



U.S. CHAMBER

Institute for Legal Reform

Unprincipled Prosecution

*Abuse of Power and Profiteering in
the New “Litigation Swarm”*

OCTOBER 2014





U.S. CHAMBER
Institute for Legal Reform

An Affiliate of the U.S. Chamber of Commerce

© U.S. Chamber Institute for Legal Reform, October 2014. All rights reserved.

This publication, or part thereof, may not be reproduced in any form without the written permission of the U.S. Chamber Institute for Legal Reform. Forward requests for permission to reprint to: Reprint Permission Office, U.S. Chamber Institute for Legal Reform, 1615 H Street, N.W., Washington, D.C. 20062-2000 (202.463.5724).

Table of Contents

Executive Summary	1
Roots of the Swarm: Multiple, Overlapping Enforcement	5
Self-Interest Trumps the Public Interest	7
Enforcement Officials Virtually Always Prevail Through Coerced “Settlements” Regardless of the Merits of Their Claims	12
Enforcement Officials Use Their Coercive Power to Circumvent Checks and Balances and Unilaterally Impose New Taxes and Expanded Regulation	17
The Resulting Harm to Consumers, Investors, and Employees	22
The Way Forward	25

Prepared for the U.S. Chamber Institute for Legal Reform by

Andrew J. Pincus, Mayer Brown LLP

Executive Summary

Fair government enforcement plays a critical role in promoting compliance with legal rules and regulations. Punishing real violations demonstrates that “crime does not pay” and helps to deter future transgressions.

Everyone—consumers, investors, and legitimate businesses—benefits when companies that have engaged in fraud and other unlawful conduct are identified and receive a punishment that fits the crime.

However, government enforcement loses its legitimacy when:

- Enforcement decisions are influenced by government officials’ self-interest rather than the public interest;
- Investigations and lawsuits are the product of lobbying by self-interested plaintiffs’ lawyers rather than decisions by neutral government lawyers—and those same plaintiffs’ lawyers are hired to prosecute the claims on a contingency fee basis;
- The enforcement process fails to ensure that sanctions are imposed only on guilty companies and does not give the innocent a legitimate chance to defend themselves; or
- Enforcement actions are based upon novel interpretations of vague laws that no reasonable business could have anticipated.

Government enforcement instead becomes an unprincipled exercise of unconstrained power: unprincipled because government power that is supposed to serve the public interest is hijacked by private interests; unconstrained because a single official is prosecutor, judge, and jury with the power to decide whether to initiate an investigation, whether to file litigation, and what the settlement terms will be. That one official may—and often does—decide to impose huge financial levies and expand regulatory obligations as the price for

“ [O]ne official may—and often does—decide to impose huge financial levies and expand regulatory obligations as the price for settlement, circumventing the checks and balances that are essential to our system of government. ”

settlement, circumventing the checks and balances that are essential to our system of government.

Consider these scenarios:

- If the political branches are unwilling to expand government by imposing new taxes, then funds can be raised through enforcement action settlements.
- If an agency lacks the power to impose new regulations and the legislature will not expand the agency's power, the new rules can be included in a settlement and consent decree.
- And if plaintiffs' lawyers are pressing for assistance in promoting their newest litigation theory, a government enforcement action can be contrived to complement their private lawsuits—and they can represent the government on a contingency fee basis as well.

The last ten years have seen an explosion in this form of unprincipled, abusive, "enforcement." As *The Economist* recently explained,

[t]he formula is simple: find a large company that may (or may not) have done something wrong; threaten its managers with commercial ruin, preferably with criminal charges; force them to use their shareholders' money to pay an enormous fine to drop the charges...Then repeat with another large company.¹

Here's how it works: a company (or an entire industry) is targeted by up to fifty state attorneys general, multiple state regulators, and one or more federal agencies, all acting in concert with private class action lawyers. They institute multiple overlapping investigations and lawsuits,

alleging violations of state or federal law based on ambiguous claims such as "consumer deception," "unfair practices," "public nuisance," or some other similarly vague theory.

The company is then forced to defend multiple duplicative investigations and legal actions that are pursued either simultaneously or in succession (forcing targets to litigate the same issues over and over again), imposing huge litigation costs long before any finder of fact might have an opportunity to evaluate the merits of the claims. Even more important, the public drumbeat regarding these accusations (regardless of the underlying merits), amplified exponentially by today's social media, subjects the target to significant, ongoing reputational damage.

Faced with gargantuan monetary claims that now routinely range into the tens of billions of dollars and the prospect of multi-year, multi-front litigation—costing millions of dollars in legal fees, producing brand damage, and diverting the time and attention of senior managers—the company ultimately has little choice but to agree to whatever settlement is demanded by the government officials and class action lawyers. Regardless of whether the company has strong or even overwhelming, arguments on the merits the severe damage it would suffer before vindicating its position in court typically forces it to agree to a settlement.

The Swarm Enforcement Model

The rise of this swarm enforcement model—and its use to selectively target companies doing business in the United States—undermines several fundamental principles of our system of government.

FIRST

Punishments should be imposed only upon actual wrongdoers. In the swarm litigation context, however, innocent targets of enforcement actions do not as a practical matter have an opportunity to obtain a neutral decision-maker's assessment of their defense; they are virtually always forced to settle.

SECOND

Public law enforcement should be free from profiteering and manipulation for private benefit. But in swarm litigation, it can be the government officials' self-interest and private plaintiffs' lawyers' profit motive that drive the enforcement agenda. Indeed, the plaintiffs' bar often pitches potential actions to government officials and dictates litigation strategy. Captured by these private attorneys, officials allow them to wield governmental power for their own enrichment through contingency fee arrangements and the pursuit of parallel private lawsuits. As a result, these lawyers' profit motive—and not the public interest—can become the controlling factor in determining which companies are sued, what legal theories are advanced, and what is demanded in a settlement.

THIRD

Exercises of significant government authority should be subject to checks and balances. Yet enforcement officials have virtually unrestricted discretion in deciding whether to initiate investigations and institute lawsuits, and in setting the price of settlement. These actions are a politically cost-free means of subsidizing governmental activity, padding public coffers without having to raise taxes, and imposing new regulations through decree rather than new legislation or properly promulgated regulations, all of which would be subject to legal and political constraints.

FOURTH

Once a claim of wrongdoing is resolved, the target should not be subjected to "double jeopardy" and forced to litigate the same claim over and over again. Swarm litigation by its very nature involves not just double jeopardy, but double jeopardy cubed: the same conduct is targeted by multiple government entities and private lawyers, in simultaneous and/or successive investigations.

Swarm litigation is hurting American consumers, investors, and workers. They bear the burden of the exorbitant monetary payments extracted from companies, which means billions of dollars not available to invest in inventing new products and bringing them to market, fewer resources to invest in expanding businesses and creating new jobs, higher prices for goods and services, and lower returns for investors and their pension funds. And they also bear the burdens of regulation imposed unilaterally via settlement: increased cost and decreased innovation.

Reforms are needed to protect the fundamental principles of fairness and impartiality that are the hallmark of our legal system. Double jeopardy cubed should be prohibited: no one should have to defend themselves against multiple claims multiple times for the very same conduct. Punishments should not be based on a government official's desire to tout ever-larger settlement numbers, but rather should be proportional to the harm directly

tied to the wrongdoing. And enforcement decisions should be made by government officials guided by the public interest, not by plaintiffs' lawyers motivated by self-interest. These changes would go a long way toward preventing today's enforcement abuses and ensuring that enforcement actions are focused on actual wrongdoing that inflicts real harm on the consumers, investors, workers, and businesses that the law is intended to protect.



Roots of the Swarm: Multiple, Overlapping Enforcement

The American system of law enforcement has long been characterized by some degree of overlapping enforcement authority between the federal government and the fifty states.

Today, however, the number of different entities and individuals wielding enforcement authority has multiplied exponentially and, in a number of instances, these enforcement officials have effectively merged with the plaintiffs' bar:

FIRST

There are now literally hundreds of federal agencies, offices, and sub-agencies that regulate various types of businesses and activities.

SECOND

There are corresponding state agencies in each of the 50 states (and the District of Columbia and Puerto Rico) that have virtually identical regulatory mandates to their federal counterparts.

THIRD

Each state also has a state attorney general (AG), who typically is vested with wide discretion to initiate cases on behalf of his or her state's residents.

FOURTH

An increasing number of federal laws grant state attorneys general and other state officials the power to bring lawsuits under federal law.²

FIFTH

The U.S. Justice Department (DOJ) and other federal agencies with independent litigating authority possess nearly unlimited discretion to bring their own actions.

SIXTH

Private law firms are retained by state attorneys general and other state agencies, endowed with the delegated authority of the state, and typically compensated on a contingency fee basis.

SEVENTH

There are also tens of thousands of plaintiffs' attorneys that can act as "private attorneys general" under laws that confer standing on private plaintiffs to sue based on alleged public harm (i.e., by initiating a *qui tam* action, in which a private party purports to be litigating on behalf of the government).

EIGHTH

Plaintiffs' lawyers not representing the state (and sometimes even those who are) bring class actions and mass tort claims seeking huge damages payments on behalf of private parties.

In the past, enforcement agencies would defer to one another. Today, they all pile on in just about every case in order to get a share of the "winnings." Why is this authority increasingly employed to institute overlapping investigations and litigation? As explained next, several factors have combined to produce a fertile environment for the rapid growth of the swarm enforcement phenomenon.



“ *In the past, enforcement agencies would defer to one another. Today, they all pile on in just about every case in order to get a share of the ‘winnings.’* **”**



Self-Interest Trumps the Public Interest

Enforcement officials have extraordinarily broad discretion to decide whom to sue and what to claim. That power is supposed to be exercised to further the public interest, without fear or favor for any group, company, or individual. Unfortunately, there is substantial evidence that enforcement officials have diverged significantly from that fundamental principle.

Government Officials' Self-Interest Increasingly Appears to Influence Enforcement Decisions

It has long been recognized that some State AGs may selectively target corporations (especially out-of-state corporations) in high-profile litigation as a means of burnishing their credentials for higher office. Judge Richard Posner described these political incentives this way:

[S]tate attorneys general are politicians, that is they are elected rather than appointed officials.... [T]he natural ambition of a politician who holds high state office is to be elected governor; hence, there is often...an incentive on the part of the attorney general to bring suits that confer a political benefit on him....The coalescence of these factors suggests a strategy for a state attorney general that is in fact observed. The strategy consists in bringing high-profile lawsuits that attract publicity to the attorney general and that promote the interests of politically influential state residents[.]³

And that is exactly what happens, because taking harsh action against unpopular industries—whether or not justified by the underlying facts—is often good politics. As Donald Stenberg, former attorney general of Nebraska, put it: “[Many State AGs] campaign promising to be activist attorneys general.”⁴ For these State AGs and other regulators, bringing high-profile cases against businesses can attract favorable attention that is the ticket to higher office or a lucrative private law practice. For example, then-New York Attorney General Eliot Spitzer made his aggressive pursuit of Wall Street investment firms the centerpiece of his subsequent successful campaign for governor.⁵ After Spitzer resigned the governorship in disgrace, his successor as attorney general, Andrew Cuomo, rode this same strategy into the governor’s mansion.

This politicization of enforcement decisions is spreading from AGs to other government officials. Increasing media attention on allegations of business “wrongdoing”—and the availability of lucrative private sector jobs or political office for successful prosecutors—means that more government

“ *The bottom line: if the public spotlight falls on a company, or if initiating action against a company or industry will win popular acclaim, large numbers of enforcement officials can—and will—launch simultaneous investigations followed by litigation in order to gain a share of public attention.* **”**

officials are acting like AGs, trumpeting their enforcement actions in order to increase their public profiles.⁶ In this world of self-interested enforcement, ever-bigger monetary settlements are especially prized, because it is these eye-popping dollar values that produce the most headlines. Indeed, officials who take a less activist approach to their positions are often subject to harsh criticism in the press if they fail to exercise their authority. These critiques typically rest solely on the identity of, and the level of public opprobrium directed at, the potential target—because the critics have no idea whether the official’s decision was justified on the basis of the law and the facts.⁷

The bottom line is if the public spotlight falls on a company, or if initiating action against a company or industry will win popular acclaim, large numbers of enforcement officials can—and will—launch simultaneous investigations followed by litigation in order to gain a share of public attention. An army of opportunistic private plaintiffs’ attorneys will inevitably follow suit (either by filing parallel actions simultaneously or by pursuing subsequent cases that seek to free ride on the government’s efforts), thus rendering the cost of defending against all of these collective actions astronomical.

The Plaintiffs’ Bar and Its Profit Motive Hijack the Public Interest

Enforcement actions typically are justified as “protecting the public interest,” but many of these cases are actually driven in large part by the self-interest of the plaintiffs’ bar.

State AGs and regulators often argue that they lack the expertise or resources to pursue corporate defendants on their own, and therefore “deputize” private law firms to sue on their behalf under a contingency-based fee structure. Plaintiffs’ firms have represented states or state entities on a contingency fee basis in suits against homebuilders, financial services providers, pharmaceutical manufacturers, and healthcare companies, among many others.⁸

In most of these cases, *it is the plaintiffs’ lawyers themselves who first conceive of bringing the lawsuit and select the companies to target*. Indeed, plaintiffs’ lawyers travel the country pitching case theories to various State AGs and other regulators, offering to handle all aspects of the litigation in exchange for a percentage of the ultimate recovery.

For example, the Valorum Law Group, a Chicago-based plaintiff’s firm, recently circulated a draft proposal to State AGs,



“ In most of these cases, it is the plaintiffs’ lawyers themselves who first conceive of bringing the lawsuit and select the companies to target. ”

urging them to retain the firm and vest it with the states’ *parens patriae* power, in order to sue “Big Food” companies for reimbursement of Medicaid costs resulting from obesity-related conditions.⁹ The draft proposal specifically urges the AGs to partner with the firm to target manufacturers of foods that are “high in fat, saturated fat, caloric density, sugars, and/or glycemic index” on the theory that such foods “produce harmful externalities that are ‘eating up’ state budgets.”¹⁰

The proposal provides a rare look “behind the curtain” at how plaintiffs’ lawyers lobby government officials to authorize actions selectively targeting business interests. Among other things, the pitch:

- Appeals to the political interests of State AGs by emphasizing states’ budgetary shortfalls and shrinking availability of funds for healthcare and suggesting that states can potentially recover billions of dollars through litigation, “transform[ing] AGs into unlikely heroes in budget dramas”;
- Notes that *parens patriae* actions eliminate defenses that are otherwise available to defendants in private product

liability or consumer protection actions and preclude “personal responsibility” defenses;

- Asserts that the hiring of contingency fee attorneys poses “no budgetary cost or risk” to the states;
- Recommends that the states use their unique ability to investigate food companies before filing suit by issuing investigatory subpoenas under consumer protection statutes—fishing expeditions that would not be permitted in the private lawsuits otherwise available to plaintiffs’ lawyers; and
- Suggests that, in addition to extracting a substantial recovery from food companies, litigation can also be used to impose additional regulations on the food industry because “policy objectives could be agreed to as part of any settlement.”¹¹

The plaintiffs’ lawyers’ “pitch” leaves little doubt about the true aims of the contemplated litigation: enhancing the political profile of State AGs, extracting funds from target companies that can be used to ease state budget shortfalls (while providing the law firm with a generous contingency fee), and circumventing the legislative process to impose new regulations on the food industry.

Food litigation is just one example of the claims private lawyers regularly pitch to government officials. Other “enforcement opportunities” have included corporate data security, product safety, financial regulation, the labeling of pharmaceuticals and medical devices, and the privacy of healthcare information, among many others.¹²

In too many instances, the government officials who delegate their enforcement authority exercise little or no oversight over these private lawyers, who also frequently represent plaintiff classes with parallel private claims. These private attorneys have a very substantial financial incentive to extract the greatest settlement payment possible but are subject to virtually no oversight to prevent them from abusing their delegated authority. Unsurprisingly, private lawyers pay little heed to the social or economic consequences of their actions and focus primarily on garnering the largest possible financial windfall—whether or not such a windfall is truly justified.

By ceding state power to plaintiffs' lawyers, government officials allow these self-interested private parties to exercise an

outsized—and entirely illegitimate—influence over public enforcement priorities. Corporate defendants are often pursued by plaintiffs' lawyers simply because they have the “deepest pockets,” not because they have actually caused public harm. Actions brought under these contingency fee arrangements can distort the public interest by focusing “blame” for what are often complex social problems onto companies that are convenient litigation targets. Businesses are used as scapegoats because they present the easiest, most lucrative, and politically expedient target for regulators. That diverts regulatory attention away from real wrongdoing or complicated structural problems, harming the public interest for the sake of private gain.

“ By ceding state power to plaintiffs' lawyers, government officials allow these self-interested private parties to exercise an outsized—and entirely illegitimate—influence over public enforcement priorities. ”



Equally troubling, contingency fee relationships between plaintiffs' lawyers and regulators are rarely competitively bid and can result in serious conflicts of interest for the regulators that award such work. It is not uncommon, for example, for State AGs to award contingency representations to political allies in apparent exchange for continued contributions and support. For example, Mississippi Attorney General Jim Hood selected the plaintiffs' firms of Bernstein Litowitz Berger & Grossman; Kaplan Fox; Kessler Topaz Meltzer & Check; Labaton Sucharow; and Wolf Popper to represent his state's public employees' pension funds on a contingency fee basis in 16 securities lawsuits between 2005 and 2011.¹³ During that same period, those firms gave a combined \$330,750 to Hood's campaigns.¹⁴ When his state brought a lawsuit against BP as a result of the Deepwater Horizon oil spill, Hood retained his predecessor, former Mississippi Attorney General Mike Moore, who helped pioneer the use of contingency fee arrangements by the office and now runs his own successful plaintiffs' firm in Jackson, MS.¹⁵

Hood's selective use of politically-connected plaintiffs' firms is just one of many documented instances of potential "pay to play" relationships between state officials

and the plaintiffs' bar. In states from Connecticut to Pennsylvania to California, State AGs and other regulators make frequent use of plaintiffs' firms with political and financial ties to the state officials in charge of awarding the work.¹⁶ Indeed, the practice is so common and so clearly undermines the legitimacy of governmental action that it has drawn the attention of Congress, which held a hearing in 2012 to investigate the close ties between State AGs and the plaintiffs' bar.¹⁷ In his testimony before the House Committee on the Judiciary, researcher James R. Copland concluded: "Ethical concerns about state-sponsored litigation contracted to private attorneys on a contingency fee basis are not merely theoretical; arrangements that at least create an appearance of impropriety have been commonplace in practice."¹⁸

Enforcement Officials Virtually Always Prevail Through Coerced “Settlements” Regardless of the Merits of Their Claims

If unjustified enforcement actions are being brought, why don’t the victims of these actions simply fight them in court? The simple answer is that in many circumstances they can’t.

That means the government official with enforcement authority—typically a single individual—in reality ends up exercising the power of prosecutor, judge, and jury, all without any real oversight or review.

The Reputational and Financial Costs of Fighting an Unjustified Case Force Virtually Every Target to Settle

As Colorado Attorney General John Suthers—criticizing swarm litigation—put it, “[w]hen threatened by a suit by multiple AGs [or other regulators], most publicly held companies conclude they can’t afford the fight.”¹⁹

Few corporate defendants are willing to risk protracted and costly litigation, ongoing

reputational harm, and potential exposure in the billions of dollars for claims asserted on behalf of thousands of plaintiffs in multiple jurisdictions. As a result, government actors and plaintiffs’ lawyers have tremendous leverage to force lopsided settlement terms, regardless of the actual legal merits of their claims. The *Economist* explained,

[b]usinesspeople generally argue that an indictment or a criminal charge can cause unacceptable damage, including the loss of operating licenses, government contracts and customers, so their only realistic choice may be to settle, even if they have a good chance of being acquitted. Some think this gives prosecutors too much power, and that settlements feel more like shakedowns.²⁰

“ *[G]overnment actors and plaintiffs’ lawyers have tremendous leverage to force lopsided settlement terms, regardless of the actual legal merits of their claims.* **”**



The recent settlements relating to off-label pharmaceutical marketing provide an example of the disproportionate pressure that can force billion-dollar settlements, notwithstanding the complete rejection of liability by other courts. During the past 10 years, State AGs, regulators, and plaintiffs' lawyers have simultaneously pursued overlapping actions against large pharmaceutical companies based on the alleged off-label promotion of their products. At the same time, the Justice Department has conducted criminal probes and pursued its own civil claims under federal drug labeling laws and the False Claims Act. The combination of this tremendous law enforcement pressure—both state and federal, and civil and criminal—has resulted in truly unprecedented monetary settlements.

For example, in November 2013, in order to resolve multiple criminal and civil actions leveled against it by the Justice Department relating to the marketing of the drug Risperdal, Johnson & Johnson was forced to pay more than \$2.2 billion, one of the largest pharmaceutical settlements of all time.²¹ Johnson & Johnson was forced to enter this massive settlement of federal claims despite the fact that—in related cases advanced on nearly identical state theories—the supreme courts of Arkansas and Louisiana rejected the claims asserted against Johnson & Johnson.²² As the Louisiana Supreme Court concluded:

There was insufficient evidence adduced that any defendant engaged in fraud, misrepresentation, abuse or other ill practices seeking to obtain, pursuant to a claim made against the medical assistance program funds, payments to healthcare providers or other persons to which the healthcare providers or other persons were not entitled.”²³

Despite its early attempts to defend itself and the favorable rulings of two state supreme courts, Johnson & Johnson ultimately was unable to resist the swarm of criminal and civil claims advanced against it. In particular, it could not withstand the tremendous burden of multiple parallel criminal investigations by the Justice Department, an effort that Attorney General Eric Holder characterized at a press conference announcing the settlement as “relentless.”²⁴

The Johnson & Johnson example also demonstrates the hazard of duplicative judgments in swarm litigation. Even after paying \$2.2 billion to resolve the Justice Department’s claims, Johnson & Johnson was obligated to separately settle state consumer fraud claims brought by multiple State AGs at a further cost of hundreds of millions of dollars.²⁵ The plaintiffs’ attorneys whom the State AGs deputized in these actions stood to pocket more than \$250 million in contingency-based legal fees.²⁶ Even more troubling, building off the coercive model used against Johnson & Johnson, federal and state officials have since reached similar settlement agreements for similarly exorbitant amounts with multiple other drug makers.²⁷

Another example of an extortionate swarm action can be seen in the claims brought by a consortium of State AGs and private class action plaintiffs against virtually the entire pharmaceutical industry alleging fraud in the reporting of prices for drugs covered under state Medicaid programs. State Medicaid agencies have traditionally reimbursed pharmacies for drugs based upon an average wholesale price (AWP), which suppliers report to an independent price reporting service. In the AWP lawsuits, the states alleged that companies’ AWPs

overstated the actual price of the drugs because they failed to include discounts and rebates provided to certain private retailers. At the same time, private class plaintiffs made virtually identical allegations against the same defendants, asserting that manipulation of the AWP had inflated their co-payments and reimbursements.

Despite early attempts to defend these cases and favorable judgments for the drug makers in some state courts,²⁸ the corporate defendants ultimately had little choice but to settle the vast majority of these claims as successive suits depleted their litigation resources. In June 2012, Beasley Allen, a plaintiffs' firm representing eight states in AWP litigation, touted its achieving settlements of \$600 million against a number of drug manufacturers, with an additional \$118 million in verdicts on appeal.²⁹ The defendants were also forced to enter into separate settlements with private class plaintiffs, costing them additional hundreds of millions of dollars.³⁰ Thus, despite early state court judgments finding no merit to the plaintiffs' claims,³¹ the corporate defendants were ultimately made to pay millions of dollars simply to end the deluge of litigation in which they had been immersed.

These settlements have affected the cost and potential availability of medicines to the public. As part of these settlements, several states imposed modifications in the way AWP was calculated, effectively reducing the amount that Medicare reimburses for pharmaceutical drugs. At the time of these changes, many non-party medical providers warned that such modifications would constrict drug pricing, put independent pharmacies out of business, and ultimately reduce patients' access to important

medicines.³² The plaintiffs' lawyers—who stood to gain millions of dollars in settlement-based fees—were unmoved by these concerns.

Vague, Expansive Statutes Place Few Limits on the Conduct That Can be Claimed to be "Illegal"

Enforcement officials frequently rely on novel and expansive interpretations of statutes, such as the provisions of the federal False Claims Act (FCA) and its multiple state-level variations; the Foreign Corrupt Practices Act (FCPA); the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA); and various state statutes prohibiting "unfair business practices."³³ The broad and general statutory language greatly enhances the ability to force settlements, as targets cannot be sure that courts will set aside novel interpretations of these laws.

Moreover, statutes like the federal FCA—and its many state counterparts—not only allow government agencies to sue but also confer general standing on the plaintiffs' bar to act as "private attorneys general" on the government's behalf. Under the FCA, for example, any private individual with new information about a potential claim (i.e., whistleblowers or disgruntled employees) can sue any entity that receives funds from the federal government on the theory that the payments were elicited by false or fraudulent requests. The statute imposes statutory penalties of up to treble damages for each false request for payment and per-claim statutory penalties ranging between \$5,500 and \$11,000. Under the FCA's *qui tam* provisions, a private individual who brings suit may be entitled to receive a share of the government's recovery. This potential



for contingent recovery creates strong financial incentives for private plaintiffs to bring even frivolous FCA claims, in the hopes of extracting a lucrative settlement from a corporate defendant.

This perverse incentive—combined with the provisions broadening the pool of potential FCA claimants that were included in the Affordable Care Act (ACA)³⁴ and the Dodd-Frank Act³⁵—has resulted in a dramatic increase in the number of FCA *qui tam* actions, with suits nearly doubling between 2008 and 2012.³⁶ The Justice Department, which evaluates *qui tam* actions to determine if its direct participation is appropriate, ultimately intervenes in only about 20 percent of these cases, meaning that the vast majority of *qui tam* actions are pursued by plaintiffs' lawyers alone *after* the government has determined that the case does not have sufficient merit to warrant its participation.³⁷ In addition to the federal FCA, 29 states and the District of Columbia have enacted similar state laws to allow the plaintiffs' bar to advance *qui tam* claims on the states' behalf.

Novel liability claims also result from shoehorning claims into common law theories such as public nuisance or unjust enrichment. These theories are popular because they allow plaintiffs to bring broad claims without having to clearly articulate traditionally-required legal elements such as causation or harm. In the late 2000s, a number of activist State AGs and environmental regulators—led by then-California Attorney General (now Governor) Jerry Brown—attempted to sue automotive manufacturers for “public nuisance” on the theory that their vehicles (although fully compliant with all federal emissions standards) were wrongly contributing to the effects of global warming in the plaintiff

“ Novel liability claims also result from shoehorning claims into common law theories such as public nuisance or unjust enrichment. These theories are popular because they allow plaintiffs to bring broad claims without having to clearly articulate traditionally-required legal elements such as causation or harm. ”

states. Although that effort was ultimately rejected by the courts after a long and costly fight,³⁸ plaintiffs' lawyers have repeatedly invoked nuisance theory in recent years. In particular, plaintiffs have attempted to rely upon nuisance actions to halt natural gas drilling operations, alleging that the practice of “fracking” has the potential to interfere with the use and enjoyment of neighboring property, even where there is no evidence to demonstrate that the practice has actually contaminated adjacent property.³⁹

There is an additional problem with these *ex post* attempts to stretch vague statutes or common law principles to target otherwise lawful business activity: Enforcement actions are illegitimate when businesses could not have known that their actions would later be claimed to violate the law.

“ Enforcement actions are illegitimate when businesses could not have known that their actions would later be claimed to violate the law. ”

It is unconstitutional to punish someone who did not have “fair notice” that his or her conduct was unlawful; punishments imposed without notice have no useful deterrent effect and cannot otherwise be justified.⁴⁰ Indeed, the effect of the use of enforcement in this manner is to deter innovation, because a business cannot anticipate whether or not its behavior might retroactively be declared “unlawful.”

The proper approach in that situation is for government to promulgate new rules that apply prospectively, or enact new statutes, setting the “rules of the road” so that legitimate businesses can determine in advance the line between lawful and unlawful conduct and comply with the law. Use of enforcement actions to set those rules retroactively is entirely improper.

Lack of Standards for Monetary Fines Allows Claims for Exorbitant Sanctions

Statutory standards for monetary fines—whether in criminal enforcement actions or as civil penalties or “statutory damages”—typically provide no meaningful constraints on the monetary award that can be sought in these lawsuits. Still others provide for grossly excessive fines or damages amounts, without considering the exorbitant damages amounts that result in the class

action context where claims are advanced on behalf of millions of potential plaintiffs. Facing claims in the billions or tens of billions of dollars—and no clear statutory standard for assessing penalties, such as proportionality between the penalty and harm actually inflicted by the target’s conduct—the rational business will settle to avoid the downside risk, even if remote, of a huge monetary sanction that could not be appealed because of the inability to obtain an appeal bond.

For example, the Telephone Consumer Protection Act of 1991⁴¹ (TCPA) prohibits unsolicited advertisements by telephone, cell phone, or fax machine and allows plaintiffs to recover either the actual monetary loss from such communications or \$500 per violation, whichever is greater. Courts may also award treble statutory damages if the violations are found to be “willful or knowing.” The TCPA was passed in 1991 by lawmakers hoping to curb certain abusive telemarketing practices and end expensive, unwanted calls to cell phones, but the law has never been updated to reflect the fact that most cell phone calls are now cheap and that more and more consumers no longer use land lines. Under the existing statutory scheme, any company of a reasonable size that attempts to communicate with its own customers via unsolicited phone calls or text messages is potentially at risk for being sued for tens of millions of dollars. According to the *Wall Street Journal*, more than a dozen companies paid more than \$200 million in TCPA settlements between 2012 and 2013.⁴² In virtually all of these cases, the consumers who received these calls suffered no harm whatsoever.



Enforcement Officials Use Their Coercive Power to Circumvent Checks and Balances and Unilaterally Impose New Taxes and Expanded Regulation

The coercive power to force settlement is used by officials with enforcement authority acting alone, without legislative action, judicial review, or any of the other checks and balances that are critical to maintaining the fairness of our system of government and preventing the concentration of power in any one individual or institution.

Taxing and Spending Decisions

When the price of settlement is money, enforcement officials can decide the amount without any constraints—extracting vast sums of money in the absence of any of the normal protections that accompany the adoption of new taxes. Indeed, these coerced settlements are often used to finance government activities not authorized by the normal legislative appropriation process, circumventing the checks and balances that otherwise would apply.

For example, several recent regulatory settlements between certain states and various insurance companies have been

“ [C]oerced settlements are often used to finance government activities not authorized by the normal legislative appropriation process, circumventing the checks and balances that otherwise would apply. ”

used to fund the growth of permanent state bureaucracies to review and conduct ongoing monitoring of the insurance industry. Because these monitoring agencies are largely funded by settlement proceeds outside of the legislative process, their budgets are not subject to the oversight that ordinarily applies to government agencies.⁴³

The multi-billion-dollar National Mortgage Settlement will ultimately be used to fund an explosion of new government activities not authorized by law. According to the National Conference of State Legislatures, the agreement compelled mortgage servicers to pay almost \$5 billion directly to the states, most of which will be used to create and fund new state agencies.⁴⁴ In Rhode Island, the entire amount recovered by the state will be used to create the Rhode Island Foreclosure Protection Program, a new agency administered by Rhode Island's Attorney General. In Delaware, Kansas, Maryland, Michigan, North Carolina, and Wisconsin (among others), millions of dollars will be used to expand the enforcement staff of those state's respective State AGs.⁴⁵ Nebraska's entire recovery "will be deposited into the state's rainy day fund," and Ohio intends to use \$75 million to create a "grant program for abandoned/vacant property demolition."⁴⁶ None of these spending choices depend upon authorizations by the legislatures or the citizens of these various states.⁴⁷

New Regulation Without Legislative Authorization

Settlements also impose entirely new regulatory regimes, developed by enforcement officials without the normal legislative and rulemaking process. By forcing a business to accept ongoing oversight and regulation as a condition of settlement, a single government official can circumvent all of the protections and public accountability that go into legislative decision-making. The antidemocratic policymaking that emerges from regulatory settlements, therefore, is not only bad in itself; it also results in extremely ill-informed regulations and policies.

One advocate of regulation-through-litigation has stated: "What has happened is that the legislatures...have failed...Congress is not doing its job [so] lawyers are taking up the slack."⁴⁸ Indeed, the stated purpose of swarm litigation is often to impose new regulations to "change business practices" that some small cadre of state or federal officials find offensive, without having to follow the applicable legislative or regulatory processes.

"The antidemocratic policymaking that emerges from regulatory settlements, therefore, is not only bad in itself; it also results in extremely ill-informed regulations and policies."



This handful of officials effectively substitutes their judgment for that of the legislature. But imposing regulation through coercive settlement is inconsistent with democratic government and the separation of powers. In no other area of American life are so few individuals vested with so much power to unilaterally impose their own policy preferences without any oversight or authorization from the elected legislature.

For example, although many members of Congress have repeatedly questioned its authority to do so, the Environmental Protection Agency (EPA), aided by environmental NGO's and plaintiffs' lawyers, has used litigation to unilaterally stifle new economic development,⁴⁹ prohibit certain kinds of carbon emissions,⁵⁰ impose new air and water standards,⁵¹ set guidelines for sewage treatment in the San Francisco Bay area,⁵² and establish new complicated rules for chemical and pesticide research.⁵³ Many of these measures have been attempted or achieved primarily through litigation.⁵⁴

“In no other area of American life are so few individuals vested with so much power to unilaterally impose their own policy preferences without any oversight or authorization from the elected legislature.”

Other examples include:

- The SEC's and DOJ's recent use of corporate settlements to aggressively expand their enforcement authority under the Foreign Corrupt Practices Act (FCPA) to include previously unrecognized criminal and civil penalties for books and records violations and insufficient compliance programs, even in the absence of any corrupt payment or other clear statutory violation.⁵⁵
- The DOJ's and State AGs' use of the National Mortgage Settlement to establish a new “Office of Mortgage Settlement Oversight” and oversee the operations of federally chartered banks (which are already subject to oversight by multiple federal regulators—the Federal Reserve System, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the U.S. Treasury Department, among others). Under the new Office's oversight, the settlement imposes dozens of new business requirements on banks, ranging from case review and paperwork processing requirements to prohibiting banks from seeking loan modifications in certain situations. All of these requirements—and the new bureaucracy created to enforce them—were imposed without any participation from or authorization by Congress.⁵⁶
- The DOJ's and State AGs' use of settlements with large drug manufacturers—such as Johnson & Johnson—to impose new labeling and promotion requirements for the entire pharmaceutical industry, even those companies that were not accused of

improperly promoting their products.⁵⁷ By way of further illustration, in 2014, Pfizer entered a \$35 million settlement with 42 separate State AGs to resolve allegations that a subsidiary improperly promoted its drug Rapamune for off-label uses. In addition to its large monetary payment, Pfizer was forced to accept ongoing restrictions and oversight, which (a) limited the ways in which Pfizer could market or promote all of its products (not just Rapamune); (b) imposed entirely new rules regarding the type of evidence needed before Pfizer could make any claim about the safety or effectiveness of its products; and (c) restricted Pfizer from conducting clinical trials or funding other research in an effort to influence hospitals or transplant centers to prescribe its medicines.⁵⁸ These ongoing obligations amount to an additional regulatory regime—imposed by a collection of State AGs—over and above the statutory scheme contemplated by the Federal Food, Drug, and Cosmetic Act and the regulatory power granted to the FDA.

Aggressive State Attorneys General Can Impose Their Regulatory Choices Nationwide, Overriding Basic Federalism Principles

Regulatory settlements also allow a single State AG to demand terms that apply nationwide and therefore impose his or her preferred regulatory standard on the entire country, even if other states (or the federal government) disagree with the underlying policy. This “extraterritorial encroachment” by one state, using a settlement to override the policy preferences of other states, violates fundamental principles of federalism.⁵⁹ For example:

- In 2004, the West Virginia Attorney General forced a settlement with Purdue Pharma, manufacturer of the drug OxyContin—a lawful product heavily regulated by the FDA—based on the unconventional legal theory that the manufacturer should be held responsible for harms caused by OxyContin users who had illegally obtained and/or abused the drug. In addition to extracting a significant cash payment from the drug manufacturer, the settlement also impacted the way companies may design and market their products across the United States, lest they face civil liability for social harms caused by drug

“ Regulatory settlements also allow a single State AG to demand terms that apply nationwide and therefore impose his or her preferred regulatory standard on the entire country, even if other states (or the federal government) disagree with the underlying policy. ”



abusers who illegally obtain prescription drugs. Prior to this action, the marketing and sale of drugs had been considered to be the province of federal regulators at the FDA. By imposing duplicative obligations through settlement, however—obligations by which drug companies as a practical matter must abide nationwide—West Virginia acting alone was essentially able to supersede federal drug regulations that had previously applied to the entire country.⁶⁰

- Other State AGs quickly followed West Virginia's playbook. In 2007, then-District of Columbia Attorney General Linda Singer forced Purdue Pharma into a similar settlement to resolve claims from "past and future" marketing of OxyContin in 26 states and the District of Columbia.⁶¹ If Purdue thought this settlement would finally resolve the marketing issue, however, it was mistaken. Today it faces similar lawsuits from multiple states, the City of Chicago

and Orange County, California. And many of these plaintiffs are now represented by Linda Singer in her new role as a high-paid lawyer in a private plaintiffs' firm.⁶²

- In 2012, New York Attorney General Eric Schneiderman and San Francisco District Attorney George Gascón launched a multistate action dubbed the "Secure Our Smartphones (S.O.S.) Initiative." Ostensibly intended to reduce theft, the action seeks to compel device manufacturers and carriers nationwide to implement technological safeguards to prevent the usability of lost or stolen devices. The New York AG and San Francisco District Attorney have pursued this initiative, which has implications for the manufacturing of smart phones and the delivery of telephone service nationwide, despite the fact that these devices and services are already heavily regulated by the Federal Communications Commission.⁶³

The Resulting Harm to Consumers, Investors, and Employees

The swarm litigation phenomenon imposes huge burdens on the American economy. Most estimates suggest that the financial levies alone exceed \$100 billion.⁶⁴

But the real consequences—virtually always hidden from view—are borne by customers, investors, and employees. The hundreds of millions of dollars that American businesses must spend to navigate and resolve redundant enforcement efforts produce no economic value, and these costs are inevitably passed on to consumers in the form of higher prices and the elimination of beneficial consumer products. These costs also weaken the American economy structurally, reducing the competitiveness of American businesses when compared with their counterparts overseas, causing losses in productivity and shareholder value, and ultimately making it more difficult for business to create jobs and drive economic progress.

INVENTING NEW PRODUCTS

The hundreds of billions of dollars drained from American businesses by swarm litigation settlements mean less money to invent new products and bring them to market. For example, the entire pharmaceutical industry spent approximately \$50 billion on research and development last year.⁶⁵ That investment could have, and likely would have, been

greater—producing new drugs and other products—if companies were not forced to devote billions of dollars to managing and settling multiple, duplicative lawsuits.

LENDING

The onslaught of lawsuits that slammed the mortgage lending and servicing industry in the wake of the 2008 financial crisis has produced a dramatic contraction in the availability of credit, slowing the United States' economic recovery. That is because “lenders are applying standards that are more conservative than what is required” by legal and regulatory requirements.⁶⁶ Why? Fear of swarm litigation:

Lenders are putting policies in place for self-protection. All you have to do is read the headlines about the massive legal settlements against the largest lenders for loans they made that went into default...And there's no end in sight. Lenders are saying we're going to have clear lines so our decisions can never be questioned when a loan defaults.⁶⁷

Lawsuits brought by regulators and private attorneys have as a practical matter stopped lenders from loaning money except under extremely narrow and rigid circumstances, meaning many Americans no longer have access to the necessary capital to buy a home, invest, or grow small businesses. As one industry publication put it, “[b]uyers and sellers of such assets cannot agree on pricing because probes by regulators could result in increased liability, demands for more settlements or even more class-action lawsuits from borrowers.”⁶⁸ One leading mortgage servicer explained, “[i]t’s the whole market that’s basically stopped.”⁶⁹ Indeed, uncertainty over continued litigation and overregulation has so damaged lending in the housing market that even former Chairman of the Federal Reserve Ben Bernanke said he is having trouble refinancing his own home loan.⁷⁰ “I’m not making that up,” Bernanke said after admitting his own borrowing challenges. “The housing area is one area where regulation has not yet got it right.”⁷¹ Meanwhile, while banks wait for relief from the swarm, borrowers can’t get the credit they need, and the economy continues to suffer.

SMALL BUSINESSES

Many commentators also believe that duplicative lawsuits and financial regulations disproportionately harm small businesses and cause greater industry consolidation. For example, small community banks rarely have the wherewithal to pay for expensive regulatory compliance departments or to resolve swarm actions directed against them. As a result, scholars have concluded that overregulation in the financial sector is likely “unjustifiably hasten[ing]” banking consolidation and may pose a “significant threat” to the continued existence of small banks in the United States.⁷² As the vice chairman of one such bank put it: “I am deeply concerned that [the community bank] model will collapse under the massive weight of new rules and regulations...”⁷³

HEALTHCARE

Duplicative litigation and overregulation also have detrimental impacts on the quality of healthcare that Americans receive. Collaboration among doctors, drug makers, and medical device manufacturers is a key component in the development, design, and use of life-saving drugs and devices. Interactions can lead to the development of new medical innovations, the improvement of existing products, and better training and education. Yet despite these recognized

“ Lawsuits brought by regulators and private attorneys have as a practical matter stopped lenders from loaning money except under extremely narrow and rigid circumstances, meaning many Americans no longer have access to the necessary capital to buy a home, invest, or grow small businesses. ”

benefits, some states—including Connecticut, Massachusetts, Minnesota, Vermont, West Virginia, and the District of Columbia—have used lawsuits to enforce onerous reporting requirements and expenditure limits on interactions between doctors and manufacturers.⁷⁴

At the same time, the federal government imposes its own reporting requirements. The federal rules and the various state laws all have different requirements and reporting deadlines. As a result, manufacturers doing business in multiple states are required to adopt state-specific policies and procedures and train their employees and agents accordingly, making beneficial interactions with doctors across the country more difficult and diverting valuable resources away from innovative medical research, development, and education.

JOBs

When manufacturing companies are targeted by swarm litigation, Americans can lose their jobs. That was the case when Blitz, USA, a manufacturer of gas cans that employed about 120 people in Miami, Oklahoma, drew the attention of plaintiffs' lawyers. Although the company's products warned of the obvious danger of using gas cans to fuel fires, and the Consumer Product Safety Commission (CPSC) found that certain injuries were the result of misuse, plaintiffs' lawyers nevertheless rushed in to allege that the cans could have been designed to be safer. Within about a year, Blitz went from being the largest manufacturer of gas cans in America to being completely out of business. As Blitz's former CEO testified before Congress:

About a decade ago, we started to see a couple of lawsuits here and there. Then, as our insurance provider started to

“ The collective drain of these lawsuits ultimately filters down to all aspects of the economy and reduces the competitiveness and dynamism of the United States overall. ”

increase settlement payments, we saw a flood of lawsuits. This became lucrative business for the trial bar All our efforts were insufficient and the rest is history for a once proud American manufacturer.⁷⁵

As industry after industry have come under attack from swarm litigants, the same unfortunate story has been repeated: overzealous regulators and plaintiffs' lawyers use their leverage to impose huge transaction costs and ill-advised regulations on industries, which in turn reduce resources available for investment, place undue financial burdens on investors and consumers, and stifle economic growth. The collective drain of these lawsuits ultimately filters down to all aspects of the economy and reduces the competitiveness and dynamism of the United States overall.

The Way Forward

The swarm litigation phenomenon is a direct consequence of the complete absence of any significant constraints on the discretion of law enforcement officials.

Limitations are urgently needed that will prevent these abuses while preserving appropriate authority to investigate, prosecute, and punish real violations. These reforms should include:

- Addressing the problem of multiple double jeopardy cubed—which forces businesses to litigate the same issue against multiple claimants multiple times. As a first step, each governmental entity (the federal government and each of the states) should permit only a single enforcement entity to take action with respect to a particular set of facts, requiring other entities to stand down once one has begun the investigation or enforcement process.
- Establishing standards for calculating monetary sanctions—criminal fines, civil penalties, and statutory damages—to ensure that the punishment is proportionate to the damage inflicted and thereby limit the ability to coerce settlements through the threat of draconian damages.
- Limiting enforcement actions to situations in which the relevant statute and regulations made clear at the time of the alleged violation that the conduct in question was unlawful. Punitive sanctions should not be used to impose new standards.

- Regulating the use of contingency fee counsel in enforcement actions. The federal government and some states prohibit or regulate governmental retention of contingency fee counsel.⁷⁶ At a minimum, states should prohibit the improper delegation of state authority to private parties, ensure transparency with respect to the selection of and fee arrangements with outside counsel, limit the size of fees, and increase oversight and accountability.
- Preserving fundamental federalism values by prohibiting state authorities from entering into settlement agreements that have the practical effect of regulating conduct in other states.

Solving the problems of swarm litigation and abusive enforcement will not be easy. Government officials and plaintiffs' lawyers have considerable vested interests in the status quo and certainly will resist all efforts at reform. But change is needed to restore the fairness and checks and balances that are fundamental to our legal system.

Endnotes

- 1 "The criminalisation of American business," THE ECONOMIST (Aug. 30, 2014), *available at* <http://www.economist.com/news/leaders/21614138-companies-must-be-punished-when-they-do-wrong-legal-system-has-become-extortion>.
- 2 See, e.g., The Consumer Product Safety Improvement Act of 2008, Pub. Law No. 110-314, 122 Stat. 3016 (2008), the HITECH Act of 2009, Pub. Law No. 111-5, Title XIII, §13001, 123 Stat. 115,266, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Pub. L. No. 111-203, § 1079A, 124 Stat. 1376, 2077-80. To illustrate the point: changes to federal HIPAA Privacy and Security Rules that were implemented by the (HITECH) Act now allow state attorneys general to enforce HIPPA violations independently from the Department of Health and Human Services. Under the HITECH Act, State AGs are granted a right to collect statutory penalties for any breach of protected health information. This additional authority has already been used by State AGs to extract million-dollar settlements from healthcare providers. It also paves the way for increased cooperation between State AGs and plaintiffs' lawyers seeking to bring private actions based upon the disclosure of health information. See Erin Staab, "Massachusetts Enforces Data Security Regulations Against Out-of-State Entity," NAT. L. REV. (Aug. 14, 2014).
- 3 Richard A. Posner, "Federalism and the Enforcement of Antitrust Laws by State Attorneys General," 2 GEORGETOWN J.L. & PUB. POL'Y 5, 8-9 (2004).
- 4 Monisha Bansai, "State AGs Critical of Some Colleagues Activism," CNS NEWS (July 7, 2008).
- 5 See, e.g., Daniel Gross, "Eliot Spitzer: How New York's attorney general became the most powerful man on Wall Street," SLATE (Oct. 21, 2004) *available at* http://www.slate.com/articles/news_and_politics/assessment/2004/10/eliot_spitzer.html.
- 6 See Kara Scannell, "Lawsky to step up assault on Wall Street's corporate wrongdoing," FINANCIAL TIMES (March 9, 2014) ("Mr. Lawsky, who has ruffled the feathers of other US regulators by jumping ahead of them to accuse Standard Chartered of breaking sanctions on Iran, has already begun to take a tougher approach to individual behaviour."); see also Evan Weinberger, "NY's Powerful Financial Regulators Poised to Extend Reach," LAW 360 (July 29, 2013) ("You now have an activist government in New York saying, 'We're going to look broadly at using this authority we have. So if we hear about problems we can respond to them in six months, not three years'"), *available at* <http://www.law360.com/articles/460513>; see also Kellan Howell, "EPA chief McCarthy, critics spar at Senate hearing over new rules," WASH. TIMES (July 23, 2014).
- 7 Indeed, in some cases, it is the activist regulators themselves who have heaped criticism on counterparts they perceive to be insufficiently aggressive in "taking on" business interests. See, e.g., Ryan Grim & Shahien Nasiripour, "Eric Schneiderman Challenges Obama Administration Over Mortgage Investigations," HUFFINGTON POST (April 24, 2013) *available at* http://www.huffingtonpost.com/2013/04/24/eric-schneiderman-mortgage-settlement_n_3140928.html.
- 8 Andrea Lannom, "WV Supreme Court Takes Up Cases Challenging AG Outside Counsel," THE STATE JOURNAL (May 14, 2013); Dee Miles, *An Update on the AWP Litigation*, JERE BEASLEY REPORT (July 3, 2012); see also Steve Green, "Homebuilders Pulte and Lennar Sue AG Over Hiring of Law Firm to Probe Lending," LAS VEGAS SUN (March 11, 2010); see also Wexler Wallace LLP Pharmac. Litig. Summary, *available at* <http://www.wexlerwallace.com/cases/awp-litigation-in-re-pharmaceutical-industry-average-wholesale-price-litigation/>.



- 9 Letter to the Hon. Kathleen Kane, Pennsylvania Attorney General, from Paul L. McDonald, Partner, Valorum Law Group, *[Redacted Litigation Proposal: Using Parens Patriae Authority to Prosecute [Redacted] Claims against "Big Food" for its Contribution to the State's \$30 Billion Annual Medicaid Bill for Obesity* (Feb. 9, 2013) (on file with ILR).
- 10 *Id.*
- 11 *Id.*
- 12 See, e.g., Peter Loftus, "States Take Drug Makers to Court Over Marketing," WALL STREET JOURNAL, (Apr. 23, 2013) at B3 ("Plaintiffs' law firms have been pitching new consumer-protection lawsuits to state attorneys general, according to Oregon's Mr. [David] Hart[, Assistant Attorney in Charge, Consumer Protection Section, Oregon Department of Justice]. Some states have outsourced such litigation to outside counsel after issuing requests for proposals."); see also Alison Frankel, "Should state AGs be allowed to use contingency fee lawyers?", REUTERS (Dec. 20, 2012) ("State agencies continue to make a habit of hiring private lawyers on contingency, most notably to prosecute securities class actions and consumer fraud cases. To cite one prominent example, in the biggest class action settlement of the year, Bank of America's \$2.43 billion settlement of claims related to its acquisition of Merrill Lynch, the Ohio pension funds that served as lead plaintiff contracted for representation from Bernstein Litowitz Berger & Grossmann; Kessler Topaz Meltzer & Check; and Kaplan Fox & Kilsheimer"); see also Robert McKenna & Scott Lindlaw, "Targeting Harm From a Breach: Plaintiffs' Lawyers Get Creative In Data Privacy Suits," WASH. LEGAL FOUNDATION REPORT (Feb. 7, 2014); see also Kira Lerner, "Cohen Milstein Wrongly Handed Police Powers: Drugmakers," LAW 360 (Sept. 22, 2014), available at <http://www.law360.com/productliability/articles/579883/cohen-milstein-wrongly-handed-police-powers-drugmakers>.
- 13 See Stephen J. Choi, Jessica Erickson, and Adam C. Pritchard, Frequent Filers: Repeat Plaintiffs in Shareholder Litigation, at 5-7 (U.S. Chamber Institute for Legal Reform, Sept. 2013).
- 14 *Id.* at 7; according to statistics disclosed by his office, Hood is the single largest user of contingency fee arrangements with plaintiffs' attorneys in the country. See Office of the Mississippi Attorney General, "Outside Legal Counsel," available at http://agjimhood.com/index.php/sections/divisions/outside_counsel (disclosing forty active contingency fee agreements).
- 15 See "Hood Hires Ex-AG Mike Moore to Sue BP," WAPT NEWS (March 21, 2012).
- 16 See Thomas Scheffey, "Winning the \$65 Million Gamble," CONN. L. TRIB., at 1 (Dec. 6, 1999) (observing that Connecticut's AG awarded lucrative contingency fee representations to his own former firm and other politically connected firms); see also Glenn G. Lammy, "Pennsylvania High Court Joins Judicial Stampede That's Trampling State Attorneys-General/Plaintiffs' Bar Alliances," FORBES (June 19, 2014) ("Pennsylvania came under considerable fire for the state AG-trial lawyer alliance in its case, in part because the Texas-based law firm ... had made over \$90,000 in campaign contributions to then-Governor Ed Rendell's reelection bid prior to being chosen.").
- 17 See Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 112th Cong. (2012).
- 18 *Id.*, Testimony of James R. Copland (Feb. 2, 2012), available at http://www.manhattan-institute.org/pdf/testimony_copland_02-02-12.pdf.
- 19 Bansai, *supra* n. 4.
- 20 "A Mammoth Guilt Trip," THE ECONOMIST (Aug. 30, 2014), available at <http://www.economist.com/news/briefing/21614101-corporate-america-finding-it-ever-harder-stay-right-side-law-mammoth-guilt>.
- 21 DOJ Press Release, "Johnson & Johnson to Pay More Than \$2.2 Billion to Resolve Criminal and Civil Investigations" (Nov. 4, 2013), available at <http://www.justice.gov/opa/pr/johnson-johnson-pay-more-22-billion-resolve-criminal-and-civil-investigations>.
- 22 See *Ortho-McNeil-Janssen Pharm., Inc. v. State of Arkansas*, 432 S.W.3d 563, 580 (Ark. 2014); *Caldwell v. Janssen Pharm., Inc.*, 144 So.3d 898, 913 (La. 2014).

- 23 *Caldwell*, 144 So.3d at 913.
- 24 DOJ Press Release, "Attorney General Eric Holder Delivers Remarks at Johnson & Johnson Press Conference" (Nov. 4, 2013) ("This significant settlement was made possible by the relentless investigative and enforcement efforts of dedicated men and women serving as part of the Health Care Fraud Prevention and Enforcement Action Team – or, HEAT – which Health and Human Services Secretary Kathleen Sebelius and I launched more than four years ago to recover taxpayer dollars, to keep the American people safe, and to aggressively pursue fraud and misconduct whenever and wherever it is found"), *available at* <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-johnson-johnson-press-conference>.
- 25 David Voreacos & Margaret Fisk, "J&J Will Pay \$181 Million to Settle Risperdal Ad Claims," BLOOMBERG (Aug. 30, 2012), *available at* <http://www.bloomberg.com/news/2012-08-30/j-j-will-pay-181-million-to-settle-risperdal-ad-claims.html>; *see also* Jef Feeley *et al.*, "J&J to Pay \$158M to Settle Texas Drug Case," BLOOMBERG (Jan. 19, 2012), *available at* <http://www.bloomberg.com/news/2012-01-19/johnson-johnson-to-pay-158-million-to-settle-texas-risperdal-drug-case.html>.
- 26 *See, e.g.*, Casey Sullivan, "Houston Law Firm Wins Big Fees From Johnson & Johnson," REUTERS (Feb. 1, 2013).
- 27 *See* Katie Thomas, "J.&J. to Pay \$2.2 Billion in Risperdal Settlement," NYTIMES (Nov. 4, 2013).
- 28 *See, e.g.*, *Commonwealth v. TAP Pharm. Products, Inc.*, 94 A.3d 350 (Pa. 2014) (vacating judgment against drug company on the grounds that the state had failed to demonstrate that it had suffered harm as a result of any alleged unfair pricing practices); *see also* *AstraZeneca LP v. State of Alabama*, 41 So. 3d 15, 29-22 (Ala. 2009) (reasoning that the state could not have reasonably relied on alleged fraudulent misrepresentations about AWPs given that the state had ample data concerning actual drug acquisition costs by pharmacies).
- 29 Dee Miles, *An Update on the AWP Litigation*, JERE BEASLEY REPORT (July 3, 2012).
- 30 According to the website of one of the Plaintiffs' firms involved in the class action, Defendant GlaxoSmithKline paid \$70 million in the settlement, Defendant AstraZeneca paid \$24 million, and Defendant Bristol Myers Squibb paid \$19 million just to settle the individual class action claims. *See* Wexler Wallace LLP, Case Summary, *available at* <http://www.wexlerwallace.com/cases/awp-litigation-in-re-pharmaceutical-industry-average-wholesale-price-litigation/>.
- 31 *See* *TAP Pharm. and AstraZeneca LP* *supra* n. 28.
- 32 *See, e.g.*, National Community Pharmacists Association's Memorandum Of Law In Support Of Its Objection To Settlement, Case No. 1:05-CV-11148-PBS (D. Mass. Dec. 21, 2007) at 11 ("The terms of the settlement will force pharmacies to cut their expenses by reducing store hours, reducing the number of employees on staff and cutting important services such as deliveries and compounding prescriptions. In some communities, especially in critical underserved areas the local independent pharmacy is the only health resource in the area. Ultimately these changes will force more and more pharmacies out of business, patients will suffer as the result of reduced access to pharmacy services. The remaining pharmacies will be bogged down with high prescription volumes causing unreasonably long wait times.").
- 33 Statutory prohibitions on "unfair" and "unconscionable" business practices—which form the basis for much regulatory litigation—have long been the subject of successful constitutional challenges based on vagueness and widespread criticism from legal scholars. *See, e.g.*, *Dept. of Business Regulation v. National Manufactured Hous. Fed'n, Inc.*, 370 So. 2d 1132, 1136 (Fla. 1979) (striking down rent control regulations prohibiting "unfair" terms on vagueness grounds); *see also* M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L. J. 757, 761 (1969) ("Although the results of the cases [upholding unfairness provisions] have a ring of conviction about them, the reasoning in support have frequently shown a want of analytical rigor."); *see also* Evelyn Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L. J. 287, 290 (2000) (reviewing cases and concluding that unconscionability provisions were frequently manipulated by plaintiffs "in order to reach the equitable results they desire").



- 34 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Tit. X, § 10104(j)(2) (2010) (amending 31 U.S.C. § 3730(e)).
- 35 Dodd-Frank, Pub. L. No. 111-203, § 1079A (2010) (amending 31 U.S.C. § 3730(h)).
- 36 See U.S. Dep’t of Justice, Civil Division, Fraud Statistics – Overview (Oct. 24, 2012).
- 37 *Id.*
- 38 See Keith Goldberg, “No Future For Climate Change Torts, Attys Say,” LAW 360 (May 23, 2013); Christopher E. Appel, “Time for Climate Change Tort Litigation to Cool Off Permanently,” ENVIRONMENTAL REPORT (BLOOMBERG BNA) at B-1 (Nov. 20, 2012).
- 39 See Jim Efstatthiou, “Missouri Lawyer Brings Nuisance Claims to Fracking Arena,” BLOOMBERG BUSINESSWEEK (June 10, 2013).
- 40 See, e.g., *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012) (“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required....This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.”).
- 41 47 U.S.C. § 227(b)(3)(B).
- 42 See Ryan Knutson, “Curbs on Cellphone Calls Pay Off for Lawyers,” WALL ST. J. (Nov. 17, 2013).
- 43 For example, in Massachusetts, a single consumer complaint in 1999 ultimately resulted in the State AG’s office pursuing claims against (and settling with) 19 separate motorcycle insurance companies for a value of more than \$574 million. The monies have been used to fund additional enforcement initiatives in the State AG’s office and to create a new subagency within the office to administer “Motorcycle Insurance Settlements” without any additional state appropriation of funds. See, e.g., Office of the Massachusetts Attorney General, “Motorcycle Owners to Receive \$14.6 Million in Refunds Through Settlement with Commerce Insurance,” (July 7, 2014) available at <http://www.mass.gov>.
- 44 National Conference of State Legislatures, “National Mortgage Settlement Summary,” available at <http://www.ncsl.org/research/financial-services-and-commerce/national-mortgage-settlement-summary.aspx>.
- 45 *Id.*
- 46 *Id.*
- 47 *Id.*
- 48 Donald G. Gifford, “Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation,” 49 B.C. L. REV. 913, 914 & n. 1 (2008) (quoting mass tort plaintiffs’ attorney John P. Coale).
- 49 See, e.g., Lisa Demer, “EPA Proposes strict limits on Pebble mine to protect salmon,” ALASKA DISPATCH NEWS (July 18, 2014) (“The U.S. Environmental Protection Agency on Friday said it intends to take extraordinary action to protect Bristol Bay’s world-class salmon runs.... EPA’s work on Pebble already is the subject of a federal lawsuit, a watchdog agency review and harsh criticism from Republican political leaders. Just this week, a U.S. House committee approved a bill to keep EPA from blocking the mine”).
- 50 See *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007) (lawsuit brought by the Attorney Generals of California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington against the EPA, attempting to compel the agency to regulate carbon dioxide emissions under the Clean Air Act). That lawsuit contributed to the EPA’s subsequent adoption of new carbon dioxide regulations under Section 111(d) of the Clean Air Act, regulations which Jody Freeman, a Harvard University law professor and former adviser to President Barack Obama on climate issues, described as “in many ways unprecedented, so it will attract a challenge to its core.” Brent Kendall & Alicia Mundy, “EPA’s Approach on Carbon Limits to Spark Court Challenges,” WALL ST. J. (May 29, 2014), available at <http://online.wsj.com/articles/epas-approach-on-carbon-limits-to-spark-court-challenges-1401406854>.

- 51 See, e.g., EPA Press Release, Consumers Energy Clean Air Act Settlement (September 16, 2014) (describing settlement and consent decree compelling electric and natural gas utility to accept new pollution control standards and technologies, estimated to cost \$1 billion), *available at* <http://www2.epa.gov/enforcement/consumers-energy-clean-air-act-settlement/>.
- 52 See, e.g., EPA Press Release, East Bay Municipal Utility District Settlement (July 28, 2014) (describing settlement and consent decree imposing civil fines and requiring treatment facilities to implement new management systems for treatment of sewage), *available at* <http://www2.epa.gov/enforcement/east-bay-municipal-utility-district-settlement>.
- 53 See, e.g., EPA Press Release, Scotts Miracle-Gro Company Settlement (Sept. 7, 2012) (describing settlement and consent decree imposing civil fines and imposing new branding and warning requirements for chemical and pesticide products), *available at* <http://www2.epa.gov/enforcement/scotts-miracle-gro-company-settlement>.
- 54 See, e.g., James E. McCarthy & Claudia Copeland, "EPA Regulations: Too Much, Too Little, or On Track?" Congressional Research Service Report (July 8, 2014) ("Many, both within Congress and outside of it, have accused the agency of reaching beyond the authority given it by Congress and ignoring or underestimating the costs and economic impacts of proposed and promulgated rules. The House has conducted vigorous oversight of the agency in the 112th and 113th Congresses, and has approved several bills that would overturn specific regulations or limit the agency's authority. Particular attention has been paid to the Clean Air Act; congressional scrutiny has focused as well on other environmental statutes and regulations implemented by EPA."), *available at* <http://fas.org/sgp/crs/misc/R41561.pdf>.
- 55 See SEC Press Release, SEC Charges Smith & Wesson With FCPA Violations (July 18, 2014) (describing settlement penalty for alleged internal controls violations), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542384677>.
- 56 See National Mortgage Settlement Summary, *supra* n. 44.
- 57 See John Osborn "Feds Have Beaten Pharma Into Submission Over Off-Label Drug Use, But At What Cost?" FORBES (Nov. 7, 2013), *available at* <http://www.forbes.com/sites/johnosborn/2013/11/07/ho-hum-another-multi-billion-dollar-drug-company-fraud-settlement/>.
- 58 Oregon Attorney General's Office, "42 States Announce \$35 Million Settlement with Pfizer for Immunosuppressive Drug Rapamune; Oregon Receives \$1.2 Million," *available at* <http://www.doj.state.or.us/releases/Pages/2014/rel080614.aspx>.
- 59 As scholars have also pointed out, the risk of extraterritorial enforcements by states also raises the "specter of spillover effects, whereby a state uses its liability regime to benefit in-state residents with larger compensation payments, or exports the costs of its regulation to out-of-state manufacturers and product consumers in the rest of the nation." Samuel Issacharoff & Catherine M. Sharkey, "Backdoor Federalization," 53 UCLA L. REV. 1353, 1386 (2006).
- 60 For a description of the case and settlement, see Joseph Prater, "West Virginia's Painful Settlement: How The Oxycontin Phenomenon And Unconventional Theories Of Tort Liability May Make Pharmaceutical Companies Liable For Black Markets," 100 NW. U. L. REV. 1409 (2006).
- 61 Office of the D.C. Attorney General, Press Release, "Multistate Settlement Reached With Manufacturer of OxyContin," (May 8, 2007) *available at* <http://oag.dc.gov/release/multistate-settlement-reached-manufacturer-oxycontin>.
- 62 See Amaris Elliott-Engle, "Chicago Fights Push to Disqualify Its Lawyer in Opioids Suit," NAT. L.J. (Sept. 10, 2014) ("Purdue and related defendants have moved to disqualify Linda Singer of Cohen Milstein Sellers & Toll PLLC because Singer's office prosecuted a lawsuit over opioids against the pharmaceutical industry when she was attorney general for the District of Columbia and now is doing the same in private practice for Chicago and Santa Clara and Orange counties in California.")
- 63 See Office of the New York Attorney General, "Secure Our Smartphones (S.O.S.)" *available at* <http://www.ag.ny.gov/feature/secure-our-smartphones-sos>.



- 64 See, e.g., Peter Eavis, "Behind the Headline Numbers of a Mortgage Settlement," NYTIMES (Dec. 24, 2013) (identifying over \$41 billion in settlements between the DOJ and three lenders related to the financial crisis); see also Jacob Davidson, "Bank of America Is Paying Up for the Mortgage Mess, But Who Will Get the Money?," TIME MAGAZINE (Aug. 29, 2014) (discussing an additional \$17 billion settlement entered into by Bank of America); see also Christina Rexrode and Andrew Grossman, "Record Bank of America Settlement Latest in Government Crusade," WALL ST. J. (Aug. 21, 2014) ("Large banks have agreed to pay almost \$127 billion to settle cases related to the 2008 credit crisis"); also Lena Groeger, "Big Pharma's Big Fines," PROPUBLICA (Feb. 24, 2014) ("In the last few years pharmaceutical companies have agreed to pay over \$13 billion to resolve U.S. Department of Justice allegations of fraudulent marketing practices, including the promotion of medicines for uses that were not approved by the Food and Drug Administration.").
- 65 PhRMA, 2014 Profile Biopharmaceutical Research Industry, at 69 (2014).
- 66 "A top mortgage industry executive explains why banks don't want to take a chance on some borrowers," WASH. POST (Aug. 13, 2014), available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/13/a-top-mortgage-industry-executive-explains-why-banks-dont-want-to-take-a-chance-on-some-borrowers/?wpisrc=nl-wnkpm&wpmm=1>.
- 67 *Id.*
- 68 "'The Whole Market' for Mortgage Serving Rights Frozen? Not Quite," MORTGAGE SERVING NEWS (Apr. 24, 2014).
- 69 *Id.* (quoting William Erbey, Executive Chairman of mortgage servicer Ocwen Financial).
- 70 Elizabeth Campbell & Lorraine Woellert, "You Know It's a Tough Market When Bernanke Can't Refinance," BLOOMBERG BUSINESSWEEK (Oct. 3, 2014).
- 71 *Id.*
- 72 See, e.g., Marsh & Norman, REFORMING THE REGULATION OF COMMUNITY BANKS AFTER DODD-FRANK (2013), published by the St. Louis Federal Reserve, available at https://www.stlouisfed.org/banking/community-banking-conference/PDF/Marsh_Norman_Reforming_Regulation.pdf.
- 73 *Id.* (quoting testimony of Thomas Boyle, Vice Chairman of State Bank of Countryside).
- 74 See, e.g., David Armstrong, "Two States Restrict Firms' Gifts to Doctors," WALL ST. J. (July 1, 2009) ("Massachusetts and Vermont will have the most restrictive laws, and follow a long-standing partial gift ban in Minnesota. Legislatures in Oregon, Texas, Connecticut, Colorado, Illinois and Maryland have been debating whether to impose similar bans, or to require public disclosure of such gifts.... Medtronic Inc. agreed in 2006 to pay the government \$40 million to settle allegations it paid doctors to get them to use its spine products, including with trips to resorts. Medtronic has denied any wrongdoing. In one of the biggest cases, a unit of Pfizer Inc. pleaded guilty in 2004 to a criminal charge and agreed to pay \$430 million related to the marketing of its drug Neurontin.").
- 75 See Rocky Flick, Testimony Delivered before the House Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice, Hearing on Excessive Litigation's Impact on America's Global Competitiveness at 4 (Mar. 5, 2013).
- 76 See Exec. Order No. 13433, 72 Fed. Reg. 28,441 (May 16, 2007) (federal government); Fla. Stat. Ann. § 16.0155 (Florida); Ind. Code Ann. § 4-6-3-2 (Indiana); Mo. Rev. Stat. §§ 34.376, 34.378, and 34.380 (Missouri); and Iowa Code §§ 13.7, 23B.1 *et seq.* (Iowa).

Notes

Notes

Notes



U.S. CHAMBER

Institute for Legal Reform

202.463.5724 main
202.463.5302 fax

1615 H Street, NW
Washington, DC 20062

instituteforlegalreform.com