ the Omnibus Appropriations Act FY 2009;²⁶ the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) of 2010;²⁷ and the Restore Shoppers Online Confidence Act of 2010.²⁸

¹⁴ Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6103 (2006). This Act authorizes the Federal Trade Commission to promulgate a rule prohibiting certain conduct in telemarketing. The Federal Trade Commission used its authority to promulgate the Telemarketing Sales Rule (TSR). 16 C.F.R. § 310 (2010). State enforcement actions are brought to remedy violations of the TSR.

¹⁵ Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248(c)(3) (2006).

¹⁶ Odometer Disclosure Act, 49 U.S.C. § 32709(d) (2006).

¹⁷ Credit Repair Organizations Act, 15 U.S.C. § 1679h(c) (2006).

¹⁸ Professional Boxing Safety Act of 1996, 15 U.S.C. § 6309(c) (2006).

¹⁹ Consumer Credit Reporting Reform Act of 1996, Pub. L. 104-208, the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, II(D)(1) Title II, Subtitle D, Chapter 1 (amending Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681–1681x to include state enforcement provisions).

²⁰ Children's On-Line Privacy Protection Act of 1998, 15 U.S.C. § 6504 (2006).

²¹ Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, 15 U.S.C. § 7706(f) (2006).

²² The Sports Agent Responsibility and Trust Act, 15 U.S.C. § 7804 (2006).

²³ Household Goods Mover Oversight Enforcement and Reform Act of 2005, 49 U.S.C. §§ 14710–14711 (2006).

²⁴ Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2073(b) (2006) (incorporating 15 U.S.C. §§ 1194(a), 1264(d), 1477).

²⁵ Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-5(d) (2006).

²⁶ Omnibus Appropriations Act for FY 2009, Pub. L. No. 111-8, Title VI, § 626 (2009) (authorizing state enforcement of FTC mortgage-related rules).

²⁷ Dodd-Frank Act, Pub. L. No. 111-203, § 1042, 124 Stat. 1376, 2012-14 (2010) (to be codified at 12 U.S.C. § 5552).

²⁸ Restore Online Shoppers' Confidence Act, Pub. L. No. 111-345 (2010).

B. *Legislative Debate About Concurrent Public Enforcement*

The legislative history of these statutes shows a marked increase in political rhetoric and dispute around concurrent enforcement provisions in federal law in recent years. Early statutes had little legislative discussion of these provisions. Mostly, the record shows comments merely noting the attorney general authority without discussion or explanation.²⁹

The first House report to specifically address the role of state enforcement of federal law appears in the Nutrition Labeling Act. The Report noted that the state attorneys general had already been playing a role in enforcement and that state involvement can aid the federal government in a time of “dwindling Federal resources.”³⁰

In 1994, the legislative history of the TSR shows a Senate again concerned with efficiency and lack of federal resources to address the “widespread nationwide consumer problem that requires enhanced enforcement authority at the federal level, and increased enforcement resources beyond those available to Federal authorities.”³¹ The Congressional Budget Office positively noted the opportunity these laws create for multi-state cooperation, commenting that “the provision permitting state officials to sue for telemarketing fraud could reduce the aggregate number of such cases nationwide . . . [because] [u]nder current law . . . each affected state must individually bring action against the fraudulent operation.”³²

The debate around the FACE introduces the first criticisms of state authority to enforce federal law. In that case, the House and Senate versions of the bill had slightly different language regarding when a state attorney general may bring an enforcement action.³³ The debate itself

²⁹ See, e.g., H.R. REP. NO. 97-532, at 56 (1982) (noting that an attorney general of a “state in which a violation is occurring” may bring an action); see also, H.R. REP. NO. 98-123, at 132 (1983) (“[T]he Attorney General of any State . . . may bring an action to enjoin violations of RESPA provisions.”).

³⁰ H.R. REP. NO. 101-980, at 19 (1990) (“In an era of dwindling Federal resources, the Federal Government should encourage as much participation as possible from State enforcement agencies. State participation is especially important given FDA’s admission that it lacks the resources to adequately enforce Federal food labeling laws. It is essential for Federal and State enforcement agencies to work cooperatively to protect consumers from deceptive health claims.”). Also around this time, the executive branch under George H.W. Bush questioned the constitutionality of state enforcement provisions in the telecommunications statutes. See Lemos, *supra* note 7, at 11 n.64 (noting that “subsequent administrations have abandoned the complaint.”).

³¹ S. REP. NO. 103-80, at 3 (1993).

³² S. REP. NO. 101-396, at 5 (1990).

³³ See, e.g., H.R. REP. NO. 103-488, at 11 (1994). The Senate Bill provided that the attorneys general may bring an action “if he or she has reasonable cause to believe that ‘any person or group of person is being, has been, or may be injured by conduct constituting a violation of this

also contained many mentions of the state attorneys general enforcement powers³⁴ and some of the first criticisms of state enforcement power.³⁵

Debate over granting states concurrent enforcement power over federal law increased sharply in recent years. Two of the most contentious examples are the enactment of amendments to CPSIA in 2008 and the Dodd-Frank Act in 2010. The main focus of the criticisms has been the concern that federal statutes will be enforced too often by eager state attorneys general and that having multiple enforcers will create inconsistencies in the interpretation and application of the laws.

The CPSIA seemed to be a catalyst for a larger scope of criticisms surrounding concurrent state enforcement. The legislative history for the CPSIA shows opponents fearing the power of state attorneys general more generally than the matters covered by the statute's terms. For example, the history shows a concern with "some State attorneys general . . . us[ing] their positions to garner national attention to advance their careers," and a concern that such enforcement provisions "would tempt some [attorneys general] to file frivolous lawsuits that could ultimately undermine the effectiveness of the [Consumer Product Safety Commission]."³⁶ Senator Coburn echoed these larger criticisms of state attorneys general with his disapproval of the CPSIA:

Overzealous state attorneys general will now have the authority and discretion to interpret safety regulations and could unilaterally on a whim rule a business is noncompliant and could then hand over expensive lawsuits to their trial lawyer's cronies who are notoriously

section, and such conduct raises an issue of general public importance." The House had provided that the attorneys general could bring an action "upon reasonable cause to believe that 'any person, or group of persons, is aggrieved by a violation.'" The Committee proposed that the "reference to 'an issue of general public importance'" be deleted.

³⁴ See, e.g., 140 CONG. REC. 10,171 (statement of Sen. Chafee) (stating, in support of the bill, "[v]ictims of clinic violence will now be able to seek injunctive relief and civil damages against the perpetrators, and the Attorney General and State attorneys general will have new enforcement roles through the courts"); *id.* at 10,172 (statement of Sen. Moseley-Braun) ("The passage of the Freedom of Access to Clinic Entrances Act will help local and State law enforcement, who, despite their best intentions, have been unable to adequately safeguard medical providers, patients, and clinics against this dangerous activity. Attorneys general throughout the United States are looking forward to this legislation going into effect in order to protect women and medical providers who are currently under assault by violent demonstrators."); *id.* at 9400 (statement of Rep. Sensenbrenner) ("It allows the U.S. Attorney General as well as the State attorneys general, another unprecedented provision, to sue pro-lifers in Federal court on behalf of the abortion clinic or personnel and gives the court authority to assess thousands of dollars in civil penalties against each pro-lifer. Moreover, conferees dropped a provision contained in the Senate bill, which is part of traditional civil rights laws, requiring the U.S. Attorney General to find that the conduct raises an issue of general public importance before initiating a lawsuit."); *id.* at 5392 (statement of Rep. Morella) ("FACE would permit the Federal Government to take an active role in ending attacks against abortion clinics. Without enactment of FACE, the Attorney General cannot deploy Federal marshals to assist local police to keep clinics open.");

³⁵ *Id.* at 10,173 (statement of Sen. Hatch).

³⁶ 154 CONG. REC. S7871 (daily ed. July 31, 2008) (statement of Sen. Kyl).

close with state law enforcement officials. State attorneys, then, would be hard-pressed to deny politically active state trial lawyers to sue companies when the litigation will not cost the State a dime and could, in many cases, bring the attorney general positive publicity.³⁷

This concern in the legislative debate parallels arguments, often fueled by industry groups, against the increasingly active role of state attorneys general in many areas of litigation and policy.³⁸

The controversy over concurrent state enforcement authority continued with the Dodd-Frank Act. The U.S. Senate debated an amendment authored by Senator Corker to eliminate state attorney general enforcement of the statute and of rules to be promulgated by the envisioned Consumer Financial Protection Bureau (CFPB).³⁹ Proponents of the Corker Amendment focused on predicted inconsistencies in interpretation of the federal law that they argued would result from concurrent enforcement. During debate on the amendment, Senator Corker described state enforcement powers as “very detrimental” and argued that:

Now you have state AGs all across the country who have the ability to enforce. I think that is a huge step in the wrong direction. . . .

[W]ithout my amendment passing . . . what happens is, state AGs, interpreting these (rules) in different ways all across the country, will now be taking actions against these institutions on vague language such as “abusive.”⁴⁰

As with the CPSIA, industry trade groups lobbied against concurrent state enforcement authority in Dodd-Frank. Senator Dodd decried the “false claim” by the U.S. Chamber of Commerce that companies would be “lost in the maze of . . . State attorneys general interpreting and enforcing Federal law at the State level.”⁴¹ An American Bankers Association official described the concurrent enforcement authority in Dodd-Frank as exposing “banks to a multiplicity of state interpretations of the law” and argued that “[w]hen states have an independent hand in enforcement, it will call into question the finality of the supervisory process.”⁴²

³⁷ 154 CONG. REC. S7872 (statement of Sen. Coburn).

³⁸ See, e.g., Hans Bader, *The Nation's Worst State Attorneys General*, Competitive Enter. Inst. (July 2010), http://cei.org/sites/default/files/Hans%20Bader%20-%20The%20Nation%27s%20Worst%20State%20Attorneys%20General_0.pdf; Victor E. Schwartz & Christopher E. Appel, *The Plaintiffs' Bar's Covert Effort To Expand State Attorney General Federal Enforcement Power*, Wash. Legal Found. (July 10, 2009), http://www.wlf.org/Upload/legalstudies/legalbackgrounder/071009Schwartz_LB.pdf.

³⁹ 156 CONG. REC. S3866-72 (May 18, 2010).

⁴⁰ 156 CONG. REC. S3871 (Statement of Sen. Corker).

⁴¹ 156 CONG. REC. S3003 (Apr. 30, 2010) (Statement of Sen. Dodd).

⁴² Richard Riese, *Reforming Consumer Financial Protection*, CONSUMER PROTECTION UPDATE (ABA Section of Antitrust Law, Consumer Protection Committee, Chicago, Ill.), Spring 2010, at 5, 7. The President and CEO of the American Bankers Association, Edward Yingling,

Despite the growing criticism of concurrent enforcement authority in federal consumer protection laws, both the CPSIA and Dodd-Frank authorize state enforcement of federal law. Critics, however, were successful in restricting the Dodd-Frank authority in a manner that precludes multiple states from joining litigation in a single federal court.⁴³

C. Common Features of Concurrent Enforcement Statutes

Congress has used certain procedural mechanisms in an attempt to balance federalism concerns with this form of concurrent enforcement. We note some of these procedural mechanisms below.

A notice requirement is perhaps the most common legislative parameter included in these state enforcement powers. The Clayton Act provides for the federal government to notify the state attorneys general if they are bringing an action under the antitrust laws and have reason to believe a state attorney general would be entitled to bring an action under the Act based on the same alleged violation.⁴⁴ Some have argued that this type of notice procedure goes too far toward empowering the states.⁴⁵ Subsequent state enforcement provisions contain the now common requirement that a state must give prior or contemporary notice to the federal agency involved in enforcement of the law.⁴⁶ The notice requirement is usually followed with a provision that gives authority to the primary federal agency to intervene in a case at its discretion.⁴⁷

stated the following during the early Congressional proceedings on Dodd-Frank: “[T]he safety and soundness regulator will not be able to do its job if it has no authority over consumer laws, much less if that authority is held by not only the Federal consumer regulator, but every State regulator, legislature and attorney general as well.” *Creating A Consumer Financial Protection Agency: A Cornerstone of America’s New Economic Foundation: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 111th Cong. 76 (2009) (statement of Edward Yingling, President and CEO, Am. Bankers Ass’n).

⁴³ See *infra* note 60.

⁴⁴ Notably, this is a “reverse notification” procedure, similar to one currently being championed by Catherine Sharkey. See Catherine Sharkey, *Federal Agency Preemption of State Law*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Nov. 27, 2010) (Third Draft Report), available at <http://www.acus.gov/wp-content/plugins/download-monitor/download.php?id=48>. All of the statutes since the Clayton Act have required the state to notify the federal agency if they plan to enforce federal law, rather than the federal agency notifying the states.

⁴⁵ See, e.g., Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 941 (2001).

⁴⁶ Fourteen statutes require notice. 15 U.S.C. § 15c (2006); 15 U.S.C. § 1640(e) (2006); 15 U.S.C. § 1679h(c) (2006); 15 U.S.C. § 1681s(c)(1)(2006); 15 U.S.C. § 2073(b) (2006); 15 U.S.C. § 5712 (2006); 15 U.S.C. § 6103 (2006); 15 U.S.C. § 6504 (2006); 15 U.S.C. § 7706(f) (2006); 15 U.S.C. § 7804 (2006); 21 U.S.C. § 337(b) (2006); 42 U.S.C. § 1320d-5(d) (2006); 47 U.S.C. § 227(f) (2006); 49 U.S.C. § 14710-14711 (2006).

⁴⁷ See, e.g., 7 U.S.C. § 13a-2(2) (2006); 15 U.S.C. § 1640(e)(1) (2006); 15 U.S.C. § 1679h(c)(2)(B) (2006); 15 U.S.C. § 2073(b)(3) (2006); 15 U.S.C. § 5712(b) (2006); 15 U.S.C. § 6103(b) (2006); 15 U.S.C. § 6504(a)(2)(B)(ii) (2006); 15 U.S.C. § 7706(f)(5) (2006); 15 U.S.C. § 7804(b) (2006); 21 U.S.C. § 337(b)(2)(B)-(C) (2006); 42 U.S.C. § 1320d-5(d)(4) (2006); 47

States often are precluded from bringing a case while a federal action is pending.⁴⁸

Throughout the 1990s, Congress began to address the role of preemption when drafting these grants of authority.⁴⁹ Most of these earlier statutes contain savings clauses to signal that the grant of authority does not preempt states from also bringing suit under their state laws that govern similar violations, so long as the state law remains consistent with the federal law.⁵⁰ Some of these statutes clarify that a more stringent state law is not considered inconsistent.⁵¹ More recent legislative history shows a marked increase in debate about a state enforcement provision having a preemptive effect on state laws governing the area more generally, although these proposed restrictions on state authority rarely make it into the law.⁵²

The relief available from the enforcement actions is another area where Congress has chosen different legislative parameters over the years, ranging from limiting the enforcement powers to injunctive relief,⁵³ to allowing damages within certain legislatively prescribed limits,⁵⁴ to allowing uncombined damages.⁵⁵ Similarly, some statutes award costs and fees, while others do not.⁵⁶

The CAN-SPAM legislative history illuminates the strategic decisions underlying both the preemption and fees issues. In that case, there was a subcommittee compromise “prohibiting class action lawsuits, and

U.S.C. § 227(g)(3) (2006).

⁴⁸ The only statutes which clearly preclude States from bringing an action while a federal action is pending are CPSIA, 15 U.S.C. § 2073(b)(5) (2006); TDDRA, 15 U.S.C. § 5712(g) (2006); TCFAP, 15 U.S.C. § 6103(d) (2006); CAN-SPAM, 15 U.S.C. § 7706(f)(8) (2006); SPARTA, 15 U.S.C. § 7804(d) (2006); Nutrition Labeling Act, 21 U.S.C. § 337(b)(2)(C) (2006); HIPPA, 42 U.S.C. § 1320d-5(d)(7) (2006); TCPA, 47 U.S.C. § 227(g)(7) (2006).

⁴⁹ For examples of statutes that explicitly preempt state law, see Lemos, *supra* note 7, at 13 n.71. See also 7 U.S.C. § 16(e) (2006) (commodities); 11 U.S.C. § 526(d) (2010) (debt relief agencies); 15 U.S.C. § 1681t (2006) (credit transactions); 15 U.S.C. § 5722(a) (2006) (pay-per-call services); 15 U.S.C. § 6502(d) (2006) (children’s online privacy protection); 15 U.S.C. § 7707(b) (2006) (spam email); 49 U.S.C. § 32711 (2006) (odometer tampering).

⁵⁰ See, e.g., CROA, 15 U.S.C. § 1679j (2006); Fair Credit Reporting Act, 15 U.S.C. § 1681t (savings clause) (2006); CPSIA, 15 U.S.C. § 2073(b)(4) (2006); TCFAP, 15 U.S.C. § 6103(f) (2006); FACE, 18 U.S.C. § 248 (2006); TCPA, 47 U.S.C. § 227(e)(1) (2006); 49 U.S.C. § 32711 (2006).

⁵¹ See, e.g., RESPA, 12 U.S.C. § 2607(d)(6) (2010) (“No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.”). CPSIA also allows for a state to petition the agency to be exempt from preemption for more stringent state laws. CPSIA, 15 U.S.C. § 2075(c) (2006).

⁵² See *supra* notes 366–8 (describing CPSIA and Dodd-Frank legislative histories).

⁵³ CPSIA, 15 U.S.C. § 2073(c) (2006); see also CAN-SPAM, 15 U.S.C. § 7706(f)(2) (2006) (allowing injunctive relief only for a lesser burden of proof—without showing knowledge).

⁵⁴ For example, CAN-SPAM, 15 U.S.C. § 7706(f)(3) (2006), provides clear statutory damages.

⁵⁵ For more on financial incentives possibly affecting state enforcement, see Lemos, *supra* note 7, at 23–27.

⁵⁶ Statutes expressly providing for fees and costs are 15 U.S.C. § 15(c)(A)(2) (2006); 15 U.S.C. § 1681s(c) (2006); 15 U.S.C. § 7706(f)(4) (2006); 49 U.S.C. §§ 32709–32710 (2006).

instead authoriz[ing] State Attorneys General to enforce the bill's anti-spam provisions on behalf of aggrieved citizens in their respective States."⁵⁷ After the compromise was reached, however, a later amendment expressly prohibited the states from recovering litigation costs from enforcement actions.⁵⁸

All of the statutes examined herein provide for the states to bring their claims in federal district court.⁵⁹ In a controversial move, Dodd-Frank further provided that the state may only bring a claim in the federal district court of that state.⁶⁰ This provision likely will prevent groups of states from becoming joint plaintiffs in a single federal court action,⁶¹ as regularly occurs in the antitrust areas and in some cases brought under other consumer protection statutes.⁶²

The Clayton Act antitrust statute contains a unique provision excluding someone receiving a contingency fee from the definition of "state attorney general."⁶³ This restriction was not revisited until the recent CPSIA legislation, where Congress provided other limitations on private counsel retained to assist state attorneys general but did not address contingency fees.⁶⁴ This provision responds to criticisms of state attorneys general employing outside counsel on contingency fee arrangements.

⁵⁷ H.R. REP. NO. 107-41 (2001) (statement of Rep. John Dingell).

⁵⁸ *Id.* ("In my view, it is simply unfair to require the taxpaying public to foot the legal bill for the damage caused by spammers. Recovery of reasonable legal fees is properly included in damage awards to individuals under this bill, and I believe it should likewise be permitted when the State acts as an agent on their behalf. If we are serious about putting an end to spam, as I hope we are, then we should not be creating a disincentive to enforcing the law against it.")

⁵⁹ Some statutes also provide for "another court of competent jurisdiction." *See, e.g.*, HOEPA, 15 U.S.C. § 1640(e) (2006); FCRA, 15 U.S.C. § 1681s(c)(1)(A) (2006); Odometer Act, 49 U.S.C. § 32709(2) (2006). In these cases, the federal agency may sometimes intervene and remove to federal district court. *See* HOEPA, 15 U.S.C. § 1640(e) (2006). Keeping all cases where a state enforces federal law in federal court can address the industry lobbies concerns of multiple interpretations of regulations. Further, as Prof. Lemos points out, the fact that these statutes provide for enforcement without regulatory authority goes even further toward addressing concerns that such cases will result in a patchwork of regulations. Lemos, *supra* note 7, at 40-42.

⁶⁰ Dodd-Frank Act, Pub. L. No. 111-203, § 1042(a)(1) ("[T]he attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State in any district court of the United States in that State or in State court that is located in that State.") This language was contained in an amendment authored by Senator Carper in response to the Corker amendment rejected by the Senate. 156 CONG. REC. S3868-3872 (May 18, 2010). *See supra* notes 36-39 and accompanying text.

⁶¹ *Id.*

⁶² *See infra* note 79.

⁶³ 15 U.S.C. § 15g (2006).

⁶⁴ 15 U.S.C. § 2073(b)(6) (2006) ("If private counsel is retained to assist in any civil action under paragraph (1), the private counsel retained to assist the State may not—(A) share with participants in other private civil actions that arise out of the same operative facts any information that is—(i) subject to attorney-client or work product privilege; and (ii) was obtained during discovery in the action under paragraph (1); or (B) use any information that is subject to attorney-client or work product privilege that was obtained while assisting the State in the action under paragraph (1) in any other private civil actions that arise out of the same operative facts.")

D. *Scholarly Analysis of Concurrent Enforcement Statutes*

Recent high-profile legislative acts granting states power to enforce federal law have coincided with expanded preemption of state law and renewed interest in creating buffers to agency capture.⁶⁵ The use of state enforcement power has become a legislative tool that is increasingly politicized but without much study of its purposes and effects. Scholarly literature has in turn begun to examine state enforcement of federal law as a valuable federalism tool in the administrative arena.⁶⁶ In a previous article, one of the co-authors examined the particular accountability-forcing mechanism embedded in legislation delegating enforcement powers to the states alongside the federal government, particularly in the recent CPSIA.⁶⁷

Gillian Metzger has tracked the rise of federalism in administrative law generally, most recently looking in detail at the states' role in reforming agency failures.⁶⁸ While primarily focused on a judicially-created special state role, Professor Metzger acknowledges the congressional delegations of state enforcement power and the ability of such enforcement powers to reform certain agency failures. Professor Metzger points to several justifications for a special state role in reforming agency failure, including "the belief that states are likely to be particularly effective monitors of agencies and instigators of administrative change."⁶⁹

Echoing similar concerns of agency failure, Rachel Barkow recently examined the history and design of the Consumer Product Safety Commission (CPSC) and the CFPB to determine new institutional design features that could buffer such independent consumer protection agencies against industry capture.⁷⁰ Professor Barkow points to the benefits of state enforcement of federal law especially to address agency under-enforcement, which is a distinct element of industry capture.⁷¹ Catherine Sharkey further acknowledges the unique role of the states in federal agency design, recommending in her recent draft guidance to the

⁶⁵ Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010); Sharkey, *supra* note 44.

⁶⁶ See, e.g., Barkow, *supra* note 65; Lemos, *supra* note 7; Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1 (2011); Widman, *supra* note 7.

⁶⁷ Widman, *supra* note 7. The other co-author similarly has argued that preemption of state enforcement against national banks serves to reduce competition between regulators and thus promote industry capture of federal banking regulators. Prentiss Cox, *The Importance of Deceptive Practice Enforcement In Financial Institution Regulation*, 30 PACE L. REV. 279, 306–09 (2009).

⁶⁸ Metzger, *supra* note 66.

⁶⁹ *Id.* at 70.

⁷⁰ Barkow, *supra* note 65.

⁷¹ *Id.* at 58.

Administrative Conference of the United States that states be inserted into agency policy in meaningful ways, such as consultation and notification of both agency policy and enforcement decisions.⁷²

Finally, Margaret Lemos examines state enforcement of federal law as a unique form of state power.⁷³ Professor Lemos begins to sketch a comprehensive picture of state enforcement of federal law as an understudied break from more typical enforcement patterns (i.e., a sovereign enforcing its own laws) and the more common model of public enforcement. Lemos does not empirically examine the use of these laws.⁷⁴

II. IDENTIFICATION AND CLASSIFICATION OF STATE ENFORCEMENT ACTIONS

This Part describes the data our study collected. We focus on sixteen federal consumer protection statutes that contain express state enforcement authority (hereinafter “examined statutes”).⁷⁵ For each of the examined statutes, we sought to identify all public enforcement action taken by any state.⁷⁶ We obtained information from electronic database searches, from state data practice act requests to all fifty state attorneys general, and from requests to eight federal agencies under the Freedom of Information Act (FOIA).⁷⁷ For each identified case, we collected data about claims under federal law apparent from the face of the initial pleadings.

⁷² Sharkey, *supra* note 44.

⁷³ Lemos, *supra* note 7; *see also* Widman, *supra* note 7, at 176.

⁷⁴ *See, e.g.*, Lemos, *supra* note 7, at 43 (stating that, on the question of whether state enforcement of federal law creates a problem of over-enforcement, “[e]mpirical research is necessary to answer the question conclusively, but the existing record does not suggest an imminent risk of over-enforcement of all or even most federal consumer protection law”).

⁷⁵ RESPA, 12 U.S.C. § 2607(d)(4) (2006); HOEPA, 15 U.S.C. § 1640(e) (2006); CROA, 15 U.S.C. § 1679h (2006); FCRA, 15 U.S.C. § 1681s(c)(1) (2006); CPSIA, 15 U.S.C. § 2073(b) (2006); TSR, 15 U.S.C. § 6103 (2006); Boxing Safety, 15 U.S.C. § 6309 (2006); COPPA, 15 U.S.C. § 6504 (2006); CAN-SPAM, 15 U.S.C. § 7706(f) (2006); FACE, 18 U.S.C. § 248 (2006); Nutrition Labeling Act, 21 U.S.C. § 337(b) (2006); HIPPA, 42 U.S.C. § 1320d-5 (2006); TCPA, 47 U.S.C. § 227(f) (2006); Household Goods Mover Oversight Enforcement and Reform Act of 2005, 49 U.S.C. §§ 14710–14711 (2006); Odometer Act, 49 U.S.C. § 32709(d) (2006); Dodd-Frank, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

⁷⁶ *See infra* Part III.B.

⁷⁷ *See infra* Part III.B.

A. *Federal Consumer Protection Laws Examined*

Of the twenty-four total statutes incorporating state enforcement provisions, our study focuses on sixteen consumer protection laws. Those statutes are: RESPA, HOEPA, CROA, FCRA, CPSIA, TSR, Boxing Safety, COPA, CAN-SPAM, FACE, Nutrition Labeling, HIPPA, TCPA, SAFETEA-LU, Odometer Act, and Dodd-Frank.⁷⁸

At the outset, we determined that antitrust and environmental law—both areas with long and rich cooperative federalism regimes—would be carved out of any results. The early environmental administrative regimes commonly provided for state enforcement, but states were actively engaged in regulation as well as enforcement.⁷⁹ For example, the Clean Air Act allowed the states to regulate under State Implementation Plans (SIPs). Such state plans remained subject to approval by the federal Environmental Protection Agency (EPA).⁸⁰ Because of the federal regulatory connection to the state's enforcement authority⁸¹ and the

⁷⁸ Our study did not include two consumer protection statutes: The Telephone Disclosure and Dispute Resolution Act of 1992, 15 U.S.C. § 5712 (2006), and the Sports Agent Responsibility and Trust Act of 2004, 15 U.S.C. § 7804 (2006). A 2010 Westlaw search reveals that the Telephone Disclosure and Dispute Resolution Act has resulted in one state enforcement action, *Massachusetts v. Info Access*, filed in federal court on Oct. 21, 1994. No states have enforced the Sports Agent Responsibility and Trust Act of 2004.

⁷⁹ See William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 121–26 (2005) (discussing the “parallel, overlapping, and cooperative” structure of environmental laws and pointing to state attorney general enforcement as a particular benefit, along with a significant citizen role); Alex Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 580 (2007) (“[T]here has always been a close and complimentary relationship between federal law and state law in the area of environmental protection.”).

⁸⁰ Clean Air Act, 42 U.S.C. § 7410(a)(1) (2006) (“Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State.”) For more on the environmental laws and their role in creating a model of cooperative federalism, see Widman, *supra* note 7, at 10–12 (“Other laws, such as the Clean Water Act, gave states the authority to amend or reverse federal permitting decisions. The Superfund law allowed for state enforcement of clean-up standards. This model became known as ‘cooperative federalism.’ The cooperation often consisted of parallel state administrative regimes with local expertise working under the auspices of the Federal agency. The state regimes would issue permits, investigate violations and issue sanctions, however with varying degrees of Federal oversight.”) (footnotes omitted).

⁸¹ Lemos, *supra* note 7, at 13–14 (“The model employed by the Clean Air Act, in which states regulate at the direction of the federal government, is well known in the literature on cooperative federalism. Students of federalism have emphasized the various ways that states can exercise regulatory authority in areas of concurrent state-federal authority. For these scholars, preserving state regulatory authority is the primary goal of federalism. . . . Accordingly, while states implementing the Clean Air Act and similar statutes certainly engage in enforcement, the rules they are enforcing may vary from state to state.”).

particular legislative history of the environmental system of state and federal cooperation, we omitted all cases arising under the environmental statutes.

The original concurrent enforcement authority in federal law concerned antitrust enforcement.⁸² State attorneys general frequently use this federal enforcement power to bring actions that are filed jointly by numerous states in federal court. These cases are part of a well-organized group of antitrust enforcement officials in state attorneys general offices who have a fairly long history of cooperating to bring such joint actions in federal courts.⁸³ In fact, state attorney general engagement in antitrust work, like in the environmental area, occurred through a federal initiative to increase state antitrust enforcement of federal law.⁸⁴ Some data has been collected about the number and type of these actions and scholars have examined the use of concurrent enforcement authority under the Clayton Act.⁸⁵ State attorneys general do not have such a well-developed multi-state system for enforcement of the federal consumer protection laws that form the subject of this study.

B. *Identification of Enforcement Actions*

We used three primary methods to identify relevant state enforcement actions.⁸⁶ First, we conducted a search of electronic legal databases for cases. Not surprisingly, we found mostly cases that were filed by the states in court and for which there was at least one written opinion issued by the court in the matter.

Second, we issued requests under the relevant state government data practice laws to each of the fifty state attorneys general. These requests sought “information on past or present cases or public investigations where your office asserted a claim under a federal consumer protection statute (other than antitrust law) that explicitly grants enforcement power to state attorneys general or other state enforcement agencies.”⁸⁷ We identified for each state the sixteen federal statutes for which we sought this information.⁸⁸ If our search of electronic legal databases revealed that the state receiving the request had been involved in

⁸² See *supra* notes 5, 8.

⁸³ Calkins, *supra* note 5, at 678–79.

⁸⁴ *Id.*

⁸⁵ Greve, *supra* note 5, at 103–10.

⁸⁶ We also searched state attorney general websites to identify possible actions under the examined statutes. No cases were identified through this method that were not found by one of the other three methods.

⁸⁷ State data practices act requests from Amy Widman, Legal Dir., Ctr. for Justice & Democracy, to fifty state attorneys general (Dec. 31, 2010) (on file with authors).

⁸⁸ *Id.*

an action under the authority of one of the examined statutes, we asked that state to verify the accuracy of the identified case and provide information on any further cases undertaken by that state.⁸⁹

We received responses from thirty-three of the fifty states.⁹⁰ Fourteen of the states responding identified additional cases that were brought under the enforcement authority in the examined statutes.⁹¹ Seventeen states did not respond at all.⁹²

Third, we issued requests under the FOIA to eight federal agencies. Most of the examined statutes require that a state bringing an action under the statute notify a designated federal agency, and thus we reasoned that the agencies would have records of such actions.⁹³ We sent a FOIA request to seven federal agencies designated to receive such notices under one or more of the examined statutes—the U.S. Federal Trade Commission (FTC), U.S. Federal Communications Commission (FCC), U.S. Health and Human Services Administration (HHS), U.S. Department of Transportation (DOT), U.S. Department of Housing and Urban Development (HUD), U.S. Department of Justice (DOJ), and CPSC.⁹⁴ We sent a similar request to the U.S. Food and Drug Administration (FDA). Although the FDA is not required to be notified under any of the examined statutes, it is the primary federal regulator for one of the statutes, the Nutrition Labeling Act.⁹⁵

Each agency was requested to provide documentation of notice by state attorneys general for any action taken, or intended to be taken, under the federal statute for which the agency was to be notified of the state action.⁹⁶ We received timely responses to our FOIA requests from seven of the agencies. After initially refusing to respond to our initial request, the FTC responded in February 2011 with a limited production

⁸⁹ *Id.*

⁹⁰ We received documents from Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Washington, West Virginia, Wisconsin, and Wyoming. Responses on file with authors.

⁹¹ Minnesota, Maryland, Washington, Indiana, Texas, Connecticut, Idaho, Colorado, Delaware, Illinois, California, Ohio, Iowa, Arkansas.

⁹² Alabama, Kansas, Kentucky, Louisiana, Maine, Michigan, Montana, Nevada, New Jersey, New York, North Carolina, Oklahoma, Oregon, Tennessee, Utah, Vermont, and Virginia. Responses on file with authors.

⁹³ See *supra* notes 41–44.

⁹⁴ Federal agency FOIA requests from Amy Widman, Legal Dir., Ctr. for Justice & Democracy, to fifty state attorneys general (June 14, 2010) [hereinafter Freedom of Information Requests] (on file with authors).

⁹⁵ 12 U.S.C. § 337(b) (2006).

⁹⁶ The FOIA requests also included a request for “[a]ll communication since 1976 from state attorneys general to the Commission, including, but not limited to, the Commission’s rule making, enforcement, investigation, or adjudication, or lack thereof” related to the statutes for which the agency is to receive notice from the states. Freedom of Information Requests, *supra* note 94.

of nine documents.⁹⁷ Because the FTC is the federal agency designated to receive notice for six of the sixteen examined statutes,⁹⁸ its limited response may limit the comprehensiveness of the data for these statutes.

We searched electronic legal databases during July 2010. State data practices requests were sent during August 2010 and responses were received through January 2011. The federal FOIA requests were sent during June 2010 and October 2010 and responses were received from July 2010 through February 2011.

C. Relevant State Enforcement Cases and Data

State actions were counted as relevant enforcement cases only if the action included a claimed violation of one of the examined statutes and was brought under the express state enforcement authority in the examined statute.⁹⁹ We looked solely to the assertion of the claim as the criterion for a relevant enforcement action and did not consider the disposition of that claim in the lawsuit.

We included settlements negotiated under state law authority for an attorney general to enter into a pre-complaint settlement with the defendant, which is commonly referred to as an Assurance of Voluntary Compliance (AVC).¹⁰⁰ Pre-complaint settlements were included if the AVC identified an alleged violation of one of the examined statutes as a legal basis for the settlement. We did not include one instance in which

⁹⁷ The FTC responded after we sent a second FOIA request in October 2010. FTC amended FOIA request from Amy Widman, Legal Dir., Ctr. for Justice & Democracy (Oct. 12, 2010) (on file with authors). The second request sought only information about any state actions under the identified statutes and omitted the request for communications from state attorneys general related to these statutes. *Id.*

⁹⁸ HOEPA, 15 U.S.C. § 1640(e) (2006); CROA, 15 U.S.C. § 1679h (2006); FCRA, 15 U.S.C. § 1681s(c)(1) (2006); TCPA, 47 U.S.C. § 227(f) (2006); TSR, 15 U.S.C. § 6103 (2006); COPPA, 15 U.S.C. § 6504 (2006).

⁹⁹ Two cases we examined, *Attorney Gen. of Md. v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989), and *Utah ex rel. Wilkinson v. B & H Auto*, 701 F. Supp. 201 (D. Utah 1988), were both brought under the Federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1981 (2006), which was replaced with the Odometer Disclosure Act, 49 U.S.C. § 32709(d) (2006), in 1994. For purposes of our study, the language in the two acts was the same regarding state enforcement authority.

¹⁰⁰ State attorneys general have statutory authority to enter into pre-complaint settlements with individuals or companies they investigate for violations. These settlement mechanisms are known as Assurance of Voluntary Compliance, or in some states an Assurance of Discontinuance. Luther McKinney & Dewey Caton, *What to Do when the Attorney General Calls: State Regulation of National Advertising*, 3 DEPAUL BUS. L.J. 119, 140 (1990-1991). In most cases these settlements are filed with and approved by the court, but some states do not require filing with the court. One AVC not filed with a court is included in the relevant state enforcement cases identified for the study. *In the Matter of United Collections Bureau*, No. 364940 (Assurance of Voluntary Compliance with Ohio Attorney General's Office) (Aug. 12, 2010).

the state sent a letter threatening enforcement but did not either file a lawsuit or reach a settlement.¹⁰¹

We excluded several cases in which the state attorneys general brought actions referencing one of the examined statutes but which did not allege that the states were relying on the examined statute to obtain relief. Most commonly, these cases asserted that a violation of the federal law gave rise to per se violation of state unfair and deceptive acts and practices laws.¹⁰² We similarly excluded cases in which assertions of state law violations relied on the standards or definitions in an examined statute, or referenced the federal law only as relevant background.¹⁰³ In many of these cases, the defendant removed to federal court and the state sought a remand. In *Florida v. CSA Credit Solutions*, for example, Florida was one of eight states to bring claims against CSA Credit Solutions of America under state unfair and deceptive acts and practices (UDAP) laws.¹⁰⁴ One count of the complaint included references to CROA. As Florida stated in its Response to Defendant's Motion to Remand, "The Attorney General could have instituted an action under CROA, but elected to utilize the state law enforcement tools and remedies provided under FDUTPA (Florida Deceptive and Unfair Trade Practices Act)."¹⁰⁵

We also identified but excluded one case in which a multi-state group of state attorneys general brought an action under an examined statute but alleged a violation of a provision of that statute not enforceable by state attorneys general.¹⁰⁶ Finally, we did not include as a relevant enforcement case a joint action between a state attorney general

¹⁰¹ Washington Attorney General's Office letter to Advantage citing violation of TCPA (on file with the authors).

¹⁰² See, e.g., *Missouri ex rel. Nixon v. Progressive Bus. Publ'ns, Inc.*, 504 F. Supp. 2d 699 (W.D. Mo. 2007). For a discussion of state consumer protection actions brought as a violation of state UDAP laws, see JONATHON SHELDON & CAROLYN CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 4.2.1 (National Consumer Law Center, 7th ed. 2008).

¹⁰³ See, e.g., *Florida v. Credit Solutions of Am., Inc.* (2009); see also *New York ex rel. Cuomo v. Dell, Inc.*, 514 F. Supp. 2d 309, 401 (N.D.N.Y. 2007).

¹⁰⁴ See *Texas v. CSA-Credit Solutions of Am., Inc.*, Case No. D-1-GV-09-000417, 261 (Travis Cnty. Dist. Ct. filed 2009); *Idaho v. Credit Solutions of Am., Inc.*; *New York v. Credit Solutions of Am., Inc.* (filed 2009); *Missouri v. Credit Solutions of Am.* (filed 2009); *Maine v. Credit Solutions of Am., Inc.* (filed 2009); *Florida v. Credit Solutions of Am., Inc.* (2009); *Oregon v. Credit Solutions of Am.* (filed 2010); News Release, Idaho Dep't of Fin., Department of Finance Settles With A Dallas, Texas Based Debt Settlement Company – \$588,000 In Consumer Restitution Ordered (Jan. 15, 2008), available at http://finance.idaho.gov/PR/2008/Credit_Solutions_PressRelease.pdf. In 2010, the FTC changed its Telemarketing Sales Rule to include these types of debt relief practices under the TSR and therefore clarified state authority to enforce the federal law for such instances under the TSR as well. See Final Rule Amendment, 75 Fed. Reg. 48,458 (amending 16 CFR § 310.2 (2010)).

¹⁰⁵ *Florida v. Credit Solutions of Am., Inc.* (filed 2009); see also *New York ex rel. Cuomo v. Dell, Inc.*, 514 F. Supp. 2d 309, 401 (N.D.N.Y. 2007) (granting remand and finding no federal question jurisdiction for claims alleging violations of state law based on violations of federal law, ECOA and FCRA, brought by the New York Attorney General).

¹⁰⁶ *New York v. GMAC Mortg. Corp.*, No. 90-7294 (S.D.N.Y. filed 1990).

and a federal agency in which the violation of an examined statute was asserted only by the federal agency.¹⁰⁷

D. *Data Gathered from State Enforcement Actions*

For each relevant case, we gathered the following data: (1) the parties to the lawsuit or settlement; (2) the date the complaint or AVC was filed with the court;¹⁰⁸ and (3) the examined statute(s) that the state attorney general claimed had been violated. This information was derived from the complaint or the AVC. We looked beyond the face of the complaint or AVC only to determine whether a federal agency took any formal action in the case beyond joining the case at the outset as a party, such as intervening in a lawsuit or filing an amicus brief.

The identity of the public enforcement plaintiffs to the cases bears mention. The most common use pattern for concurrent enforcement authority is where a state notifies the designated federal agency and then files an action in federal court against one defendant claiming a violation of federal law as well as state laws. In other cases, states will join with other states as plaintiffs in a lawsuit or settlement, will file jointly with a federal agency, or both. Cases in which states jointly prosecute a matter are known as “multi-state” actions.¹⁰⁹

III. DATA ON USE OF EXAMINED STATUTES BY STATE ATTORNEYS GENERAL

We identified 104 cases of state attorney general use of federal law enforcement authority. In this Part, we analyze these cases along three dimensions: (1) use by examined statute, (2) use by state attorney general, (3) and use over time. In Part V, we look at the relationship between state and federal actors in these enforcement cases.

A. *Use by Examined Statute*

State attorneys general have asserted claims under nine of the sixteen examined statutes. We could not find evidence of any cases

¹⁰⁷ United States and State of Illinois v. Mercantile Mortg. Co., No. 02-CV-5079, 2002 WL 32153637 (N.D. Ill. July 18, 2002).

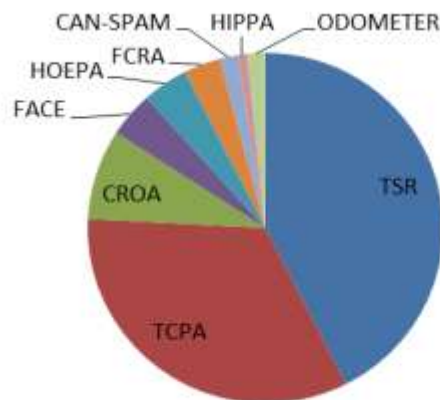
¹⁰⁸ In the case of Ohio’s AVC not filed with a court, *see supra* note 100, we used the date the AVC was fully executed by all parties.

¹⁰⁹ Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of the State Attorneys General in Multi-state Litigation*, 101 COLUM. L. REV. 1992, 2003–07 (2001).

brought by state attorneys general under the following seven statutes: CPSIA, Boxing Safety, COPPA, Nutrition Labeling, RESPA, Dodd-Frank, and SAFETEA-LU.¹¹⁰ Sixteen of the cases involved claims under two of the examined statutes, and thus there are 120 claims under the examined statutes for the 104 cases. Fourteen of the multiple-claim cases asserted claims under both the TSR and TCPA, while the other two cases involved adding a TSR or TCPA claim to a case alleging a violation of CROA.

As shown in Figure 1, the nine statutes used by state attorneys general clearly divide among the two telemarketing statutes, the TSR and TCPA, and the other seven statutes. The two telemarketing statutes account for ninety-one of the 120 claimed violations, including fifty-one TSR claims and forty TCPA claims. The remaining seven statutes accounted for twenty-nine claims, as follows: CROA (10), FACE (5), HOEPA (5), FCRA (4), CAN-SPAM (2), HIPPA (1), and Odometer (2). Figure 1 shows the distribution of claims by examined statute.

Figure 1: Claims By Examined Statute



Some of the examined statutes are extensively used by a few attorneys general. Other statutes were used by a range of different state attorneys general. Comparing FACE and FCRA claims offers a useful contrast as to breadth of use. There were five claims brought under the FACE, but the FACE was used four times by New York and once by neighboring Connecticut. In contrast, we identified four FCRA claims that were widely dispersed among the state attorneys general—a multi-state case brought by sixteen attorneys general against TransUnion Cor-

¹¹⁰ The Dodd-Frank authority was enacted as the data was being collected, so the lack of cases under that statute was not surprising.

poration in 1992, and another multi-state case brought by twenty-nine states against U.S. Bancorp in 1999, one lawsuit by Minnesota in 2004, and one lawsuit by Ohio in 2010.¹¹¹

B. *Use by State*

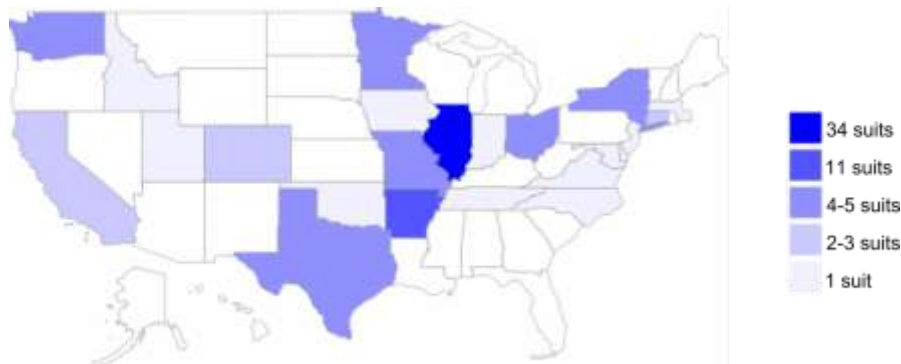
This section analyzes the number of cases brought by each state attorney general and the extent to which each state used the various examined statutes.

1. Number of Cases by State

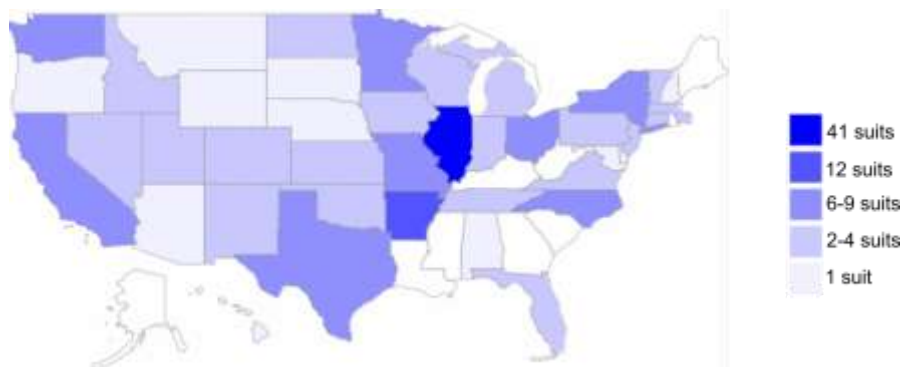
The overwhelming majority of the cases, ninety-two of the 104 cases, were brought by a single attorney general.¹¹² Slightly fewer than half the state attorneys general—twenty-three—brought at least one individual case asserting a violation of one of the examined statutes. The Illinois Attorney General has been by far the most prolific user of the federal enforcement authority, bringing thirty-four cases under the examined statutes. Illinois has brought more than three times as many cases as the state with the second highest number, Arkansas, which brought eleven cases. About half of the twenty-three states using the examined statutes—eleven states—had only a single case. A group of six state attorneys general are moderate users of the examined statutes, bringing four or five cases. Those states are Minnesota, Missouri, New York, Ohio, Texas and Washington. Figure 2 is a map showing the number of cases brought by each state, exclusive of multi-state actions.

¹¹¹ The case against U.S. Bancorp asserting a FCRA claim was originally filed as an individual action by Minnesota. *Minnesota v. U.S. Bank N.A.*, No. 0:99cv872 (D. Minn. filed 1999) The case was settled and then later joined by twenty-eight other states. *Id.* (Amended Consent Judgment, 2000).

¹¹² A federal agency filed jointly with the state, intervened or was otherwise joined to the action in thirteen of these cases. *See infra* Part V.A.

Figure 2: Cases by State (Individual State Cases Only)

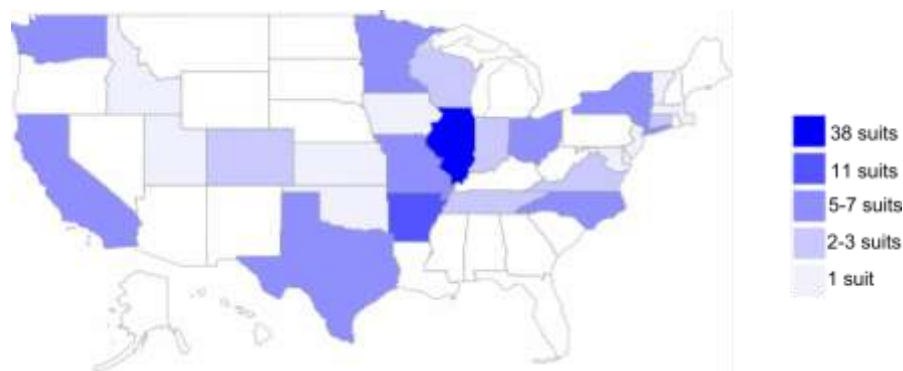
The other twelve cases were multi-state actions. Two of the cases were large multi-state groups of twenty-nine and sixteen states, respectively, that alleged violations of the FCRA.¹¹³ In one case, a group of seven states asserted a violation of the TSR. In the other nine cases, smaller multi-state groups of two to four states alleged violations of one of the telemarketing statutes. Figure 3 shows the number of cases brought by each state, including that state's participation in any of the multi-state cases.

Figure 3: Cases by State (Individual & Multi-State Cases)

¹¹³ The case originally filed by Minnesota and later joined by twenty-eight other states is counted here as a multi-state case. *See supra* note 111.

As shown above, forty-one of the fifty states were a plaintiff in at least one case, either individual or multi-state, brought under one of the examined statutes.¹¹⁴ Participation by state attorneys general in a large multi-state action, however, often involves little expertise or effort by most participating states. Multi-state cases are investigated and settlements are negotiated by a small group of “lead” states. But a state participating in a very small multi-state case of two to four states presumably must have greater knowledge of the details of the matter and more involvement in the case. Accordingly, including both individual and small multi-state cases in measuring the number of cases, as is shown in Figure 4, may provide a more accurate reflection of the active use of the examined statutes by each state.

Figure 4: Cases by State (Individual & Small Multi-State Cases Only)



This measure shows twenty-six states using the examined statutes. Only three additional states were added to the twenty-three states that have brought individual cases. Interestingly, some states used the examined statutes primarily by joining in small multi-state actions. North Carolina, for example, brought only one individual case, a 2004 action under the TCPA. Yet North Carolina brought four cases alleging TSR or TCPA violations as part of a small multi-state case. It joined with New York in 1996; with Wisconsin and Virginia in 2001; with California, Illinois, and Ohio in 2009; and with Kansas, Illinois, and Minnesota, also in 2009. Three of these four cases were filed jointly with the FTC.

¹¹⁴ The nine states that have never been a plaintiff in a case using one of the examined statutes are as follows: Alaska, Georgia, Kentucky, Louisiana, Maine, Mississippi, Rhode Island, South Carolina, and West Virginia.

2. Use of Examined Statutes by State

Another useful way to look at the use of the examined statutes by states is to evaluate the extent to which each state brought cases under different statutes. Figure 5 indicates the number of examined statutes used at least once by each state bringing an individual or small multi-state case.

Figure 5: Number of Examined Statutes Used by Each State (Individual & Small Multi-State Cases Only)



No state used more than four of the sixteen examined statutes. Nor did any state use more than two of the non-telemarketing examined statutes. Some states used multiple statutes. Illinois, the dominant user of these statutes, brought claims under the CROA, HOEPA, TCPA, and TSR in the forty-one individual or small multi-state cases in which it was a plaintiff. Minnesota also used four of the examined statutes (the FCRA, HOEPA, TCPA, and TSR) in just six individual or small multi-state cases. Other states specialized in just one type of statute. Colorado brought three individual cases from 2003 through 2010, all of which were CROA claims. Missouri brought seven individual or small multi-state cases from 2000 through 2009, all of which were under the telemarketing statutes.

Figure 6 shows the use of the examined statutes by differentiating the two telemarketing statutes from the other eight examined statutes actually used at least once by a state attorney general.

Figure 6: Cases by State by Telemarketing Statutes Versus Other Examined Statutes

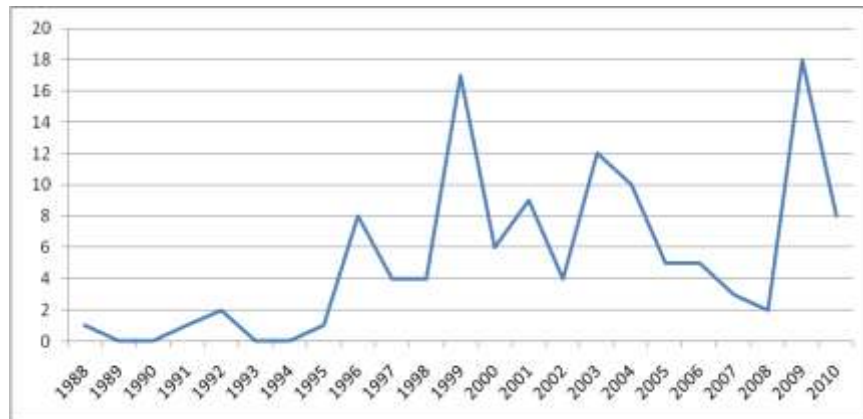


Of the twenty-six states that have brought an individual or small multi-state action, only eight—Arkansas, California, Illinois, Minnesota, New Jersey, New York, Ohio, and Washington—brought cases under both a telemarketing statute and one of the other seven statutes utilized by the states. Five of the twenty-six states (Colorado, Connecticut, Delaware, Maryland, and Utah) brought only non-telemarketing claims. The remaining thirteen states used only the telemarketing statutes.

C. Use over Time

We also analyze the cases based on the filing date of the complaint or the AVC. Although the concurrent enforcement provisions in the examined statutes were enacted between 1988 and 2010, the bulk of the statutes date from the early to mid-1990s.¹¹⁵ Figure 7 shows the number of claims filed by year.

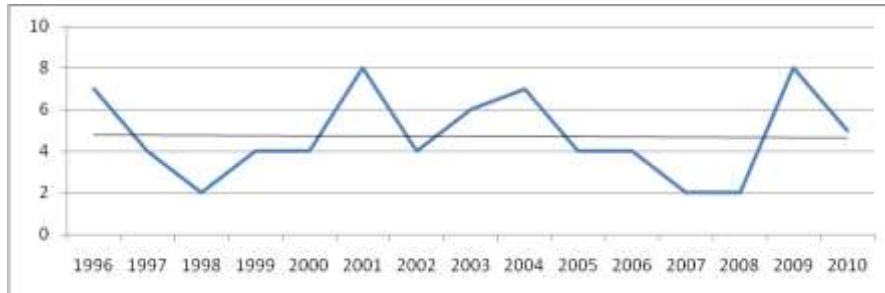
¹¹⁵ See *supra* notes 10–18.

Figure 7: Number of Claims by Year (1988–2010)

Use of the examined statutes rose starting in 1996, soon after passage of the mid-1990s statutes. Since 1996, there have been year-to-year variations in the number of claims filed, and the number of claims dropped during 2005–2008, but a fairly steady average of about seven to eight claims are filed each year.

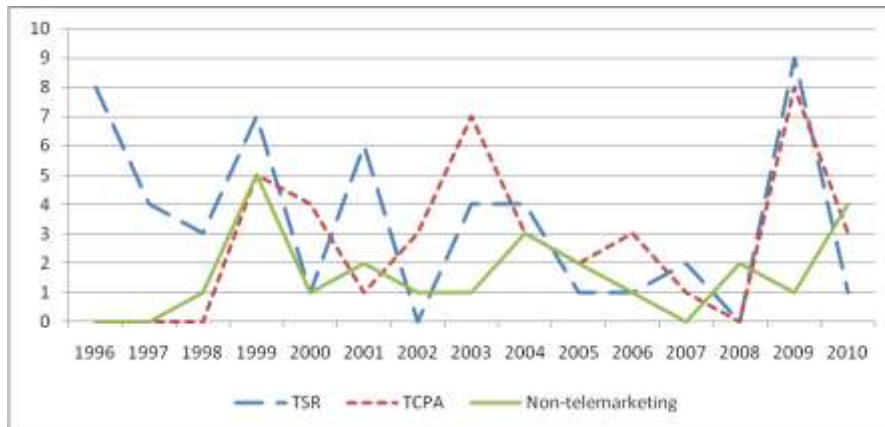
The number of claims shown spiked in 1999, 2004, and 2009. This resulted from one state filing multiple claims under the same statute in the same year. Figure 8 is based on modifying the database to count as one-claim situations in which one state brought multiple claims under the same statute in the same year. This method of counting the claims, denoted as “annual counting,” removes fluctuations due to a spike of claims by one state under one statute. It may provide a more accurate depiction of the breadth of use of the examined statutes over time. The trend line in this graph makes clear the relatively constant use of the examined statutes over the last fifteen years in terms of states filing non-duplicative claims.

Figure 8: Number of Claims by Year Using Annual Counting Method (1996–2010)



Finally, Figure 9 provides a count of the claims filed asserting violations of each of the two telemarketing statutes and of all the non-telemarketing statutes considered as a group.

Figure 9: Number of Claims by Year Filed by Type of Statute (1996–2010)



IV. DATA ON FEDERAL INVOLVEMENT IN STATE CASES

Federal agencies were actively and cooperatively involved in the cases brought by state attorneys general. Overall, a federal agency participated in twenty of the 104 cases brought by the states under the authority in the examined statutes. The FTC participated in thirteen state lawsuits under the examined statutes. The DOJ and FCC participated in four and three cases, respectively. The type of federal involvement varied by the identity and number of state plaintiffs and the federal agency involved in the matter.

Federal participation was much higher in multi-state suits than in actions by individual states. A federal agency was involved in seven of the twelve multi-state cases (58.3%) as compared to thirteen of the ninety-two individual cases (14.1%).

The FTC tends to cooperate prior to filing in TSR cases with multi-state groups and with the State of Illinois. It filed jointly with states in five of the eight multi-state suits alleging violations of the TSR. Illinois was the sole state plaintiff in each of the other four cases in which the FTC filed jointly with a state, three of which were brought under the TSR. The nine cases in which the FTC filed jointly with the states were brought between 1997 and 2009. In 1996, the FTC intervened in a case brought by Tennessee alleging TSR violations. The FTC also filed an amicus brief in a case brought by Minnesota under the TSR. In two other cases, actions brought separately by the FTC and a state under the same examined statute were consolidated after filing. One such case was brought by New Jersey under the CROA and TSR, and the other case was a HOEPA claim filed by Illinois.

The FCC was involved in a series of three cases alleging TCPA violations brought by state attorneys general in California, Indiana, Missouri and Texas between 2000 and 2003. In each case, the FCC did not participate as a plaintiff seeking relief in the action, but rather moved to intervene on the question of the constitutionality of the “junk fax” provisions of the TCPA. The DOJ also intervened in two cases raising the same constitutional issues regarding the TCPA—a 2002 case brought by Minnesota and a 2009 and a 2006 case brought by Oklahoma. In each of these cases, the federal agency intervention was in support of the state position.

The DOJ filed jointly with states in two cases. The DOJ joined a multi-state group of four states (California, Illinois, North Carolina, and Ohio) alleging TCPA and TSR violations against Dish Network. The DOJ also joined with Connecticut in a case under the FACE in 1995.

More rarely, an agency will monitor litigation and sometimes intervene at a later date if the agency feels the litigation addresses issues of federal concern.¹¹⁶ This was the case in a series of TCPA cases filed by Missouri, which caused the FCC to note the filings in their internal email and to note that “it would be a good idea for the FCC to intervene or at least track closely so that we can file a brief or an amicus brief if legal issues of concern to us arise, which seem very likely.” Ultimately the FCC did not intervene in those cases. Similarly, in *Texas v. American Blast Fax*, the FCC moved to intervene once the defendant raised an issue of the constitutionality of the TCPA.¹¹⁷ The motion to intervene became moot once defendant’s motion to dismiss was denied.¹¹⁸

V. ACTUAL USE OF CONCURRENT ENFORCEMENT AUTHORITY APPEARS LIMITED

Our study found that state attorneys general use concurrent enforcement authority with federal consumer protection laws in a sparing manner. The cases brought are overwhelmingly to enforce the telemarketing laws. The state cases appear to have generated almost no conflict with federal agency enforcement. Federal agency involvement in state cases has been cooperative.

A. *The Data Do Not Suggest Excessive Enforcement*

The criticisms of concurrent enforcement authority do not find support in the data we collected about the actual use of these provisions by state attorneys general. Although our data are limited, neither over-enforcement nor inconsistency with federal regulators is apparent.

A primary concern raised by critics of state enforcement power is that the state attorneys general would be “overzealous.”¹¹⁹ The most striking fact about the data is the modest number of cases brought by state attorneys general. Although most of the sixteen statutes have been available for use by the states since at least the mid-1990s,¹²⁰ we were

¹¹⁶ See, e.g., FCC email chain July 9, 2003 regarding Missouri’s filing of a TCPA case (“It seems at least on first blush that it would be a good idea for the FCC to intervene or at least track closely so that we can file a brief or an amicus brief if legal issues of concern to us arise, which seem very likely.”) (on file with authors).

¹¹⁷ Fed. Comm’n Comm’n Motion to Intervene, *Texas v. Am. Blast Fax*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000) (No. 1:00CV00085). Both the FTC and the OCC monitored a suit by Minnesota under the TSR and the two agencies filed competing amici briefs in the case.

¹¹⁸ *Texas v. Am. Blast Fax*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000).

¹¹⁹ See *supra* notes 8–27.

¹²⁰ See *supra* notes 35–39.

able to identify only 104 cases asserting 120 claims under the concurrent enforcement authority in the examined statutes. Only the two telemarketing statutes were used in more than ten cases. In fact, the very small sample size makes it difficult to make many detailed conclusions from the data.¹²¹

Because “over-enforcement” is a vague claim that could refer to the merits of public enforcement actions rather than just the number of cases, it is difficult to refute conclusively the charge of misuse of the authority. Beyond the small raw number of cases and claims, there is no evidence of patterns that suggest the kind of use by states that was of concern to the critics of concurrent enforcement. One concern raised by critics is that state attorneys general will hire outside counsel on a contingency basis to prosecute cases and that this arrangement will result in frivolous suits.¹²² While we did not collect data on the use of outside counsel in our study, it appeared to be infrequent or even non-existent on the face of the pleadings in the state enforcement cases. A few states have shown a preference for not asserting claims under their enforcement authority in the examined statutes even when referencing the standards or definitions in these statutes.¹²³ The number of claims has not varied substantially since the most commonly used statutes were enacted in the 1990s, so there is no evidence that state attorneys general are trending toward over-use of the examined statutes.

B. *Some Observations on Non-Use of Examined Statutes*

One of the more striking results from our study was that about half of the statutes were never used by the state attorneys general. Of the sixteen examined statutes, we found no cases brought under seven of the statutes, and three of the statutes were used by the states only once or twice. Four of these ten never- or rarely-used statutes were passed since 2005, Dodd-Frank being enacted almost contemporaneously with our data collection.¹²⁴ But some of the statutes have been in place for years. Enforcement authority has been available for Nutrition Labeling for over twenty years, for instance.¹²⁵

¹²¹ Given the relatively small number of cases and the large number of possible explanatory variables, it is difficult to make many firm conclusions about the causation for the outcomes observed in our study. *See generally* Gregory Mitchell, *Case Studies, Counterfactuals, and Causal Explanation*, 152 U. PA. L. REV. 1517 (2004).

¹²² *See supra* note 37.

¹²³ *See supra* notes 102–05 (citing cases in which the state attorneys general brought actions referencing the examined statutes but did not use the concurrent enforcement authority in the statute).

¹²⁴ *See supra* notes 21–27.

¹²⁵ Nutrition Labeling and Education Act of 1990, 21 U.S.C. § 337 (2006).

As we compiled our data, we found ourselves wondering if there was any pattern or common thread amongst the statutes that were used by the states as opposed to the statutes that were not used, since only nine of the sixteen statutes we examined, as far as we could detect, had ever been used by a state attorney general. Put another way, why are some statutes not accessed by the states even when the state has express enforcement power?

One possible explanation is that certain features of the enforcement power might influence usage. No particular language or structure of the enforcement provisions was readily correlated to use by the states. Although almost all of the statutes that awarded fees and costs were used,¹²⁶ five of the statutes that do not mention fees and costs also were used by the states. Almost all of the statutes that were used provided for damage awards, but there were a few statutes providing damage awards that were never used.¹²⁷ Use versus non-use was split evenly amongst statutes providing for federal court jurisdiction only and those allowing other courts of competent jurisdiction.¹²⁸

Nor is there a clear connection between some of the other obvious factors that might influence state attorneys general use of the examined statutes. The availability of alternative state law seems to offer little explanatory value. The examined statutes for which there are widespread state analogs varied from the most used, such as the TCPA and CROA, to the least used, such as the Odometer Act. Neither did preemption of state law coupled with concurrent enforcement authority seem to have much of an impact on the states' use of the examined statutes. Of the five statutes that explicitly preempt some state law, three had been used and two were not used.¹²⁹

Perhaps the best explanation may lie in a careful examination of the relationship between use and subject matter of the examined statutes. Obviously, the telemarketing statutes are by far the most often employed by the states.¹³⁰ Telemarketing has long been an area of great concern to state attorneys general.¹³¹ The next group of examined sta-

¹²⁶ The only exception was RESPA, for which concurrent state authority is limited to its anti-kickback provisions. 12 U.S.C. § 2607(d) (2006).

¹²⁷ Boxing Act, 15 U.S.C. § 6309(c)(3) (2006); COPPA, 15 U.S.C. § 6504(a)(1)(C) (2006); Household Goods Mover Oversight Enforcement and Reform Act of 2005, 49 U.S.C. § 14710(a) (2006).

¹²⁸ However, our data revealed that even where those statutes providing for other courts, state attorneys general brought enforcement actions in federal court when claiming under these federal laws.

¹²⁹ Only five of the seven statutes with clear preemption were included in our study.

¹³⁰ *But see* TDDRA, 15 U.S.C. § 5712 (2006). Though not included in our data, there was only one case on record of a state using this enforcement power. *See supra* note 71.

¹³¹ *See, e.g.,* Prentiss Cox, *The Importance of Deceptive Practice Enforcement in Financial Institution Regulation*, 30 PACE L. REV. 279, 292 (2009) ("Telemarketing, automobile sales, credit repair organizations, and countless other marketplace transactions are regularly subject to UDAP actions by the FTC or the state attorneys general.").

tutes most frequently used by the states in terms of number of unique claims is the CROA, HOEPA, and FCRA. These statutes concern consumer credit and finance, another area of traditional focus by state attorneys general.¹³² The only other consumer finance statutes were the very recently enacted Dodd-Frank and RESPA, for which the enforcement authority is limited to injunctive relief for only one provision of the statute. The remaining statutes address a variety of consumer protection concerns either not commonly associated with state attorney general consumer protection efforts (household goods transportation and boxing safety) or consumer protection areas in which state attorneys general actions have been over-shadowed by a comprehensive federal regulatory system (nutrition labeling and consumer product safety). Yet subject matter does not fully explain the difference in use. Auto fraud, such as odometer tampering, is a long-standing area of state attorney general expertise, but almost no cases have been brought by the states under the Odometer Act.

In any case, our collected data clearly are insufficient to explain the differences in use between the examined statutes. Some other possible factors influencing states might be differences among analogous state laws, substantive differences between the state and federal law at issue, and knowledge about the various examined statutes among state attorneys' general offices.

Identifying the factors influencing state use of concurrent enforcement authority would be useful for drafting and debate concerning future federal statutes incorporating this authority.

C. *States Make Strategic Use of Concurrent Enforcement Authority*

State motivations and litigation strategies obviously cannot be quantified purely through statistical data, but observations from our data suggest that states are clearly weighing the federal and state options and making specific decisions as to how to bring their claims. For instance, we received complaints from both Arkansas and Washington, both filed in 2010, both claiming violations of various telecommunications laws.¹³³ Arkansas filed in federal court under the TCPA and TSR, whereas Washington chose to file in state court under various Washington

¹³² *But see* RESPA 12 U.S.C. §§ 2601–2617 (2006), CPSIA 15 U.S.C. §§ 2051–2089 (2006), COPPA 15 U.S.C. §§ 6501–6506 (2006); Dodd-Frank, Pub. L. No. 111-203, 124 Stat. 1376 (2010). All of these statutes are arguably traditional areas of state attorneys general enforcement, yet are not used.

¹³³ *See* Complaint, Arkansas v. U.S. Fidelis, Inc., No. 4:10CV00378, 2010 WL 3229812 (E.D. Ark. May 11, 2010); Complaint, Washington v. U.S. Fidelis, No. 10-1-00885-1 (Thurston Cnty. Dist. Court Apr. 29, 2010), *available at* http://www.atg.wa.gov/uploadedFiles/Home/News/Press_Releases/2010/State%20of%20WA%20v.%20Fidelis.pdf.

state consumer laws. In this particular case, Washington led a multi-state investigation against the defendant, U.S. Fidelis, and other states filed similar claims in their state courts as well.¹³⁴ While the precise factors leading Arkansas to enforce the federal law cannot be deduced from the complaint, some reasons might be as simple as attorney forum preference or the lack of state law remedies for precise violations. Or, in a state where state consumer laws are not used frequently, a federal law might afford stronger precedent for certain types of claims. On the other hand, states might choose state law when the state law mirrors the federal law due to familiarity with state law, courts, and procedure. Cost considerations also may be a factor. For example, in a case where many states are tracking a certain defendant, there is a chance that actions brought under concurrent enforcement authority in federal law would be consolidated in a multidistrict litigation, which could either increase or decrease the litigation costs for the state, depending on the circumstances.

Another example we found illuminating was that varying state motivations appeared in the parallel state and federal multi-state actions against Dish Network. In this case, Illinois, California, North Carolina, and Ohio joined with the FTC and the DOJ to sue Dish Network under the TCPA as well as various state consumer protection laws.¹³⁵ Within a similar time period, the remaining forty-six states reached a multi-state settlement with Dish Network based on violations of state telecommunications and consumer protection laws.¹³⁶ The federal action remains open.

The data does bear some evidence that states are making clear choices how best to protect their state's consumers. Giving states a choice, through both retaining state consumer protection laws alongside federal enforcement powers, allows a state attorney general to use the approach best suited to the particular case. It also creates a dynamic where a state attorney general can operate in tension with both the state legislature as well as the federal agency. Such tensions can create opportunities for accountability.

¹³⁴ Iowa, Idaho, Kansas, North Carolina, Ohio, Wisconsin, and Arizona all filed similar complaints in their state courts on the same day as Washington.

¹³⁵ Complaint, *United States v. Dish Network*, No. 3:09-cv-03073-JES-CHE (C.D. Ill. Mar. 25, 2009), available at <http://www.ftc.gov/os/caselist/0523167/090325echostarcmt.pdf>.

¹³⁶ See, e.g., Idaho AVC re: Dish Network (on file with the authors).

VI. ACTUAL USE OF CONCURRENT ENFORCEMENT AUTHORITY
APPEARS COOPERATIVE

The argument that use of concurrent enforcement authority by states would lead to inconsistent interpretations of the statutes also appears to be unsupported. Although we did not evaluate the merits of the state claims, information collected on federal agency participation in state cases shows no conflict with federal interpretation of the law. With only one exception among the twenty cases of federal agency participation, the federal agency jointly prosecuted the case with the state or participated in the case to support the position of the state attorney general.¹³⁷ Federal–state cooperation in the cases identified in our study provides some indication that the advocates of concurrent enforcement were correct that the states would use their enforcement power to support and supplement federal enforcement of the examined statutes.

If over-enforcement or inconsistent use of the statutes have occurred, Illinois's conduct is likely to be the best example. Illinois was the outlying state as a prolific user of the examined states. It accounted for thirty-four of the cases brought by an individual state, or more than a third of the total number of cases. The data show that federal agencies cooperated more with Illinois than other states, even adjusting for the disproportionate use of the statutes by Illinois. Illinois was the plaintiff in five of the six cases in which the FTC or DOJ filed as a joint plaintiff in a case brought by a single state. And even though Illinois brought many more cases than any other state, it only used four of the sixteen examined statutes—the same number as Minnesota.

The only exception to federal–state cooperation was one instance when a state suit under concurrent enforcement authority provided a forum for litigation of an inter-agency disagreement. Minnesota brought a TSR claim against Fleet Mortgage Corporation.¹³⁸ The FTC, the federal agency responsible for promulgating and enforcing the TSR, participated as an amicus supporting Minnesota's position while the Office of the Comptroller of the Currency (OCC) filed a contrary amicus brief.¹³⁹ The issue of concern was the authority of the FTC to bring enforcement actions against a non-bank operating subsidiary of a national bank. Fleet

¹³⁷ See *supra* Part V.A. Also, in one case the state joined in filing a case with a federal agency but only the federal agency asserted the claim under the examined statute, with the state alleging only a UDAP violation. *United States & Illinois v. Mercantile Mortg. Co.*, No. 02-CV-5079, 2002 WL 32153637 (N.D. Ill. July 18, 2002).

¹³⁸ *Minnesota v. Fleet Mortg. Corp.*, 181 F. Supp. 2d 995 (2001). One of the co-authors was lead counsel for the State of Minnesota in this litigation.

¹³⁹ See *supra* notes 118–123.

Mortgage Corporation (FMC) was not a bank, but it was an operating subsidiary of a bank.¹⁴⁰ FMC argued that the FTC had no authority to enforce the TSR against it, and thus Minnesota had no authority to bring a TSR action under its concurrent enforcement power, because FMC was an operating subsidiary of a national bank and the FTC generally has no authority over banks.¹⁴¹ The OCC filed an amicus in support of FMC's motion to dismiss.¹⁴² The FTC responded by filing an amicus brief in support of the Minnesota action and urging the court to allow the Minnesota action because FMC was itself not a bank.¹⁴³ In a matter of first impression, the court interpreted section 133 of the Gramm Leach Bliley Act, then recently enacted, as allowing for FTC actions against non-bank operating subsidiaries of banks, and thus permitted the Minnesota suit to proceed.¹⁴⁴

While there were no instances of substantial federal–state conflict, in two cases state use of concurrent enforcement authority seems to have spurred agency action. New Jersey gave proper notice to the FTC of its intention to bring a suit under the CROA and TSR in *In re Credit Management*. The agency approved the state complaint and then later the agency filed its own complaint based on the same facts. The court then consolidated the two cases pending approval by the agency. Eventually, the court granted a preliminary injunction against the defendant credit company.¹⁴⁵ In another case, the state action also took place before independent federal agency action. In that case, *Arkansas v. Troescher*, the state notified the agency of its intent to file a complaint under its enforcement authority in March of 2005. In January of 2006, the FCC issued a citation to the same company for the same violation.¹⁴⁶

These two cases may reflect a form of competition between state and federal agencies. If so, such a result suggests a benefit of state concurrent enforcement by introducing competition for the federal agency that will force a form of accountability. This type of “uncooperative federalism” is perhaps more at play with legislative grants of state enforcement authority perceived as a response to lax agency enforcement, for example in areas of product safety or financial regulation.¹⁴⁷

¹⁴⁰ *Fleet Mortg. Corp.*, 181 F. Supp. 2d 995.

¹⁴¹ *Id.*

¹⁴² *Id.* at 997.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1002.

¹⁴⁵ *In re Nat'l Credit Mgm't Grp., LLC*, 21 F. Supp. 2d 424 (D.N.J. 1998).

¹⁴⁶ *In re Troescher Typing Service*, 22 FCC Rcd. 19789 (2007), available at <http://www.fcc.gov/eb/Orders/2007/DA-07-4590A1.html>.

¹⁴⁷ See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009) (explaining uncooperative federalism as taking place when “states use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law”). In this case, states might be using their enforcement power to function as a watchdog of sorts over the federal agency and encourage consistent enforcement.

CONCLUSION

This study provides data on actual use of enforcement authority that should help ground the increasingly polarized debate about when and how states are permitted to enforce federal law. The criticism of such provisions as creating a flood of lawsuits appears unfounded based on the past twenty years of use of these statutes by the states. The federal agencies primarily responsible for enforcing the statutes examined cooperatively participate with states in public enforcement of these statutes. This study should assist legislators, other policymakers, and scholars in their continuing work to balance enforcement between states and federal agencies to maximize consumer protection.