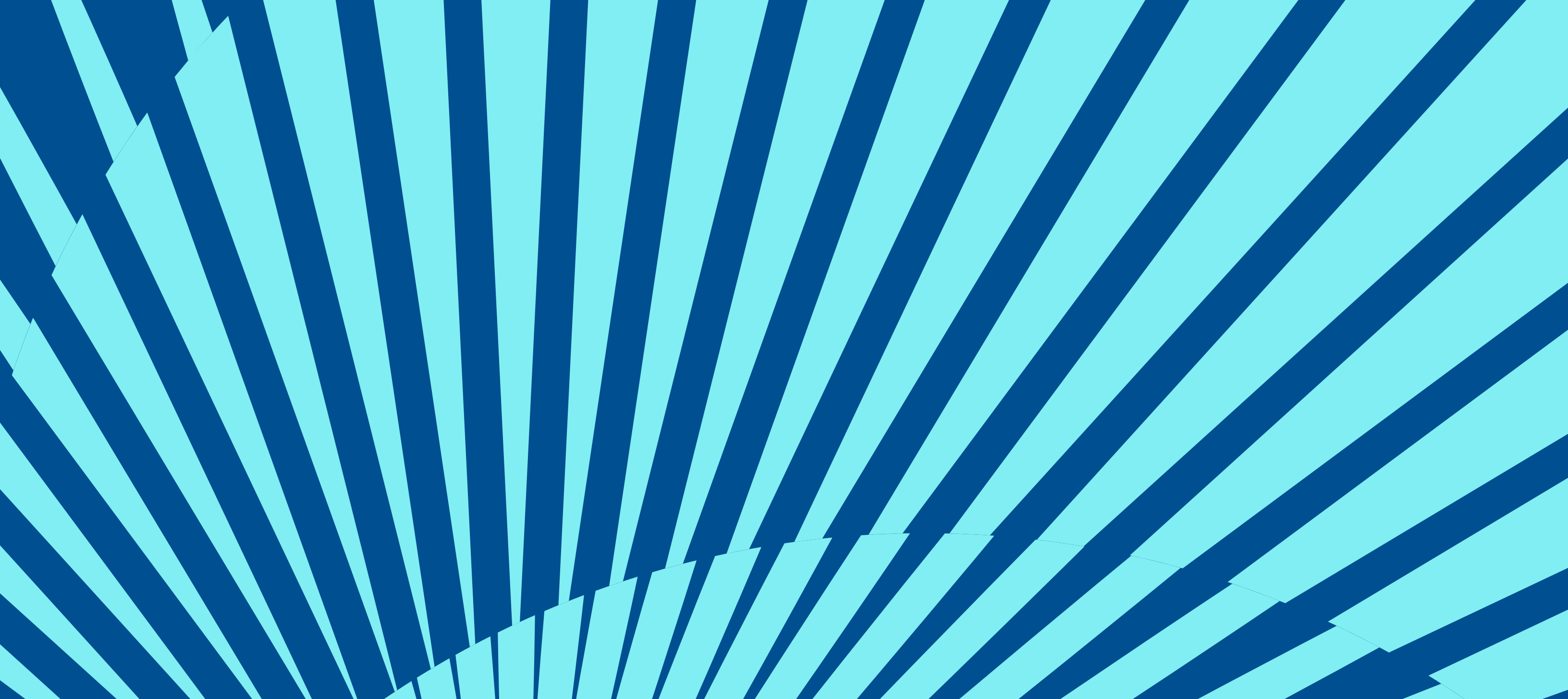
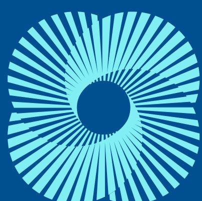


French Fries to Fossil Fuels

The Misplaced Reliance on UDAPs to Pursue Policy Agendas

August 2023



U.S. Chamber of Commerce
Institute for Legal Reform

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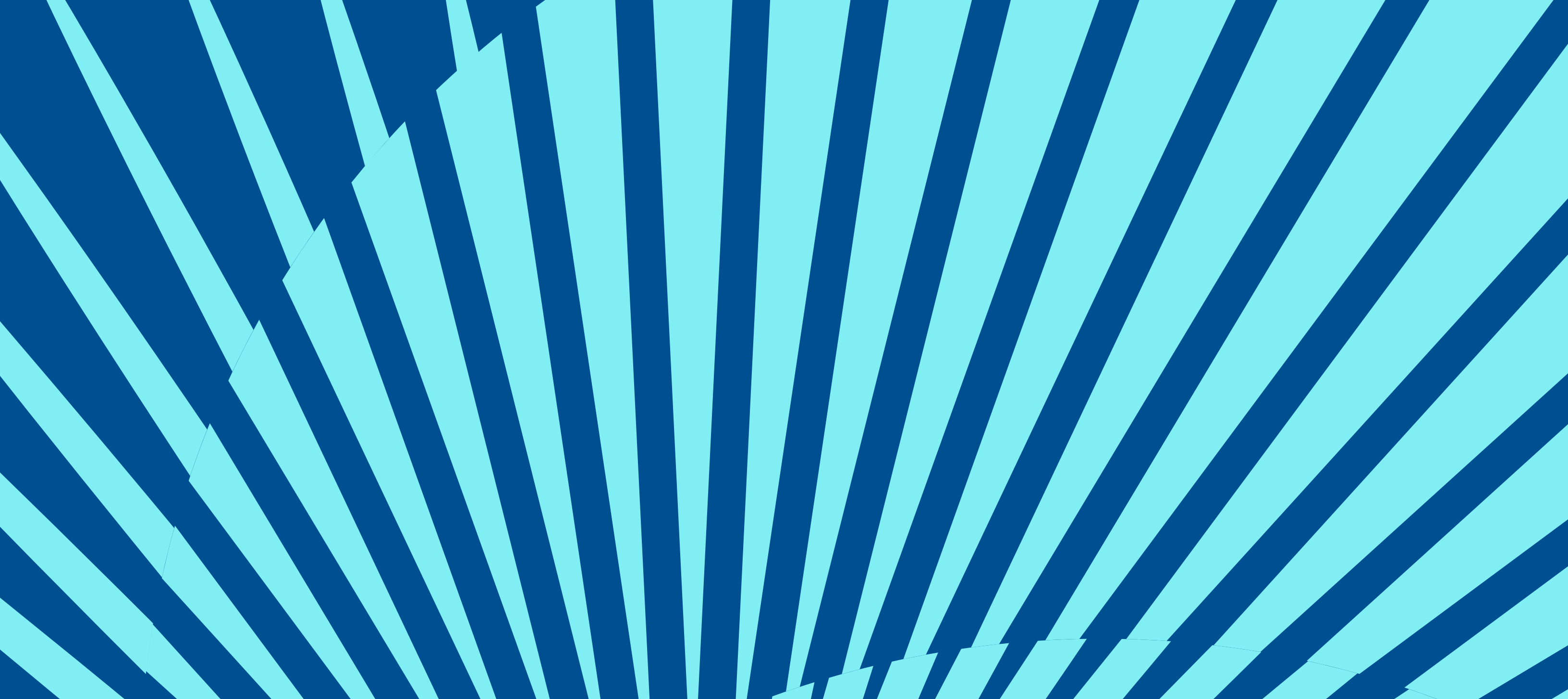

Chapter

01

Executive Summary

Consumers in the United States benefit from a regime of robust legal protections. In most jurisdictions, consumer protection enforcement and litigation are enabled and guided not only by the common law, but also by a wide array of federal and state statutes commonly referred to as Unfair and Deceptive Acts and Practices laws (UDAPs). While the responsibility of enforcing UDAPs primarily falls to state and federal enforcement authorities, local governments in some states are also empowered to pursue claims based on statutory or pseudo-*parens patriae* authority.[1] Private litigants, likewise, frequently pursue UDAP claims, both on an individual and class basis.

This paper explores a burgeoning and alarming trend in UDAP litigation and enforcement—a trend that is detrimentally shifting how and for what purposes UDAPs are used. To be sure, many enforcement actions properly seek to halt deceptive commercial practices and redress specific consumer harms. However, a review of contemporary UDAP litigation reveals something else altogether: the attempted use of UDAPs, both by government and private plaintiffs, to address broad-based political and social issues through lawsuits with little or no nexus to consumer protection and limited direct benefits to consumers. In aiming to influence public policy, these suits implicate issues that are appropriately addressed exclusively by lawmakers—as historically has been the case—not litigants. Moreover, as this paper examines in depth, such lawsuits at times depend on dubious interpretations of UDAPs. These interpretations and applications lead to confusion, lack of predictability, increased compliance costs, and criticism of "regulation through litigation,"[2] among other issues.

Lawmakers, law enforcers, courts, and consumers should all be concerned about this changing approach to UDAP enforcement. The reliance on UDAPs to address public policy issues has the potential to significantly harm states' business climates and, as a result, their overall economies. It chills economic activity and threatens citizens' ability to access often necessary and desirable products (e.g., pharmaceuticals, oil and gas, foods, etc.).[3] The misguided use of UDAPs also offends fundamental due-process rights and other core constitutional and federalism principles; and, by inappropriately diverting scarce enforcement resources, ultimately undermines the critical goal

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of protecting consumers. Given the limited resources that state enforcers have at their disposal, one significant effect of pursuing policy-focused UDAP enforcement actions is that the work of protecting their states' consumers from direct harm and immediate danger is necessarily, and inappropriately, deprioritized.[4]

This paper aims to bring attention to the growing reliance on UDAPs to address matters of public policy, explain the factors contributing to it, and offer potential responses for addressing it. The paper begins with a brief history of UDAPs and the evolution of their application. It then explains how overreliance on UDAPs ultimately undermines the protection of consumers from direct and immediate harms occurring within a state. Importantly, without thoughtful reforms, UDAPs will become all-purpose tools for state enforcers, plaintiffs' lawyers, and activists to pursue their desired policy and economic objectives—effectively usurping the democratic process. For enforcers and activists, these ends include addressing broad social concerns, policing activity in other states, and weighing in on policy and political questions traditionally resolved by Congress and state legislatures. And for the plaintiffs' lawyers representing public and private litigants in UDAP actions, a paramount objective remains the financial windfalls achieved by pursuing (and ultimately settling) broad and aggressive claims that often are driven by harnessing the public zeitgeist around divisive issues. This powerful mixture of political and financial incentives threatens to push the focus of protecting consumers to the side and fundamentally change how policy is made in the United States.

After exploring the possible motivations for this rising reliance on UDAPs to address policy questions, this paper then proposes potential—primarily state legislative—reforms that could help ensure that UDAP enforcement is focused more squarely on protecting consumers from unfair and deceptive business practices. These solutions include:

- identifying the specific practices or categories of practices that constitute "unfair and deceptive acts and practices";
- requiring a showing of specific consumer injury or harm before liability may be imposed;

- requiring a showing of intent to deceive or engage in unfair and deceptive acts and practices before liability may be imposed;
- limiting remedies to injunctive relief and, when appropriate, restitution to consumers;
- implementing specific jurisdictional limitations on UDAP-related discovery and actions;
- clearly defining key UDAP terms; and
- introducing a "materiality" standard in relation to the type and scope of information at issue in a UDAP action.

Of course, legislative reforms that impose much-needed guardrails will not completely solve this problem. State enforcers must adopt a greater degree of scrutiny and restraint when assessing the scope of what UDAPs actually empower them to do by way of enforcement, as well as what their mandate and jurisdiction as law enforcers are in the first place. Likewise, courts need to enforce such guardrails to ensure that UDAPs do not become all-purpose legal cudgels. Thoughtful and tailored reforms, combined with an adherence by enforcers to consumer protection that prioritizes protecting state consumers from direct and immediate harms—rather than attempting to effect or change policy—will produce better business environments while still ensuring that bad actors are not able to deceive and harm consumers.

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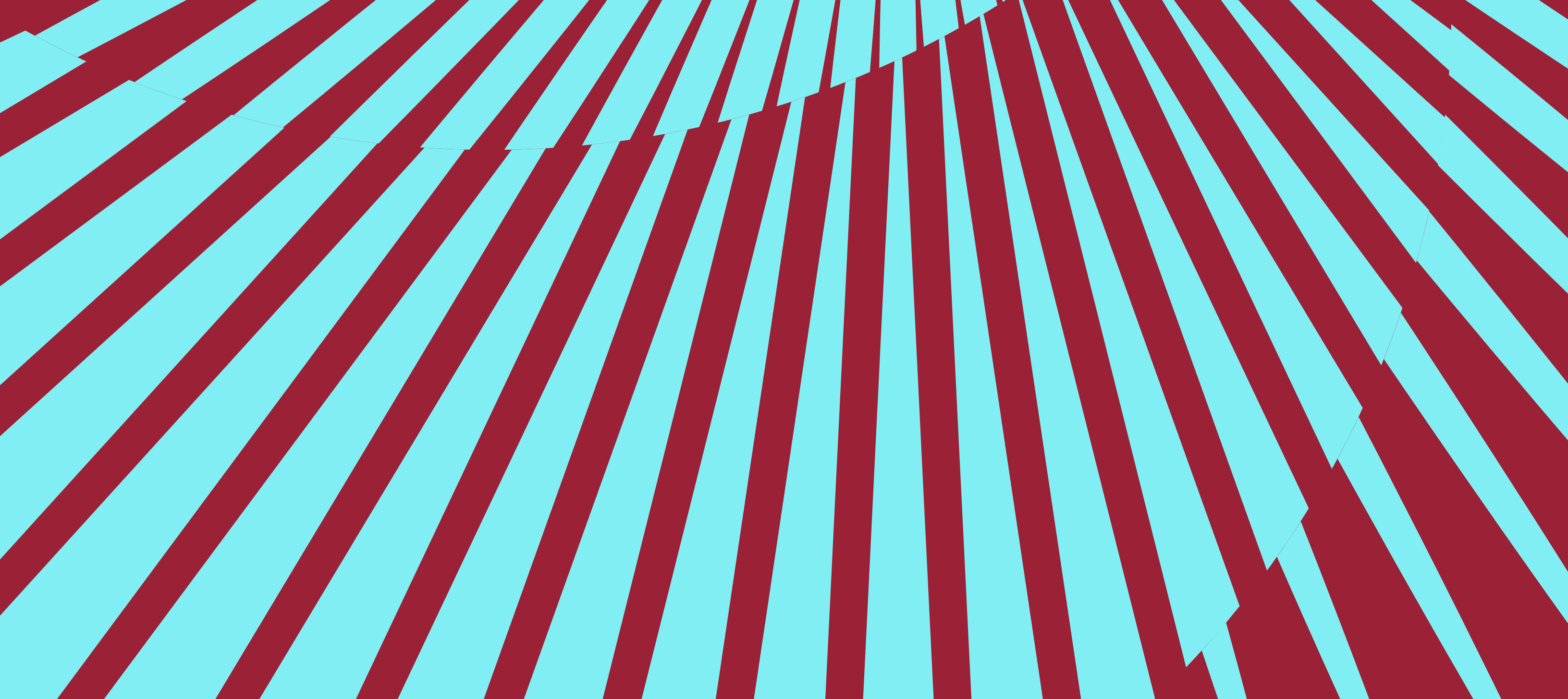


Chapter

02

The Evolution of State Consumer Protection Statutes

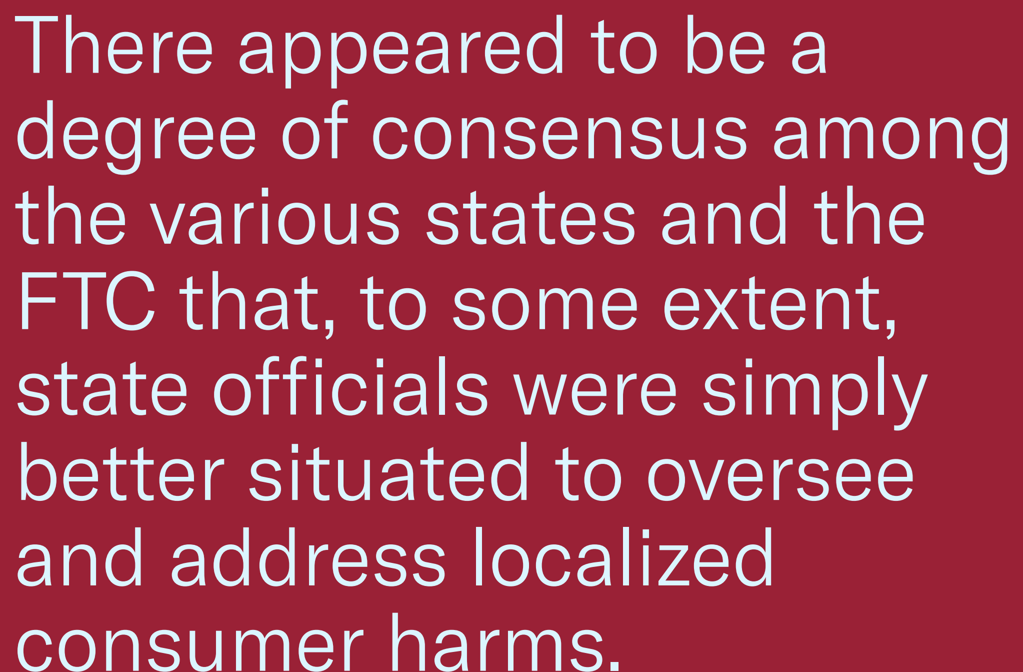
Today, UDAPs are ubiquitous, with all 50 states and the District of Columbia having enacted one in some form.[5] But this was not always the case. In fact, states only began claiming a role in consumer protection and enacting UDAPs in the 1960s and 1970s, in the midst of a nationwide pro-consumer movement. During earlier periods of American history, the concept of *caveat emptor* (buyer beware) prevailed, and few state or federal laws or regulations defined sellers' obligations in the marketplace.[6] Common law-based private actions for fraud or deceit were, by and large, the only remedies available to consumers who were misled by unfair and deceptive business practices.[7]

When the United States Federal Trade Commission (FTC) was established in 1914,[8] the agency focused entirely on regulating the actions of market participants in relation to competitors (i.e., dealings between various market participants and actions damaging the integrity of the marketplace). It was not until nearly a quarter-century later that Congress further empowered the FTC to address dealings between businesses and consumers.[9] In 1938, Congress passed the Wheeler-Lea Act, which amended the Federal Trade Commission Act (FTC Act) to prohibit "unfair or deceptive acts or practices . . . affecting commerce," in addition to "unfair methods of competition," thereby authorizing the FTC to protect consumers directly.[10] Even with its newfound authority, the FTC remained a mostly antitrust-oriented regulator, dedicating few of its resources to consumer protection matters.[11] Moreover, under both the FTC Act and the Wheeler-Lea Act, the FTC's oversight and enforcement activity was largely limited to unfair and deceptive acts and practices that touched interstate commerce and, thus, did not typically implicate consumer transactions that occurred only at a local level.[12]

The consumer movement of the 1960s came with strong criticisms of what some viewed as the FTC's failure to police direct consumer abuses.[13] In response, the FTC increased its focus on consumer protection, ramping up efforts to curb false and deceptive advertising practices.[14] The FTC also began to scrutinize more closely unfair and deceptive business practices and scams outside the realm of advertising[15] and encouraged states to take a more prominent, complementary role in consumer protection.[16] There appeared to be a degree of consensus among the various states and the FTC

that, to some extent, state officials were simply better situated to oversee and address localized consumer harms.[17]

In addition to encouraging states to join in consumer protection efforts, the FTC also collaborated with the National Conference of Commissioners on Uniform State Laws (now known as the Uniform Law Commission) to develop a model consumer protection statute, an effort that resulted in the Model Unfair Trade Practices and Consumer Protection Law.[18] Most states' UDAPs were drafted using this model, which was developed with the FTC's significant input and which, unsurprisingly, incorporated and codified many of the FTC's objectives.[19] It is no coincidence that UDAPs are colloquially referred to as "little FTC Acts,"[20] or that many UDAPs frame the states' role as complementary to the FTC's role.[21] Moreover, many UDAPs explicitly direct states to rely on federal law in defining unfair and deceptive acts and practices.[22] Essentially, the FTC intended to "provide the substantive guidelines while state authorities would provide enforcement and remedies."[23]



New Era of "Cooperative Federalism"

The widespread passage of UDAPs shepherded in a new era of cooperative federalism in consumer protection, with both states and the FTC pursuing consumer protection enforcement—at times individually and at times jointly.

In the vast majority of states, UDAPs confer enforcement authority on the state attorney general (AG),[24] but not in every state. For example, in Connecticut, Hawai'i, and Utah, separate agencies are primarily responsible for consumer protection.[25] And some states, including Nevada, Oregon, Virginia, and Wisconsin, entrust consumer protection authority to other state officials in addition to their AGs.[26] For most states, the AGs were likely an obvious choice to serve as the consumer protector-in-chief. Not only are the AGs their states' chief legal officers, but at about the same time that UDAPs were being developed and adopted by states, AGs also were granted the power to enforce federal antitrust laws. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 "amended the Clayton Antitrust Act to authorize [AGs] to bring *parens patriae* actions for damages."[27] So while there was no government authority responsible for protecting consumers in the United States only a few decades prior, by the 1980s there were (and continue to be) more than 50 state and federal agencies—together amounting to thousands of attorneys, investigators, and staff—devoted to consumer protection, each as authorized and informed by their own law.

Importantly, 43 of the nation's AGs are popularly elected in partisan contests, while the remainder are chosen by their state's governor (Alaska, Hawai'i, New Hampshire, New Jersey, and Wyoming), supreme court (Tennessee), or legislature (Maine).[28] As such, the incorporation of state AGs into the consumer protection landscape

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introduced, for the first time, political actors into the enforcement process.

Consumer protection enforcement was also significantly affected by the inclusion of private rights of action in state UDAPs. Each state and the District of Columbia currently provide for a mechanism through which private consumers can enforce their state's UDAP.[29] Although these procedures vary, private plaintiffs have become a significant part of consumer protection enforcement in every state.

General Functions of UDAPs

Although state UDAPs are, as one scholar put it, "wildly divergent,"[30] each statute provides mechanisms for various aspects of consumer protection.[31] These typically include a mix of regulatory and enforcement mechanisms that can address a range of consumer protection issues.

Remedy Consumer Harms

Many UDAPs either explicitly state that they are, or courts have interpreted them as being,[32] remedial in nature. For example, Virginia's UDAP states that "[i]t is the intent of the General Assembly that this section shall be applied as remedial legislation to promote fair and ethical standards of dealings between suppliers and the consuming public."[33] Likewise, Connecticut's UDAP simply provides that "[i]t is the intention of the legislature that this section be remedial and be so construed."[34] As such, UDAPs that include this specific language—as well as UDAPs more broadly—are often construed as intended to address specific consumer harms.

Reduce Information Asymmetries

Businesses have detailed information about their products or services. The consumer only needs to know some of that information in order to make a rational decision about whether or not to purchase that product or service; in fact, too much information can distract consumers from the information that is actually material to their decision. But it would be unfair for a business with an informational advantage in a transaction to use that advantage to deceive the other party for the business's undeserved benefit. For example, a business that markets its product as long-lasting and durable while knowingly using cheap and inferior materials to make the product misleads consumers about the duration of the product's useful life.

Provide Opportunities for Redress Beyond Common-Law Claims

UDAPs emerged partly in response to customers' frustration that there were inadequate means of accessible legal redress to go after unscrupulous market participants that had caused them harm.[35] Pre-FTC and pre-UDAPs, the common law at times proved inadequate to protect against unfair and deceptive consumer acts and practices because many practices did not meet the elements required to assert a common-law claim. For example, victims of false advertising were unable to bring breach-of-contract claims where the deceptive advertising was not directly part of the sales contract.[36] Many UDAPs are more specifically intended to address consumer harms that common-law claims, like breach of contract, at times proved ill-suited to remedy.

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Codify Standing for the States

UDAPs explicitly enable states to bring claims, often through their state AG, on their consumer-citizens' behalf through *parens patriae* actions. Prior to UDAPs, while some states may have had the ability to investigate and pursue certain claims of fraud, including by relying upon common law causes of action, it likely would have been more difficult for a state to stand in the shoes of consumers who suffered a breach of contract or were subject to unconscionable contract terms. As such, UDAPs effectively—and far more clearly—transfer to the state the standing that a private consumer-citizen would have to sue over an alleged harm. This function closely relates to the remedial function of UDAPs, in that the state is empowered, through its UDAP authority, to seek redress for one or more consumers.

Support and Supplement Federal Consumer Protection

The FTC viewed the enactment of UDAPs and engagement of state enforcers, primarily state AGs, in consumer protection efforts as supplemental to the FTC's own efforts.[37] This cooperative federalism model made sense for the FTC, particularly at a time when the majority of commercial interactions that consumers had were with businesses that operated locally. As discussed above, the FTC fundamentally lacked (and continues to lack) authority to regulate or enforce against conduct that did not affect interstate commerce.[38] Therefore, the Commission is unable to ensure that consumers are protected from the unfair and deceptive business practices and acts of unscrupulous market participants that limit their product or service offerings to consumers in far-flung states, with no effect on interstate commerce. Most state UDAPs explicitly acknowledge the cooperative dynamic between state enforcers and the FTC.

Scope of UDAPs

In addition to understanding the general functions of UDAPs, it is also important to analyze and understand their scope. When sufficiently defined in a statute, a law's scope ensures that it is not open-ended and thereby susceptible to overly broad interpretations, abuses, and misapplications. Thoroughly examining the issue of UDAP scope is also critical in the analysis of reliance on UDAPs for the purposes of effectuating public policy, as broad interpretations of both substantive and geographic UDAP scope are likely significant contributing factors to, and facilitators of, this trend. This chapter briefly describes two areas of a UDAP's scope—substantive and geographic—that, when ill-defined, leave it vulnerable to overreliance and, at times, misuse.

Substantive Scope

It is generally accepted that the scope of many UDAPs is relatively broad.[39] Many courts agree; the Supreme Court of Hawai'i, for instance, recently noted that it "interpret[s] Hawai'i's consumer protection law in a way that maximizes consumer protection. The UDAP 'was constructed in broad language in order to constitute a flexible tool to stop and prevent fraudulent, unfair or deceptive business practices for the protection of both consumers and honest business[people].'"[40] Recent examples of far-reaching, policy-focused UDAP litigation tend to rely on such language in support of expansive interpretations of UDAPs.

To understand the scope of UDAP laws, it is instructive to consider FTC guidance, given that many UDAPs explicitly direct state enforcers and courts to look to the FTC's interpretations for direction. Unsurprisingly, the FTC historically has faced similar criticisms about the unclear scope of consumer protection laws targeting unfair and deceptive acts and practices. In 1980, the Commission sent Congress a joint letter, entitled the "FTC Policy Statement on Unfairness," acknowledging "that the concept of consumer unfairness is one whose precise meaning is not immediately obvious, and also recogniz[ing] that this uncertainty has been honestly troublesome for some businesses and some members of the legal profession."[41] The letter went on to "delineate[] the Commission's views of the boundaries of its consumer unfairness jurisdiction."[42]

The FTC Policy Statement on Unfairness acknowledges and expands upon three criteria for determining the Commission's "unfairness jurisdiction": (1) consumer injury; (2) violation of public policy; and (3) unethical or unscrupulous conduct.[43] The letter acknowledges that "consumer injury is the primary focus of the FTC Act, and the most important of the three . . . criteria."[44] The FTC further clarifies that consumer injury, alone, is insufficient for purposes of finding unfairness.[45] Rather, the injury "must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided."[46] As to the second factor, violation of public policy, the FTC Policy Statement on Unfairness explains that it "asks whether the conduct violates public policy as it has been established by statute, common law, industry practice, or otherwise."[47] But the letter explains that this factor is most frequently used by the FTC to provide "additional evidence on the degree of consumer injury caused by specific practices," going on to explain that the FTC's "focus on injury is the best way to ensure that the Commission acts responsibly and uses its resources wisely."[48]

Finally, as to unethical or unscrupulous conduct, the FTC explained that it has

never relied upon this third factor and would not do so in the future, because the Commission found it "to be largely duplicative" and further noted that "[c]onduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well."[49] The Policy Statement on Unfairness was ultimately codified into the FTC Act in 1984.[50] Critically, the statute prohibits the Commission from taking public policy considerations into account as a primary basis for an unfairness allegation.[51]

In 1983, three years after issuing the FTC Policy Statement on Unfairness, the FTC likewise issued an FTC Policy Statement on Deception, also in the form of a letter to Congress.[52] The Commission stated there that it would "find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[53] It enumerated three factors it uses in all deception cases. First, "a representation, omission or practice must be likely to mislead the consumer."[54] Second, the FTC will "examine the practice from the perspective of a consumer acting reasonably in the circumstances."[55] And third, "the representation, omission, or practice must be a 'material' one."[56] On the final point, the Commission further explained that "[t]he basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception."[57]

The FTC's interpretation of the scope of its own authority, and particularly its understanding that that scope is grounded in, and limited to, specific and direct consumer injury, is potentially instructive in attempting to delineate the scope of authority envisioned by state UDAPs. This is especially true given the complementary role of UDAPs to FTC policymaking and the common textual requirement that UDAPs be interpreted in light of FTC guidance. For UDAPs that specifically call for reliance upon the FTC's interpretations, there is even more reason to closely align a state's enforcement of its UDAP with the scope set forth by the FTC, including the requirement that there be "substantial injury."

Geographic Scope

As commerce grows progressively borderless and state AGs collaborate more closely with each other and with federal executive agencies, the question of UDAPs' geographic scope has become increasingly relevant. The extraterritorial effect of any statute, including a UDAP, is fact-specific and depends on the language of the statute at issue, but has constitutional implications. Under some states' UDAPs, if targeted conduct (even if not all conduct) occurs within the state, a defendant could potentially be subject to the law .[58] "Twenty states have adopted a presumption against extraterritorial application of state statutes," while "[s]ixteen states have rejected such a presumption.

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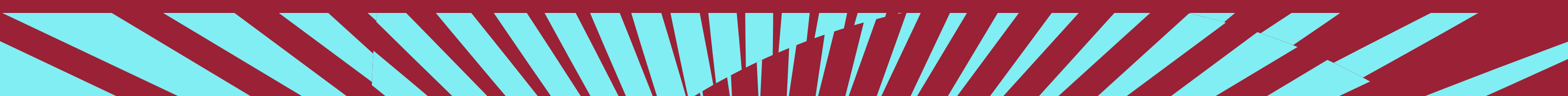
In the remaining states, the status is unclear."[59] Courts have been mixed in how they have resolved this question.[60]

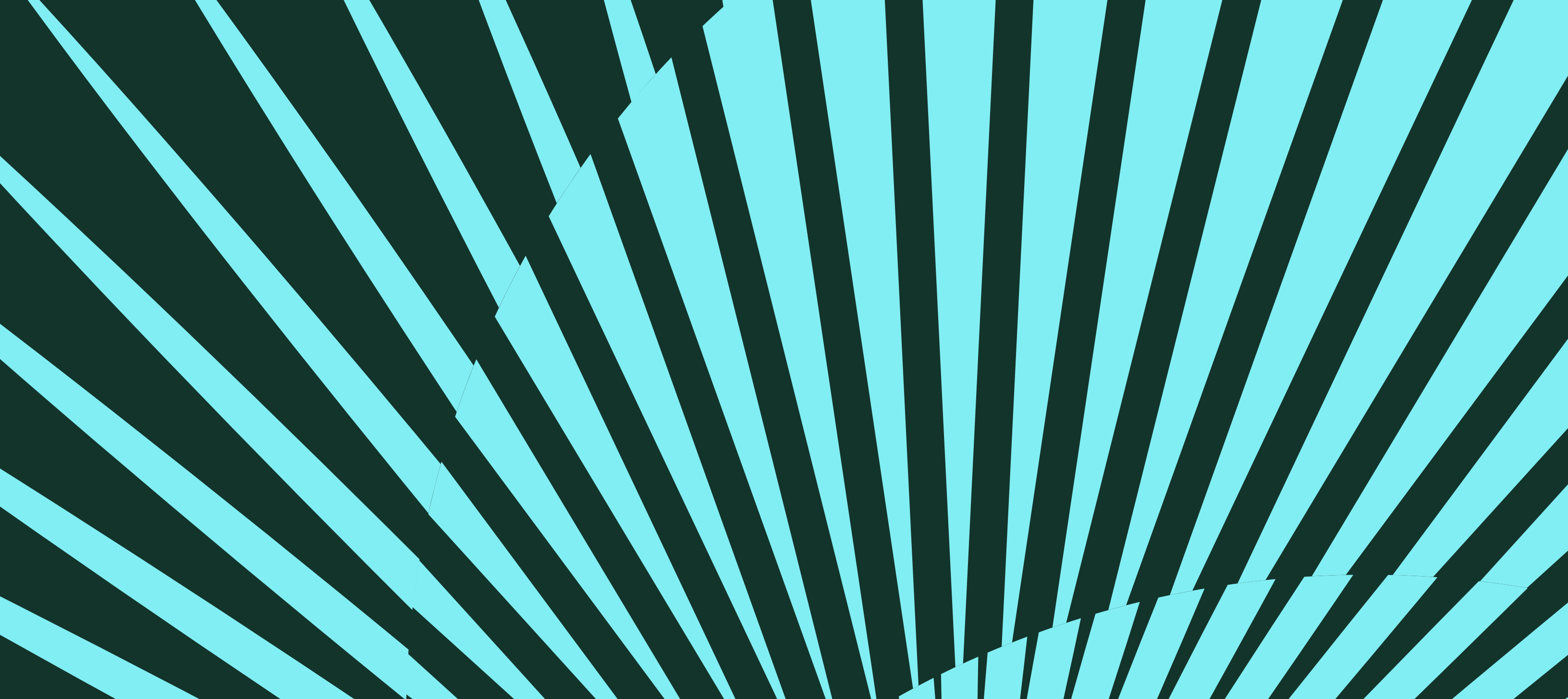
In *Goshen v. Mutual Life Insurance Co. of New York*, the New York Court of Appeals affirmed dismissal of New York UDAP claims filed by out-of-state residents, holding that "to qualify as a prohibited act under the statute, the deception of a consumer must occur in New York."[61] In contrast, the Supreme Court of Washington found that "an out-of-state plaintiff may bring a claim against a Washington corporate defendant for allegedly deceptive acts" and "[s]imilarly, an out-of-state plaintiff may bring a UDAP claim against an out-of-state defendant for the allegedly deceptive acts of its in-state agent" if Washington residents are directly or indirectly harmed by the conduct at issue.[62] More recently, the Oklahoma Supreme Court found that "the Oklahoma Consumer Protection Act [does not] apply to a consumer transaction when the offending conduct that triggers the Act occurs solely within the physical boundaries of another state. . . ."[63] The court further found that, likewise, Oklahoma's UDAP does not necessarily apply "to conduct where, even if the physical location is difficult to pinpoint, such actions or transactions have a material impact on, or material nexus to, a consumer in the state of Oklahoma[.]"[64] It reasoned that "the mere fact that a transaction has a material impact on or nexus to a consumer in Oklahoma, without more, is not enough to invoke this state's consumer protection laws. The focus is on the location of the offending conduct, and such conduct must occur in this state."[65]

The geographic scope of UDAPs is a consideration not always clarified by the text of a given statute. As such, courts are frequently called upon to determine such scope. These determinations have significant implications and play a role in how and for what purposes UDAPs are relied upon by state enforcers and private litigants alike.

UDAPs were adopted, at least in part, to fill perceived gaps in federal and common law consumer protection and to provide for local enforcement and remedies. Since their passage, courts have grappled with questions about their substantive and geographic limitations and have often looked to interpretations of the FTC Act for guidance. Although UDAPs vary significantly in structure and form, many include variations of the same general elements, and these variations have resulted in differing interpretations and applications across the states.

The geographic scope of UDAPs is a consideration not always clarified by the text of a given statute. As such, courts are frequently called upon to determine such scope. These determinations have significant implications and play a role in how and for what purposes UDAPs are relied upon by state enforcers and private litigants alike.





Chapter

03

Common Elements of UDAPs and How They Have Been Interpreted and Applied

Having examined the history, function, and scope of UDAPs, this paper now turns to a survey of UDAPs themselves—in particular, common elements and terms in UDAPs and how they are typically interpreted and applied.

The advocates for state consumer protection laws and the state legislators who enacted UDAPs well over a half-century ago could not have imagined the consumer or marketplace of today. While also true of many older laws that still play a critical role today, it is particularly the case with UDAPs, given the exponential proliferation of digital and e-commerce that now accounts for between 14 and 20 percent of overall U.S. retail sales.[66] Today, both consumers and businesses operate in a marketplace largely without state, or even national, borders. At the same time, the regulatory state, both at the state and federal levels, has continued to expand since UDAPs first emerged. There are now many more laws and regulations in a variety of areas (e.g., environmental, financial, commercial) to address specific commercial issues.

The “Consumer”

How broadly or narrowly a UDAP defines “consumers” has a significant impact on its scope and its risk of misapplication. Virtually every American citizen is, to some degree, a consumer. Some UDAPs do not define the term “consumer” at all, while others do not use the term, opting instead to use the term “person.” Florida’s UDAP defines a “consumer” as “an individual; child, by and through its parent or legal guardian; business; firm; association; joint venture; partnership; estate; trust; business trust; syndicate; fiduciary; corporation; any commercial entity, however denominated; or any other group or combination.”[67] Alabama defines the term as “[a]ny natural person who buys goods or services for personal, family, or household use.”[68] Given that many UDAPs lack even minimal requirements to show that some in-state transaction was made between the defendant and a citizen-consumer, it is theoretically possible that states could bring UDAP actions on behalf of their states’ “consumers” without even having to show that a single consumer in their state actually purchased the good or service.

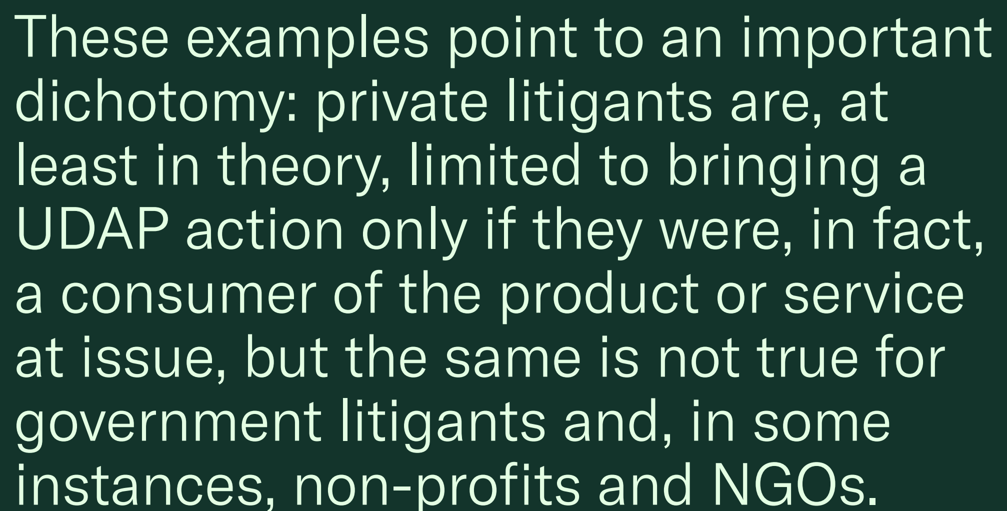
While UDAPs’ definitions of “consumer” (where present) are often extremely broad and are in some cases widely divergent from state to state, the private rights of action in UDAPs frequently require some transactional nexus between the plaintiff and the defendant. For example, the Maine UDAP’s private remedy is available to “[a]ny person who purchases or leases goods, services or property, real or personal, primarily for personal, family or

household purposes and thereby suffers any loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful" under the statute.[69]

These examples point to an important dichotomy: private litigants are, at least in theory,[70] limited to bringing a UDAP action only if they were, in fact, a consumer of the product or service at issue, but the same is not true for government litigants and, in some instances, non-profits and non-governmental organizations (NGOs).[71] In other words, in UDAP lawsuits, AGs are often permitted to bring claims on behalf of consumers that never consumed the product or service at issue. As one Texas court explained, "[a]ny person engaging in . . . deceptive practices may be subjected to a suit by the Consumer Protection Division of the AG's Office, under [the Texas Deceptive Trade Practices Act]" but "one who engages in deceptive acts may not be subjected to a private suit for damages under the Act unless the aggrieved party is a consumer."[72]

"Trade or Commerce"

It seems today that nearly every business practice is potentially subject to UDAPs. But some courts have stepped in to make clear that is not necessarily the case and to clarify that only business practices in which consumers are involved are subject to UDAPs. For example, a North Carolina court hearing a dispute over a corporate board of directors' membership requirements found that that state's UDAP was, indeed, "not meant to encompass all business activities or all wrongdoings in a business setting but 'was

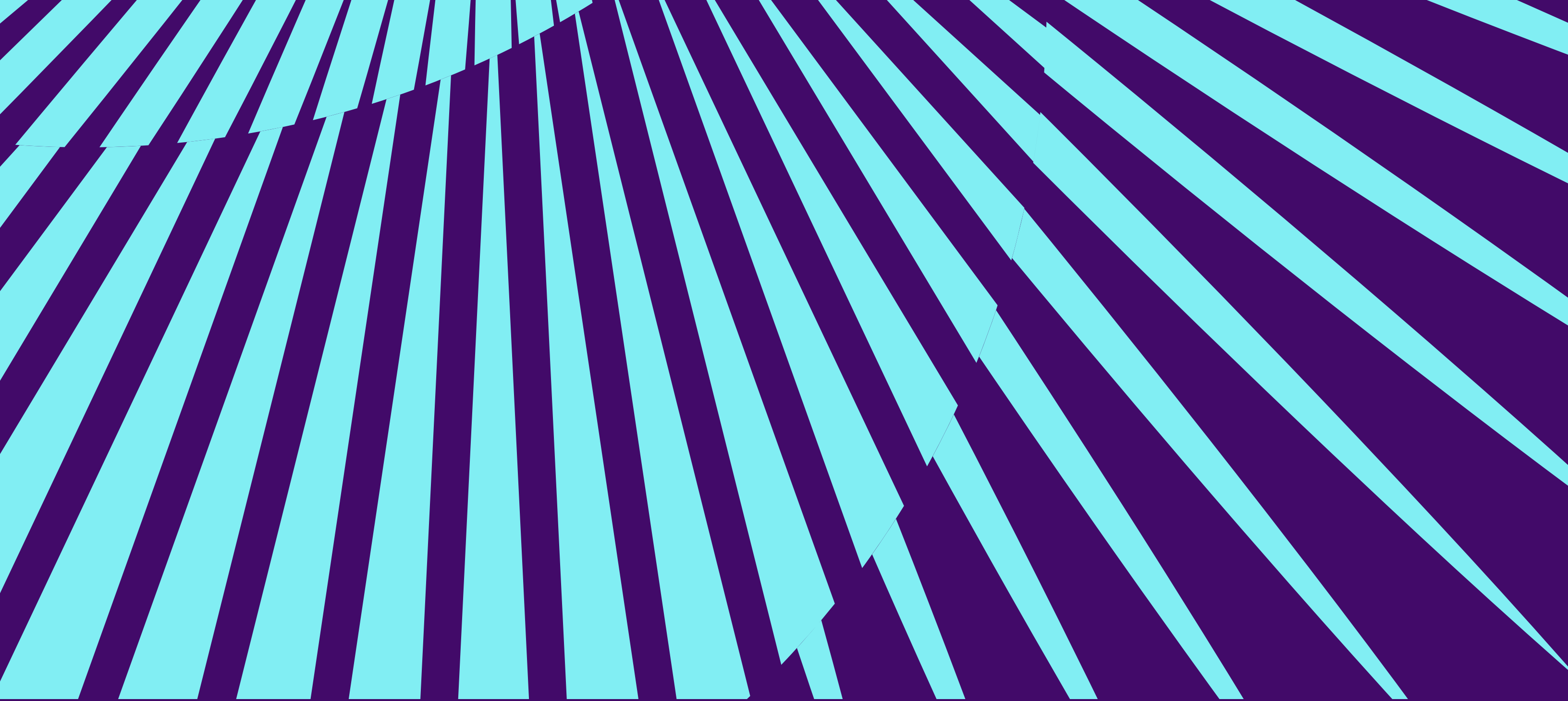


adopted to ensure that the original intent of the statute . . . was effectuated.'"[73] The original intent of the statute was "to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business and the consuming public within [the] State to the end that good faith and fair dealings between buyers and sellers at all level[s] of commerce be had in [North Carolina]."[74] Other states have been even clearer about what does and does not constitute "trade or commerce." A California court clarified that the California Legal Remedies Act (CLRA) applies only to the sale or lease of "goods" and "services" as defined in the statute.[75] The court noted that, "despite the potential for unfair or unlawful insurance practices, the California Supreme Court observed that CLRA did not apply to an automobile insurance policy, because 'insurance is technically neither a 'good' nor a 'service' within the meaning of the act."[76]

"Unfair and Deceptive Acts and Practices"

States have taken different approaches to identifying what types of conduct fall under the category of "unfair and deceptive acts and practices." Some states, including Arizona, Connecticut, Montana, North Carolina, Vermont, and Washington, ban deceptive or misleading business practices at a high level, leaving interpretation of substantive scope to state agencies (state AGs, consumer protection agencies, etc.) and courts.[77] Many states left this term undefined and, thus, open to broad interpretations, presumably to allow for their laws to "adapt to future business practices[,]" rather than updating them to meet the needs of new practices and circumstances.[78] Other states, including Alabama, Alaska, Hawai'i, Idaho, Illinois, Ohio, Oregon, Pennsylvania, Rhode Island, and Virginia, identify specific types of conduct that qualify as deceptive or misleading, definitions often borrowed from the Model Unfair Trade Practices and Consumer Protection Law.[79]

Despite the open-ended definitions in many UDAPs, courts have occasionally stepped in when AGs or private plaintiffs have attempted to stretch them beyond their proper bounds. For example, courts have recognized that UDAPs may not apply to conduct extensively regulated by other administrative and legislative schemes.[80] As noted above,[81] courts have also refused to extend UDAP enforcement to purely extraterritorial conduct. Examining some of the common elements among various UDAPs and how they have been interpreted and applied—as well as where courts have drawn lines on the extent of their applications—is an important part of understanding how these laws are currently being relied upon to address issues of major policy concern.



Chapter

04

Evolution of UDAPs to Pursue Policy Agendas

As previously discussed, the scope and reach of UDAPs are often fact-specific and state-dependent—both because of the varying text across UDAPs and because of their differing interpretations among enforcers and courts. But one overarching trend is discernible: both historical and contemporary enforcement examples show that UDAPs are increasingly being relied upon by state and private litigants to advance public policy goals.

And the issues targeted by many of these policy-focused lawsuits might not have been contemplated by the UDAPs' drafters, given the suits' primary focus on challenging or changing policy rather than on protecting consumers. While these actions might arguably have secondary or tertiary consumer-protection effects, they largely aim to regulate business activities or punish businesses for politically disfavored commercial activities—even when such activities are otherwise lawful, are approved or encouraged by governments, and have significant consumer benefits. These actions have a few common themes.

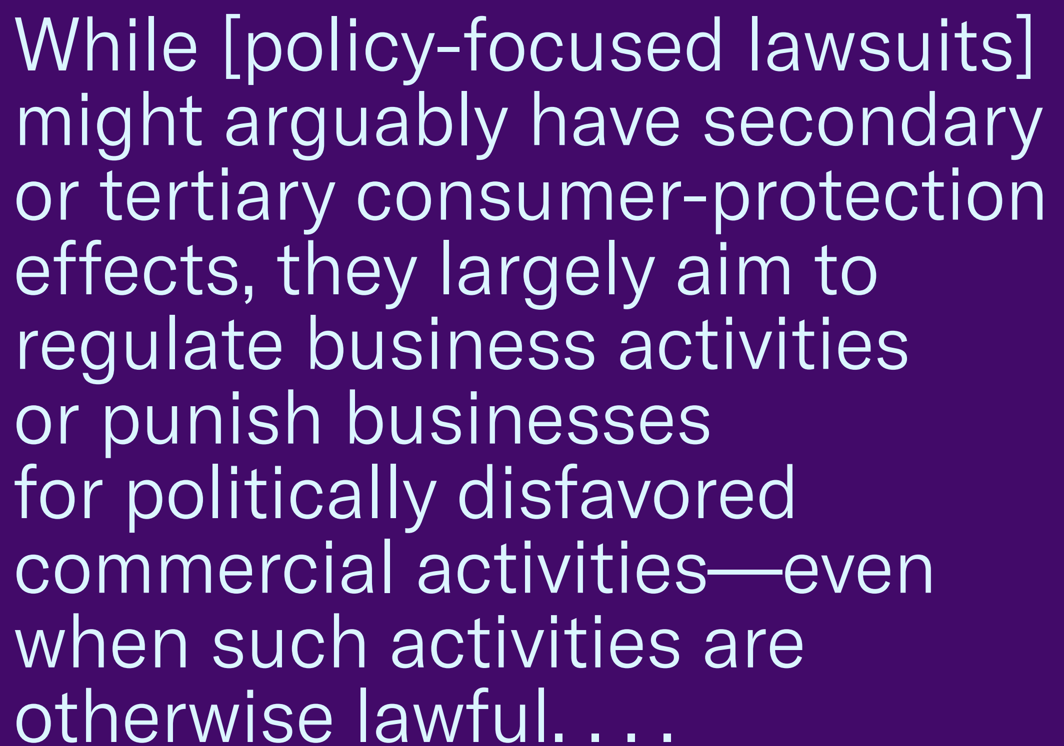
- First, in many instances, they are national or global in scale, claiming alleged harm to consumers from numerous states and jurisdictions, rather than addressing localized or state-specific issues. Unsurprisingly, they are typically pursued on a multistate basis or in close coordination with other states individually pursuing similar claims.
- Second, they closely relate to major, current policy, political, and/or social questions and have the potential to impact the direction of such ongoing debates.
- Third, they frequently address industries and products or services that are already highly regulated and subject to specific regulations or bodies of administrative law—and, in some cases, the claims sound in common-law tort and contract theories, such as product liability.
- Fourth, these suits, particularly when filed by public plaintiffs, tend to be brought on behalf of consumers generally, rather than those who actually consumed the product or service or were harmed by it (in some instances the harm alleged is not to any consumer at all, but rather to, for example, the public health or the environment).
- Finally, in many instances, the state or private litigants in the litigation are associated with activist organizations and private plaintiffs' lawyers.

This chapter spotlights and briefly describes some key examples of misplaced reliance on UDAPs, from

both state and private litigants, that created mass litigation with nationwide, and even global, social and policy implications.

Historical Use of UDAPs to Address Major Social and Policy Issues

While certainly more prevalent today than in the past, plaintiffs—both public and private—attempting to leverage UDAP authority to engage in and address public policy matters is not altogether new. In fact, particularly in the context of litigation brought by states, the emergence of consumer protection litigation on a national scale in the 1990s and early 2000s to address pressing matters of public policy is arguably one of the primary reasons state AGs rose to the positions of powerful national prominence that they occupy today. Plaintiffs' lawyers at this time likewise began leveraging UDAP authority, rather than or in addition to traditional tort claims, as the basis to bring class action lawsuits over issues that had garnered significant public attention and, in some instances, consternation. A look at some of these early



applications of state UDAPs to public policy matters provides helpful context in understanding the situation today and how we got here.

Tobacco

In the 1990s, 46 states, the District of Columbia, and several U.S. territories sued the four major U.S. tobacco manufacturers and their trade associations, in a *parens patriae* capacity, alleging, among other things, violations of UDAPs. That set of suits, and their resolution through the 1998 Master Settlement Agreement (MSA),[82] changed how AGs operate, both in terms of litigation tactics and their role in major policy issues, and how UDAPs are applied to issues of national concern. The MSA required the tobacco companies to pay over $200 billion and agree to injunctive terms around marketing and advertising their products. The MSA resulted in states' forfeiting their UDAP (and other) claims, thereby preventing those claims from being tested in court. But the states' success in banding together, threatening companies with crippling liability, and securing an until-then unheard-of settlement amount ushered in a new era in which private plaintiffs' lawyers, hired by states to prosecute consumer protection claims on the states' behalf, began to receive massive financial windfalls carved out of the states' settlements and awards.

Mortgage Lending

In response to the 2007–08 global financial crisis, several states filed consumer protection lawsuits against financial institutions associated with the subprime mortgage market, claiming liability for their alleged role in creating the crisis.[83] The suits targeted mortgage servicers that facilitated the financial products at issue, as well as the credit rating agencies that allegedly misled investors through their rating of structured finance securities.[84] In 2012, it was announced that 49 states, in conjunction with the

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federal government, reached a $25 billion settlement with the nation's five largest mortgage servicers.[85] Likewise, in 2015, Standard & Poor's parent company, McGraw Hill Financial Inc., resolved claims against it with 19 states and the District of Columbia for $687.5 million.[86] In 2017, 21 states, again in conjunction with the federal government,

settled financial crisis-related claims against Moody's Corporation, Moody's Investor Services, Inc. and Moody's Analytics, Inc. for just short of $1 billion.[87]

Fast Food

Fast food has long been a popular target of lawsuits sometimes viewed as frivolous given the choice of consumers to eat fast food, notwithstanding general public awareness of the possible health implications often associated with doing so. In 1986, the Texas, California, and New York AGs opened investigations into a major fast food franchise to determine whether the company's failure to disclose the nutritional content of its products was deceptive and misleading, in violation of state consumer protection laws.[88] As part of a settlement agreement, the company agreed to provide customers with booklets outlining ingredients and nutritional information.[89] The Texas, California, and New York AGs opened a separate investigation into the company in 1987 arising out of a series of advertisements that allegedly promoted the company's fast food as nutritious.[90] This investigation was terminated after the company agreed not to run the advertisements again.[91]

Private litigants, too, have attempted to wield UDAPs against fast food restaurants. In the early 2000s, the first obesity lawsuit was filed as a class action under New York's UDAP against the same fast food company that was the subject of the 1986–87 state AG investigations on behalf of a class of child plaintiffs. The suit alleged that the franchise "had produced food that was unreasonably unsafe; failed to warn consumers of the dangers of its products; and, engaged in deceptive advertising, sales, and marketing," and further alleged that the company "knew or should have known that its actions would cause obesity and related health problems in millions of American children."[92] Ultimately, the case fizzled when the court denied class certification for failure to satisfy Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement, given that plaintiffs had failed to show a sufficient causal link between consumption of the fast food and the claimed harms.[93]

Off-Label Drug Marketing

The early 2000s saw a rise in drug marketing litigation as part of a nationwide trend alleging that pharmaceutical companies were advertising off-label uses of medication in violation of FDA regulations and state consumer protection laws. For example, *In re Actimmune Marketing Litigation* challenged defendants' marketing and sale of interferon gamma-1b (Actimmune).[94] Asserting claims under various state UDAPs, the plaintiffs alleged that the defendants engaged in a fraudulent and deceptive scheme to sell Actimmune for off-label use in the treatment of idiopathic pulmonary fibrosis.[95] As in the fast food litigation, the proposed class action was

dismissed on the grounds that the plaintiffs had failed to show a sufficient causal link between the off-label marketing of the product and the alleged injuries suffered by the putative class.[96] The court made clear that violation of the consumer fraud law alone, without a further showing that the plaintiffs' injuries were "as a result of" the violation, was insufficient for purposes of class certification.[97]

Student Loans

In the early 1990s, 59 former students of the defunct Culinary School of Washington brought legal action against the school over its allegedly fraudulent representations to prospective students about culinary training and post-graduation employment prospects.[98] In *Jackson v. Culinary School of Washington*, former students alleged that the school misrepresented its facilities and educational program and fraudulently induced the students to take out loans to attend.[99] Plaintiffs asserted numerous causes of action, including violation of the D.C. Consumer Protection Procedures Act, and sought declaratory and injunctive relief in the form of voiding their student loans.[100] The U.S. District Court for the District of Columbia found that the plaintiffs stated a valid claim, observing that "[t]he CPPA enacts a broad scheme to protect consumers from unscrupulous merchants connected with the supply side of the consumer transaction."[101] The parties settled the claims after several rounds of appeals, which included a successful petition to the U.S. Supreme Court.[102]

Similar actions were not limited to educational institutions. More recently, litigation against student loan servicers has included consumer protection claims. Just last year, 39 AGs announced a $1.85 billion settlement with national lender Navient, arising out of its alleged use of unfair and deceptive practices targeted at student-loan borrowers.[103] The multistate lawsuit "claimed that Navient engaged in unfair and deceptive practices by steering student loan borrowers into forbearances and away from critical federal student loan relief programs, like income-driven repayment plans and Public Service Loan Forgiveness (PSLF)."[104]

Current Examples of Applying UDAPs to Major Social and Policy Issues

While the general public might not necessarily be familiar with the legal bases underlying them, many of today's lawsuits brought by states over major public policy matters are either partially or primarily grounded in theories of deception or unfairness codified under state UDAPs. In many cases, the same is true for large-scale litigation brought by private plaintiffs. These cases frequently involve dozens of states or thousands of private plaintiffs and, in addition to putting potentially billions of dollars at stake, have far-reaching social and policy implications. Below we review some of the most significant

> "[Lawsuits brought by states over major public policy issues] frequently involve dozens of states or thousands of private plaintiffs and, in addition to putting potentially billions of dollars at stake, have far-reaching social and policy implications."

recent examples of UDAPs being used as a tool to shift policy under the guise of consumer protection.

Climate Change

Ongoing global climate litigation is one of the clearest and most ambitious examples of states and localities attempting to use UDAPs to address a matter of national and global concern with immense political, policy, and social considerations. These lawsuits—brought by both states and municipalities—assert a variety of claims, but almost all argue that oil and gas industry defendants deceived consumers in the course of their marketing and sale of fossil fuel products about those products' role in contributing to climate change. Of the lawsuits filed by states and territories—Rhode Island (2018), Minnesota (2020), the District of Columbia (2020), Delaware (2020), New Jersey (2022), Massachusetts (2019), Connecticut (2020), Vermont (2021), and Puerto Rico (2022)—all but one (Rhode Island) allege violation of the state or territory's consumer protection law, in addition to other causes of action such as public nuisance.[105]

Reliance on UDAPs by states in their climate lawsuits has proved to be important even at the early stage of litigation, before the merits are tested. To date, nearly four years after the first state climate action of this nature was filed by Massachusetts, most of the litigation has focused on whether the asserted claims belong in state or federal court, with states insisting that their UDAP claims do not raise any questions of federal law that would allow industry defendants to remove the cases to federal court.

Opioids

The opioid litigation of this decade in many ways mirrors the tobacco litigation of the 1990s. This litigation is a product of an epidemic that has caused widespread harm and forced local communities to grapple with the economic and human costs of addiction.[106] Thousands of cases have been filed against opioid manufacturers, distributors, and retailers, alleging that the defendants misled or failed to warn patients about the risks of opioid addiction.[107]

UDAP claims have featured prominently in the opioid litigation,[108] but with mixed results. While not all UDAPs allow municipalities to bring claims under the statutes, some do.[109] In *City of Chicago v. Purdue Pharma L.P.*, the city withstood the defendants' motion to dismiss, which argued that "plaintiff fail[ed] to state a claim because it

[did] not plausibly allege that defendants [had] engaged in any practice that offends public policy, is immoral, unethical, oppressive, or unscrupulous, or causes substantial injury to consumers."[110] On the other hand, a California court rejected opioid-related UDAP claims brought by Los Angeles, Orange, and Santa Clara Counties, along with the City of Oakland, resulting in a win for industry defendants.[111] The court in that case found on the UDAP claims that "[a] 'mere possibility' that marketing 'might conceivably be misunderstood' by 'unreasonable' consumers cannot support a[] [false advertising law] claim" and that "a general, subjective claim about a product is non-actionable puffery" because it is "extremely unlikely to induce consumer reliance."[112] Finally, the court found that "advertising that takes a legitimate position on matters of scientific debate cannot be false and misleading, as '[t]he UCL, FAL, and CLRA do not requir[e] unanimous

" '. . . [A] general, subjective claim about a product is non-actionable puffery' because it is 'extremely unlikely to induce consumer reliance.' "

scientific consensus for each advertising claim on Defendants' products.'"[113] While most states' opioid claims were never tested, Oklahoma's UDAP claim against one drug manufacturer was dismissed early in the litigation as a result of a broad exemption for regulated products in the state's UDAP.[114]

PFAS

The producers of per- and polyfluorinated substances (PFAS) are emerging targets of litigation that raise UDAP claims. Well over a dozen states have sued PFAS manufacturers, some invoking their state's UDAP in doing so. For example, Massachusetts sued 13 PFAS manufacturers, alleging, among other things, that the industry defendants "repeatedly violated state [specifically, the Massachusetts UDAP] and federal laws protecting drinking water and prohibiting consumer deception by marketing, manufacturing, and selling PFAS-containing aqueous film-forming foam (AFFF) to government entities, counties, municipalities, local fire departments, businesses and residents in Massachusetts while knowing of the serious dangers the chemicals posed."[115] Likewise, Alaska sued dozens of companies for allegedly "engaging in deceptive trade practices codified under the Alaska Unfair Trade Practices and Consumer Protection Act" by knowingly marketing products containing PFAS.[116]

Greenwashing

Greenwashing—the practice whereby companies "represent themselves as sustainable by providing false or misleading information about their practices"[117]—has been the subject of several UDAP lawsuits by state and private litigants. In one recent example, Danone Waters of America

Inc. was sued in federal court for claimed violations of New York's consumer protection laws arising out of the company's allegedly deceptive marketing of its water as "carbon neutral."[118] Many older greenwashing claims have focused on companies' marketing of plastics, specifically allegedly false claims that a company's plastic products are recyclable and/or biodegradable. In October 2011, California's then-AG, Kamala Harris, "filed a first-of-its-kind 'greenwashing' lawsuit against three companies that allegedly made false and misleading claims by marketing plastic water bottles as '100 percent biodegradable and recyclable.'"[119] Those claims were settled out of court, with the defendant companies paying monetary penalties and removing their products from stores.[120] In another action, Connecticut's AG brought suit against Reynolds Consumer Products, Inc. alleging that the company violated the Connecticut Unfair Trade Practices Act by marketing its Hefty trash bags as "recyclable," despite allegedly knowing that those bags could not be recycled in Connecticut facilities.[121]

NGOs and private plaintiffs also have been active in consumer protection litigation over plastics. For example, the Earth Island Institute, an environmental NGO, sued Coca-Cola under the D.C. Consumer Protection Procedures Act, alleging that the company deceived consumers by portraying itself as sustainable and environmentally friendly.[122] In late 2022, a D.C. Superior Court judge dismissed the NGO's claims, finding that "most of them lacked promises or measurable data points that could render them false and added that while some statements did set specific goals about improved sustainability, those goals were caveated with the fact that they weren't expected to be met until 'significantly in the future,' which is not enough to create a violation of the CPPA."[123] The Earth Island Institute brought a similar claim against BlueTriton Brands (formerly known as Nestlé Waters North America) under D.C.'s UDAP.[124] And a plaintiff in Illinois brought suit, on behalf of herself and a proposed class of consumers, under the Illinois Consumer Fraud and Deceptive Business Practices Act against 7-Eleven, Inc. for allegedly deceptively marking foam products, like cups and plates, as well as freezer bags, as "recyclable."[125]

Data Breaches

Data breaches have increasingly become a focus of AGs across the country, with all 50 states and the District of Columbia having enacted data breach laws requiring notification, often facilitated through and overseen by AG offices, to consumers whose information was compromised. In 2019, the New York AG sued Dunkin' Donuts after its customers' online accounts were compromised in multiple data breaches beginning in 2015.[126] The AG alleged that Dunkin' "did nothing for years to address the compromised accounts despite repeated alerts from its own app developer" and

"failed to adopt safeguards against future attacks despite reports of continuing fraud."[127] Dunkin' ultimately settled these claims and agreed to update its security systems and pay $650,000 in fines and costs.[128]

Some states have expressly extended UDAP liability to companies that suffer data breaches. For example, "[a] violation of [the Maryland Personal Information Protection Act]: (1) Is an unfair or deceptive trade practice within the meaning of [the Maryland UDAP]; and (2) Is subject to the enforcement and penalty provisions contained in [the Maryland UDAP]."[129] In multi-district litigation arising out of the November 2018 data breach impacting the guest reservation database for Marriott hotels, the court held that plaintiffs stated a valid claim for a violation of the Maryland UDAP because they adequately pled a violation of Maryland's privacy statute.[130] The court held separately that plaintiffs' UDAP claim was valid because they alleged: (1) that Marriott "knew or should have known about its allegedly inadequate data security practices and the risk of a data breach," (2) that "these omissions [in the form of inadequate data security practices] would have been important to a significant number of consumers," (3) that plaintiffs relied on the omissions, and (4) that they "'would not have paid Marriott for goods and services or would have paid less for such goods and services' if [they] had known the truth about Marriott's alleged omissions."[131] The court found that "[t]hese allegations establish that 'it is substantially likely that the consumer would not have made the choice in question had the commercial entity disclosed the omitted information.'"[132]

Private plaintiffs have been similarly active in data breach litigation. In one such case, a defendant provider of genetic testing for medical issues was sued by its former patients after a 2020 data breach impacted its systems.[133] Plaintiffs alleged that the defendant failed to take adequate measures to protect their personal information, in violation of the California Unfair Competition Law.[134] The defendant in this case ultimately agreed to a $12.25 million settlement.[135]

Workplace Sexual Harassment

In late 2022, then-D.C. AG Karl Racine filed suit "against the Washington Commanders, team owner Dan Snyder, the National Football League (NFL), and NFL Commissioner Roger Goodell for colluding to deceive District residents—the Commanders' core fanbase—about an investigation into toxic workplace culture and allegations of sexual assault to maintain a strong fanbase and increase profits."[136] A press release issued in conjunction with the filing of the suit noted that "[t]he District's Consumer Protection Procedures Act (CPPA) prohibits unfair and deceptive trade practices. [The Office of the Attorney General] has broad authority under the CPPA to hold accountable any company or any head of a company if they mislead or lie to District consumers, regardless of

Interestingly, the District of Columbia has been relatively explicit that its lawsuit is more about regulating general business practices than about remediating any specific consumer harms.

where they are located. The Washington Commanders actively view District consumers as their fanbase, as evidenced by marketing campaigns to align the team with the city, including selling jerseys with the District of Columbia flag on it and other merchandise with 'D.C.' clearly visible."[137]

Interestingly, the District of Columbia has been relatively explicit that its lawsuit is more about regulating general business practices than about remediating any specific consumer harms. In a recent filing, it noted that "[our] goals are regulatory and deterrence objectives that go well beyond the ability to recoup money for individual consumers," and that its lawsuit "will ensure the [D]istrict's laws are followed and other merchants do not mimic defendants' example by deceiving consumers into ongoing financial support with sham 'independent investigations' when allegations of serious misconduct are raised."[138]

ESG

Environmental, social, and governance (ESG) practices, particularly when applied to lending and investing, have become a major area of focus for AGs on both sides of the aisle. Several high-profile multistate investigations and inquiries by Republican AGs were recently initiated against large financial institutions, each ostensibly in search of potential violations of antitrust and consumer protection laws related to ESG investment practices. One of the investigations, led by Kentucky AG Daniel Cameron and joined by 13 other states, explained that the "information requested centers on suspected financial discrimination against companies that do not align with the United Nations' 'net-zero' climate agenda."[139] Other investigations by AGs include those of major credit rating agencies, which the AGs allege might have violated their states' UDAPs by "deceptively confound[ing] the distinction between subjective opinions and objective financial facts."[140]

Chapter

05

The Problems With and Motivations for Using UDAPs to Pursue Policy Agendas

There are a number of reasons why reliance on UDAPs to address public policy should raise serious concerns for enforcers, courts, policymakers, and the public. Regardless of its motivations or ends, the use of UDAPs in this way necessarily deprioritizes the protection of consumers from direct and immediate harms, blurs state separation-of-powers boundaries, introduces confusion and unpredictability into the marketplace, potentially chills protected speech, and undermines public faith in the division of politics and law enforcement.

Why Reliance on UDAPs to Address Policy Questions Is Problematic

Misallocation of Limited Resources

When UDAPs are used in novel ways to influence policy, that necessarily deprioritizes the traditional work of consumer protection—ensuring that consumers are not harmed by unfair and deceptive acts and practices and providing them with relief when they are. The office of an AG, like any government agency, has limited resources that must be allocated with a high degree of discretion to ensure maximum impact.[141] Even where the AG has retained outside counsel on a contingency-fee basis, the state must typically dedicate substantial resources to supervising and approving litigation strategy.[142] Thus, every dollar devoted to bringing UDAP actions aimed at effectuating some policy preference is a dollar taken away from efforts to ensure that consumers are protected from in-state scammers and unscrupulous businesses .[143]

Interference With Legislative Authority

When state and private litigants attempt to engage in policymaking through litigation, they inappropriately usurp the roles of elected legislators, violating principles of separation of powers and federalism. For example, an AG bringing a legal action against a private party that has the effect of creating policy raises concerns that the AG is intruding on the sovereign role of its state legislature, or of Congress.[144] The same could also be said of private litigants, including NGOs, who initiate actions under UDAPs explicitly for the purposes of shifting policy, rather than seeking relief from a direct and immediate injury that they

". . . [E]very dollar devoted to bringing UDAP actions aimed at effectuating some policy preference is a dollar taken away from efforts to ensure that consumers are protected from in-state scammers and unscrupulous businesses."

"Even though many UDAPs were drafted with the intent that they would be liberally interpreted and broadly applied, if UDAP enforcement is not, at a minimum, grounded in the concept that protecting consumers from direct and immediate harm is the paramount priority, then significant unpredictability and confusion is introduced into the market."

have suffered. In those instances, the problem is perhaps even more acute; not only have those private litigants not been entrusted by the public to set or change policy (just as state AGs have not been), but unlike elected state AGs, private parties are in no way accountable to the public, and their outside lawyers have a financial incentive to pursue the litigation.

Unpredictable Enforcement and the Chilling Effect on Legitimate and Beneficial Business Activities

Predictability of law enforcement is critical not only to the rule of law (as discussed further below and in Chapter 7) but also to the functional operation of a marketplace. Unlimited UDAP application, by definition, allows courts (through both state and private UDAP litigation) to decide, retroactively, what conduct is lawful and what conduct is unlawful. Even though many UDAPs were drafted with the intent that they would be liberally interpreted and broadly applied, if UDAP enforcement is not, at a minimum, grounded in the concept that protecting consumers from direct and immediate harm is the paramount priority, then significant unpredictability and confusion is introduced into the market.

With such unpredictability inevitably comes a chilling effect, as businesses respond to unknown liability with retreat. As one scholar has observed, "[w]ith broad laws, the issue is not notice but reach. Broad statutes can be plenty clear about what they require. The problem is they sweep in too much everyday conduct, arousing worry about outsized power and arbitrary enforcement."[145] One consequence of unpredictable enforcement and litigation, given the resulting disengagement by businesses from commerce in certain jurisdictions, is less consumer access to products and services in those jurisdictions. Unlimited UDAP application, in particular, often targets commercial speech in the form of marketing and advertising, which has the potential of chilling productive, helpful, and informative speech. As Professors Joanna Shepard and James Cooper have noted, "uncertainty imposes special costs where, as here, the penalties impose unpredictable punishments for speech[,]" as it is well established that "firms often refrain from informative advertising out of fear

of consumer protection liability."[146] They go on to explain that "[w]hen this happens, consumers suffer again by either making less-informed purchases or by incurring costs to seek out relevant product information that is no longer supplied to them."[147]

"Despite [the] critical protection [provided by the Due Process Clause of the U.S. Constitution] the breadth of and lack of specificity in many states' UDAPs leave businesses with little or no way of knowing or predicting that their commercial activities could later be construed as consumer protection violations."

In a recent petition for certiorari to the U.S. Supreme Court, one major pharmaceutical manufacturer that was challenging the inadequate notice provided by California's UDAP argued that "[t]he threats of expansive and uncertain UDAP liability 'both chill and tax socially desirable manufacturer/marketer communication to consumers.'"[148] Professors Henry Butler and Jason Johnston, in their analysis of consumer protection liability and enforcement through an economic lens, cite several instances in which businesses did in fact cease what might otherwise be viewed as productive communications between manufacturers and consumers.[149] For example, Butler and Johnston cite an instance in which a major footwear manufacturer was sued under California's UDAP by a private litigant on behalf of consumers, who alleged that the manufacturer's public comments about its treatment of factory workers abroad amounted to a violation of the law.[150] Following a settlement, the footwear manufacturer "stopped issuing its annual Corporate Social Responsibility reports and making claims regarding its labor and environmental practices."[151] "This self-imposed speech moratorium lasted several years, and when [the manufacturer] resumed communications regarding its labor practices, it was careful not to assert anything about labor conditions, but instead simply posted an online list with its suppliers' names and locations."[152] As discussed further below, this dynamic also raises First Amendment concerns, particularly when states are able to include criminal charges and penalties in their UDAP actions.

Due Process—Notice

"Extremely broad laws offend due process."[153] The Due Process Clause of the Constitution of the United States, found in the Fourteenth Amendment, requires state governments to inform the public of what conduct constitutes a violation of the law.[154] In *Mullane v. Central Hanover Bank & Trust Co.*, the Supreme Court confirmed

that procedural due process includes the right to such notice.[155] Despite that critical protection, the breadth of and lack of specificity in many states' UDAPs leave businesses with little or no way of knowing or predicting that their commercial activities could later be construed as consumer protection violations. This opens businesses up to limitless (and thus potentially crippling) liability that they had no way to plan for or avoid. "The U.S. Supreme Court has closely scrutinized the notice provided under civil laws that implicate interests such as free expression or (in the context of immigration) personal liberty. It has not, however, spoken on what due-process standards apply to statutes like state UDAP laws."[156] The problem of virtually unlimited UDAP application becomes even more acute when criminal penalties are involved.[157]

Additionally, laws with imprecise limits on what conduct is prohibited can sow confusion and deprive market participants of notice to which they are entitled. Those potentially regulated by the law may not be able to understand fully how to modify their activities in order to come into compliance, or even know that they are subject to the law in the first instance. Put another way, a "[l]aw must announce its demands. If ordinary people do not understand what is required of them – if consulting statute books and case reporters would not inform a reasonable person of her legal duties – the rule of law falters."[158] This is not just a concern for regulated entities; it is also a concern for consumers. The aim of consumer protection laws is to protect consumers, not punish businesses. Fewer consumers will be harmed if market participants understand the requirements of the law at the outset, rather than only after a consumer has been harmed. Actions claiming to have a sufficient nexus to protecting consumers that, in fact, lack such a nexus and are promoted as being intended to "benefit the public" or "improve consumer conditions" should be viewed with a high degree of skepticism. These broader and more indirect motives are often the pretext for misusing UDAPs for purposes other than protecting consumers.

Due Process—Assessment of Penalties

Application of UDAP penalties on a "per violation" basis, with significant latitude often granted to enforcers as to how the number of "violations" is calculated, also threatens defendants' due-process rights, particularly when an alleged violation is premised on activity that never touched, let alone harmed, a consumer. This precise issue was recently presented to the U.S. Supreme Court in the form of a major pharmaceutical company's request for review of a California court's award of $300 million in a lawsuit brought by the California AG under California's Unfair Competition Law and False Advertising Law.[159] The AG alleged that the company violated state law by distributing false

and misleading advertising related to its pelvic mesh products.[160] The company argued that the Supreme Court should review and overturn the verdict because the penalties under the UDAP were applied arbitrarily and without notice, in violation of the company's due-process rights.[161] The company argued, among other things, that California's statutes left the determination of what constituted a violation—including conduct that never reached or harmed a consumer—to the discretion of the court, providing no meaningful limiting principle or way for a potential defendant to assess the scope of potential liability.[162] But the Supreme Court denied the company's petition for certiorari, leaving many of these questions open and up to state and lower federal courts to continue deciding.

First Amendment

UDAP laws are frequently used to address allegedly false and misleading marketing and advertising. Carefully crafted laws or amendments to UDAPs that narrowly and explicitly forbid certain commercial speech that is false or misleading would likely withstand First Amendment scrutiny and may serve important consumer protection ends. However, the potentially massive monetary penalties that are often at stake in UDAP actions, and that incentivize settlement of even the most marginal of claims, can chill speech in the first instance, even speech that would otherwise be protected. To that end, "[m]assive UDAP penalties are all the more problematic because they risk chilling protected commercial speech."[163] Speech can be chilled as a result of a UDAP's breadth, particularly where there is significant statutory ambiguity. As the defendant in the mesh case above noted in its petition for certiorari to the U.S. Supreme Court, "given the broad scope of the UDAP statutes, it is hard to isolate unprotected speech from protected speech. Indeed, the complex analysis of what speech is 'likely to deceive' under California's UDAP statutes has been deemed outside of the 'type of ordinary factfinding assigned to a jury.'"[164] As with the due-process concerns cited above, far-reaching, policy-motivated UDAP enforcement actions are of greater concern when they are applied to speech and include criminal penalties.

Incentives for Redundant Private Litigation

Unlike the FTC Act, most UDAPs also include private enforcement mechanisms that allow for individual consumer actions.[165] Private

"Private rights of action under UDAPs were originally intended to supplement the limited resources available to state enforcers to remedy consumer protection violations. Instead, private UDAP suits often follow state enforcement actions with overlapping claims aimed at securing attorneys' fees for plaintiffs' counsel."

rights of action under UDAPs were originally intended to supplement the limited resources available to state enforcers to remedy consumer protection violations.[166] Instead, private UDAP suits often follow state enforcement actions with overlapping claims aimed at securing attorneys' fees for plaintiffs' counsel.[167] These redundant actions inflate the costs of UDAP enforcement without providing any of the purported benefits of private enforcement, such as shared resources and experience.[168] In addition to pursuing class claims, plaintiffs' firms may represent states in public enforcement actions, blurring the lines between state AG offices and private plaintiffs.[169]

Because many UDAPs provide for statutory damages and/or attorneys' fees for a prevailing plaintiff,[170] they have also incentivized the plaintiffs' bar to pursue increasingly novel claims without any clear connection to actual unfair or deceptive business practices.[171] For example, private litigants have filed UDAP lawsuits against gun manufacturers for mass shootings,[172] chemical manufacturers for pollution,[173] and social media companies for depression and anxiety among adolescents.[174] Whether advanced by state AG offices or private litigants, UDAP claims with little to no nexus to consumer harms pose similar dangers to businesses and consumers.[175]

Possible Explanations for the Reliance on UDAPs to Effect Policy Ends

There is a range of possible explanations and incentives for AGs and private litigants to rely upon UDAPs for purposes of effecting policy ends. As professors Henry Butler and Josh Wright note, "[c]ritics argue that the combination of private rights of action, generous remedies, expansive and elusive definitions of illegal conduct, lack of administrative expertise, and relaxation of common law limitations have generated a set of incentives that encourages plaintiffs and their attorneys to file claims of dubious merit."[176] The next portion of this chapter discusses some of the potential reasons for this trend, particularly in AGs' use of consumer protection actions.

Increasing National Footprint of AGs and Advent of Multistate Litigation

In many ways shaped and catalyzed by the tobacco litigation, the advent of multistate litigation fundamentally changed the role of AGs and injected them into national policy conversations where they formerly had little place. Where the efforts of a single AG's office previously might have been limited by a lack of resources or jurisdiction, that same office now could band together with dozens of other states to share investigation and litigation resources and, perhaps even more importantly, leverage the jurisdictional powers of their sister states to

demand information from companies for conduct that occurred outside of a state's borders.[177] This development also significantly increased the potential liability a target company can face, with dozens of states, rather than one or two, suddenly demanding relief. Attorneys general quickly realized that with this newfound power of collaboration came the ability to engage on policy and political issues at the national scale.[178]

While this trend began to emerge in the 1980s,[179] the tobacco litigation a decade later crystallized it as a new model for AG activity. As Professor Mark Miller has written, "[t]he tobacco litigation clearly started a trend of cooperation among state attorneys general, although on some issues the cooperation is limited to those from the same political party."[180] Analyzing the multistate tobacco litigation through the ongoing opioid litigation, Professor Miller observes that these are "example[s] of multistate litigation taking the place of federal regulation of" key industries.[181] While the emergence of multistate litigation might very well have brought AGs to the national stage, it is the broad application of UDAPs to issues of a national scale (applications not possibly envisioned by the lawmakers who enacted them) that, along with state and federal antitrust laws, provided AGs with the tools to continue to claim a seat at the national regulatory table. Professor Miller also notes that "[s]ome worry that the multistate litigation will harm the esteem in which the public holds the office of attorney general."[182] He points to one former state AG's concern "that [through excessive multistate litigation] the AGs become seen as one more lawyer, one more politician on the make, and that undercuts the credibility of the office itself."[183]

As outlined above, through multistate consumer protection litigation, AGs have become engaged at the national level and established themselves as a nationwide—and, in some instances, even a global—political force. As AGs have flexed this political power, they have turned to their states' UDAPs to claim their role in taking on issues that are national in scope and involve major policy, political, and social considerations.[184] National enforcement of state UDAPs further allows AGs to utilize political power where they might otherwise be limited by local constraints, such as a governor or legislature that disagrees with their actions.

Jurisdictional Advantages

By asserting purely state-law claims, AGs are better able to control jurisdiction and ensure that their UDAP enforcement efforts are heard in their preferred forums even though they may be far-reaching and have national import. As well illustrated in the climate change litigation referenced above, states and the outside counsel often retained to represent them usually seek to have their cases heard in state court. As one prominent plaintiffs' attorney has put it, "[p]laintiffs prefer

"As well illustrated in the climate change litigation referenced above, states and the outside counsel often retained to represent them usually seek to have their cases heard in state court. As one prominent plaintiffs' attorney has put it, '[p]laintiffs prefer to be in state court. . . . We're happy as pigs in slop in state court.'"

to be in state court. . . . We're happy as pigs in slop in state court." [185] State AGs enjoy certain procedural advantages when proceeding in state court, including familiarity with local practices and a more plaintiff-friendly bench.[186] But federal oversight of subjects like pharmaceuticals and air pollution can provide a good basis for removal to federal court when litigation arguably raises federal questions. While much of the recent national-scope litigation has rested on novel applications of common-law claims like public nuisance and trespass, AGs also have begun including UDAP claims in their suits, perhaps under the impression that such claims could help defeat removal efforts. This tactic was successfully deployed in the multidistrict litigation against Standard & Poor's parent company, McGraw Hill Financial Inc., referenced earlier.[187] In these cases, 16 states and the District of Columbia alleged that McGraw Hill made false or misleading statements about its credit rating system in violation of the states' respective UDAPs.[188] McGraw Hill removed the actions to federal court, arguing that federal jurisdiction was proper because evaluation of the states' claims would require the court to determine the extent to which it complied with the federal Credit Rating Agency Reform Act of 2006.[189] The district court rejected this argument and remanded the case after finding that the states' claims were "derived entirely from state law."[190]

Legislative Inaction

Congressional gridlock is not a new phenomenon.[191] Much has been said about the rise of the administrative state (and the delegation of congressional powers to administrative agencies) being both a cause and symptom of chronic congressional inaction, but the corresponding rise in activity at the state level has not received the same attention. Law Professor Paul Nolette observed the following about this dynamic:

> AGs have used their positions to circumvent gridlock by acting as opportunity points for policy change when Congress is unwilling or unable to act. Through lawsuits and settlements with corporate defendants, such as the for-profit education sector . . . AGs have shaped the regulatory environment of entire national industries in the absence of new federal laws or regulations. In this sense, the increasing

polarization of state level politics might open more opportunities for policy change, even as polarization in Congress stymies lawmaking.[192]

Aside from separation-of-powers concerns, this approach also risks reinforcing legislative gridlock, as legislators become conditioned to expect that law enforcers with broad authorities will initiate policy change in the absence of legislative activity.

Political Ambitions of AGs and Local Officials

The office of AG can be a powerful launching pad for politicians aspiring to higher office. Vice President Kamala Harris served as California AG from 2011 to 2017 before being elected to the U.S. Senate. The U.S. Secretary of Health and Human Services, Xavier Becerra, likewise served as California's AG. Former Oklahoma AG Scott Pruitt served as President Donald Trump's Administrator of the Environmental Protection Agency. And U.S. Senators Sheldon Whitehouse (RI) and Richard Blumenthal (CT), former U.S. AG Jeff Sessions, Pennsylvania Governor Josh Shapiro, and dozens of other current and former members of Congress, governors, and federal judges have served as their state's AG. Thus, it is not surprising that calculations about career enhancement may enter into an AG's decision-making. In an environment where name recognition and airtime are political currency, opportunities to lead or be involved in major litigation that is regularly covered by local, national, and global media outlets alike are coveted. As a result, there may be instances where interpreting and applying a UDAP law in order to be in the marquee position of leading the charge to take down the industry target of the moment is simply too good a political opportunity to pass up.

Rise of Populism in Litigation

Populist and anti-business rhetoric from AGs across the political spectrum has taken hold in litigation in recent years.[193] This particular breed of populism often rejects nuance in favor of achieving specific ends through litigation, such as "reining in big business" or taking down "Big Tech" or "Big Oil," with little to no concern about how it is accomplished. To the extent that AGs embrace such a populist approach, they are likely more amenable to pursuing their goals even through laws that do not fit such purposes. Some private litigants likewise have ridden this ideological wave in an attempt to improve their chances of success in court.[194]

Pressure From Activists and Plaintiffs' Lawyers

It is no secret that activist groups and plaintiffs' lawyers have long courted AGs to partner in litigation.[195] As this paper has described, AGs are powerful legal and political forces, and their involvement in litigation can increase a case's significance, profile, and likelihood of success. Activists can potentially use the participation of states

in litigation as a vehicle to accomplish policy goals that they were not able to effectuate through the legislative or administrative process. By working with states, activists are also able to take advantage of standing and causes of action that otherwise would be unavailable to them in private litigation. For these same reasons, and others, plaintiffs' lawyers are attracted to states as clients; through states they can bring large-scale, lucrative litigation that otherwise might have been pursued as a class action. The longer the list of potential defendants and the wider the scope of the alleged conduct, the greater the potential payday. Given these incentives, both activists and plaintiffs' lawyers benefit by pressuring AGs to use their authority, including under UDAPs, as expansively and aggressively as possible.

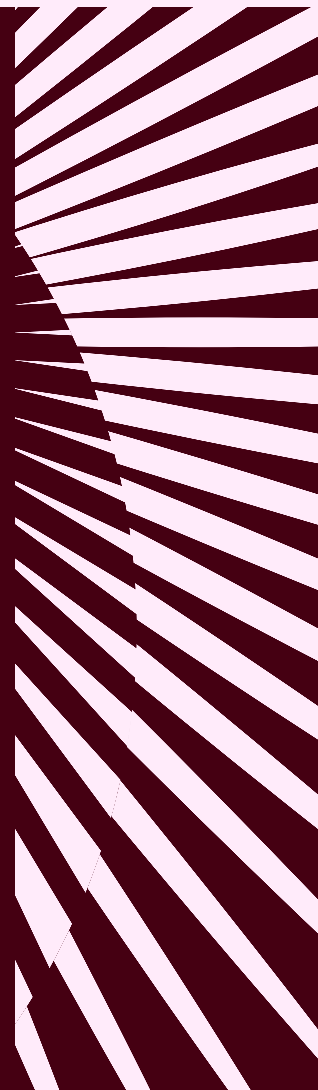
Encouragement From the Federal Agencies

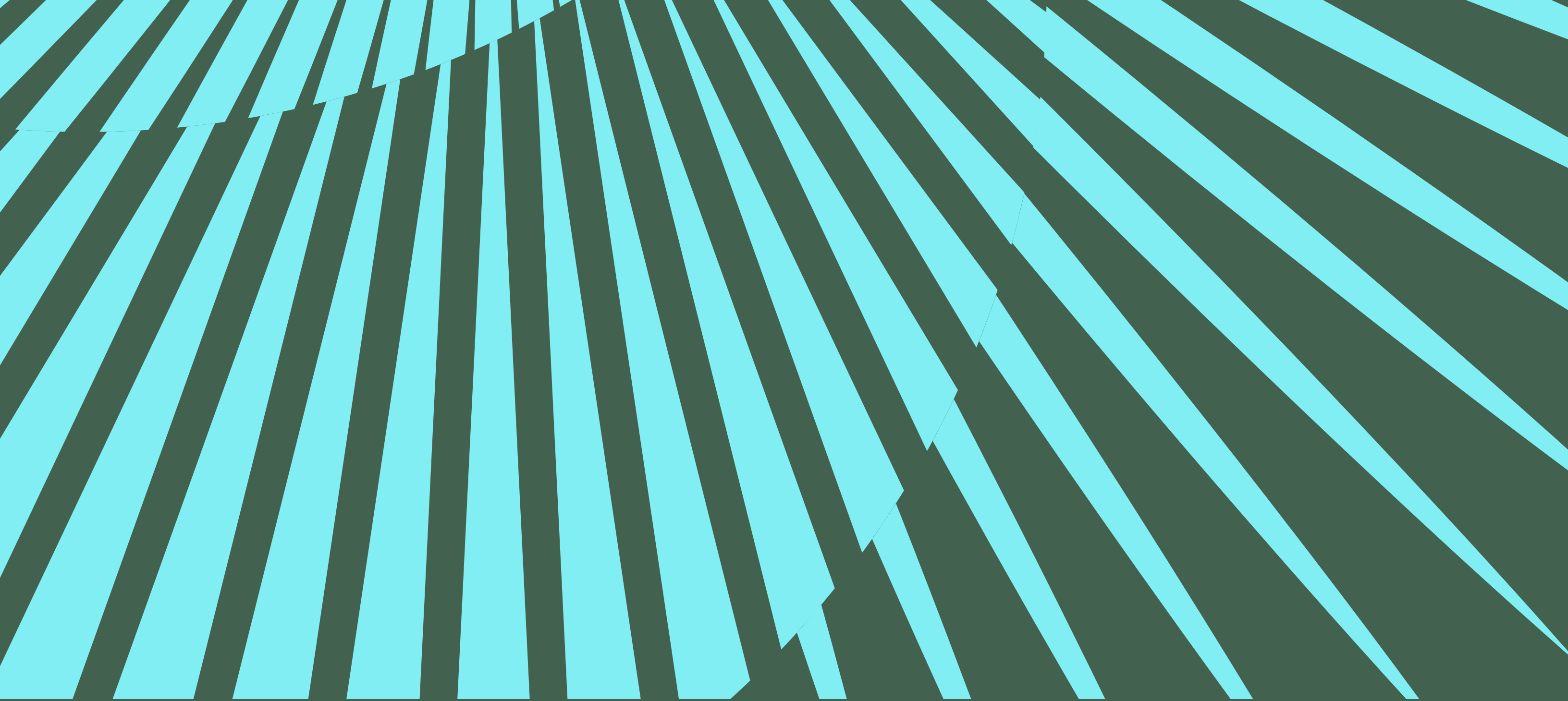
With AGs gaining legal and political power over the last decades, federal agencies with consumer protection responsibilities have turned to states to help them carry out their mandates. Although similar to the FTC's request for help in the 1960s that, at least in part, spurred the development of UDAPs, there are also significant differences. In December 2021, Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra spoke at a meeting of the National Association of Attorneys General (NAAG) and highlighted concerns about the purported dangers of federal preemption of state UDAPs.[196] Director Chopra expressed an interest in expanding state authority to enforce federal consumer protection laws, particularly the Consumer Financial Protection Act (CFPA). He stated that "[t]o encourage more state enforcement of federal consumer financial protection statutes, I have encouraged CFPB staff to explore ways that states could be able to get more out of the remedies available under the [CFPA]," including "seeking civil penalties that the states could then use to bolster deterrence" and "explor[ing] . . . how we could make the CFPB's victims relief fund . . . available to compensate victims identified in state enforcement actions."[197] In that spirit, in May 2022, the CFPB published an interpretive rule describing the broad authority of states to enforce federal consumer financial protection laws.[198] Likewise, in June 2022, the CFPB published an interpretive rule narrowly construing federal preemption of state UDAPs under the Fair Credit Reporting Act.[199]

In addition to carving out certain UDAP actions from federal preemption, federal agencies have increased reliance on state AG enforcement of federal consumer protection laws as a workaround to limits on federal enforcement. In December 2021 remarks before NAAG, FTC Chair Lina Khan emphasized the importance of the FTC's cooperation with state enforcement actions as a way to achieve monetary redress after the FTC's authority to do so

independently was narrowed by the Supreme Court in *AMG Capital Management v. FTC.*[200] Likewise, as instructed by the federal FTC Collaboration Act of 2021, signed into law in October 2022, the FTC recently announced that it was "seeking public comments and suggestions on ways it can work more effectively with state AGs nationwide to help educate consumers about, and protect them from, potential fraud."[201] This request for input may signal a more concerted effort by the FTC to leverage the work of state AGs in the years ahead. More specifically, the precise questions that the FTC appears to be gathering input on—including one that asks, "[t]o what extent has federal law that has preempted State jurisdiction affected the ability of State Attorneys General to protect consumers from unlawful business practices?"—telegraph that the current FTC may believe that federal law is stymying state-level consumer protection efforts.[202]

The longer the list of potential defendants and the wider the scope of the alleged conduct, the greater the potential payday [for plaintiffs' lawyers]. Given these incentives, both activists and trial lawyers benefit by pressuring AGs to use their authority, including under UDAPs, as expansively and aggressively as possible.





Chapter

06

Potential Solutions

The use of UDAPs in a manner that prioritizes other ends over consumer protection has become too commonplace with both government and private plaintiffs and should be stemmed. State legislatures, in particular, have the authority, ability, and even responsibility to update consumer protection laws to reflect the needs of the modern marketplace and prevent further abuses of UDAPs. In turn, both consumers and market participants will be better protected. Attorneys general and courts also can take steps under the existing regimes to ensure the proper use of UDAPs.

As with many other legal reforms, efforts to reform UDAPs will assuredly draw criticism from plaintiffs' lawyers, activist groups, and state enforcers, who likely will assert that narrowing UDAPs in any way will handicap necessary enforcement efforts and "close the courthouse doors." But, as detailed in this paper, better-defined laws are better laws and matters of public policy are appropriately left to the legislature. Legislatures are well-positioned to tailor laws to effectively address the problems that need solving. By contrast, broad, malleable laws will undoubtedly cover more conduct—good and bad—with the negative consequences greatly outweighing the benefits.

Moreover, before assuming that misconduct will simply fall through the cracks as a result of updating UDAPs to be more targeted, states should assess the laws and regulations adopted since their UDAPs were passed into law, to determine what conduct is already addressed by them and whether they obviate the perceived need for broad UDAP laws.

State Legislative Solutions

To address the key issues with far-reaching, policy-focused reliance upon UDAPs, state legislatures should consider amending and updating their states' UDAPs in the ways described below.

Better Defining "Unfair and Deceptive Acts and Practices"

Perhaps the most potent tool to address the misuse of UDAPs is specificity. States should identify the specific practices or categories of conduct that constitute unfair and deceptive acts and practices. The UDAPs of states including Alabama, Alaska, Hawai'i, Idaho,

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Illinois, Ohio, Oregon, Pennsylvania, and Rhode Island already specify the types of conduct that qualify as deceptive or misleading—often adapting their enumeration language from the conduct delineated in the Uniform Deceptive Trade Practices Act. This best practice helps provide enforcement authorities and courts with necessary guidance about the type of harms that state consumer protection laws are intended to remedy. This solution also mitigates the concerns described above about the lack of notice and due process.

Requiring a Showing of Specific Consumer Injury or Harm

By requiring a showing of specific consumer injury or harm, litigants seeking to rely on UDAPs would be forced to refocus their application of the statutes on protecting consumers. In the absence of any consumer harm, lawsuits aimed at businesses' conduct are simply quasi-regulatory tools that can be used for a host of purposes unrelated to protecting consumers, including those that are primarily motivated by disagreements about public policy. As noted above, some states explicitly state that their UDAP is intended to be remedial. Plaintiffs relying on UDAPs with such language should be required to show that their action would, in fact, remedy a specific consumer harm. States with UDAPs lacking such requirements should strongly consider adding them. Similarly, legislatures should require that monetary penalties allowable under their state's UDAP, if any, be tied to specific and identifiable consumer harms. This will ensure that defendants' due-process rights are protected and will prevent plaintiffs from using the threat of runaway judgments as coercion to settle even meritless claims.

Requiring a Showing of Intent to Deceive or Engage in Unfair and Deceptive Acts and Practices

As noted in an amicus brief recently filed in the U.S. Supreme Court by the Washington Legal Foundation, "some state consumer protection laws attempt to protect against overreach by expressly requiring evidence that a business knowingly or intentionally engaged in unfair or deceptive conduct before civil penalties may be assessed."[203] As of a 2016 survey, "[a]bout twenty state laws require evidence that a business knowingly, willfully, or intentionally engaged in a deceptive practice before imposing civil penalties, though in practice, this culpability requirement often receives little consideration."[204] Requiring a showing of actual knowledge is also consistent with federal requirements set forth in the FTC Act.[205] Given that a UDAP enforcement action can result in immense penalties (some criminal in nature) that have the potential to shutter a business, an intent requirement is warranted to ensure that otherwise well-meaning market participants are not subject to punishment for conduct that they did not even know violated the UDAP.

Limiting Remedies to Injunctive Relief and, When Appropriate, Restitution to Consumers

Injunctive relief serves many important goals of consumer protection, while at the same time ensuring that the rights of market participants are preserved. Especially if UDAPs are viewed as quasi-regulatory statutes, injunctive relief is sufficient to enable UDAP enforcers to stop any violative conduct they have identified, prevent any further consumer harm, and establish that any future such conduct is impermissible. Injunctive relief also gives businesses the opportunity to assess and alter their conduct without being punished for activities they reasonably thought were lawful. If a business goes on to violate the terms of an injunction, UDAPs can provide that the business is only then subject to monetary penalties. Monetary penalties are likely unfair and unwarranted in instances where UDAPs are extremely broad—including where they do not enumerate any specific conduct that would be considered violative or require an intent to deceive or engage in unfair and deceptive acts and practices. If, however, consumers suffer harm from the conduct sought to be enjoined—which, as described above, is not always the case in UDAP actions—restitution to make the consumer whole also may be warranted.

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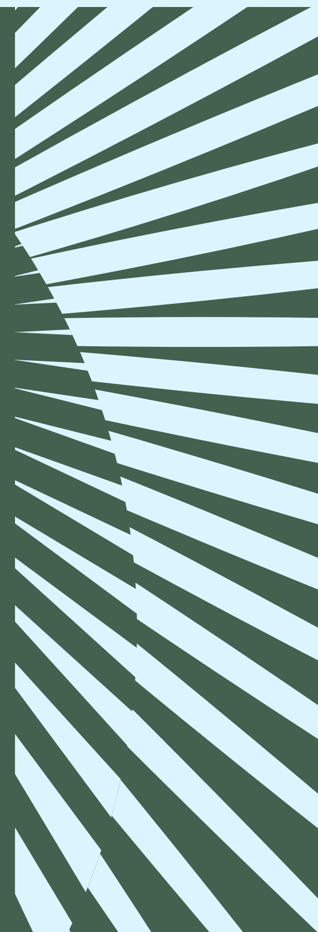


Specific Jurisdictional Limitations on UDAP-Related Actions and Discovery

Clear geographical limitations on the jurisdictional reach of UDAPs are critical. Arguably, regardless of whether a given state's UDAP explicitly states that its enforcement is limited to activities and harms occurring within the state, such a limitation is intrinsic. Absent that constraint, basic federalism principles and the constitutional protections that embody them would be violated. It is incumbent upon law enforcers to acknowledge and abide by jurisdictional constraints, and for courts to enforce them, or otherwise risk undermining state sovereignty.

To better ensure that federalism principles are respected, and that concerns about the extraterritorial application of UDAPs are adequately accounted for, state legislatures should consider clarifying limitations on extraterritorial reach under UDAPs. States should enact explicit language adopting a presumption against extraterritorial application of UDAPs to ensure that courts focus on the harms that the statutes were intended to remedy: injuries to a state's own consumers.

State legislatures should also consider clarifying limitations on extraterritorial discovery in UDAP actions. UDAP litigation often features requests for documents and information with little or no nexus to in-state consumers. This type of extraterritorial discovery can result in "fishing expeditions" in search of "hot documents," not for the purpose of building a strong enforcement case (many documents would never make their way into a courtroom) but, rather, to coerce settlement or publicly shame a target.[206] Legislatures should do what they can to ensure that their state's AG is focused on protecting consumers in their state, not using their enforcement authority to engage in nationwide dragnets with minimal connection to their state's consumers.

Defining—or More Clearly Defining—Key UDAP Terms

As previously noted, textual specificity is the antidote to the overly broad interpretations and applications of laws. State legislatures should endeavor to clearly define the core terms used in UDAPs—including those enumerated in Chapter 3 above—to ensure that those terms do not become subject to the varying whims of plaintiffs and courts. For example, legislatures should consider precisely defining the term "consumer" in their state's UDAP. If the term were clarified to mean an in-state purchaser of a product or service, that would preclude plaintiffs from bringing claims over business practices that did not occur in a given state or products that no in-state consumer ever consumed.

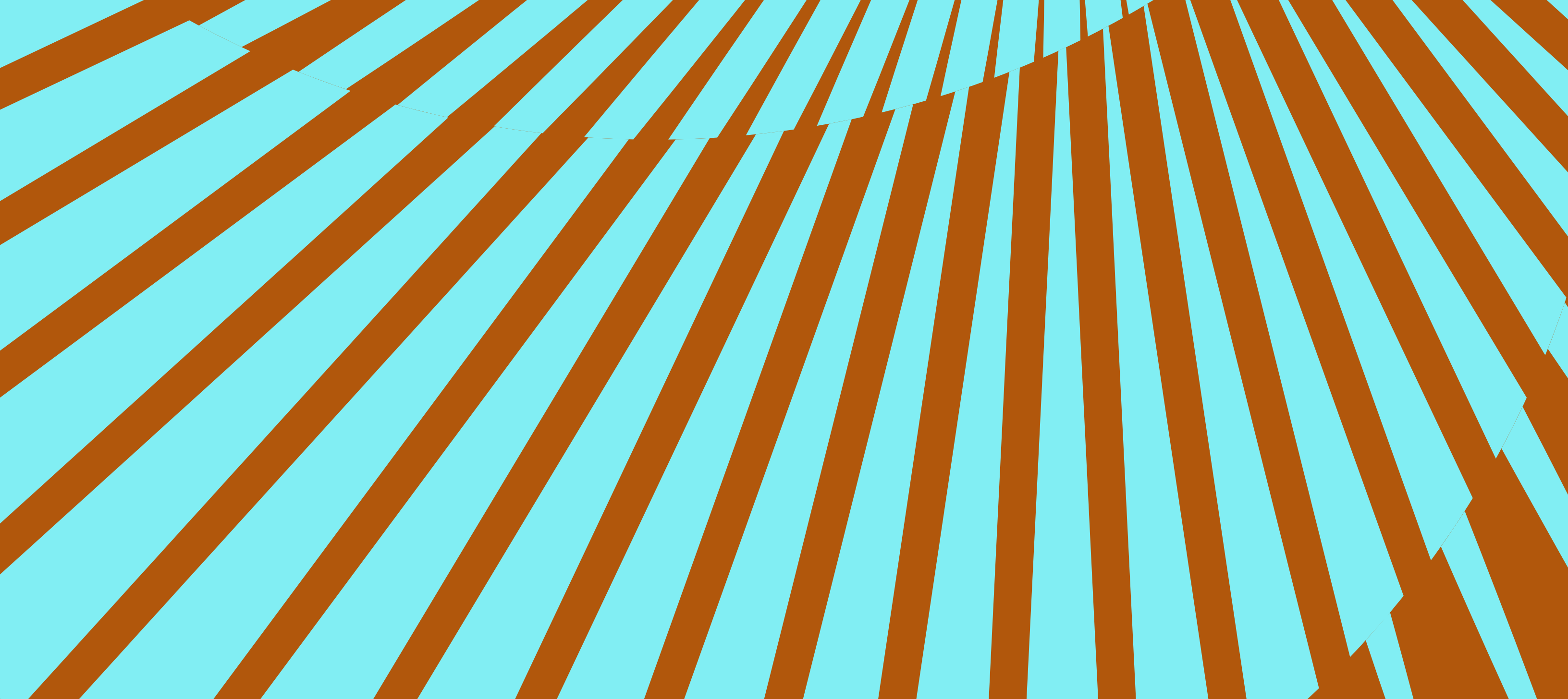
Introducing a "Materiality" Standard Into UDAPs

As noted above, the FTC Policy Statement on Deception specifically states that, in any deception case, "the representation, omission, or practice must be a 'material' one."[207] Courts have affirmed this principle. In *FTC v. Millennium Telecard, Inc.*, the U.S. District Court for the District of New Jersey held that, in order to establish liability under the deception prong of Section 5(a) of the FTC Act, "the FTC must establish: '(1) there was a representation; (2) the representation was likely to mislead customers acting reasonably under the circumstances, and (3) the representation was material.'"[208] Materiality is a bedrock concept in many areas of the law, including federal securities laws. There is little reason why this principle should not be incorporated into UDAPs.[209]

AG Solutions

Attorneys general and other state enforcers should think critically about how they use their enforcement authority, including under UDAPs, and how they can better ensure that consumer protection, fairness, and adherence to rule-of-law principles are served through their enforcement activities. Moreover, AGs should ensure that their offices are using UDAPs in the most appropriate ways. This might be accomplished through the issuance of a formal legal opinion. Most AGs have the authority to issue such opinions, on a wide variety of topics and typically at the request of a state official or state legislator.[210] Working with a state legislator, who could request a formal opinion on the scope and application of the state's UDAP, an AG could make a public determination of the statute's appropriate interpretation and application.[211]

Likewise, AGs can establish policies outlining how office staff should apply a given statute.[212] While most AGs, with good reason, confer on their staff a degree of discretion to pursue claims on behalf of the state based on specific facts and circumstances, a formal office policy that seeks to ensure that UDAPs are not relied upon by line attorneys for purposes of addressing policy matters could be constructive guidance.



Chapter

07

Conclusion

UDAPs—and state consumer protection more generally—unquestionably play an important role in ensuring the functionality of a free market economy. Consumers, armed with imperfect information about products and services, are at an inherent disadvantage to businesses and other market participants in commercial transactions. Therefore, in order for consumers to continue to feel comfortable participating in the marketplace, they must be confident that rules are in place and enforced to ensure that they will not be taken advantage of or otherwise harmed.

To instill that confidence, consumers must know that there will be remedial efforts when harms do occur and that those harmful practices will cease. Ultimately, the laws that enable consumer protection must be aimed primarily, if not exclusively, at protecting consumers. To the extent such laws attempt to allow for the pursuit of other, less focused objectives, they threaten to deprioritize that fundamental goal and raise a host of other concerns.

The responsibility for ensuring consumer protection has fluctuated throughout American history. We have evolved from a culture of consumers being responsible for protecting themselves through a healthy dose of skepticism and, at times, insufficient common-law causes of action—the prevailing regime for the majority of our country's first two centuries—to the federal government somewhat overseeing and regulating consumer transactions, to, most recently, a combination of private litigation, federal enforcement, and state enforcement. Today, UDAPs and their enforcement by AGs and private litigants are a significant feature of the consumer protection landscape. With those relatively new enforcement authorities, and the new enforcement dynamic that they have created, have also come attempts to interpret and apply UDAPs in ways that undermine consumer protection, threaten the legal and constitutional rights of market participants, and undermine core rule-of-law principles. UDAPs should not be used to address any and all social or policy issues that a state, NGO, or plaintiffs' lawyer may view as a suitable target. The unfortunately growing trend of misusing UDAPs to effectuate policy, political, and social ends—even when covered in the veneer of a hypothetical consumer benefit—warrants scrutiny and restraint.

State legislatures can and should take action to ensure that UDAPs—critical tools for the protection of their

states' consumers—are not relied upon for political purposes and in ways that threaten core legal and constitutional rights, undermine the rule of law, and deprioritize consumer protection. Amendments to UDAPs that incorporate a greater degree of specificity and ensure that AGs and private litigants do not attempt to regulate markets in other states should be carefully considered and enacted. Likewise, it is incumbent upon AGs to ensure that their consumer protection authority is not being misused in ways that will undermine the authority of their office or the legitimacy of the law itself.

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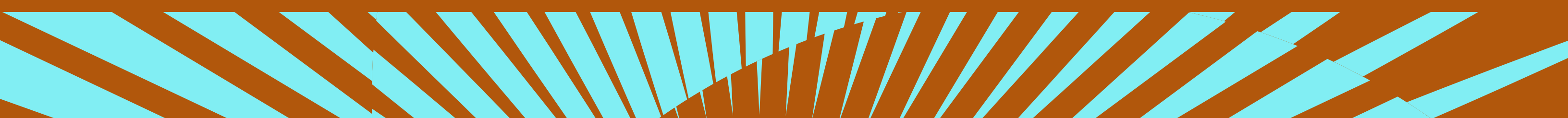
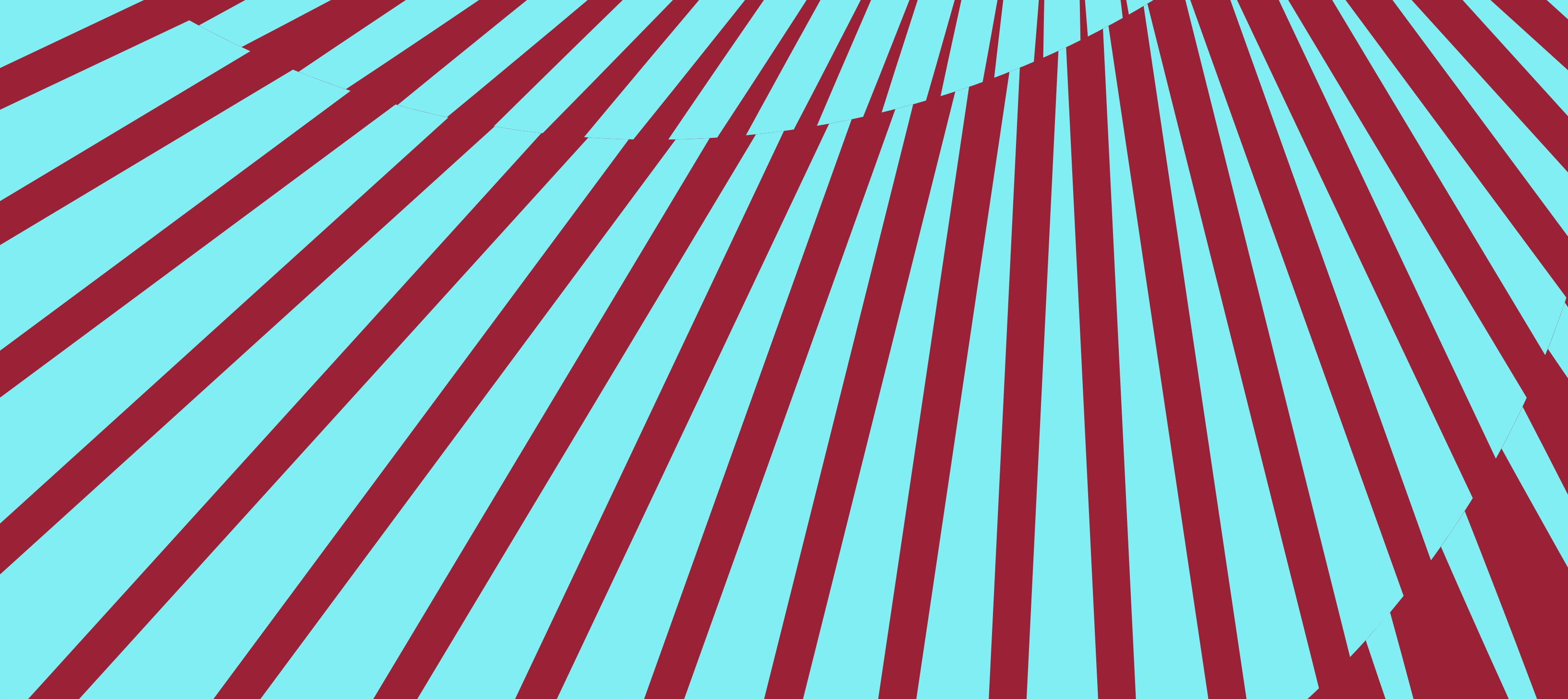




Appendix: The Role of the FTC

Although it is not the primary focus of this paper, the role of the FTC in our nation's consumer protection landscape can hardly be ignored. The FTC's consumer protection authority, while not fully realized until the mid-20th Century, predates UDAPs and the active involvement of state AGs in consumer protection by decades. And given the primarily dual role of government-led consumer protection in the U.S., dual reform efforts will be necessary to address the full scope of issues associated with consumer protection. To appreciate the complementary role played by AGs, a brief summary of the FTC's role is provided below.

The FTC possesses investigative, enforcement, and rulemaking authority.[213] With respect to its investigative authority, the FTC's Bureau of Consumer Protection (BCP)—which, along with the Bureau of Competition and the Bureau of Economics are the primary bureaus comprising the FTC—can, in administrative actions, only issue civil investigative demands (CIDs), unlike the Bureau of Competition, which can issue both subpoenas and CIDs.[214] CIDs, like subpoenas, can include demands for existing documents and oral testimony, but, unlike subpoenas, can also require that the recipient "file written reports or answers to questions."[215] Under Section 20 of the FTC Act, the BCP can also use CIDs to require "the production of tangible things and provides for service of CIDs upon entities not found within the territorial jurisdiction of any court of the United States."[216]

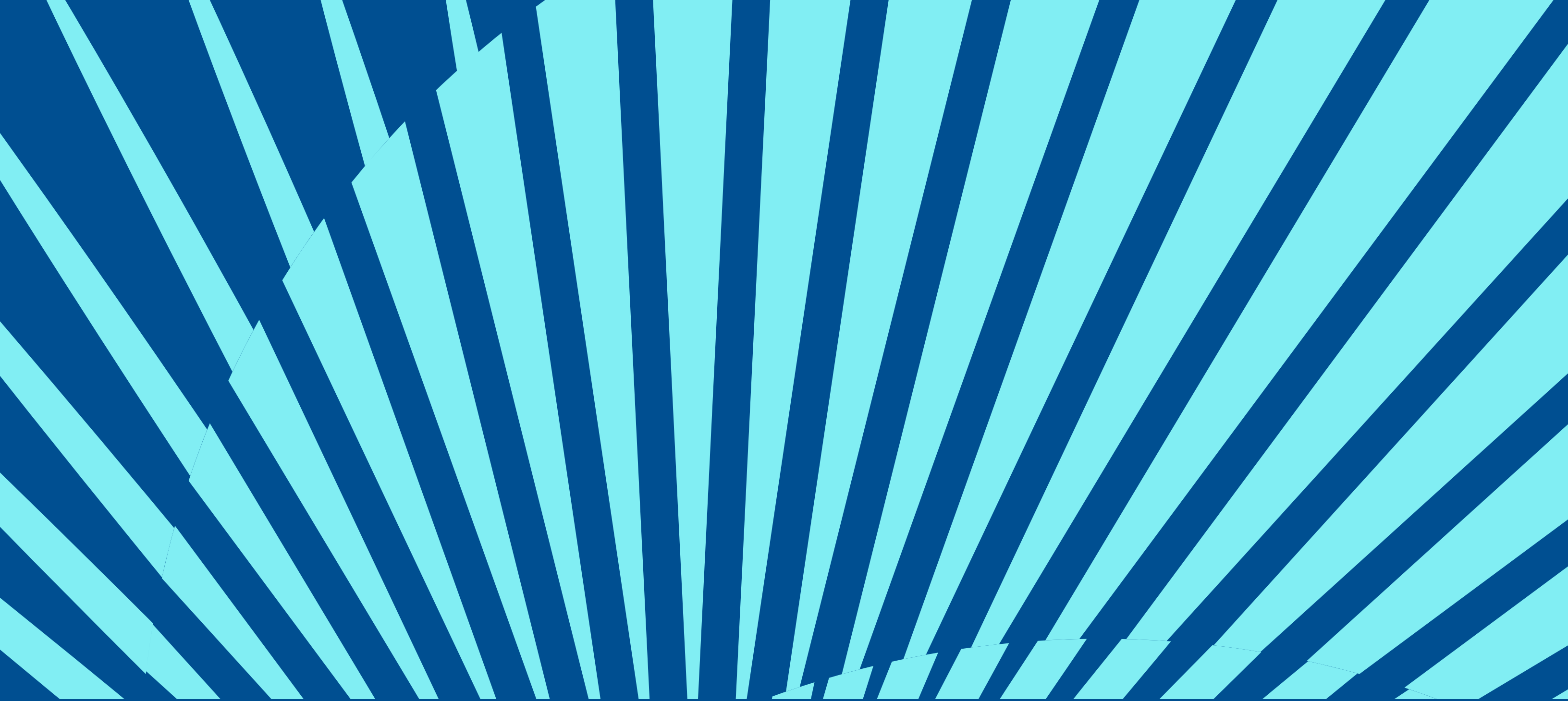
The FTC BCP's enforcement authority is found in Section 5(a) of the FTC Act, which provides, in relevant part, that "unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful."[217] For decades, the FTC frequently sought monetary penalties and other forms of relief in consumer protection actions under Section 13(b) of the FTC Act, a "mainstay of the Commission's consumer protection program."[218] But Section 13(b) was significantly curtailed—or brought back into line with the FTC's statutory authority—by the U.S. Supreme Court's 2020 decision in *AMG Capital Management, LLC v. FTC*.[219] *AMG* held that Section 13(b) "does not authorize the Commission directly to obtain court-ordered monetary relief" such as restitution or disgorgement.[220]

Attorneys general frequently join together with the FTC on consumer protection education, investigations,

and enforcement actions. As NAAG notes, AGs "routinely work collaboratively with federal agency partners [including, specifically, the FTC] to protect and educate consumers. This collaboration includes joint investigations, enforcement actions, and creating educational materials to help members of the public be more informed consumers."[221] While the degree of such collaboration ebbs and flows, we currently appear to be in a period of high engagement between the states and the FTC. In May 2021, in the wake of the *AMG* decision referenced above, the FTC's then-acting Chair Rebecca Kelly Slaughter noted that the Commission was "planning to partner 'more frequently and more enthusiastically' with state attorneys general to press consumer protection and privacy enforcement actions. . . ."[222] Moreover, in October 2022, the FTC Collaboration Act of 2021 was signed into law, which requires the FTC "to study its efforts to work with state attorneys general to address fraud and scams, including procedures, such as accountability mechanisms, that would facilitate such collaboration."[223] The FTC is directed to "submit legislative recommendations based on the results of the study."[224] The resource-sharing, collaboration in investigations, and cooperation in enforcement actions by AGs and the FTC will likely continue to be a prominent feature of U.S. consumer protection, regardless of the political affiliations of the FTC leadership or the AGs. As such, businesses should be prepared to address state and federal concerns simultaneously.

Like the AGs, the FTC has not been immune to criticisms of its approach to consumer protection. Indeed, the U.S. Chamber of Commerce recently noted, "[a]s the Commission continues to undo bipartisan due process protections in rulemakings, the stakes are even higher for the business community if the FTC proceeds with an overly aggressive consumer protection agenda."[225] Specifically discussing the implications for artificial intelligence innovations, the U.S. Chamber further noted that "[t]he Commission has also signaled it plans to micromanage how companies communicate pricing and earnings and allow them to rely less on providing disclaimers to consumers."[226]

Potential remedies to the FTC's overly aggressive consumer protection enforcement may differ from the ideas advanced in this paper for making enforcement efforts by AGs and private litigants more fair and effective. But, it is likely that some of the same needs for clearly defined laws and prohibited conduct under them are present at the federal level. As such, some of the reform solutions, or the core concepts that they embody, discussed above may equally apply. Thoughtful analysis and tailored improvements are warranted, both at the state and federal level, to benefit consumers, market participants, and ultimately the economy as a whole.



Endnotes

[1] "The doctrine of *parens patriae* is a doctrine under which a state has third-party standing to bring a lawsuit on behalf of a citizen when the suit implicates a state's quasi-sovereign interests for the well-being of its citizens." Cornell Law School, Legal Information Institute, Wex, (parens patriae) (emphasis altered), available at: https://www.law.cornell.edu/wex/parens_patriae (last visited July 6, 2023). *See* Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 Conn. L. Rev. 355, 365 (2006) (noting that "[t]he federal courts have unequivocally held that political subdivisions cannot bring claims as *parens patriae* because their power is derivative, not sovereign"); *see also* Eli Savit, *States Empowering Plaintiff Cities,* 52 U. Mich. J. L. Reform 581, 581 (2019) (noting that "states can and should delegate to cities standing to sue as *parens patriae*—that is, on behalf of the people of the state").

[2] *See* Timothy Meyer, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 Calif. L. Rev. 885, 914 (2007).

[3] *See* Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 Colum. Bus. L. Rev. 1, 39–40 (2010) ("If virtually any selling practice can trigger liability, then there is no particular 'precautionary' selling practice that a seller can adopt to lessen the chance of liability. If this is so, then the only effective precaution that can be taken to reduce potential liability for selling practices is to get out of the business of selling directly to consumers.").

[4] *See* Mark Totten, *The Enforcers & the Great Recession*, 36 Cardozo L. Rev. 1611, 1660 (2015) ("[E]ven the most well-funded AG's office faces considerable constraints and focusing on one harm means little or no resources for other harms.").

[5] *Unfair, Deceptive and Abusive Practices (UDAP)*, Nat'l Consumer Law Ctr., https://www.nclc.org/topic/unfair-deceptive-and-abusive-practices-udap/#:~:text=Every%20state%20has%20a%20consumer,a%20few%20prohibit%20abusive%20practices (last visited May 3, 2023).

[6] *The Roots of Consumer Protection in America*, Conn. Dep't of Consumer Prot., https://portal.ct.gov/DCP/Agency-Administration/About-Us/History/The-Roots-of-Consumer-Protection-in-America (last visited May 3, 2023).

[7] J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 Santa Clara L. Rev. 347, 355 (1992).

[8] *See* 15 U.S.C. §§ 41–58.

[9] *See id.*

[10] J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, Fed. Trade Comm'n (May 30, 2003), https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection (last visited July 6, 2023).

[11] Franke & Ballam, *supra* note 7, at 357.

[12] *See FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 356 (1941) (rejecting FTC Act interpretation that "would give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law" and holding that "to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce', requires . . . much clearer manifestation of intention than Congress has furnished"). In 1975, Congress amended the FTC Act to broaden the Commission's jurisdiction over conduct in "or affecting" interstate commerce. *See* John A. Maher, Jr., *Two Little Words and the FTC Goes Local*, 80 Dick. L. Rev. 193, 193 (1976) ("These two little words expand FTC's jurisdiction from activities 'in commerce' to activities 'in or affecting commerce,' unleashing the Commission on a host of previously untouchable activities—all 'unfair or deceptive acts or practices which, although local in character, affect interstate commerce.'" (alteration omitted) (quoting H.R. Rep. No. 1107, 93d Cong., 2d Sess. (1974))).

[13] Franke & Ballam, *supra* note 7, at 356.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 357.

[17] *Id.*

[18] *Id.*

[19] National Policy & Legal Analysis Network to Prevent Childhood Obesity, *Consumer Protection: An Overview of State Laws and Enforcement*, Pub. Health L. Ctr. at Wm. Mitchell Coll. of L. (June 24, 2010), https://www.changelabsolutions.org/sites/default/files/documents/Consumer_Protection-An_Overview_of_State_Laws_and_Enforcement_FINAL_20100624.pdf (last visited July 6, 2023).

[20] *See, e.g.*, Jack E. Kearns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 Dick. L. Rev. 373 (1990).

[21] Franke & Ballam, *supra* note 7, at 357.

[22] *Id.*

[23] *Id.*

[24] Consumer Protection 101, NAAG, https://www.naag.org/issues/consumer-protection/consumer-protection-101/ (last visited May 15, 2023).

[25] Connecticut's Commissioner of Consumer Protection within the Department of Consumer Protection has general authority to order "immediate discontinuance" of a CUTPA violation and/or the payment of restitution, but judicial enforcement of an order is pursued through the Attorney General. Conn. Gen. Stat. § 21a-7(a)(2). Hawai'i's Director of the Office of Consumer Protection has authority to investigate consumer protection violations and enforce through civil actions. Haw. Rev. Stat. Ann. § 487-5(6). Utah's Division of Consumer Protection is responsible for enforcement of the Utah Consumer Sales Practices Act. Utah Code Ann. §§ 13-11-3(3); 13-11-17.

[26] *See, e.g.*, Nev. Rev. Stat. § 598.096 (outlining powers of the Director of the Department of Business and Industry, Commissioner of Consumer Affairs, and Attorney General); Or. Rev. Stat. § 646.642 (authorizing "[a]ny prosecuting attorney" to seek assessment of a civil penalty under state UDAP); Va. Code Ann. § 59.1-206 (authorizing recovery of penalties under state UDAP by "the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town").

[27] Michael Murray, *Antitrust Federalism*, U.S. Dep't of Justice, at 4 (Aug. 31, 2020), https://www.justice.gov/opa/speech/file/1351066/download (last visited July 6, 2023).

[28] Ballotpedia, *Attorney General Elections, 2022*, https://ballotpedia.org/Attorney_General_elections,_2022 (last visited May 15, 2023).

[29] Carolyn Carter, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, Nat'l Consumer L. Ctr. (Mar. 1, 2018), https://www.nclc.org/resources/how-well-do-states-protect-consumers/ (last visited July 6, 2023).

[30] Joanna Shepherd, *The Expansion of New Jersey's Consumer Fraud Act: Causes and Consequences*, Am. Tort Reform Found. at 7, https://www.civiljusticenj.org/wp-content/uploads/2014/09/14Oct_Shepherd_TheExpansionOfNJCFA_CausesAndConsequences.pdf (last visited May 15, 2023).

[31] *See, e.g.*, Tex. Bus. & Comm. Code § 17.44 (Texas's UDAP "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."); Cal. Civ. Code § 1760 (California's UDAP "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.").

[32] *See, e.g.*, *Plath v. Schonrock*, 64 P.3d 984, 990 (Mont. 2003) (noting that "the treble damage award under Montana's Consumer Protection Act is intended to be compensatory and remedial rather than punitive").

[33] Va. Code Ann. § 59.1-197.

[34] Conn. Gen. Stat. § 42-110b.

[35] *See* Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 Fla. L. Rev. 163, 167 (2011).

[36] Megan Bittakis, *Consumer Protection Laws: Not Just for Consumers*, 13 Wyo. L. Rev. 439, 442 (2013).

[37] *See* Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 Geo. Wash. L. Rev. 521, 521 (1980).

[38] See *supra* note 12 and accompanying text.

[39] According to a 2018 survey conducted by the National Consumer Law Center, a consumer-focused non-profit organization, "45 states and the District of Columbia include a broad prohibition against deception that is enforceable by both consumers and a state agency[,]" while "[i]n 39 states and the District of Columbia, the UDAP statute includes at least a fairly broad prohibition against unfair or unconscionable acts that is enforceable by consumers and a state agency." Carter, *supra* note 29, at 13–14. As the National Association of Attorneys General put it, "[s]tate consumer laws are very broad in scope and provide protections for the myriad of transactions that consumers across the U.S. enter into every day." Consumer Protection 101, NAAG, *supra* note 24.

[40] *State ex rel. Shikada v. Bristol-Myers Squibb Co.*, 526 P.3d 395, 423 (2023) (quoting *Zanakis-Pico v. Cutter Dodge, Inc.*, 47 P.3d 1222, 1230 (Haw. 2002) (citation omitted).

[41] *FTC Policy Statement on Unfairness*, Fed. Trade Comm'n (Dec. 17, 1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness (last visited July 6, 2023).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See* 15 U.S.C. § 45(n).

[51] *Id.*

[52] *FTC Policy Statement on Deception*, Fed. Trade Comm'n (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf (last visited July 6, 2023).

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] In *Mallory v. Norfolk Southern Railway Co.*, the Supreme Court held that a Pennsylvania law requiring that a foreign corporation register with the Commonwealth and submit to general personal jurisdiction as a condition of doing business within Pennsylvania did not violate the corporation's due process rights. 143 S. Ct. 2028, 2037–38 (2023).

[59] Robert Wing & Tom Melton, *Extraterritorial Application of Consumer Protection Laws*, Nat'l Ass'n of Att'ys Gen. (Jan. 3, 2020), https://www.naag.org/attorney-general-journal/extraterritorial-application-of-consumer-protection-laws/ (citing William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. Davis L. Rev. 1389 (2019)) (last visited July 6, 2023).

[60] The U.S. Supreme Court recently rejected a proposed rule that would have barred enforcement of "state laws that have the 'practical effect of controlling commerce outside the State'" under the Court's dormant Commerce Clause doctrine. *See Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1153–54 (2023). The Court noted separately, however, that "a law that *directly* regulate[s] out-of-state transactions by those with *no* connection to the State" may still be unconstitutional. *See id.* at 1157 n.1 (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 641–43 (1982)).

[61] 774 N.E.2d 1190, 1195 (N.Y. 2002).

[62] *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wash.2d 793, 363 P.3d 587 (2015).

[63] *Cont'l Res., Inc. v. Wolla Oilfield Servs., LLC*, 510 P.3d 175, 180 (Okla. 2022).

[64] *Id.* at 181.

[65] *Id.* at 180.

[66] Alex Wang, *What Is the Share of E-Commerce in Overall Retail Sales?*, CBRE (May 16, 2022), https://www.cbre.com/insights/articles/omnichannel-what-is-the-share-of-e-commerce-in-overall-retail-sales (last visited July 6, 2023).

[67] Fla. Stat. § 501.203.

[68] Ala. Code § 8-19-3.

[69] Me. Stat. tit. 5, § 213.

[70] Private litigants, supported by entrepreneurial plaintiffs' lawyers, frequently bring UDAP actions to challenge conduct that has only a tenuous connection to their use of a specific product or service. *See infra* Ch. 4.

[71] For example, the District of Columbia Consumer Protection Procedures Act states that "a public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class could bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice." D.C. Code § 28-3905(k)(1)(D)(i). Other states, including New York, have considered including explicit statutory language conferring standing to non-profits and NGOs. Patterson Belknap, *Update on the Proposed Amendments to New York's Consumer-Protection Law* (July 8, 2019), available at https://www.pbwt.com/misbranded/update-on-the-proposed-amendments-to-new-yorks-consumer-protection-law; New York City Bar, Committee Report, *Support of Consumer and Small Business Protection Act* (May 15, 2023), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/support-of-consumer-and-small-business-protection-act (last visited July 6, 2023).

[72] *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 173 (Tex. 1980).

[73] *Wilson v. Blue Ridge Elec. Membership Corp.*, 578 S.E.2d 692, 694 (N.C. Ct. App. 2003) (quoting *Threatt v. Hiers*, 333 S.E.2d 772, 773 (N.C. Ct. App. 1985)).

[74] *Bhatti v. Buckland*, 400 S.E.2d 440, 443 (N.C. 1991) (quoting N.C. Gen. Stat. § 75-1.1 (1975)).

[75] See *Berry v. Am. Express Publ'g, Inc.*, 54 Cal. Rptr. 3d 91, 96–97 (Cal. Ct. App. 2007).

[76] *Id.* (quoting *Civil Serv. Emps. Ins. Co. v. Superior Court*, 584 P.2d 497, 506 (Cal. 1978) (en banc)); *see also I.B. ex rel. Fife v. Facebook, Inc.*, 905 F. Supp. 2d 989, 1007–08 (N.D. Cal. 2012) (dismissing CLRA claim involving "Facebook Credits" based on argument that the credits are "intangible interests" in digital currency and do not constitute "goods and services" covered by the statute).

[77] *See, e.g.*, Ariz. Rev. Stat. § 44-1522(A) (prohibiting "any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely on such concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise . . ."); N.C. Gen. Stat. § 75-1.1(a) (prohibiting "unfair or deceptive acts or practices in or affecting commerce").

[78] *See* Cary Silverman & Jonathan L. Wilson, 65 Kan. L. Rev. 209, 212 (2016) (citing Glenn Kaplan & Chris Barry Smith, *Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Law to Make Handguns and Other Consumer Goods Safer*, 17 Yale J. Reg. 253, 279–80 (2000)).

[79] *See, e.g.*, 6 R.I. Gen. Laws § 6-13.1-1(6) (enumerating conduct that qualifies as "[u]nfair methods of competition and unfair or deceptive acts or practices"); Idaho Code § 48-603 (listing "unfair methods of competition and unfair or deceptive acts or practices"); Or. Rev. Stat. § 646.608 (listing unlawful trade practices); Va. Code Ann. § 59.1-200 (declaring certain "fraudulent acts or practices committed by a supplier in connection with a consumer transaction" to be unlawful).

[80] *See, e.g.*, *Lynch v. Conley*, 853 A.2d 1212, 1214–16 (R.I. 2004) (affirming denial of AG's petition to enforce civil investigative demand regarding lead paint disclosures under statutory exemption for "activities and businesses which are subject to monitoring by state or federal regulatory bodies or officers" because "[l]ead paint disclosure . . . already is comprehensively regulated by the state and federal government"); *State v. Schwab*, 693 P.2d 108, 113–14 (Wash. 1985) (en banc) (rejecting Washington AG's argument that violations of the landlord-tenant act were *per se* UDAP violations and finding that the state's UDAP does not apply to real estate rentals); *Kaplan, Inc. v. Yun*, 16 F. Supp. 3d 341, 352–53 (S.D.N.Y. 2014) (dismissing claims brought under New York's UDAP in trademark dispute).

[81] *See supra* pp. 12–13.

[82] Truth Initiative, *Master Settlement Agreement*, https://truthinitiative.org/who-we-are/our-history/master-settlement-agreement (last visited May 15, 2023).

[83] *See, e.g.*, *Commonwealth v. Fremont Inv. & Loan*, 2008 WL 517279, at *1 (Mass. Super. Ct. Feb. 26, 2008), *modified in part*, 2008 WL 1913940 (Mar. 31, 2008).

[84] *Attorney General Jepsen Leads Multistate Coalition in $863M State-Federal Settlement with Moody's*, Conn. Off. Att'y Gen. (Jan. 13, 2017), https://portal.ct.gov/AG/Press-Releases-Archived/2017-Press-Releases/Attorney-General-Jepsen-Leads-Multistate-Coalition-in-863M-StateFederal-Settlement-with-Moodys.

[85] *Federal Government and State Attorneys General Reach $25 Billion Agreement With Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses*, U.S. Dep't of Justice (Feb. 9, 2012), https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest (last visited July 6, 2023).

[86] Aruna Viswanatha & Karen Freifeld, *S&P Reaches $1.5 Billion Deal with U.S., States Over Crisis-Era Ratings*, Reuters (Feb. 3, 2015), https://www.reuters.com/article/us-s-p-settlement/sp-reaches-1-5-billion-deal-with-u-s-states-over-crisis-era-ratings-idUSKBN0L71C120150203 (last visited July 6, 2023).

[87] *See Attorney General Jepsen Leads Multistate Coalition, supra* note 84.

[88] *See* Aff. of Stephen Gardner, *Pelman v. McDonald's Corp.*, No. 1:02-cv-07821 (S.D.N.Y. Feb. 19, 2003) (ECF No. 23, Ex. F).

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] Saul Wilensky & Kerry C. O'Dell, *Where's the Beef? The Challenge of Obesity Suits*, Bloomberg (June 21, 2013), https://news.bloomberglaw.com/product-liability-and-toxics-law/wheres-the-beef-the-challenges-of-obesity-suits.

[93] *Id.*

[94] 614 F. Supp. 2d 1037, 1040 (N.D. Cal. 2009).

[95] *Id.*

[96] *See* Sean Wajert, *Dismissal of Actimmune Proposed Class Action Affirmed*, Mass Tort Defense (Jan. 10, 2012), https://www.masstortdefense.com/2012/01/articles/dismissal-of-actimmune-proposed-class-action-affirmed/ (last visited July 6, 2023).

[97] *Id.*

[98] *Jackson v. Culinary Sch. of Wash.,* 788 F. Supp. 1233, 1239–40 (D.D.C. 1992).

[99] *Id.*

[100] *Id.*

[101] *Id.* at 1252–53.

[102] *See* Settlement Agreement, *Jackson v. Culinary Sch. of Wash.*, No. 1:91-cv-00782 (D.D.C. Feb. 13, 1997) (ECF No. 302).

[103] *See, e.g.*, *AG Ferguson Lawsuit Nets $45M in Debt Relief, Payments From Navient*, Wash. Off. Att'y Gen. (Jan. 13, 2022), https://www.atg.wa.gov/news/news-releases/ag-ferguson-lawsuit-nets-45m-debt-relief-payments-navient (last visited July 6, 2023); *Attorney General Josh Shapiro Announces $1.85 Billion Landmark Settlement with Student Loan Servicer Navient*, Pa. Off. Att'y Gen. (Jan. 13, 2022), https://www.attorneygeneral.gov/taking-action/attorney-general-josh-shapiro-announces-1-85-billion-landmark-settlement-with-student-loan-servicer-navient/ (last visited July 6, 2023).

[104] Adam S. Minsky, *Navient Settlement to Result in $1.7 Billion in Student Loan Cancellation*, Forbes (Jan. 13, 2022), https://www.forbes.com/sites/adamminsky/2022/01/13/navient-settlement-to-result-in-17-billion-in-student-loan-cancellation/?sh=75ff569d274d (last visited July 6, 2023).

[105] As discussed further below, Rhode Island might have refrained from claiming violations of its UDAP because its UDAP enumerates specific violations, rather than leaving it to the AG's discretion to determine on a case-by-case basis what conduct constitutes a consumer protection violation.

[106] *See* Jocelyn Mackie, *Prescription Opioid Lawsuit Guide (2023)*, Forbes (Feb. 3, 2023), https://www.forbes.com/advisor/legal/personal-injury/prescription-opioid-lawsuit-guide/ (last visited July 6, 2023).

[107] *Id.*

[108] Melissa D. Berry, *Opioid Litigation – Hundreds of Cases Consolidated: Here's What You Should Know*, Thompson Reuters (Sept. 28, 2018), https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/opioid-litigation-consolidated/.

[109] *See, e.g.*, Cal. Bus. & Prof. Code §§ 16759, 17535; Tex. Bus & Comm. Code Ann. § 17.48; N.M. Stat. Ann. § 57-12-15; Minn. Stat. §§ 325F.67, 325F.70; Pa. Cons. Stat. § 201-4.

[110] 2021 WL 1208971, at *7 (N.D. Ill. Mar. 31, 2021).

[111] *See* Tentative Decision at 41, *People v. Purdue Pharma L.P.,* No. 30-2014-00725287-CU-BT-CXC (Cal. Super. Ct. Nov. 1, 2021).

[112] *Id.* at 25.

[113] *Id.* (quoting *Reed v. NBTY, Inc.*, 2014 WL 12284044, at *14 (C.D. Cal. Nov. 18, 2014) (applying California law)).

[114] Paul Singer, *Opioids: State Attorney General Marketing Enforcement Under Attack?*, Ad Law Access (Nov. 21, 2021), https://www.adlawaccess.com/2021/11/articles/opioids-state-attorney-general-marketing-enforcement-under-attack/ (last visited July 6, 2023).

[115] *AG Healey Sues Manufacturer of Toxic 'Forever' Chemicals for Contaminating Massachusetts Drinking Water and Damaging Natural Resources*, Mass. Off. Att'y Gen. (May 25, 2022), https://www.mass.gov/news/ag-healey-sues-manufacturers-of-toxic-forever-chemicals-for-contaminating-massachusetts-drinking-water-and-damaging-natural-resources (last visited July 6, 2023).

[116] *Alaska Attorney General Files Complaint Seeking Damages Against PFAS Manufacturers*, Alaska Off. Att'y Gen. (Apr. 7, 2021), https://law.alaska.gov/press/releases/2021/040721-PFAS.html.

[117] Kelly Anne Smith, *Greenwashing and ESG: What You Need To Know*, Forbes (Aug. 25, 2022), https://www.forbes.com/advisor/investing/greenwashing-esg/ (last visited July 6, 2023).

[118] Julie Steinberg, *Danone Sued Over Evian Water 'Carbon Neutral' Statements*, Bloomberg Law (Oct. 14, 2022), https://news.bloomberglaw.com/product-liability-and-toxics-law/danone-sued-over-evian-water-carbon-neutral-representations (last visited July 6, 2023).

[119] *Attorney General Kamala D. Harris Sues Plastic Water Bottle Companies over Misleading Claims of Biodegradability,* Cal. Dep't of Justice (Oct. 26, 2011), https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-sues-plastic-water-bottle-companies-over.

[120] *Green or Greenwashed? Amazon $1.5 Million Settlement for Bogus Environmental Claims*, Californians Against Waste (Aug. 2, 2018), https://www.cawrecycles.org/recycling-news/e2ndmfbd2ddr6fhwj65nz3tc9jtet9.

[121] *Plastic Litigation Tracker*, Guarini Ctr. on Env't, Energy & Land Use Law, https://plasticslitigationtracker.org/ (last visited May 15, 2023).

[122] *Id.*

[123] Katryna Perera, *Enviro Group Wants Coca-Cola 'Greenwashing' Suit Revived*, Law360 (Mar. 16, 2023), https://www.law360.com/articles/1586639/enviro-group-wants-coca-cola-greenwashing-suit-revived.

[124] *See* Compl., *Earth Island Inst. v. BlueTriton Brands*, No. 2021 CA 003027 B (D.C. Super. Ct. Aug. 27, 2021).

[125] *See Plastic Litigation Tracker*, *supra* note 121.

[126] Jonathan Stempel, *Dunkin' Donuts Parent Settles New York Cyberattack Lawsuit, Is Fined*, Reuters (Sept. 15, 2020), https://www.reuters.com/article/us-dunkin-brnds-new-york/dunkin-donuts-parent-settles-new-york-cyberattack-lawsuit-is-fined-idUSKBN2662PX (last visited July 6, 2023).

[127] *Id.*

[128] *Id.*

[129] Md. Comm. Code § 14-3508.

[130] *In re Marriott Int'l, Inc. Customer Data Sec. Breach Litig.*, 440 F. Supp. 3d 447, 489 (D. Md. 2020).

[131] *Id.* at 489–90.

[132] *Id.* (quoting *Willis v. Bank of Am. Corp.*, 2014 WL 3829520, at *22 (D. Md. Aug. 1, 2014)).

[133] *See In re Ambry Genetics Data Breach Litig.*, 567 F. Supp. 3d 1130, 1138 (C.D. Cal. 2021).

[134] *Id.* at 1147.

[135] Gina Kim, *Ambry Genetics to Pay $12.25M to End Data Breach Suit*, Law360 (Sept. 12, 2022), https://www.law360.com/articles/1529248/ambry-genetics-to-pay-12-25m-to-end-data-breach-suit.

[136] *AG Racine Sues Washington Commanders, Dan Snyder, NFL & NFL Commissioner Goodell for Deceiving DC Fans for Financial Gain*, D.C. Off. Att'y Gen. (Nov. 10, 2022), https://oag.dc.gov/release/ag-racine-sues-washington-commanders-dan-snyder (last visited July 6, 2023).

[137] *Id.*

[138] Jade Martinez-Pogue, *DC Says Commanders Case Must Play Out in Superior Court*, Law360 (Feb. 7, 2023), https://www.law360.com/articles/1573832/dc-says-commanders-case-must-play-out-in-superior-court (last visited July 6, 2023).

[139] *Attorney General Cameron Announces Multi-State Investigation Into Six Major Banks for ESG Investment Practices*, Ky. Off. Att'y Gen. (Oct. 19, 2022), https://www.kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prId=1269 (last visited July 6, 2023).

[140] *Paxton Launches Investigation into S&P Global's Use of ESG Factors in Credit Ratings, Potentially Violating Consumer Protection Laws*, Tex. Off. Att'y Gen. (Sept. 28, 2022), https://www.texasattorneygeneral.gov/news/releases/paxton-launches-investigation-sp-globals-use-esg-factors-credit-ratings-potentially-violating (last visited July 6, 2023).

[141] *See Gonzalez v. Wilshire Credit Corp.*, 25 A.3d 1103, 1120 (N.J. 2011) (observing that "the Attorney General has limited resources" to dedicate to consumer protection); *see also Attorney General James Releases Top 10 Consumer Complaints of 2022*, N.Y. Off. Att'y Gen. (Mar. 7, 2023), https://ag.ny.gov/press-release/2023/attorney-general-james-releases-top-10-consumer-complaints-2022 (reporting that the N.Y. AG's Office received over 23,000 consumer complaints in 2022).

[142] *See City & Cnty. of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1135 (N.D. Cal. 1997) (authorizing outside contingency fee counsel where government attorneys "retain[] full control over the course of the litigation" and "actively direct[] th[e] litigation").

[143] It is cold comfort that these novel legal actions may result in monetary awards for the AG's office. The perverse concept that AGs should bring inappropriate lawsuits to generate funding for future enforcement is also problematic. *See* O.H. Skinner, *Fixing Public Consumer Protection Enforcement*, 30 Harv. J.L. & Pub. Pol'y Per Curiam 1, 3 (2022) ("Consumers plainly lose out when public consumer protection enforcement merely sends money into the hands of bureaucrats.").

[144] *See* John M. Broder & Barry Meier, *Tobacco Accord, Once Almost Sure, Seems to Crumble*, N.Y. Times (Sept. 14, 1997), https://archive.nytimes.com/www.nytimes.com/library/national/091497tobacco-deal-dispute.html ("'There was institutional reluctance – resentment, even – that a handful of attorneys general and plaintiffs' lawyers would come to us with such a detailed [tobacco settlement] agreement, even divvying up the spoils,' said Sen. John McCain, R-Ariz., chairman of the powerful Commerce Committee. 'Who do these people think they are? That's a legislative and executive branch prerogative.'") (last visited July 6, 2023).

[145] Kiel Brennan-Marquez, *Extremely Broad Laws,* 61 Ariz. L. Rev. 641, 642 (2019).

[146] James Cooper & Joanna Shepherd, *State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis,* 81 Antitrust L.J. 947, 974 (2017).

[147] *Id.* at 974–75.

[148] Petition for Writ of Certiorari, *Johnson & Johnson v. California*, No. 22-447, at 21 (Nov. 10, 2022) citing Butler & Johnston, *supra* note 3, at 35, 42–43 [hereinafter Johnson & Johnson Cert. Pet.].

[149] Butler & Johnston, *supra* note 3, at 41–43.

[150] *Id.*

[151] *Id.* at 42.

[152] *Id.* at 42-43.

[153] *See* Brennan-Marquez, *supra* note 145, at 642.

[154] U.S. Const. amend. XIV.

[155] 339 U.S. 306 (1950).

[156] Glenn G. Lammi, *Time for SCOTUS to Set Meaningful Due-Process Standards for State UDAP Laws*, Forbes (Feb. 13, 2023), https://www.forbes.com/sites/wlf/2023/02/13/time-for-scotus-to-set-meaningful-due-process-standards-for-state-udap-laws/?sh=80eb3178d33d (last visited July 6, 2023).

[157] *See, e.g.*, Ohio Rev. Code Ann. § 1345.99; S.D. Codified Laws § 37-24-6.

[158] *See* Brennan-Marquez, *supra* note 145, at 642.

[159] Johnson & Johnson Cert. Pet., *supra* note 148.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* at 20.

[164] *Id.*

[165] Franke & Ballam, *supra* note 7, at 357. Some states further allow private plaintiffs to step into the shoes of AGs for purposes of UDAP enforcement to bring claims on behalf of the general public with the same rights and remedies afforded to the states. *See, e.g.*, D.C. Code § 28-3905(k)(1); Minn. Stat. Ann. § 8.31, subdiv. 3a.

[166] *See* Jeff Sovern, *Private Actions under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 Ohio St. L.J. 437, 448 (1991).

[167] *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215, 228 (1983) ("[W]e see today a . . . spectacle, one resembling the Oklahoma land rush, in which the filing of the public agency's action serves as the starting gun for a race between private attorneys, all seeking to claim the prize of lucrative class action settlements, which public law enforcement has gratuitously presented them.").

[168] *See* William B. Rubenstein, *On What a 'Private Attorney General' Is—and Why It Matters*, 57 Vand. L. Rev. 2129, 2151 (2004) ("The only *supplemental* function performed by this private attorney general is that of multiplying wrongdoers' penalties: she provides no independent search skills, no special litigation savvy, and no nonpoliticized incentives. She simply piles on and runs up the tab.").

[169] *See Privatizing Public Enforcement: The Legal, Ethical and Due-Process Implications of Contingency-Fee Arrangements in the Public Sector*, U.S. Chamber of Commerce Institute for Legal Reform (Sept. 3, 2013), https://instituteforlegalreform.com/research/privatizing-public-enforcement-the-legal-ethical-and-due-process-implications-of-contingency-fee-arrangements-in-the-public-sector/.

[170] Carter, *supra* note 29.

[171] Donald R. Richardson, *"Want Fries With That?" A Critical Analysis of Fast Food Litigation*, 107 W. Va. L. Rev. 575, 583 (2005) (observing that the prospect of high attorneys' fees awards "give[s] a considerable economic incentive to enterprising lawyers seeking to broaden the marketplace by finding deep-pocketed defendants who are alleged to have caused a variety of social ills").

[172] Adam Gabbatt, *Wave of Lawsuits Against US Gun Makers Raises Hope of End to Mass Shootings*, Guardian (May 27, 2023), https://www.theguardian.com/us-news/2023/may/27/gun-lawsuits-manufacturer-sellers-crimes.

[173] Shannon E. McClure, Jennifer A. Smokelin & Casey J. Snyder, *Litigation Over 'Forever Chemicals' Is Growing: Is Your Company the Next Defendant?*, Reuters (Dec. 7, 2022), https://www.reuters.com/legal/legalindustry/litigation-over-forever-chemicals-is-growing-is-your-company-next-defendant-2022-12-07/ (last visited July 6, 2023).

[174] Julie Steinberg, *Meta, Snap, Others Face Social Media Injury Suits in California*, Bloomberg (Oct. 6, 2022), https://news.bloomberglaw.com/litigation/meta-snap-others-face-social-media-injury-suits-in-california (last visited July 6, 2023).

[175] *See supra* pp. 33–34.

[176] Butler & Wright, *supra* note 35, at 166.

[177] Similarly, private plaintiffs have increasingly relied on multidistrict litigation (MDL) to pursue UDAP claims. *See, e.g.*, *In re Juul Labs, Inc., Mktg., Sales Pracs. & Prods. Liab. Litig.*, No 3:19-md-02913 (N.D. Cal. Oct. 2, 2019). Because of the lack of early vetting in MDLs, the availability of substantial attorneys' fees, and the crushing pressure on defendants to settle, MDLs have proven an attractive route for plaintiffs' attorneys to assert profitable, yet frequently dubious, claims. *See Trial Lawyers Push Quantity Over Quality in MDL Cases*, U.S. Chamber of Commerce Institute for Legal Reform (Oct. 29, 2021), https://instituteforlegalreform.com/blog/trial-lawyers-push-quantity-over-quality-in-mdl-cases/.

[178] *See* Mark C. Miller, *State Attorneys General, Political Lawsuits, and Their Collective Voice in the Inter-Institutional Constitutional Dialogue*, 48 J. Legis. 1, 8–9 (2021).

[179] *See* Franke & Ballam, *supra* note 7, at 348.

[180] Miller, *supra* note 178, at 7.

[181] *Id.* at 8; *see also* Paul Nolette, *Law Enforcement as Legal Mobilization: Reforming the Pharmaceutical Industry Through Government Litigation*, 40 Law & Soc. Inquiry 123, 146 (2015) (observing that state attorneys general have "employed the instrumental and constitutive power of the law to force changes in organizational practices, expand the scope of the conflict over corporate responsibilities, and reshape existing legal norms through lawsuits and settlements").

[182] Miller, *supra* note 178, at 28.

[183] Id.

[184] *See supra* Ch. 4.

[185] Alison Frankel, *State Court Will Be Next Frontier for Consumer Class Actions Under Federal Law*, Reuters (June 28, 2021), https://www.reuters.com/legal/litigation/state-court-will-be-next-frontier-consumer-class-actions-under-federal-law-2021-06-28/ (last visited July 6, 2023).

[186] Amy Pritchard Williams, Ryan Strasser & Ashley Taylor, *State Attorney General Actions: Strategies for Venue and Settlement Differ From Typical Litigation*, Reuters (Feb. 16, 2023), https://www.reuters.com/legal/legalindustry/state-attorney-general-actions-strategies-venue-settlement-differ-typical-2023-02-16/ (last visited July 6, 2023).

[187] *See supra* note 86 and accompanying text.

[188] *In re Standard & Poor's Rating Agency Litig.*, 23 F. Supp. 3d 378, 387 (S.D.N.Y. 2014).

[189] *Id.* at 396–98.

[190] *Id.* at 399–400.

[191] Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 Wis. L. Rev. 1097 (2013).

[192] Paul Nolette, *The Dual Role of State Attorneys General in American Federalism: Conflict and Cooperation in an Era of Partisan Polarization*, Pol. Sci. Fac. Rsch. & Publ'ns (2017).

[193] Noam Scheiber, *As Americans Take Up Populism, the Supreme Court Embraces Business*, N.Y. Times (Mar. 11, 2016), https://www.nytimes.com/2016/03/12/business/as-americans-take-up-populism-the-supreme-court-embraces-business.html (last visited July 6, 2023).

[194] *See, e.g.*, Christine Schiffner, *'The Tide is Turning' on Big Tech as Plaintiffs Firms File More Data Privacy Lawsuits*, Law.com (Feb. 16, 2022), https://www.law.com/nationallawjournal/2022/02/16/the-tide-is-turning-on-big-tech-as-plaintiffs-firms-file-more-data-privacy-lawsuits/ (last visited July 6, 2023).

[195] *See Unfair Practices or Unfair Enforcement? Examining the Use of Unfair and Deceptive Acts and Practices (UDAP) Laws by State Attorneys General*, U.S. Chamber of Commerce Institute for Legal Reform (Sept. 30, 2016), https://instituteforlegalreform.com/research/unfair-practices-or-unfair-enforcement-examining-the-use-of-unfair-and-deceptive-acts-and-practices-udap-laws-by-state-attorneys-general/ (last visited July 6, 2023).

[196] *See* Rohit Chopra, Director, CFPB, *Remarks at December National Association of Attorneys General Meeting* (Dec. 7, 2021), https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-december-naag-meeting/ (last visited July 6, 2023).

[197] *Id.*

[198] Authority of States to Enforce the Consumer Financial Protection Act of 2010, 87 Fed. Reg. 31,940 (May 26, 2022).

[199] *See* The Fair Credit Reporting Act's Limited Preemption of State Laws, 87 Fed. Reg. 41,042 (July 11, 2022).

[200] Paul Singer, *Feds + State Attorneys General = A New Enforcement Landscape*, Ad Law Access (Dec. 8. 2021), https://www.adlawaccess.com/2021/12/articles/feds-state-attorneys-general-a-new-enforcement-landscape/ (last visited July 6, 2023).

[201] Commission Seeks Public Comment on Collaboration with State Attorneys General, Fed. Trade Comm'n. (June 7, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/commission-seeks-public-comment-collaboration-state-attorneys-general (last visited July 6, 2023).

[202] *Id.*

[203] Br. of Wash. Legal Found. as *Amicus Curiae* Supporting Pet'rs, *Johnson & Johnson v. California*, No. 22-447 (Dec. 15, 2022); *see also, e.g.*, Ariz. Rev. Stat. § 44-1531(A) (civil penalties available only where defendant commits a willful violation); Del. Code tit. 6, § 2522(b) (same); 73 Pa. Cons. Stat. § 201-8(b) (same).

[204] *See* Cary Silverman & Jonathan L. Wilson, 65 Kan. L. Rev. 209, 241 n.216 (2016) (compiling statutes).

[205] *See, e.g.*, 15 U.S.C. § 45(m)(1)(B)(2).

[206] *See, e.g.*, Daniel Fisher, *Scheiderman's Fishing Expedition Against ExxonMobil Follows a Familiar Old Course*, Forbes (Nov. 13, 2015), https://www.forbes.com/sites/danielfisher/2015/11/13/scheidermans-fishing-expedition-against-exxonmobil-follows-a-familiar-old-course/?sh=210d08b250b6 (last visited July 6, 2023).

[207] *FTC Policy Statement on Deception*, Fed. Trade Comm'n (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf (last visited July 6, 2023).

[208] 2011 WL 2745963, at *3 (D.N.J. July 12, 2011) (quoting *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003)).

[209] *See* Richard F. Doyle Jr., *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 Yale L.J. 485, 490–91 (1967) ("A requirement that a false representation be likely to affect the purchasing decision of consumers is axiomatic. The law has little need to suppress irrelevant misrepresentation.").

[210] *Attorney General Opinions*, Nat'l Ass'n of Att'ys Gen., https://www.naag.org/issues/civil-law/attorney-general-opinions/ (last visited May 15, 2023).

[211] *Id.* ("In a few states, legal opinions from the attorney general are binding on state agencies. However, in most states, these opinions are merely advisory, although the courts give them significant weight.").

[212] *See, e.g.*, Colo. Dep't of Law, *Mem. re: Guidance on UCCC GAP Enforcement Priorities* (2022).

[213] *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, Fed. Trade Comm'n (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority (last visited July 6, 2023).

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[215] *See A Brief Overview*, *supra* note 213 (quoting 15 U.S.C. § 57b-1(c)(1)).

[216] *Id.* (citing 15 U.S.C. § 57b-1(c)(7)(B)).

[217] 15 U.S.C. § 45(a)(1).

[218] David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act*, https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf (last visited July 6, 2023).

[219] 141 S. Ct. 1341 (2021).

[220] *Id.* at 1347.

[221] *Interjurisdictional Collaboration*, Nat'l Ass'n of Att'ys Gen., https://www.naag.org/issues/consumer-protection/interjurisdictional-collaboration/ (last visited May 15, 2023).

[222] Allison Grande, *FTC to Lean on State AGs After High Court Ruling, Head Says*, Law360 (May 11, 2021), https://www.law360.com/articles/1383697/ftc-to-lean-on-state-ags-after-high-court-ruling-head-says (last visited July 6, 2023).

[223] FTC Collaboration Act of 2021, Pub. L. 117-187, 136 Stat. 2201 (2022).

[224] *Id.*

[225] Jordan Crenshaw, *The FTC's Consumer Protection Agenda Could Hinder Innovation and E-Commerce*, U.S. Chamber of Commerce (Apr. 22, 2022), https://www.uschamber.com/technology/data-privacy/the-ftcs-consumer-protection-agenda-could-hinder-innovation-and-e-commerce (last visited July 6, 2023).

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