

FIXING PUBLIC CONSUMER PROTECTION ENFORCEMENT

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Public consumer protection enforcement is badly in need of new thinking. As I learned soon after joining the Arizona Attorney General’s Office to work on major consumer cases, the existing public consumer enforcement apparatus often focuses on the wrong outcomes and relies on tactics that regularly fail consumers. But that doesn’t have to be the case. There is a way to reshape public enforcement efforts to make them better, to speed up consumer enforcement and make it about consumers again rather than bureaucratic empowerment. And we already have early evidence from the states showing the viability of key aspects of this new thinking. We are long past overdue for a consumer protection system that does its job better. With more public officials following the early lead we are seeing in the states—embracing a consumer-first mentality in terms of case selection, investigation strategy, and negotiation of resolutions—we are primed to get that better system sooner rather than later, which would be a sea change for everyday consumers.

THE DEEPLY FLAWED STATUS QUO

The existing public consumer protection enforcement apparatus is plagued with deep-seated flaws, with a chief criticism being that it moves incredibly slowly and too often fails to deliver meaningful money into the hands of everyday consumers. The perception is that in many cases the investigation itself becomes the primary purpose of the public enforcement effort, with a myopic focus on the investigatory process (the next document request, the next meet-and-confer call, etc.) and very little thinking about how to directly help consumers who were potentially harmed by the conduct at issue. Timely resolution of matters is not a primary focus. Flowing money to consumers’ pockets is not a primary focus. Instead, the system looks more like a bureaucratic empowerment machine, with a heavy emphasis on maximizing the civil penalties for the public enforcement entity, no matter the time that takes or the side effects it causes.

A clear illustration of these problems comes from the states (where I spent my time working in public consumer enforcement) and their longstanding multi-state investigation process.

States have long employed a consumer protection system that relies heavily on attorneys general from different states joining together to work on investigations together, with an executive committee of states marshalling the effort and certain of those states serving as so-called “lead states.” This process is usually referred to as “the multi-state process,” with each case-

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specific grouping called a “multi-state” for short. This system is the epitome of the old-line approach to consumer protection, with substantial institutional buy-in across party lines, a strong cadre of long-serving career attorneys at the helm of things, and decades of case resolutions in the books.

A defining characteristic of the state attorney general multi-state process is the glacial pace with which investigations advance and eventually resolve. Look no further than the recent multi-state Ford Motor Company settlement, which resolved claims that were essentially a decade old, involving model years 2011–2014.¹ Or consider the multi-state Navient student loan settlement, which this year resolved claims from as far back as 2009 (almost fifteen years ago).² Or pause for a moment to recognize that Arizona just settled claims involving Mercedes Benz diesel vehicles that were largely sold during the mid-2010s (the last model year at issue was 2016), even as the concomitant, well-rumored multi-state investigation into the same vehicles drags on without a final resolution.³ And those are just multi-states that resolved this year. It isn’t hard to find multi-state settlements from recent years that are about conduct from the mid-2010s, nearly a decade ago.⁴

And it is not just the tardiness of the multi-state process that illustrates the problems with public consumer protection efforts, it is also how common it is for multi-states to resolve without sending any money to consumers. This year’s Ford Motor Company multi-state settlement sent zero dollars of restitution to the consumers who purchased the trucks and cars in question, with the millions from Ford staying in the hands of government officials. The story was very much the same with the nearly \$600 million McKinsey opioid settlement from last year.⁵ And no state has announced plans to send money from the nearly \$400 million Google location-tracking multi-state settlement to consumers.⁶ Time and again the multi-state process sends money into the coffers of government officials but fails to deliver money to consumers. And this is perhaps unsurprising in light of the slow pace of multi-states—it becomes harder to find affected consumers and direct meaningful money to them when the conduct at issue occurred ten or more years in the past.

¹ Morgan Conley, *Ford Inks \$19.2M Deal To End States’ False Ad Claims*, LAW360 (May 24, 2022), <https://www.law360.com/articles/1496482/ford-inks-19-2m-deal-to-end-states-false-ad-claims>.

² Dean Seal, *Navient Reaches \$1.85B Deal To End Student Lending Probes*, LAW360 (Jan. 13, 2022), <https://www.law360.com/articles/1455300/navient-reaches-1-85b-deal-to-end-student-lending-probes>.

³ Press Release, Arizona Attorney General’s Office, General Brnovich Secures More Than \$6 Million in Consumer Fraud Settlement with Mercedes-Benz and Robert Bosch LLC (Nov. 18, 2022), <https://www.azag.gov/press-release/general-brnovich-secures-more-6-million-consumer-fraud-settlement-mercedes-benz-and>.

⁴ See, e.g., Press Release, Office Of The Tennessee Attorney General, AG Slatery Reaches \$5 Million Multistate Settlement with Community Health Systems (Oct. 8, 2020), <https://www.tn.gov/attorney-general/news/2020/10/8/pr20-44.html>; Press Release, Nebraska Attorney General’s Office, Nebraska Joins Combined \$16 Million Multistate Settlements over Previous Experian Data Breaches (Nov. 7, 2022), <https://ago.nebraska.gov/news/nebraska-joins-combined-16-million-multistate-settlements-over-previous-experian-data-breaches>.

⁵ See, e.g., Michael Forsythe & Walt Bogdanich, *McKinsey Settles For Nearly \$600 Million Over Role In Opioid Crisis*, NEW YORK TIMES (Feb. 3, 2021), <https://www.nytimes.com/2021/02/03/business/mckinsey-opioids-settlement.html> (“States will use the civil penalties . . . for opioid treatment, prevention and recovery programs, the settlement document says.”).

⁶ Dave Collins & Marcy Gordon, *40 States Settle Google Location-tracking Charges For \$392M*, THE ASSOCIATED PRESS (Nov. 14, 2022), <https://apnews.com/article/google-privacy-settlement-location-data-57da4f0d3ae5d69b14f4b284dd084cca>.

None of this means that every multi-state settlement or public consumer enforcement settlement is fatally flawed, but it does mean that far too many officials have become comfortable with a consumer protection approach that is too slow and too ready to send money toward bureaucratic empowerment at the expense of everyday consumers. Consumers plainly lose out when public consumer protection enforcement merely sends money into the hands of bureaucrats. And that indignity is amplified when public enforcement matters move so slowly that there is no other meaningful relief to come from the public enforcement settlement because the products at issue were discontinued or made obsolete years before the enforcement effort eventually resolved.⁷

A BETTER PUBLIC CONSUMER PROTECTION PARADIGM

The status quo in public consumer protection is unacceptable; we should all be demanding better from our public officials. But all is not lost, because there is a straightforward path to meaningful reform. By refocusing the goals of the system around consumers and implementing tactical changes for case selection and management, individual public officials can do a great deal to solve the existing problems.

Step One: Refocus Public Consumer Enforcement Around Consumer Restitution

The first step in reform is refocusing public consumer protection enforcement systems toward providing maximum total restitution to the consumers served by each respective public enforcement entity.

There are two components to this. First, move restitution to be the driving consideration in how a public consumer protection system's resources are deployed. Second, focus on maximizing the total, system-wide restitution generated within a public consumer enforcement apparatus.

Establishing total system-wide consumer restitution as the central goal within public consumer protection enforcement represents a major philosophical shift for a system that has long focused on individual case maximization and civil penalty accumulation. But, as I saw at the Arizona Attorney General's Office, reorienting around these two easy-to-grasp concepts is something that career staff can rally around with relative ease and has the added effect of making it easier to invest in high-return-on-investment aspects of consumer enforcement. For example, once we had identified maximizing consumer restitution as the chief goal of our consumer protection section, it was easier to prioritize the opening of cases that had a path to consumer restitution. And with this goal in mind it was also easier to invest additional resources in our unit that handled non-litigation resolution of consumer complaints, as that non-litigation resolution team (called a mediation team in other states) was able to generate relief and restitution for consumers based off a simple online or telephonic consumer complaint, without the delay or expense of a full-scale investigation or litigation.

⁷ For an example of this final point, consider that the recent Arizona Mercedes Benz diesel vehicles settlement contains injunctive relief barring future misrepresentations by Mercedes Benz about various diesel models (defined as "subject vehicles"), even though Mercedes Benz stopped selling diesel cars in the United States at least five years ago. See Jonathon Ramsey, *Mercedes Is Done Putting Diesels In U.S. Cars*, AUTOBLOG (Jan. 22, 2018), <https://www.autoblog.com/2018/01/22/mercedes-benz-diesel-cars-us/>.

Step Two: Deploy Tactical Changes In Investigations And Cases

Reforming public consumer enforcement efforts must be about more than just picking better cases and better investing finite resources prior to committing to investigations or lawsuits; it also calls for changes in the tactics that enforcers deploy once they have opened a formal investigation. Public enforcers can generate substantial value by prioritizing consumer restitution in the case selection process and prior to the initiation of an investigation. But changing the tactical approach by public enforcers during an investigation has the potential to solve many of the most pernicious problems with the consumer protection status quo and generate huge improvement for the consumer protection system and everyday consumers.

For starters, enforcers should make swift resolution through suit or settlement a stated goal of all consumer protection investigations. By making swift resolution the focus from the start, both for the target of the investigation and the staff inside the public enforcement entity, there is a better chance of curbing the bureaucratic delay that infects so much of the current public enforcement landscape. It helps diminish the likelihood of investigatory creep and delay when enforcement staff are told at the outset that they essentially have a finite time period within which to build their case to the point of litigation, settlement, or case closure; the incentive for staff becomes finding out through the investigation the key information they would need to support a lawsuit, which is often the core information necessary to determine the possibility of reasonable pre-suit settlement. And it helps to further avoid delay when the target of an investigation (and their counsel) knows that a lawsuit looms in the event of a breakdown in either investigatory cooperation or settlement discussions. On both sides, an upfront mandate for a swift resolution or transition to litigation helps with reaching a timely resolution where possible. And where such a resolution fails, such a mandate helps to put an action into court with a path toward resolution for consumers well before six, seven, or eight years have passed.

A tactical tool that can help facilitate earlier settlement—and avoid the delay that comes with the drive toward case maximization—is greater use of a “most-favored-nation clause” (MFN clause). MFN clauses in settlements ensure that if another public enforcement entity later obtains more in settling the same claims (measured on a per capita, per violation, or any other chosen basis), then the entity that moved first, and obtained the MFN clause, will get its settlement value raised up to the higher level that was later obtained by the other enforcement entity.

MFN clauses are a powerful antidote to the existing tendency of public consumer enforcement staff to push on for years in pursuit of adding a metaphorical nickel per violation to potential settlement terms, even if multiple other cases worth far more than a nickel per violation are languishing or going entirely overlooked in the meantime. MFN clauses empower enforcement officials to short-circuit this inertia. They empower officials to settle for a meaningful figure that might run the risk of being less than full potential case maximization—sending their staff to work on cases worth far more than that last metaphorical nickel—with protection if the last nickel comes through in short order in another public settlement.

MFN clauses are also a powerful way to cut through the especially pernicious bureaucratic entanglements that come when a group of enforcers are working toward a global resolution of certain allegations, where a certain enforcers’ case maximization commitment can do a great deal

to impede others from reaching a reasonable, timely settlement. Use of MFN clauses in these settings greatly empowers breakaway settlements by those officials who are pursuing reform-minded thinking on consumer protection (and who thereby resist the case maximization approach), allowing for a separate peace by these enforcers with a level of confidence that they are not risking substantial value in doing so. And MFN clauses can do even more than just free some states to pursue better consumer protection in this type of group setting, they can also help pressure holdout states to give up their case maximization fixation; for example, if breakaway enforcement officials and a defendant negotiate for a sliding-scale MFN clause—one that increases the time period covered by the MFN clause as more enforcers join the breakaway settlement's terms—then the potential impact on the holdouts grows, helping to force an honest appraisal of whether continuing the investigation will generate additional value for them or whether the breakaway deal is preferable.

Step Three: Implement Consumer Restitution In Public Settlements Wherever Feasible

There is perhaps no better single tool for cutting away the most pernicious problems with the consumer protection status quo than the embrace of MFN clauses in public consumer protection settlements, especially in conjunction with an up-front edict for swift case resolution. But it is also crucial that the settlements and other voluntary resolutions that are reached with these tactical tools include a component of direct consumer restitution wherever possible. When substantial money is on the table in a potential settlement, cash should be flowing to the benefit of everyday consumers who were victimized by the conduct at issue. This is particularly true in cases with high-cost products and extensive public record keeping, like in automobile cases where the registered owners at the relevant times can be determined in a relatively straightforward manner. But it should also be true in other large cases, like the nearly \$400 million Google location-tracking multi-state settlement that was recently announced. In a case like that, with such vast sums and a concrete population of consumers affected (e.g., those with Android phones), there is every potential to establish a claims process to allow consumers to take home real money.⁸ To make the reform of the public consumer protection system have full effect, it is crucial that public officials commit to making restitution happen in these types of cases, not just the easiest cases.

EVIDENCE FROM THE STATES PROVIDES EARLY PROOF OF CONCEPT

For evidence of how straightforward the path is toward a better public consumer protection enforcement system, consider that we are already seeing state attorneys general providing proof of concept for these reforms and a model for success that can be replicated and expanded.

⁸ There are several viable ways to set up a consumer claim process for a case like this, even when there is a vast, unknown number of potential claimants and a fear that they could too quickly exhaust the available money. For example, a public official could set aside a fixed pool of money for consumer restitution, set up a claims process with an attestation form, set a value for each claim, and advertise to the public with a notice that claims will be filled on first-come, first-paid basis until the pool of money is exhausted. And there are permutations on this. A lottery could be used to fill claims rather than a first-come, first-paid system. Or the value of claims could be set within a range, with pro-rata distribution within the range and a cap on claims where the minimum claim value would exhaust the pool of money. And that just scratches the surface of what is available in terms of viable ways to set up a claims process.

Look no further than Arizona, where Attorney General Brnovich has been a leader in prioritizing consumer restitution in his consumer protection enforcement efforts. Brnovich was able to claim over \$200 million in consumer restitution over his first six years in office, more than the office had obtained in the previous 14 years combined.⁹ That figure includes being the first state to send restitution to consumers stemming from the Volkswagen diesel engine fraud (up to \$1,000 to each Arizona consumer affected), obtaining full refunds for all Arizona consumers affected by the infamous Theranos blood testing scandal, and securing major restitution wins against Ticketmaster and the state's leading private utility.¹⁰ And that \$200 million figure does not include restitution Brnovich has generated for consumers since early 2021, like his most recent Mercedes Benz diesel settlement (up to \$625 per consumer, totaling almost \$3 million).¹¹ In case after case, Brnovich has returned money into the hands of consumers and in the process made consumer restitution a public calling card for his tenure in office, showing a path other public officials can and should be taking.

There has also been a notable shift by certain conservative attorneys general away from the traditional multi-state process, demonstrating the validity of the tactical reforms highlighted above. For example, just this year, there have been several high-profile, single-state settlements of major consumer protection cases. In February, Texas announced a nine-figure settlement with opioid-maker Teva Pharmaceutical Industries.¹² In May, Florida announced a nine-figure settlement with Walgreens over opioids.¹³ And in October, Florida announced a nine-figure opioid settlement with Walmart.¹⁴ An MFN clause was deployed in each of these single-state settlements.¹⁵ And it is especially notable that these successful breakaway settlements presaged

⁹ Press Release, Arizona Attorney General's Office, Attorney General Mark Brnovich Announces \$200+ Million in Consumer Restitution (Mar. 6, 2021), <https://www.azag.gov/press-release/attorney-general-mark-brnovich-announces-200-million-consumer-restitution>.

¹⁰ See Miranda Green, *Arizona settles suit with Volkswagen for \$40 million*, THE HILL (May 2, 2018), <https://thehill.com/policy/energy-environment/385909-arizona-settles-suit-with-volkswagen-for-40-million/>; Lydia Ramsey Pflanzler, *Theranos just agreed to refund 175,000 people in Arizona who took its tests*, BUSINESS INSIDER (Apr. 18, 2017), <https://www.businessinsider.com/theranos-reaches-465-million-settlement-with-arizona-attorney-general-2017-4>; Press Release, Arizona Attorney General's Office, AG Brnovich Secures \$71M in Ticketmaster Consumer Refunds for Events Impacted by COVID-19 (Oct. 27, 2020), <https://www.azag.gov/press-release/ag-brnovich-secures-71-million-ticket-refunds-arizona-events-impacted-covid-19>; and Press Release, Arizona Attorney General's Office, Attorney General Brnovich Secures Nearly \$25 Million in Consent Agreement with APS (Feb. 22, 2021), <https://www.azag.gov/press-release/attorney-general-brnovich-secures-nearly-25-million-consent-agreement-aps>.

¹¹ See David Shepardson, *Mercedes Benz to pay \$5.5 million to settle Arizona diesel ad case*, REUTERS (Nov. 18, 2022), <https://www.reuters.com/business/autos-transportation/mercedes-benz-pay-55-million-resolve-arizona-diesel-advertising-lawsuit-2022-11-18/> ("Under the proposed settlement, Mercedes Benz will pay \$2.8 million in consumer restitution, and each qualifying Arizona consumer will receive up to \$625 per vehicle").

¹² Emily Field, *Texas Strikes \$225M Deal With Teva Over Opioid Crisis*, LAW360 (Feb. 7, 2022), <https://www.law360.com/articles/1462529/texas-strikes-225m-deal-with-teva-over-opioid-crisis>.

¹³ Carolina Bolado, *Florida And Walgreens End Opioid Trial With \$683M Deal*, LAW360 (May 5, 2022), <https://www.law360.com/articles/1490367/florida-and-walgreens-end-opioid-trial-with-683m-deal>.

¹⁴ Lauren Berg, *Walmart To Pay \$215M In Fla. AG's Latest Opioid Deal*, LAW360 (Oct. 20, 2022), <https://www.law360.com/articles/1542098/walmart-to-pay-215m-in-fla-ag-s-latest-opioid-deal>.

¹⁵ Teva Texas State-Wide Settlement And Consent Judgment, Section XII, Paragraph D, [https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Teva%20-%20Final%20Texas%20AG%20Settlement%202.4.22%20-%20FINAL%20Executed%20\(incl%20Exhs\).pdf](https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Teva%20-%20Final%20Texas%20AG%20Settlement%202.4.22%20-%20FINAL%20Executed%20(incl%20Exhs).pdf); Settlement Agreement And Release, Section H, Paragraph 20, [http://myfloridalegal.com/webfiles.nsf/WF/GPEY-CE4NC9/\\$file/2022.05.04+EXECUTED+Florida-Walgreens+Settlement\(10878632.1\).pdf](http://myfloridalegal.com/webfiles.nsf/WF/GPEY-CE4NC9/$file/2022.05.04+EXECUTED+Florida-Walgreens+Settlement(10878632.1).pdf); Settlement Agreement And Release,

various multi-state opioid settlements with Walmart, Walgreens, CVS and Teva.¹⁶ It would not be surprising to learn in the fullness of time that the precursor breakaway settlements played a role in helping wrap up these large multi-state investigations. And, regardless, the states are showing that tactical reforms to consumer protection enforcement, including MFN clauses, can be viably deployed to great effect in different places to meet different needs in different cases.

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Too often, consumers receive too little from public consumer protection enforcement efforts. With faster resolution of cases, public enforcers have a greater chance to increase their cadence of cases, increase the number of consumers they can help, and deliver real restitution — real money — into the pockets of those consumers at a much higher level. We can achieve this. We have the path forward. It requires a mindset shift toward maximizing total consumer restitution as opposed to individual case maximization and accumulation of civil penalties. And it calls for the use of tactical tools, including greater use of MFN clauses. We need look only so far as the states to see that this is possible, and how successful it can be. One thing is clear: restoring consumers to the forefront of consumer protection is important, and achievable, we just need more of our public officials to commit to it.

Section G, Paragraph 20, [http://myfloridalegal.com/webfiles.nsf/WF/GPEY-CKDJFT/\\$file/Walmart_Florida_Settlement_Execution+Copy.pdf](http://myfloridalegal.com/webfiles.nsf/WF/GPEY-CKDJFT/$file/Walmart_Florida_Settlement_Execution+Copy.pdf).

¹⁶ Compare Emily Field, *Texas Strikes \$225M Deal With Teva Over Opioid Crisis*, LAW360 (Feb. 7, 2022), <https://www.law360.com/articles/1462529/texas-strikes-225m-deal-with-teva-over-opioid-crisis>; Carolina Bolado, *Florida And Walgreens End Opioid Trial With \$683M Deal*, LAW360 (May 5, 2022), <https://www.law360.com/articles/1490367/florida-and-walgreens-end-opioid-trial-with-683m-deal>; and Lauren Berg, *Walmart To Pay \$215M In Fla. AG's Latest Opioid Deal*, LAW360 (Oct. 20, 2022), <https://www.law360.com/articles/1542098/walmart-to-pay-215m-in-fla-ag-s-latest-opioid-deal> with Jan Hoffman, *Teva Reaches Tentative \$4.25 Billion Settlement Over Opioids*, NEW YORK TIMES (July 26, 2022), <https://www.nytimes.com/2022/07/26/health/teva-opioids-settlement.html>; Jeff Overley, *CVS, Walgreens Offer \$10B To End Nationwide Opioid Suits*, LAW360 (Nov. 2, 2022), <https://www.law360.com/articles/1545738/cvs-walgreens-offer-10b-to-end-nationwide-opioid-suits>; and Sharon Terlep & Sarah Nassauer, *Walmart to Pay \$3.1 Billion to Settle Opioid Lawsuits*, WALL STREET JOURNAL (Nov. 15, 2022), <https://www.wsj.com/articles/walmart-to-pay-3-1-billion-to-settle-opioid-lawsuits-11668514958>.