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## Enforcement Piggybacking and Multistate Actions

Elysa M. Dishman\*

*Civil enforcement in the United States is uniquely “multienforcer.” Numerous public and private enforcers including federal agencies, state attorneys general (AGs), and private litigants have overlapping authority to enforce myriad federal and state laws. Ideally, enforcers would complement one another’s efforts and use their comparative enforcement advantages to broaden the scope of enforcement and act as a check on underenforcement. But in reality, enforcers are often attracted to the same targets – large, public, deep-pocketed corporations. This means that multiple enforcers may pursue essentially the same enforcement action, arising from the same series of events and against the same target. Redundant enforcement actions may be necessary to adequately deter future misconduct and compensate victims of corporate fraud. However, duplicate actions may simply be the result of enforcers “piggybacking” on one another’s efforts and “piling on” to high-profile and lucrative enforcement actions.*

*Scholarly conversations about enforcement often treat broad categories of enforcers as static substitutes for one another rather than considering them as dynamic actors who are intertwined together. AGs are an example of dynamic enforcers that have changed the enforcement landscape by combining together in multistate actions. In some ways, state enforcement is a microcosm of the broader multienforcer system, with multiple state enforcers who can bring duplicative actions under fifty states’ laws. AGs can piggyback in multistate actions much like other public and private enforcers routinely do in enforcement actions. However, multistate actions don’t merely mimic the dynamics that occur in a multienforcer system. Multistate actions are also an innovation that*

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*changes the enforcement environment, potentially intensifying the practices of piggybacking and piling on in a multienforcer system.*

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## INTRODUCTION

Between 2003 and 2011, Deutsche Bank and several other banks manipulated the London Interbank Offered Rate (LIBOR) to generate profits for their traders at the expense of the bank's counterparties.<sup>1</sup> When the LIBOR-rigging scandal was exposed, enforcers in the United States and abroad took action, including the Department of Justice (DOJ), the Commodity Futures Trading Commission (CFTC), the New York Department of Financial Services (DFS), and the United Kingdom Financial Conduct Authority (FCA).<sup>2</sup> With so many enforcers (and so many acronyms!) it is no wonder that, in 2015, Deutsche Bank settled for over \$2.5 billion, including disgorging its ill-gotten gains and paying penalties.<sup>3</sup> The Deutsche Bank settlement was the largest settlement arising from the LIBOR scandal to date.<sup>4</sup> But Deutsche Bank was far from finished paying settlements to enforcers over the LIBOR scandal. In 2017, Deutsche Bank settled a multistate action with forty-five state attorneys general (AGs) for \$200 million.<sup>5</sup> And in 2018, Deutsche Bank settled a private antitrust class action for \$240 million.<sup>6</sup>

The Deutsche Bank enforcement story is not by any means unique. Many corporations face multiple enforcement actions arising from the same misconduct. It is a function of the

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1. LIBOR is a leading benchmark interest rate used in financial products and transactions around the world. See *Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR*, U.S. DEP'T JUST. (Apr. 23, 2015), <https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation>.

2. *Id.*

3. *Id.* ("Together with approximately \$1.744 billion in regulatory penalties and disgorgement—\$800 million as a result of a Commodity Futures Trading Commission (CFTC) action, \$600 million as a result of a New York Department of Financial Services (DFS) action, and \$344 million as a result of a U.K. Financial Conduct Authority (FCA) action—the Justice Department's criminal penalties bring the total amount of penalties to approximately \$2.519 billion.").

4. *Id.*

5. *A.G. Schneiderman Announces \$220 Million Multi-State Settlement with Deutsche Bank for Artificially Manipulating Interest Rates*, N.Y. OFF. ATT'Y GEN. (Oct. 25, 2017), <https://ag.ny.gov/press-release/ag-schneiderman-announces-220-million-multi-state-settlement-deutsche-bank>.

6. Jonathan Stempel, *Deutsche Bank to Pay \$240 Million to End LIBOR Rigging Lawsuit in U.S.*, REUTERS (Feb. 27, 2018, 3:30 PM), <https://www.reuters.com/article/us-deutsche-bank-libor-settlement/deutsche-bank-to-pay-240-million-to-end-libor-rigging-lawsuit-in-us-idUSKCN1GB32H>.

“multienforcer” system in the United States, where multiple federal agencies, state enforcers, and private litigants have overlapping authority to bring enforcement actions.<sup>7</sup> This system allows parallel civil and criminal actions involving multiple federal agencies, as well as concurrent or successive actions by state enforcers and private litigants. Thus, the same misconduct committed by a single corporation can spark numerous enforcement actions and spawn several multimillion-dollar settlements.

In some instances, multiple enforcement actions may be necessary to hold corporations accountable, deter future misconduct, and adequately compensate victims.<sup>8</sup> When enforcers coordinate together, they may achieve efficiencies and act as “force multipliers” in their respective efforts to punish and deter fraud.<sup>9</sup> The multienforcer system provides accountability by allowing other enforcers to step in to remedy lackluster enforcement resulting from problems of agency capture, resource constraints, informational disadvantages, and political impediments.<sup>10</sup>

But often duplicative actions may more closely resemble enforcement “piling on,”<sup>11</sup> creating unfair punishments and “exceed[ing] what is necessary to rectify the harm and deter future violations.”<sup>12</sup> “Piling on” occurs when multiple enforcers insist that

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7. See Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2174–75 (2010) (discussing the multienforcer system in the United States with respect to securities enforcement) [hereinafter Rose, *Multienforcer Approach*].

8. See Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 321–22 (2016).

9. Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute, U.S. DEP’T JUST. (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar> [hereinafter, *Rosenstein Remarks*].

10. See Clopton, *supra* note 8, at 290, 306; Amanda M. Rose, *State Enforcement of National Policy: A Contextual Approach (with Evidence from the Securities Realm)*, 97 MINN. L. REV. 1343, 1372 (2013) [hereinafter Rose, *Contextual Approach*]; Mark Totten, *The Enforcers & the Great Recession*, 36 CARDOZO L. REV. 1611, 1653–61 (2015) [hereinafter Totten, *The Enforcers*].

11. “Piling on” is a term in football where a player jumps onto an existing pile of players who have already successfully tackled the opponent lying at the bottom of the pile. Piling on is illegal because it slows down the game, has the potential to injure a player, and is an unnecessary action. Piling on may result in a fifteen-yard penalty. See *Piling On*, SPORTINGCHARTS, <https://www.sportingcharts.com/dictionary/nfl/piling-on.aspx> (last visited Sept. 23, 2019).

12. *Rosenstein Remarks*, *supra* note 9; see also Andrew J. Pincus, *Unprincipled Prosecution: Abuse of Power and Profiteering in the New “Litigation Swarm”*, U.S. CHAMBER INST.

each of their own actions arising from the same corporate misconduct be resolved with a separate monetary penalty that are, in the aggregate, disproportionate to the misconduct at issue.<sup>13</sup> Like the piling on that happens on the football field, duplicative enforcement actions can be unnecessary and potentially harmful when a corporation has already been successfully “tackled” by another enforcer. Piling on can be the equivalent of an enforcement “shakedown” where enforcers duplicate actions in order to extract settlements from deep-pocketed corporations.<sup>14</sup> In these instances, rather than cooperate, enforcers may take a competitive approach by bringing redundant actions, each seeking to obtain the highest settlement.<sup>15</sup>

Closely related to piling on is enforcement “piggybacking.” Piggybacking occurs when enforcers replicate or join an enforcement action after another enforcer has already invested the resources in investigation and litigation.<sup>16</sup> Often the action is brought to the point of settlement and then other regulators that may have done little or no investigative work join or replicate the action.<sup>17</sup> Piggybacking can yield unfair outcomes for corporate defendants.<sup>18</sup> At the same time, piggybacking can also be harmful to enforcers, who may have reduced incentives to invest resources in enforcement actions when other enforcers can simply piggyback off their efforts.<sup>19</sup>

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FOR LEGAL REFORM 3–6 (2014), <https://www.instituteforlegalreform.com/uploads/sites/1/unprincipled-prosecution.pdf> (describing piling on as the swarm enforcement model).

13. See *Rosenstein Remarks*, *supra* note 9.

14. See *The Criminalisation of American Business*, *THE ECONOMIST* (Aug. 30, 2014), <https://www.economist.com/news/leaders/21614138-companies-must-be-punished-when-they-do-wrong-legal-system-has-become-extortion> (“The formula is simple: find a large company that may (or may not) have done something wrong; threaten its managers with commercial ruin, preferably with criminal charges; force them to use their shareholders’ money to pay an enormous fine to drop the charges in a secret settlement (so no one can check the details). Then repeat with another large company.”).

15. See *Rosenstein Remarks*, *supra* note 9 (“Other times, joint or parallel investigations by multiple agencies sound less like singing in harmony, and more like competing attempts to sing a solo.”).

16. See Clopton, *supra* note 8, at 287–88; Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 *GEO. J.L. & PUB. POL’Y* 5, 9–10 (2004).

17. See *Rosenstein Remarks*, *supra* note 9.

18. See *Rosenstein Remarks*, *supra* note 9; Pincus, *supra* note 12.

19. See Rose, *Contextual Approach*, *supra* note 10, at 1354 (arguing that multiple enforcers “creates incentives for enforcers to free-ride on the efforts of others, which may lead to less vigorous enforcement overall”).

There is a fair amount of finger-pointing in the literature when it comes to which enforcers are piggybacking.<sup>20</sup> The most common target of such finger-pointing tends to be private enforcement—in particular, class actions. Private class actions have been criticized for piggybacking on public government enforcement actions.<sup>21</sup> Private attorneys “free ride” on the resources invested by public enforcers in order to procure class settlements.<sup>22</sup> These actions often result in handsome fees to class counsel, but often short-change class members.<sup>23</sup> Piggybacking in private class actions has been colorfully described as an “Oklahoma land rush[] in which the filing of [a] public . . . action serves as [a] 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.”<sup>24</sup>

But private enforcers are not the only ones accused of piggybacking on other enforcers. Enforcement actions brought by AGs have also been accused of piggybacking on private class actions.<sup>25</sup> Some AGs’ *parens patriae* actions on behalf of their state residents closely resemble or may even duplicate private class actions.<sup>26</sup> In fact, AGs may hire the class counsel from a class action

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20. 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, 221–25 (1983) [hereinafter Coffee, *Bounty Hunter*]; Posner, *supra* note 16, at 9–10.

21. See Coffee, *Bounty Hunter*, *supra* note 20, at 221–25 (describing private litigants as “free-riders” when they piggyback on the efforts of public enforcers).

22. See *id.*; William B. Rubenstein, *On What a “Private Attorney General” Is – And Why It Matters*, 57 VAND. L. REV. 2129, 2150–51 (2004) (“The private attorney can free-ride on these [public] efforts . . . provid[ing] no independent search skills, no special litigation savvy, and no nonpoliticized incentives. She simply piles on and runs up the tab.”).

23. See John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 633 (1987) (“At its simplest, the classic form of opportunism in class actions is the ‘sweetheart’ settlement, namely one in which the plaintiff’s attorney trades a high fee award for a low recovery.”); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1048 (1995); Susan P. Koniak & George M. Cohen, *Under the Cloak of Settlement*, 82 VA. L. REV. 1051, 1053–54 (1996).

24. Coffee, *Bounty Hunter*, *supra* note 21, at 228.

25. See Posner, *supra* note 16, at 9–10 (“[I]f the U.S. Department of Justice brings an antitrust suit, the state attorneys general may be able to take a free ride on the Department’s investment in the litigation, by bringing parallel suits that are then consolidated with the Justice Department’s suit.”).

26. See Clopton, *supra* note 8, at 287 (“Permitting the state to sue separately could allow state governments to file lawsuits duplicating private class actions, extorting damages from defendants while free-riding on the efforts of private attorneys.”); Seth Davis, *Implied Public*

to pursue an action against the same target arising from the same misconduct on behalf of state residents who may have also been class members.<sup>27</sup> AGs have also been criticized for piggybacking on federal enforcement actions, essentially free riding on the investment of federal enforcers.<sup>28</sup>

However, with the rise in prominence of the AG, new conversations are emerging about the role AGs play in a multienforcer system.<sup>29</sup> Instead of being cast solely in a piggybacking role, AGs are being lauded for their leading role in remedying lackluster federal enforcement and advancing political positions.<sup>30</sup> AG *parens patriae* actions have also been championed

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*Rights of Action*, 114 COLUM. L. REV. 1, 45 (2014) (stating that *parens patriae* actions are “particularly likely to present many of the same problems as private class action enforcement”); Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 362 (1999); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 499–500 (2012) [hereinafter Lemos, *Aggregate Litigation*]; William H. Pryor, Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1899 (2000); Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND RESOURCES & ENVTL. L. 273, 300 (2007); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 512 (1995) (“The *parens patriae* label . . . often merely dresses up actions that private parties could easily bring.”); Elysa M. Dishman, *Class Action Squared: Multistate Actions and Agency Dilemmas* (J. Reuben Clark Law Sch., Brigham Young Univ., Research Paper No. 18-21, 2018), <https://ssrn.com/abstract=3252149>.

27. See Transcript of Oral Argument at 18, *Miss. ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014) (No. 12-1036) (“[W]hat prevents attorneys general from around the country sitting back and waiting until . . . the plaintiffs’ class prevails, taking the same complaint, maybe even hiring the same lawyers, to go and say, well, now we are going to bring our *parens patriae* action. We know how the trial is going to work out or we know what the settlement is going to look like, and we are going to get the same amount of money for the State?”); Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 532–33 (2016) [hereinafter Lemos, *Privatizing Public Litigation*].

28. See Posner, *supra* note 16, at 9–10.

29. See PAUL NOLETTE, *FEDERALISM ON TRIAL* 21–22 (2015); Margaret H. Lemos & Ernst Young, *State Public Law Litigation in an Age of Polarization*, 87 TEX. L. REV. 43, 45 (2018); Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 PUBLIUS: J. FEDERALISM 469, 470 (2018); see also Rachel M. Cohen, *The Hour of the Attorneys General*, AM. PROSPECT (Mar. 22, 2017), <https://prospect.org/article/hour-attorneys-general>.

30. See Totten, *The Enforcers*, *supra* note 10, at 1611–13, 1657; Mark Totten, *The Rise of State Attorneys General a Boon to Democracy*, THE HILL (July 6, 2017, 1:00 PM), <https://thehill.com/blogs/pundits-blog/state-local-politics/340841-the-rise-of-the-state-attorney-generals-is-boon-to>.



to fill an enforcement void caused by the decline of the oft-criticized private class action.<sup>31</sup>

The emerging role of the AG and the rise of multistate actions has changed the enforcement landscape. But the phenomenon has garnered little scholarly attention.<sup>32</sup> While there is a growing literature comparing private and public law enforcement, this scholarship focuses on how private and public enforcers are substitutes for one another, rather than considering how they interact together and duplicate enforcement actions.<sup>33</sup> These scholarly conversations treat broad categories of enforcers as static substitutes for one another, rather than dynamic players in an integrated and changing enforcement environment. When scholars have considered interactions between federal, state, and private enforcers in a multienforcer system, they consider these enforcers generally along the same public and private distinction.<sup>34</sup> Few scholars have considered horizontal enforcement relationships, such as relationships among federal agencies or states, and their effect on overall enforcement levels.<sup>35</sup> And to date, no scholar has comprehensively considered the relationships among the states as enforcers in a multienforcer system, particularly in the context of multistate actions. This Article fills that gap by analyzing the relationships among AGs in multistate actions and how multistate actions interact with other enforcement actions to affect the overall level of enforcement. This Article argues that the same type of

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31. See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 660 (2012) (“In our view, state attorneys general—alone among public enforcers—have the ability to fill the void left by class actions, primarily through expanded use of the *parens patriae* powers that are currently on the books in most states.”).

32. See Colin Provost, *An Integrated Model of U.S. State Attorney General Behavior in Multi-State Litigation*, 10 ST. POL. & POL’Y Q., 1, 2 (2010) [hereinafter Provost, *An Integrated Model*] (“Multi-state litigation deserves scholarly attention because its dynamics are . . . poorly understood, yet the key players involved believe . . . it has had profound effects on regulatory governance.”); Totten, *The Enforcers*, *supra* note 10, at 1664 (“[T]he role of multistate and multigovernment actions remains understudied.”).

33. See Clopton, *supra* note 8, at 291 (“[T]he enforcement literature often ignores redundant public-private enforcement.”).

34. See Coffee, *Bounty Hunter*, *supra* note 21, at 215; Rose, *Multienforcer Approach*, *supra* note 7, at 2200.

35. See Allen Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 549 (2008); Lemos, *Aggregate Litigation*, *supra* note 26, at 524–25; Max Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2113, 2173 (2015).

dynamics that occur more broadly in the multienforcer system also occur among states in multistate actions.

Multistate actions allow multiple states to coordinate together and leverage their shared resources to mount national scale litigation.<sup>36</sup> Multistate actions may serve as an efficient mechanism to vacuum-fill for lackluster federal enforcement and hold corporations accountable when individual states may not be able to do so alone.<sup>37</sup>

However, the piggybacking that occurs in the broader multienforcer system also occurs in multistate actions. Multistate actions can pile on existing enforcement actions, dramatically increasing the penalties in a corporate enforcement action by virtue of expanding the number of enforcers. The organization of multistate actions also encourages piggybacking, allowing many states to free ride on the efforts of leading state AGs.<sup>38</sup> When states can participate in enforcement actions at little cost, but still reap large settlements, they may be incentivized to over-enforce. The potential for overenforcement may be compounded when federal enforcers and class action lawyers are attracted to the same types of targets as multistate enforcers – namely, large corporations that operate nationally and can pay settlements. When all enforcers and their resources are concentrated on a certain type of target, the potential for overenforcement increases dramatically.

At the same time, however, it is hard to feel too sympathetic to large corporations engaged in misconduct like Deutsche Bank. But nevertheless, there are problems with over-enforcing against large corporations. First, it is unfair to punish a corporate defendant beyond what is necessary to rectify the harm created and deter future misconduct. But it isn't just unfair to the corporate entity. Often, the real people who bear the burden of enforcement penalties are shareholders, employees, and other stakeholders.<sup>39</sup>

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36. See Totten, *The Enforcers*, *supra* note 10, at 1662–63.

37. See *id.*

38. See NOLETTE, *supra* note 29, at 26–27 (“Many states participate in multistate litigation, but only a few states typically take a leading role in these efforts.”).

39. See *Rosenstein Remarks*, *supra* note 9. Judge Rakoff, concerned that a settlement would solely harm the shareholders of a large corporation, opined that enforcement penalties that are paid by the corporation are not paid by the culpable party, but rather paid by the shareholders, which is “half-baked justice at best.” *Sec. Exch. Comm’n v. Bank of Am. Corp.*, Nos. 09 Civ. 6829(JSR), 10 Civ. 0215(JSR), 2010 WL 624581, at \*5 (S.D.N.Y. Feb. 22, 2010).

Second, it is inefficient. Overenforcement decreases beneficial risk-taking and prompts overinvestment in internal corporate monitoring.<sup>40</sup> It ties up resources and capital in excessive settlements that are not socially beneficial.<sup>41</sup> It also can significantly delay resolution of investigations as companies reasonably postpone resolution while they assess the universe of their potential exposure.<sup>42</sup>

But the tendency to over-enforce is not the only problem. Ironically, state enforcement piggybacking simultaneously creates the potential for both overenforcement and underenforcement. When all enforcers focus their resources and efforts on large corporate targets, it deprives enforcement resources from other targets that may cause more localized harm but lack the deep-pockets to pay large fines or create splashy headlines.<sup>43</sup> When AGs focus their time and resources on targets that have already drawn the attention of federal or private enforcers, it reduces the ability of the multienforcer system to reach a broader range of cases and provide the social benefits of wider compensation and deterrence.

This paper has three parts. Part I discusses the multienforcer model and how multiple enforcers exercise overlapping enforcement authority. Part II discusses the dynamics that occur among states in multistate actions and how multistate actions affect levels of enforcement. Part III discusses potential solutions to calibrate the multienforcer system, including multistate actions, to yield more optimal levels of enforcement.

## I. THE MULTIENFORCER SYSTEM

The United States deploys multiple enforcers to pursue violations of myriad federal and state laws.<sup>44</sup> Overlapping authority to enforce federal and state laws can vest in multiple

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40. See Rose, *Multienforcer Approach*, *supra* note 7, at 2184–88; see generally Pincus, *supra* note 12.

41. See Pincus, *supra* note 12, at 12–14; see also *The Criminalisation of American Business*, *supra* note 14.

42. See *Rosenstein Remarks*, *supra* note 9.

43. See Colin Provost, *When Is AG Short for Aspiring Governor?: Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 *PUBLIUS: J. FEDERALISM* 597 (2009) [hereinafter Provost, *Aspiring Governor*].

44. See Rose, *Multienforcer Approach*, *supra* note 7, at 2174 (“The United States employs a mishmash of enforcers to deter fraud in its national securities markets.”).

public and private enforcers.<sup>45</sup> This means that, in certain instances, federal agencies, AGs, and private litigants can all pursue the same target based on the same underlying sets of facts.<sup>46</sup>

### A. Meet the Enforcers

Within the broad categories of public and private enforcement, there are numerous federal agencies, state attorneys general, state regulators, and private litigants and their lawyers.<sup>47</sup> Public enforcers are government enforcers, such as federal agencies and AGs. Public enforcers are charged with promoting the public interest.<sup>48</sup> In contrast, private enforcers are privately-funded attorneys who pursue causes of action to vindicate their clients' rights and seek damages on their behalf.<sup>49</sup> Private enforcers are often entrepreneurial lawyers bringing private causes of actions in aggregate litigation, such as class actions.<sup>50</sup>

#### 1. Federal enforcers: The expert enforcers

The typical federal enforcer is a specialized federal agency headed by a political appointee.<sup>51</sup> Federal agencies are overseen by the President and Congress.<sup>52</sup> The President has the power to appoint most heads of agencies and can remove them at will.<sup>53</sup> Congress oversees federal agencies by appropriating funds for agency budgets, legislating agency responsibilities, and supervising agencies through congressional oversight committees.<sup>54</sup> Presidential and Congressional supervision injects politics into federal enforcement, with political pressures

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45. See *id.* at 2200-03; see also Clopton, *supra* note 8, at 296-99.

46. See Rose, *Multienforcer Approach*, *supra* note 7, at 2200-03.

47. See Lemos, *Privatizing Public Litigation*, *supra* note 27, at 524-27.

48. See *id.* at 521.

49. See *id.*

50. See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882-83 (1987) (hereinafter, Coffee, *Entrepreneurial Litigation*).

51. See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 721 (2016) [hereinafter, Lemos, *State Enforcement of Federal Law*].

52. See *id.* at 717.

53. See Rachel Brakow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16 (2010).

54. See Lemos, *State Enforcement of Federal Law*, *supra* note 51, at 717.

dictating whether political overseers demand more or less agency enforcement.

Federal statutes provide civil enforcement authority to federal agencies with subject-matter expertise in particular areas.<sup>55</sup> Many federal agencies have an enforcement arm tasked with enforcing federal law within the agency's area of regulatory expertise.<sup>56</sup> However, far from being completely siloed, many different federal agencies have overlapping enforcement authority.<sup>57</sup> For example, there is significant overlap between the enforcement authority of the SEC and the Commodities Futures Trading Commission (CFTC).<sup>58</sup> There is also overlap between civil and criminal enforcement, with one or more specialist federal agencies enforcing civil infractions and the DOJ enforcing the criminal violations.<sup>59</sup> Similarly, in securities cases, the SEC and DOJ may simultaneously bring civil and criminal enforcement actions.<sup>60</sup> This means, as a practical matter, that multiple federal agencies may bring actions not just against the same corporation but also arising from the same corporation's misconduct.<sup>61</sup>

The expertise of federal enforcers makes them unique among enforcers. Federal enforcers are generally lawyers who are embedded in a federal agency with other non-lawyer experts. Federal agencies have considerable interaction with regulated entities, which provides them expertise about the industries they regulate.<sup>62</sup> Agencies also have rulemaking power that can inform their enforcement actions and allow them to take a more holistic approach to regulation and enforcement.<sup>63</sup> Agencies can respond to misconduct with their rulemaking power, by bringing enforcement actions, or both.

Federal enforcers' expertise makes them well suited to consider national interests in enforcement, including the effects of their enforcement actions on the national economy and financial

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55. *See id.*

56. *See* Minzner, *supra* note 35, at 2114-15.

57. *See id.* at 2144 ("Misconduct by a defendant does not necessarily stay neatly within the lines draw[n] by statute.").

58. *See id.* at 2117, 2173.

59. *See id.* at 2115.

60. *See id.* at 2144.

61. *Id.*

62. *See id.* at 2157; Rose, *Contextual Approach*, *supra* note 10, at 1354.

63. *See* Minzner, *supra* note 35, at 2150.

markets. They often focus their enforcement efforts on actions that have national scope and are charged with serving the national interest.<sup>64</sup> While private and state enforcers have incentives to impose externalities outside their private or state interests, federal enforcers are supposed to internalize the national costs and benefits of their enforcement decisions.<sup>65</sup>

A justification for a concurrent enforcement system is that it expands the pool of enforcement resources by adding private and state enforcement resources. Federal agencies have resource constraints that require agencies to make decisions about which actions to pursue. Inviting private enforcers to enforce federal law shifts enforcement costs from the general public to private parties who self-finance enforcement actions. Expanding enforcement resources is also a justification for delegating enforcement authority of federal laws to AGs. When multiple AGs' offices, in addition to the federal agency, have the authority to enforce federal law, enforcement resources are greatly expanded by increasing the number of enforcers. AGs can also act as a check on federal underenforcement if they can also enforce federal laws.

A major critique of federal enforcement is that federal agencies are particularly vulnerable to capture by the entities they regulate.<sup>66</sup> Capture occurs when agencies become controlled by regulated entities to the detriment of the public.<sup>67</sup> Regulated entities are highly-organized and well-financed, especially compared to the general public and public interest groups.<sup>68</sup> Because regulated entities have considerable exposure to enforcement, they are highly incentivized to closely monitor agency decisions and seek to

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64. See Lemos, *State Enforcement of Federal Law*, *supra* note 51, at 701.

65. See Rose, *Multienforcer Approach*, *supra* note 7, at 2206.

66. Capture may be defined as responsiveness to the desires of the industry or groups being regulated. See Roger G. Noll, REFORMING REGULATION 99-100 (1971) (explaining that capture happens most often when an agency assigns undue weight to the interests of the regulated industries as against those of the public); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713 (1975) ("It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of . . . [those] interests." (footnotes omitted)).

67. See Minzner, *supra* note 35, at 2137 (explaining agency capture as a principal-agent problem).

68. See Brakow, *supra* note 53, at 22.

exercise influence over agency actions.<sup>69</sup> Regulated entities also have the resources to challenge agency decisions and enforcement actions. Agencies know they will have to invest considerable resources in enforcement against these types of targets and may underenforce when presented with more challenging and resource-intensive actions.<sup>70</sup>

Agency capture is further exacerbated by the political oversight of federal agencies. Industry groups are well-positioned to make political campaign contributions and to lobby, which in turn gives them influence with the agency's overseers on the relevant oversight committees. For example, agencies may find themselves threatened with budget cuts for enforcement deemed too aggressive by their congressional overseers.<sup>71</sup>

The "revolving door phenomenon" also contributes to capture when federal enforcers move from being agency employees to positions in the private sector and back again. Federal enforcers are salaried government employees and are not directly compensated based on the outcome of individual cases.<sup>72</sup> This helps them make decisions outside of purely financial motivations.<sup>73</sup> But federal enforcers are also enticed into the private sector where there are more lucrative opportunities. Federal agency heads and attorneys often follow a career path that leads them to the private sector after a brief stint in government.<sup>74</sup> Strong incentives exist to sell out the agency to curry favor with private sector attorneys.<sup>75</sup> Such attorneys tend to avoid difficult or complicated cases, focusing instead on developing trial experience or a winning record.<sup>76</sup>

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69. See Minzner, *supra* note 35, at 2137.

70. See Brakow, *supra* note 53, at 22 ("All else being equal, agencies would prefer not be mired in legal challenges, so they may seek to work with, rather than against these organized interests.").

71. For example, Arthur Levitt, the Chair of the SEC from 1993–2001 describes the SEC during his tenure as being constantly threatened with budget cuts by the SEC's congressional overseers if it pursued aggressive regulations. See Arthur Levitt with Paula Dwyer, TAKE ON THE STREET 132–33 (2002).

72. See Margaret H. Lemos & Max Minzner, *For Profit Public Enforcement*, 127 HARV. L. REV. 853, 863 (2014).

73. *But see generally id.* (arguing that federal agencies, like all enforcers, have financial motives in enforcement).

74. See Brakow, *supra* note 53, at 23.

75. See *id.*

76. See Lemos & Minzner, *supra* note 72, at 859.

Public attention and current events play an important role in the impact of agency capture. The impact of capture is greater when the public is not paying attention to an agency's enforcement. When the public is not paying attention, federal enforcement agencies face substantial pressure from regulated entities "to undercharge, undersettle, and undercollect in enforcement actions."<sup>77</sup> Further compounding the problem, courts provide agencies considerable deference regarding their enforcement decisions, making it even more difficult to challenge enforcement agency capture.<sup>78</sup>

But in times of high public scrutiny following major corporate fraud, agencies are very concerned about their reputation to be aggressive enforcers.<sup>79</sup> Specialized agencies face political pressure in the wake of problems that drives an overreaction to enforcement failures.<sup>80</sup> When multiple agencies feel the same pressure from current events, the pendulum can swing too far in the other direction and multiple agencies may all target the same corporations for the same misconduct.

## 2. State attorneys general: The elected enforcers

In contrast, AGs are generalist enforcers, most of whom are directly elected by their state citizenry.<sup>81</sup> AGs are the state's "chief legal officer," controlling litigation on behalf of the state and engaging in public advocacy by bringing civil enforcement actions.<sup>82</sup> The AG has "wide discretion in making the determination as to the public interest[,] " including in bringing enforcement

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77. Minzner, *supra* note 35, at 2139.

78. *See id.* at 2120-21.

79. *See id.* at 2141 ("Specialized agencies care about appearing aggressive, but only when the public is focused on enforcement.").

80. *See id.*

81. Forty-three of the nation's attorneys general are elected statewide separately from the governor or other state institutions. State AGs are appointed in the other seven states: Alaska, Hawaii, Maine, New Hampshire, New Jersey, Tennessee, and Wyoming. In Maine, the attorney general is selected by the state legislature and, in Tennessee, by the state supreme court. In the other five states, Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming, the attorney general is appointed by the governor. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *YALE L.J.* 2446, 2448 n.3 (2006).

82. *See* Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 *COLUM. L. REV.* 1998, 2002 (2001).



actions against corporations.<sup>83</sup> While federal enforcers are generally specialized agencies, AGs are generalist enforcers. They have broad jurisdiction and expansive authority that not only provides the discretion to set their enforcement agendas but also the ability to pursue far-reaching policy initiatives through their enforcement efforts.<sup>84</sup> However, each AG possessing such discretion creates the potential for more than fifty different approaches to the exercise of enforcement discretion and the “balkanization” of regulation.<sup>85</sup>

Like federal enforcers, AGs and their staffs are not directly compensated by the outcomes in particular cases and are salaried public servants.<sup>86</sup> However, in contrast to federal enforcers, AGs tend to have smaller staffs and face more significant budget constraints than their federal counterparts.<sup>87</sup> At the same time, AGs are generalists, with enforcement agendas that span myriad issues.<sup>88</sup> Their resources are often pulled over many enforcement priorities and they must carefully ration their scarce enforcement resources.

AGs have traditionally enforced state law and they have a comparative advantage in state law enforcement. They are directly elected by their state constituents, providing them a strong incentive to serve their constituents’ interests. They are also more likely to respond to local concerns and interests that may be neglected by a federal enforcer.<sup>89</sup> Their local presence provides them a better understanding of state issues and greater proximity to local information.<sup>90</sup>

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83. Florida *ex rel.* Shevin, 526 F.2d 266, 268–69 (5th Cir. 1976); *see also* Fenney v. Commonwealth, 366 N.E.2d 1262, 1266–67 (Mass. 1977) (holding the AG possesses ultimate authority over litigation); Lynch, *supra* note 82, at 2003.

84. *See* Lemos, *State Enforcement of Federal Law*, *supra* note 51 at 724.

85. *See id.* at 719; Rose, *Contextual Approach*, *supra* note 10, at 1368.

86. But both federal enforcers and AG offices may benefit from “revolving funds” that allow these enforcers to keep a portion of enforcement penalties to fund their offices. *See* Lemos & Minzner, *supra* note 72, at 861–62, 864.

87. *See* Lemos & Minzner, *supra* note 72, at 859.

88. *See* Lemos, *State Enforcement of Federal Law*, *supra* note 51, at 717 (“State enforcement also empowers a different set of agents—elected, generalist attorneys general.”).

89. *Id.* at 721.

90. *See* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 679–80 (2003).

However, in addition to enforcing state law, AGs are also increasingly enforcing federal law.<sup>91</sup> State enforcement of federal law allows AGs to vacuum-fill or hedge against lackluster federal enforcement “due to capture, bureaucratic pathologies, political influence, or resource limitations.”<sup>92</sup> AGs are less likely to be a target for industry capture or experience revolving door problems with their enforcement attorneys.<sup>93</sup> That being said, as AGs rise in prominence as national enforcers, they are becoming more attractive to lobbyists, which may make the office more vulnerable to capture in the future.<sup>94</sup>

Elections may also motivate AGs to make enforcement decisions based on their future political ambitions, rather than the public good.<sup>95</sup> For example, an AG may be tempted to favor enforcement actions that promise quick settlements and draw splashy headlines,<sup>96</sup> or may become beholden to lobbyists who help fund future campaigns.<sup>97</sup>

State election of AGs may also create enforcement externalities on other states when AGs enforce their state laws in such a way as to impose costs on other states to which they are not democratically accountable.<sup>98</sup> If a state can bring an enforcement action and impose large penalties against an out-of-state defendant at little cost to itself, it is in the state’s interest to do so, even if it imposes externalities on other states or on the rest of the country in the shape of overdeterrence costs.<sup>99</sup>

### 3. *Private enforcers: The economic enforcers*

Public and private enforcers are typically distinguished by their financial incentives. Private enforcement is driven by profit, while public enforcement is not. Private enforcement focuses on

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91. See Lemos, *State Enforcement of Federal Law*, *supra* note 51, at 702–03.

92. *Id.*

93. See Rose, *Contextual Approach*, *supra* note 10, at 1354.

94. See Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 29, 2014), <https://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html>.

95. See Provost, *Aspiring Governor*, *supra* note 43, at 604.

96. See Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1924 (2015).

97. See Lipton, *supra* note 94.

98. See Rose, *Contextual Approach*, *supra* note 10, at 1347.

99. See *id.* at 1371.

vindicating private rights and is primarily financially motivated.<sup>100</sup> Private enforcement relies on the private attorneys motivated by fees to bring private causes of actions to enforce the law.<sup>101</sup> While private enforcers stand to directly financially benefit from successful enforcement actions, public enforcers do not. These profit incentives create an active system of private enforcement that supplements public enforcement by federal and state enforcers.<sup>102</sup>

Private enforcement's comparative advantage is that it is economical and focuses on compensating injuries and vindicating private rights. It is economical in the sense that private enforcement only occurs if the benefits of financial recovery outweigh the cost of enforcement. Private enforcement is also efficient because it pushes some of the expense of enforcement to private parties instead of taxpayers who fund public enforcement.<sup>103</sup> Privatizing enforcement can more efficiently provide compensation to injured parties because those who are primarily benefiting from the enforcement action are also financing it. Private enforcement may also produce a socially beneficial deterrent byproduct. When corporations are required to pay damages, they internalize the costs of their misconduct and may be deterred in the future. Furthermore, because private enforcers are a diverse and disorganized group, they are not vulnerable to capture, unlike their public enforcement counterparts.<sup>104</sup>

However, the singular focus on advancing private interests means that private enforcement ignores the costs and benefits to others.<sup>105</sup> The calculus of private enforcers is that, as long their

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100. See Lemos, *Privatizing Public Litigation*, *supra* note 27, at 521.

101. See John C. Coffee Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 245 (2007).

102. See *id.* at 246 ("In the United States, public enforcement of law is supplemented by a vigorous, arguably even hyperactive, system of private enforcement. Relying on class actions and an entrepreneurial plaintiffs' bar motivated by contingent fees, the US system of private 'enforcement by bounty hunter' appears in fact to exact greater annual aggregate sanctions than do its public enforcers. This system has no true functional analogue anywhere else in the world.").

103. See Gilles & Friedman, *supra* note 31, at 626 ("One can imagine a world where public agencies assume primary (or even sole) responsibility for the detection, investigation, and litigation of public frauds . . . [b]ut . . . one would be imagining a very different world—one that provides orders of magnitude more resources to state and local enforcement agencies.").

104. See Lemos, *State Enforcement of Federal Law*, *supra* note 51, at 707.

105. See *id.* at 706.

expected private benefit exceeds their expected costs, they will bring action.<sup>106</sup> This means that action will be brought even if liability is questionable or if the action creates social overdeterrence costs.<sup>107</sup> This outcome yields a system where private enforcement is not well calibrated to the amount of enforcement that is socially desirable.<sup>108</sup> When the potential financial recovery is high, private enforcement is prone to overenforcement. However, when the enforcement action will have a socially valuable deterrent effect but offers little financial reward to plaintiffs, private enforcement may lead to underenforcement.<sup>109</sup>

Private enforcement only relies on aggregate actions, like class actions, to provide compensation and deterrence when there are widespread injuries but low individual damages. Private class actions provide a mechanism to address this scenario where private action would otherwise be uneconomical. However, the incentives of class counsel can undermine the value of private enforcement. For example, when class counsel enters into “sweetheart settlements” that provide class counsel handsome fees and sell out class members with little or no recovery, it undermines the compensation and deterrence objectives of private enforcement.<sup>110</sup>

The strengths, weaknesses, and incentives of each broad type of enforcer are meant to counterbalance one another and ensure that each enforcer can use its comparative advantages in a socially beneficial manner. The multienforcer system is meant to remedy an underenforcement problem by inviting multiple enforcers to act in a world of scarce resources and spread these resources over broad and diverse enforcement actions.

### B. Overlapping Enforcement

Concurrent federal, state, and private enforcement is commonplace in the United States.<sup>111</sup> Many substantive areas of the

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106. See Rose, *Multienforcer Approach*, *supra* note 7 at 2201.

107. See *id.*

108. *Id.*

109. *Id.* at 706–07.

110. See John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 *IND. L.J.* 625, 633 (1986) (“At its simplest, the classic form of opportunism in class actions is the ‘sweetheart’ settlement, namely one in which the plaintiff’s attorney trades a high fee award for a low recovery.”).

111. See Rose, *Contextual Approach*, *supra* note 10, at 1351.

law provide multiple enforcers the ability to maintain separate but overlapping actions.<sup>112</sup> As a practical matter, this means that “state, federal[,] and private enforcement often punish the same conduct.”<sup>113</sup> This may include parallel criminal and civil enforcement actions from multiple federal agencies, individual state and/or multistate actions, and private class actions and derivative suits.<sup>114</sup> The overlap can occur with contemporaneous actions or sequential actions from multiple enforcers.<sup>115</sup> This overlap, rather than being a product of cooperation and predetermination, is “more the product of historical happenstance than coherent design choices.”<sup>116</sup>

Certain conditions allow enforcement overlap to occur. First, the law provides overlapping enforcement authority to multiple enforcers. Several areas of the law provide authority for multiple enforcers to act, such as securities, environmental, antitrust, and consumer protection enforcement.<sup>117</sup>

For example, the securities law enforcement regime provides authority to multiple enforcers to bring overlapping actions.<sup>118</sup> Federal securities laws provide enforcement authority to federal agencies such as the Securities and Exchange Commission (SEC).<sup>119</sup> These laws also allow for private rights of action that are enforced through private enforcers, such as securities class actions.<sup>120</sup> States

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112. See Clopton, *supra* note 8, at 292.

113. Minzner, *supra* note 35, at 2144.

114. See *Rosenstein Remarks*, *supra* note 9.

115. See Minzner, *supra* note 35, at 2142.

116. Rose, *Multienforcer Approach*, *supra* note 7, at 2175.

117. See Clopton, *supra* note 8, at 296-99; Rose, *Contextual Approach*, *supra* note 10, at 1345.

118. See Rose, *Multienforcer Approach*, *supra* note 7, at 2175 (“Thus, in addition to facing federal fraud liability at the hands of both the SEC and class action plaintiffs, participants in the U.S. national securities markets also face potential fraud liability at the hands of fifty state governments.”).

119. *Id.*

120. See, e.g., 17 C.F.R. § 240.10b-5 (2009) (prohibiting inter alia, the making of an “untrue statement of material fact” when buying or selling securities); see also Rose, *Multienforcer Approach*, *supra* note 7, at 2174 (“Most controversially, it relies upon class action lawyers to supplement the SEC’s enforcement of Rule 10b-5, the primary antifraud provision in federal securities law.”). For a criticism of the claim that private enforcement supplements SEC enforcement, see Maria Correia & Michael Kluasner, *Are Securities Class Actions “Supplemental” to SEC Enforcement? An Empirical Analysis* (unpublished manuscript), [https://efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2013-Reading/papers/EFMA2013\\_0593\\_fullpaper.pdf](https://efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2013-Reading/papers/EFMA2013_0593_fullpaper.pdf).

also have the authority to enforce their own state securities laws.<sup>121</sup> For example, the New York Attorney General has used the state's securities fraud statute, the Martin Act, to bring a series of enforcement actions against large financial institutions.<sup>122</sup>

Another example of overlapping enforcement authority is in the area of consumer protection law. Federal agencies, such as the Consumer Protection Financial Bureau (CPFB), have the authority to enforce federal law.<sup>123</sup> Federal law also delegates authority to AGs to enforce consumer protection law.<sup>124</sup> States also have state consumer protection laws, known as unfair and deceptive acts and practices (UDAP) laws.<sup>125</sup> And private enforcers also bring class actions based on consumer protection theories.<sup>126</sup>

Second, overlap is created by enforcer discretion, or the considerable independence and choice that enforcers have in choosing their enforcement agenda and pursuing enforcement actions.<sup>127</sup> Both federal and state enforcers have tremendous discretion to choose which actions to bring against which target and what type of settlement or sanctions to pursue.<sup>128</sup> Private attorneys also have the ability to choose their cases.<sup>129</sup> Furthermore, private attorneys acting as class counsel also have considerable leeway

121. See National Markets Improvement Act of 1996 (NSMIA), 15 U.S.C. § 77r(c)(1) (2012) (preserving state's antifraud securities statutes from preemption).

122. See, e.g., N.Y. Gen. Bus. Law §§ 352 to 359-h (McKinney 2015) ("Martin Act") (providing New York State Attorney General authority to enforce state securities laws). For a discussion on how the New York State Attorney General has enforced the Martin Act, see Jeff Izant, Note, *Mens Rea and the Martin Act, A Weapon of Choice Among Securities Regulators?*, 2012 COLUM. L. REV. 913 (2012).

123. See Minzner, *supra* note 35, at 2117.

124. See Dodd-Frank Act § 1036(a)(1)(B), 12 U.S.C. § 5536 (2012) (authorizing state parens patriae enforcement of federal financial consumer protection law); Lemos, *State Enforcement of Federal Law*, *supra* note 51, at 700–01, 708–09; Amy Widman & Prentiss Cox, *State Attorneys General Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 53 (2011).

125. See Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 38 (2018).

126. See Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1 (2000).

127. See Lemos, *Privatizing Public Litigation*, *supra* note 27, at 524 (explaining that government and private litigation vests litigants with significant discretion); Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 MINN. L. REV. 2313, 2316 (2016).

128. *Id.*

129. Lawyers generally have the professional right to choose their cases. See MODEL RULES OF PROF'L CONDUCT r. 1.16 (2018).

directing class actions and negotiating the settlement on behalf of class members.<sup>130</sup>

Third, enforcers have incentives to pursue overlapping actions. Most predictably, private enforcers are incentivized to pursue actions that produce large settlements and attorneys' fees. Incentives with respect to public enforcers, however, can be more difficult to identify. Federal enforcers may pursue cases that are within their agency's expertise and raise issues of national scope. They may have financial motivations when they pursue particular actions because large settlements provide reputational benefits for the agency, or the agency may be able to keep a portion of the penalties from its enforcement actions.<sup>131</sup> AGs may be motivated to prioritize local issues that are important to their voters or step in when federal enforcers have failed to act. AGs may also seek high-profile targets and large settlements for the publicity that may help them in future campaigns.<sup>132</sup>

Because public and private enforcers have different incentives, it stands to reason that they will use their discretion to pursue different types of actions.<sup>133</sup> However, it may be that all enforcers are often incentivized to pursue the same type of action. Overlap occurs when all enforcers are attracted to the same type of cases. These cases are often high-profile actions against major national and multinational corporations. Actions against large corporate defendants have the prospects of high financial settlements and attract all types of enforcers. For example, private enforcers interested in attorneys' fees, federal enforcers focused on enforcement reputation, and AGs planning to campaign on a "tough on fraud" campaign platform.

But the financial incentives may not be enough to explain why public enforcers may be attracted to actions against major corporations. Actions against corporate targets may also be of particular national importance because of their role in interstate commerce and their potentially complex nature that may call for

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130. The considerable discretion vested in class counsel, combined with little oversight from class members, is central to the agency cost critique of class actions. See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Dishman, *supra* note 26.

131. See Lemos & Minzner, *supra* note 72, at 856-57, 863.

132. See Lemos, *Aggregate Litigation*, *supra* note 26, at 498.

133. See Lemos, *Privatizing Public Litigation*, *supra* note 27, at 524.

the expertise of a federal enforcer. AGs may also be attracted to the same type of enforcement target because their state residents were particularly affected by the misconduct or because federal enforcers have failed to bring action.<sup>134</sup>

While it may be necessary in some instances to have overlapping actions, more often in the context of major corporate fraud, there is a danger of over-enforcing these types of actions at the expense of pursuing other actions. The overenforcement in this category of actions means that, with scarce enforcement resources, other types of actions will go under-enforced, such as small-scale fraudsters, Ponzi schemes, and other less splashy but important enforcement areas. This leaves victims of these types of frauds uncompensated and fails to deter certain types of misconduct that are also deserving of enforcement resources. This means that it is possible to over-enforce certain types of actions or certain types of targets but under-enforce other types of cases against different targets.

When there is overenforcement in the multienforcer system, it is difficult to calibrate the multienforcer system to reduce levels of enforcement. If an enforcer has the legal authority, discretion, and all the incentives to proceed, arguments about unfairness to corporations (whose misconduct may not make them particularly sympathetic) may not be enough to encourage enforcers to exercise restraint. Furthermore, enforcement tends to have a “ratchet up” effect where enforcers that advocate for less enforcement are easily trumped by other enforcers pursuing actions.<sup>135</sup> These dynamics make it difficult to change the current system to approach more optimal levels of enforcement. “The hard question for system designers is how to achieve an optimal mix of public and private litigation so as to leverage the strengths, and compensate for the weaknesses, of each model.”<sup>136</sup>

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134. See Totten, *The Enforcers*, *supra* note 10, at 1615, 1652–53 (arguing that AGs took the lead on enforcement during and the wake of the financial crisis when federal enforcers failed to do so).

135. See Rose, *Multienforcer Approach*, *supra* note 7, at 2205.

136. Lemos, *Privatizing Public Litigation*, *supra* note 27, at 528.



*C. Piggybacking in a Multienforcer System*

The potential for overlap in a multienforcer system makes it prone to piggybacking among enforcers.<sup>137</sup> Piggybacking has generally been considered to be negative, with enforcers free riding on the efforts of other enforcers without adding any additional value by duplicating their efforts.<sup>138</sup> Piggybacking can be problematic when it creates overenforcement problems, facilitating excessive duplicative enforcement actions.

There is a fair amount of finger-pointing when it comes to enforcement piggybacking. The most common target of such finger-pointing tends to be private enforcers.<sup>139</sup> Private enforcers have been accused of riding on the coattails of public enforcers that have invested considerable resources in investigation and litigation.<sup>140</sup> Private enforcers are particularly incentivized to piggyback because they are financially motivated and seek to leverage the smallest investment of resources for the greatest recoveries or attorneys' fees.

But private enforcers are not the only ones accused of piggybacking. State enforcement actions brought by AGs have also been criticized for duplicating private class action litigation.<sup>141</sup> In particular AGs have the authority to bring *parens patriae* actions that closely resemble private class actions.<sup>142</sup> In fact, AGs can bring *parens patriae* actions against the same corporation as a class action and even hire the same class counsel to pursue the action on behalf of the state and its residents.<sup>143</sup>

AGs have also been criticized for piggybacking on federal enforcement actions, particularly in the areas of antitrust and

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137. See James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CAL. L. REV. 115, 120 (2012) (describing the problem of overenforcement); Rose, *Contextual Approach*, *supra* note 10, at 1354 (arguing that multiple enforcers incentivize some enforcers to free ride on the work of others).

138. See Rubenstein, *supra* note 22, at 2151.

139. See Coffee, *Bounty Hunter*, *supra* note 21, at 221-25. (describing private litigants as free-riders when they piggyback on public enforcers to reap the gain from their investigative work).

140. See *id.* at 234.

141. See Posner, *supra* note 16, at 9-10.

142. See *supra* note 26.

143. See Lemos, *Privatizing Public Litigation*, *supra* note 27, at 582; Pryor, *supra* note 26; Dishman, *supra* note 26.

securities enforcement.<sup>144</sup> In the context of securities enforcement, rational states may do little to enforce securities fraud against public corporations, and instead piggyback on federal securities enforcement.<sup>145</sup> AGs may be incentivized to piggyback on federal and private enforcers because their offices have limited budgets and, like private enforcers, they want to leverage the least amount of enforcement resources for the greatest possible settlement to benefit their states, or their own political benefit.<sup>146</sup>

Although less common, federal enforcers can also piggyback on AG actions and on private enforcement actions. Federal enforcers may piggyback because they may have come late to certain enforcement actions due to agency capture, bureaucratic sluggishness, or other political impediments.<sup>147</sup>

Piggybacking, however, can be characterized in a more flattering light. It creates efficiencies by not duplicating enforcement efforts, thus requiring fewer enforcement resources to accomplish enforcement objectives. To the extent that multiple actions are necessary to compensate and deter, piggybacking can be a way to pool and leverage enforcement resources. But, of course, the problem with piggybacking can lie in incentives. Piggybacking disincentivizes any enforcers from investing resources in enforcement actions if they know that others can duplicate their efforts without investing the same resources.<sup>148</sup> This piggybacking ironically leads to underenforcement because no enforcer may be incentivized to invest resources in any investigation or enforcement actions.<sup>149</sup>

Piggybacking actions are collateral consequences that affect how corporations respond to enforcement actions and in particular, the decisions to settle.<sup>150</sup> Corporate enforcement targets will always consider enforcement holistically, considering the aggregate

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144. See Posner, *Federalism and Antitrust*, *supra* note 16, at 9–10.

145. See Rose, *Contextual Approach*, *supra* note 10, at 1387 (showing empirical support for the proposition that states free ride on federal enforcers and other states in securities enforcement against public companies).

146. See Lemos, *Aggregate Litigation*, *supra* note 26, at 524–25 (discussing the impact of resource constraints in AG offices); Posner, *Federalism and Antitrust*, *supra* note 16, at 9 (stating attorneys general offices are chronically underfunded).

147. See Totten, *The Enforcers*, *supra* note 10, at 1664.

148. Rose, *Contextual Approach*, *supra* note 10, at 1369.

149. *Id.*

150. See Minzner, *supra* note 35, at 2146.

consequences of the current action and any potential piggybacking actions.<sup>151</sup> But enforcers can only control the direct consequences of their own enforcement actions. It is common that the future collateral consequences, especially from private actions, will be far greater than the immediate penalty.<sup>152</sup> As a result, corporate targets will litigate more intensely or refuse to settle out of concern about the consequences of piggybacking actions. This makes enforcement more expensive and drag out longer. The concern for the collateral consequences from piggybacking actions has led to public enforcers, such as the SEC, to enter into settlements that do not require the defendant to admit or deny liability.<sup>153</sup> “No admit or deny” settlements deprive piggybacking private enforcers from relying on admissions to establish liability in subsequent private actions.<sup>154</sup> But such settlements come at the cost of the public’s right to know the truth.<sup>155</sup>

Enforcement piggybacking has been criticized for creating overenforcement. This criticism has focused on piggybacking between public and private enforcers,<sup>156</sup> and federal and state enforcers.<sup>157</sup> But states also piggyback on one another in enforcement actions. State enforcement piggybacking has similar consequences as other types of enforcement piggybacking, including the potential for overenforcement.

## II. STATE ENFORCEMENT PIGGYBACKING

Multistate actions by AGs are an increasing enforcement trend. Targets of multistate actions are often major national and multinational corporations. Settlements in multistate actions can

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151. *See id.*

152. *See* Gilles & Friedman, *supra* note 31 at 157–58 & n.204 (“The SEC, FTC, and DOJ all know that the real financial wallop, in most instances, will come from the private class actions that follow their investigation.”).

153. *See generally* Samuel W. Buell, *Liability and Admissions of Wrong-Doing in Public Enforcement of the Law*, 82 U. CIN. L. REV. 505 (2013); Lynnndon Groff, *Is Too Big to Fail Too Big to Confess? Scrutinizing the SEC’s “No-Admit” Consent Judgment Proposals*, 54 B.C. L. REV. 1727 (2013); Verity Winship & Jennifer K. Robbennolt, *Admission of Guilt in Civil Enforcement*, 102 MINN. L. REV. 1077 (2018).

154. *See* SEC v. Citigroup Glob. Mkts., Inc., 827 F. Supp. 2d 328 (S.D.N.Y. Nov. 28, 2011) *vacated*, 752 F.3d 285 (2d Cir. 2014).

155. *See id.*

156. *See* Coffee, *Bounty Hunter*, *supra* note 21, at 215.

157. *See* Pryor, *supra* note 26, at 1901–03.

reach the multimillion, or even billion-dollar range.<sup>158</sup> The multistate action allows many states to piggyback on the investment of resources and leadership made by a few AGs. This piggybacking is similar to what happens more broadly in the multienforcer system. This means that multistate actions may also serve to exacerbate the problem of unfair and unnecessary duplicative litigation that occurs in a multienforcer system.

#### A. *The Rise of AGs and Multistate Actions*

The office of the AG has recently risen in prominence from a relatively unknown state actor to a national policymaker and feared enforcer.<sup>159</sup> Part of the rise in importance of the AG has been the concurrent rise of the multistate action. AGs may use their power to litigate to bring high-profile *parens patriae* actions against large corporations.<sup>160</sup> *Parens patriae* actions allow AGs to bring actions not only on behalf of the state but also on behalf of state residents for their “health and well-being—both physical and economic.”<sup>161</sup> AGs’ powers to bring actions on behalf of their residents has allowed them to bring actions against large corporations, closely resembling private class actions.<sup>162</sup> For example, AGs have brought mass product liability lawsuits with their *parens patriae* powers

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158. Paul Nolette, *State Attorneys General Are More and More Powerful. Is That a Problem?*, WASH. POST (Mar. 5, 2015), [https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/05/state-attorneys-general-are-more-and-more-powerful-is-that-a-problem/?utm\\_term=.f141b41e8f61](https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/05/state-attorneys-general-are-more-and-more-powerful-is-that-a-problem/?utm_term=.f141b41e8f61) (“AG-led lawsuits have become a crucial part of the American regulatory landscape, particularly since their resolution often involves millions (even billions) in fines and new regulatory requirements for the targeted industries.”).

159. See NOLETTE, *supra* note 29, at 1 (“Before a personal scandal that precipitated his dramatic fall, Eliot Spitzer was one of corporate America’s most feared regulators.”).

160. See Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1921–22 (2000) (“Because of the perceived successful settlement of state *parens patriae* tobacco cases, states have brought *parens patriae* suits against entire industries, including guns, lead paint, and more recently, health maintenance organizations . . . [T]here now exists a blueprint for states to consider filing class-like lawsuits for injuries to their citizens’ health and overall economic well-being.” (emphasis and footnotes omitted)).

161. Alfred L. Snapp & Sons, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982); see also Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1850–51 (2000).

162. See Brunet, *supra* note 160, at 1921–22; Lemos, *Aggregate Litigation*, *supra* note 26, at 494–95, 502; Dishman, *supra* note 26.

against manufacturers of tobacco products, lead paint, automobiles, and guns.<sup>163</sup>

While AGs have the authority to bring *parens patriae* actions alone, they are increasingly combining forces to bring multistate actions together.<sup>164</sup> Combining forces in multistate actions has allowed AGs to bring corporations to the negotiating table in a big way.<sup>165</sup> The multistate tobacco action triggered a proliferation of multistate actions that began the rise of the AG and multistate action.<sup>166</sup> During and in the wake of the Great Recession, there were a series of multistate actions brought against Wall Street banks,<sup>167</sup> rating agencies,<sup>168</sup> and mortgage servicers.<sup>169</sup> High-profile data breaches have also been the subject of multistate actions, resulting

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163. See Brunet, *supra* note 160, at 1921–22; Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 914–16 (2008).

164. See NOLETTE, *supra* note 29; Ann O'M. Bowman, *Horizontal Federalism: Exploring Interstate Interactions*, 14 J. PUB. ADMIN. RES. & THEORY 535, 541 (2004) (“This form of interstate cooperation appears to have become more popular over time, with the number of . . . lawsuits increasing during the decade.”); Lynch, *supra* note 82, at 2004 (“Over the past two decades, multistate litigation has grown to become a powerful and commonly used law enforcement tool.”).

165. See David J. Morrow, *Transporting Lawsuits Across State Borders*, N.Y. TIMES (Nov. 9, 1997), <https://www.nytimes.com/1995/11/26/business/spending-it-finding-the-value-behind-the-clutter.html> (“What we’ve found is that by coming together, the dynamics of the cases change . . . . When a corporation discovered it had to face 30 states, instead of one, it suddenly became much more serious about dealing with the issue.”).

166. The Master Settlement Agreement is the largest civil settlement in American history. The settlement occurred in 1998, with 46 states participating, and settled for over \$200 billion to be paid to the states over twenty-five years by the four largest U.S. tobacco companies. Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1859 (2000); see also Lynch, *supra* note 82, at 2006.

167. See generally, Totten, *The Enforcers*, *supra* note 10.

168. See, e.g., Office of Attorney Gen. George Jepsen, *Attorney General Jepsen Leads Multistate Coalition in \$1.375 Billion State-Federal Settlement with Standard & Poor's*, CT.GOV (Feb. 3, 2015), <https://portal.ct.gov/AG/Press-Releases-Archived/2015-Press-Releases/Attorney-General-Jepsen-Leads-Multistate-Coalition-in-1375-Billion-State-Federal-Settlement-with-Stan> [hereinafter *Conn. S&P Press Release*]; *California Attorney General's Office Announces \$150 Million Settlement with Financial Services Company Moody's for Inflating Mortgage-Backed Securities Ratings*, ST. CAL. DEP'T JUST. (Jan. 13, 2017), <https://oag.ca.gov/news/press-releases/california-attorney-generals-office-announces-150-million-settlement-financial>.

169. See, e.g., *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 JUST. (Feb. 9, 2012), <https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest> [hereinafter *DOJ National Mortgage Settlement Press Release*].

in settlements with Neiman Marcus,<sup>170</sup> Nationwide Insurance,<sup>171</sup> Target,<sup>172</sup> and a pending investigation of Equifax.<sup>173</sup> The opioid epidemic has also sparked a multistate investigation of the pharmaceutical industry.<sup>174</sup>

Multistate settlements are some of the largest in American history. The Master Settlement Agreement with forty-six states and several tobacco companies settled for over \$200 billion, the largest settlement in American history.<sup>175</sup> The National Mortgage Settlement with forty-nine states and the largest mortgage servicers settled for \$25 billion.<sup>176</sup> A joint multistate and federal coordinated working group entered into a series of multibillion dollar settlements with Bank of America, JPMorgan, and others for their role in securitizing Residential Mortgage-Backed Securities (RMBS) leading up to the financial crisis.<sup>177</sup> Federal enforcers, nineteen

170. See Office of Attorney Gen. Maura Healy, *AG Healy Joins \$1.5 Million Multistate Settlement with Neiman Marcus Over 2013 Data Breach*, MASS.GOV (Jan. 8, 2019), <https://www.mass.gov/news/ag-healey-joins-15-million-multistate-settlement-with-neiman-marcus-over-2013-data-breach>.

171. See Kevin McCoy, *Nationwide Mutual Insurance Agrees to \$5.5M Settlement Over Data Breach*, USA TODAY (Aug. 9, 2017), <https://www.usatoday.com/story/money/2017/08/09/nationwide-mutual-insurance-agrees-5-5-m-settlement-over-data-breach/552687001/>; A.G. Schneiderman Announces \$5.5 Million Multi-State Settlement with Nationwide Mutual Insurance Company over 2012 Data Breach, N.Y. ST. OFF. ATT'Y GEN. (Aug. 9, 2017), <https://ag.ny.gov/press-release/ag-schneiderman-announces-55-million-multi-state-settlement-nationwide-mutual>.

172. See Rachel Abrams, *Target to Pay \$18.5 Million to 47 States in Security Breach Settlement*, N.Y. TIMES (May 23, 2017) <https://www.nytimes.com/2017/05/23/business/target-security-breach-settlement.html>; *Attorney General Becerra: Target Settles Record \$18.5 Million Credit Card Data Breach Case*, ST. CAL. DEP'T JUST. (May 23, 2017), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-target-settles-record-185-million-credit-card-data> [hereinafter *Cal. Target Press Release*].

173. See Reuters, *Nearly 40 States Are Probing Equifax's Data Breach*, FORTUNE (Sept. 13, 2017), <http://fortune.com/2017/09/13/equifax-data-breach-investigation/>. For a discussion of AGs in the area of privacy enforcement, see Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 750 (2016) ("State attorneys general have been nimble privacy enforcement pioneers[.]").

174. See Nadia Kounang, *41 State Attorneys General Subpoena Opioid Manufacturers*, CNN (Sept. 20, 2017), <https://www.cnn.com/2017/09/19/health/state-ag-investigation-opioids-subpoenas/index.html>; see also Nolette & Provost, *supra* note 29.

175. Ieyoub & Eisenberg, *supra* note 166, at 1859.

176. See DOJ *National Mortgage Settlement Press Release*, *supra* note 169.

177. See *Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis*, U.S. DEP'T JUST. (Aug. 21, 2014), <https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading> [hereinafter *Bank of America Press Release*]; *Justice Department and State Partners Secure Record \$13 Billion Global Settlement with JPMorgan*

states and Standard & Poor's (S&P) settled for \$1.375 billion for S&P's ratings of toxic investments during the financial crisis.<sup>178</sup>

Multistate settlements not only command high-dollar settlements but also have the ability to make sweeping reforms to entire industries.<sup>179</sup> For example, the National Mortgage Settlement and its progeny changed the way mortgages are serviced and foreclosed.<sup>180</sup> The Master Settlement Agreement changed how tobacco companies could advertise.<sup>181</sup> Multistate settlements have implemented these reforms, even in the face of historic opposition of the same type of regulations in the legislature.<sup>182</sup> This regulatory ability puts tremendous power in the hands of AGs that has traditionally been vested in legislatures and executive agencies—leading some scholars to raise concerns about AGs regulating through settlements.<sup>183</sup>

The rise of the AGs and multistate actions go hand in hand; as AGs have become powerful, they have been able to combine forces in multistate actions, and, as multistate actions have become more successful, AGs have increased their power and national prominence.

### *B. Piggybacking in Multistate Actions*

Multistate actions provide a means for states to more economically pursue enforcement actions against large corporations. For instance, an AG pursuing a case alone against a major corporation would have to commit all or significant portions of her enforcement resources on a single enforcement action.<sup>184</sup> But if many states could piggyback on the investment of resources from

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for *Misleading Investors About Securities Containing Toxic Mortgages*, U.S. DEPT JUST. (Nov. 19, 2013), <https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement> [hereinafter *JPMorgan Press Release*].

178. See *Conn. S&P Press Release*, *supra* note 168.

179. See Matthew C. Turk, *Regulation by Settlement*, 66 U. KAN. L. REV. 259, 260 (2017); Lynch, *supra* note 82, at 2009 (“Where before the influence of attorneys general stopped at the borders of their states, today groups of attorneys general can affect the behavior of corporations nationally.”); see also Gifford, *supra* note 163, at 914.

180. See *DOJ National Mortgage Settlement Press Release*, *supra* note 169.

181. See *Master Settlement Agreement 10–26 (1998)*, <http://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf> (last visited Sept. 24, 2019); see also Gifford, *supra* note 163, at 914.

182. See Gifford, *supra* note 163, at 914.

183. See *id.*; Turk, *supra* note 179, at 260.

184. See Lynch, *supra* note 82, at 2005.

a single or few states, they could benefit from a multistate settlement without devoting the same amount of resources.

Piggybacking among states occurs when states join or replicate an enforcement action initially brought or led by another state, without contributing the same amount of resources to investigate, litigate, or settle the action. States can replicate other states' enforcement actions by bringing the same action alone or they can join, but not meaningfully contribute, to a multistate action. This Article focuses on piggybacking in the context of multistate actions.

By bringing multistate actions together, states can more efficiently leverage limited state enforcement resources.<sup>185</sup> Because multistate actions are based on a collective group of states asserting the same or similar legal theories and discovery, corporate defendants are faced with what amounts to a single large lawsuit and are forced to engage and negotiate with the participating states as a group.<sup>186</sup> Multistate actions thus allow states to invest fewer enforcement resources and demand bigger settlements at the same time.

Piggybacking in multistate actions is a distinct form of enforcement piggybacking, whereby states can piggyback on other states' enforcement actions in a coordinated manner. Multistate actions can take different forms depending on whether AGs are pursuing a multistate action under state or federal law. Multistate actions arising under state law actually consist of multiple cases, which are "mirror images" of complaints filed in state courts of all participating states.<sup>187</sup> States may also file a multistate action either in federal court, based on their ability to enforce federal law, or in enforcement actions coordinated with federal enforcers. In both instances, the states are joint plaintiffs in signing the same complaint.<sup>188</sup>

Whether arising under state or federal law, multistate actions produce opportunities for states to piggyback off one another. In a typical multistate action, many states may participate, but only a

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185. See Lemos, *Aggregate Action*, *supra* note 26, at 524–25 (noting attorneys general have limited budgets and small staffs, but can achieve some economies of scale by banding together in multistate actions); Totten, *The Enforcers*, *supra* note 10, at 1664–66 (noting, absent collaboration, states could not have played a critical role in Great Recession enforcement).

186. See Lynch, *supra* note 82, at 2005–06.

187. *Id.* at 2007.

188. See *id.*



few states lead the action.<sup>189</sup> Multistate actions often begin as one AG, or a small group of AGs, doing much of the early investigative work.<sup>190</sup> “[T]he states initiating the action will often propose a multistate working group and offer to chair or co-chair the group.”<sup>191</sup>

Certain states most often lead multistate actions.<sup>192</sup> In fact, the New York AG is the state AG that most commonly leads multistate actions and has led multistate actions at twice the rate of the next most active state.<sup>193</sup> Other states have played an important leading role in recent multistate litigation against corporations. For example, Illinois and Connecticut led a multistate action of eighteen states against Target Corporation for a data breach.<sup>194</sup> Multistate actions may also be led by a small group of states that form an executive committee of AGs. For example, the National Mortgage Settlement was led by an executive committee of AGs.<sup>195</sup>

These leading AGs play an important coordinating role, performing litigation tasks such as organizing document

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189. See NOLETTE, *supra* note 29, at 26; Bowman, *supra* note 164, at 540–41 (“A core group of eleven states, many of them large states, appears to have played leadership roles, given their high level of involvement.”); Cox, Widman & Totten, *supra* note 125, at 85 (describing a “heavies” group of states that lead multistate actions); Lynch, *supra* note 82, at 2004 (“Usually, the [AG] offices are so closely coordinated that those participating in the case will choose one or two lead states and cede to them primary responsibility for negotiating with the defendant on behalf of all the states involved.”).

190. See Provost, *An Integrated Model*, *supra* note 32, at 3.

191. NOLETTE, *supra* note 29, at 26. “The National Association for Attorneys General [NAAG] facilitates interaction among [AGs]” and coordinates federal-state working group and multistate actions, in particular, multistate antitrust actions. *What is the National Association of Attorneys General (NAAG)?*, NAAG, [https://www.naag.org/naag/about\\_naag/faq/what\\_is\\_the\\_national\\_association\\_of\\_attorneys\\_general\\_naag.php](https://www.naag.org/naag/about_naag/faq/what_is_the_national_association_of_attorneys_general_naag.php) (last visited Mar. 12, 2019). NAAG also promulgated antitrust and consumer protection enforcement guidelines that helped formalize cooperation among AGs. See Lynch, *supra* note 82, at 2004.

192. See NOLETTE, *supra* note 29, at 27. Nolette identified the leading states in multistate actions and listed the top ten states that were the most frequent leaders of multistate actions. The top ten states for leading multistate actions are New York, California, Massachusetts, Texas, Florida, Illinois, Ohio, Connecticut, Oregon, and Washington. *Id.*

193. See *id.* at 26.

194. See *Attorney General Madigan Announces \$18.5 Million Settlement with Target over Data Breach*, ILL. ATT’Y GEN. (May 23, 2017), [http://www.illinoisattorneygeneral.gov/pressroom/2017\\_05/20170523b.html](http://www.illinoisattorneygeneral.gov/pressroom/2017_05/20170523b.html).

195. See Consent Judgment, Exhibit B at B-5, *U.S. v. Bank of America Corp.*, No. 12-0361 (D.D.C. Apr. 4, 2012) [hereinafter *Consent Judgment*]. For example, the states that served on the National Mortgage Settlement Executive Committee were Iowa, Arizona, California, Colorado, Connecticut, Delaware, Florida, Illinois, Massachusetts, North Carolina, Ohio, Tennessee, Texas, and Washington. See *Consent Judgment*, *supra*.

reviews.<sup>196</sup> That same small group of AGs generally files the first lawsuits and then negotiates the settlement through executive or negotiating committees.<sup>197</sup> Typically, the leading AGs will send out settlement information to the other states, including states not currently part of the action, to determine whether they want to join a proposed settlement.<sup>198</sup> AGs that lead settlement negotiations play the most important role bringing the action to settlement.<sup>199</sup>

Participating states contribute in varying degrees to multistate actions but contribute significantly fewer resources than leading states.<sup>200</sup> In essence, multistate litigation is organized as a pyramid with a few leading AGs at the top and other AGs contributing to lesser degrees at lower levels of the pyramid. Once a lawsuit is initially filed after investigation, other states may file lawsuits in their own states and help with the remainder of the work to be done.<sup>201</sup> Participating states may have staff involved in a working group that meets regularly by conference call to discuss strategy and share information developed through each state's investigation.<sup>202</sup> Some participating states share staff and the costs incurred during the litigation, as well as sharing of discovery, pleadings, and legal memoranda. This collaboration makes multistate action more efficient by preventing redundant efforts among participating states and "creat[es], in effect, a temporary law firm dedicated to a single case that has more resources available to it than any individual office could commit to the matter alone."<sup>203</sup>

However, several other states completely piggyback in multistate actions. Leading AGs often attempt to recruit other states to join multistate actions.<sup>204</sup> Only states that sign the settlement get a portion of the settlement amount.<sup>205</sup> When a settlement will occur regardless of whether or not a particular AG participates, AGs may

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196. See NOLETTE, *supra* note 29, at 26.

197. See *id.*

198. See *id.*

199. *Id.*; see also Cox, Widman & Totten, *supra* note 125, at 84 (explaining that enforcers who serve on executive or monitoring committees are leaders who bring the case to close).

200. NOLETTE, *supra* note 29, at 26.

201. See Provost, *An Integrated Model*, *supra* note 32, at 3-4.

202. See Lynch, *supra* note 82, at 2008.

203. *Id.*

204. *Id.*

205. See Cox, Widman & Totten, *supra* note 125, at 84.

join the settlement to get a share of the settlement proceeds.<sup>206</sup> These states may contribute nothing more than a signature on the settlement agreement that the leading states have already negotiated.<sup>207</sup> If an AG is only required to invest minimal resources in joining a multistate action and can leverage that small investment into a large financial settlement, an AG will often be incentivized to piggyback in multistate actions.

Corporations are also incentivized to settle multistate actions in a way that encourages piggybacking. Rather than protract the investigation and litigation, corporations will often seek to settle the action quickly, which makes the upfront investment in investigation and early litigation important.<sup>208</sup> Because corporations often desire to settle expeditiously, states piggyback off the investigation and early litigation of leading AGs by joining a multistate action and expect a quick settlement with a corporation rather than protracted litigation. Further, since corporations may want to have the finality of settlement with all the states at the same time, corporations may request that all or most states be included in the settlement to avoid future litigation. A corporation's desire to settle quickly with finality contributes to piggybacking by allowing some states to simply sign the final settlement with little to no contribution of resources to the underlying enforcement action and still gain large monetary settlements.

State enforcement piggybacking is unique because states cannot preempt other states' actions, nor are they required to coordinate with one another when enforcing their own state law.<sup>209</sup> These attributes may result in states piggybacking on each other more than on other enforcers. Further, states, like private enforcers, may be particularly inclined to engage in piggybacking, both on one another and other enforcers, due to their limited resources.<sup>210</sup> As a

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206. *Id.*

207. See NOLETTE, *supra* note 29, at 26–27 (“Many states participate in multistate litigation, but only a few states typically take a leading role in these efforts.”); Cox, Widman & Totten, *supra* note 125, at 84 (“Participants may lend nothing more than a signature to a settlement agreement . . .”).

208. See Lemos, *Aggregate Litigation*, *supra* note 26, at 522–24.

209. See Rose, *Multienforcer Approach*, *supra* note 7, at 2175.

210. See Lynch, *supra* note 82, at 2003–04 (“Faced with the daunting prospect of prosecuting large, wealthy, and well lawyered corporations—defendants that often have many times the financial and legal personnel resources of even a large attorney general’s

result, states may look to other states and other enforcers to make the investment of resources necessary to pursue enforcement actions against corporations.

### C. Multistate Actions in a Multienforcer System

Piggybacking in multistate actions resembles the piggybacking that occurs among other enforcers in the broader multienforcer system. Just as other enforcers piggyback on one another, states also piggyback on each other in multistate actions. Prior to the rise of multistate actions, state enforcement had built-in safeguards that reduced the risk of overenforcement.<sup>211</sup> The safeguard was limited resources.<sup>212</sup> Limited resources forced AGs to make careful decisions about enforcement actions and largely limited the ability of AGs to bring enforcement actions against major corporations.<sup>213</sup> The multistate action has in part overcome the limited resources problem. And now, the safeguard of limited resources that once prevented overenforcement in state enforcement has given way to a system where state enforcement is more prone to overenforcement.

Piggybacking in multistate actions allows states with limited resources but strong claims to bring action where they may not have the resources to bring action alone. However, multistate actions also allow states with weak claims to piggyback on other states' stronger legal claims.<sup>214</sup> Because multistate actions are usually settled, it is rare that each state's claim and legal theory is meaningfully tested in litigation.<sup>215</sup> Like class actions, weaker claims in a multistate action can piggyback on stronger claims.<sup>216</sup> This means multistate actions run the risk of overenforcement because they allow states to duplicate actions without necessarily having a strong legal basis.

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office—for violations of state law, state attorneys general began to reach across state lines for help.”).

211. See Lemos, *State Enforcement of Federal Law*, *supra* note 51, at 703.

212. See *id.*

213. See Lynch, *supra* note 82, at 2005.

214. See Dishman, *supra* note 26.

215. See Lemos, *State Enforcement of Federal Law*, *supra* note 26, at 491; Dishman, *supra* note 26.

216. See Brunet, *supra* note 160, at 1937 (describing the common pool problem in class actions).

The piggybacking in multistate actions is not just a microcosm of what is occurring in the broader multienforcer system. Multistate actions change the dynamics in the multienforcer system, providing another species of action that can piggyback on other enforcers. Multistate actions can intensify piggybacking when entire multistate actions are the result of a few leading AGs piggybacking on the actions of another enforcer. When leading AGs piggyback on another enforcer and then organize as a multistate action, the piggybacking in the system amplifies dramatically. Instead of a few states piggybacking on a federal action, multistate actions facilitate potentially every state in the country piggybacking on a federal enforcement action. For example, multistate antitrust enforcement actions can be the result of state piggybacking on federal antitrust enforcement.<sup>217</sup> While piggybacking on federal enforcement actions may be necessary for states to remedy inadequate federal enforcement actions, there is a significant risk that piggybacking on federal actions is simply piling on to the federal actions, extracting additional penalties from an easy target that has already been tackled.

In addition to federal enforcers, multistate actions can piggyback on private class actions. AGs have the ability to bring *parens patriae* actions that closely resemble private class actions. AGs may even hire private counsel to represent the state and its residents in a *parens patriae* action on a contingency fee arrangement.<sup>218</sup> While these public-private hybrids occur on the individual state level, it is possible that they could also occur on the multistate level with many states agreeing to hire private class counsel to represent the interests of many states in a multistate action. Multistate actions that piggyback on private class actions may be necessary in light of the agency costs that arise in class actions. However, they may also be unnecessarily duplicative, especially when they may be seeking compensation for those who already recovered in private actions.<sup>219</sup>

When the genesis of an entire multistate action is piggybacking off another enforcer, it creates an enforcement echo chamber where

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217. See Pryor, *supra* note 26, at 1907.

218. See Lemos, *Privatizing Public Litigation*, *supra* note 27, at 582.

219. See Cox, *supra* note 132, at 2370; Lemos, *Aggregate Litigation*, *supra* note 26, at 531 (discussing preclusion of state actions following private action).

a single action can be duplicated many times over as states piggyback on one another. While it is possible that this type of piggybacking is filling an enforcement void, it is less likely that multistate actions are remedying underenforcement when they come on the heels of multiple federal and private actions. Rather, there is a risk of multistate actions creating unfair and unnecessary duplicative action.<sup>220</sup>

Multistate actions may also prompt other enforcers to piggyback on them. Multistate actions against major corporations are high profile and often command large settlements. They draw the attention of other federal and private enforcers in a way that an AG bringing an action alone may not. When multistate actions attract the attention of federal enforcers that then piggyback on multistate actions, this can mean that multistate actions are performing an important function in the multienforcer system. In this instance, AGs' multistate actions have prodded federal enforcers to act in areas of important national regulation where they have been slow to respond because of agency capture, political impediments, or bureaucratic red tape. For example, AGs prompted federal action by their enforcement during the Great Recession against Wall Street Banks.<sup>221</sup>

Multistate actions may also attract the attention of private enforcers. Private enforcers are strongly incentivized to piggyback on other enforcers to make their actions more economical. Private enforcement actions have traditionally been focused on compensation, and public enforcement actions have primarily focused on deterrence.<sup>222</sup> A current trend in public enforcement, including multistate actions, is to increasingly provide public compensation as part of the settlements.<sup>223</sup> When private enforcers piggyback on multistate actions, they may be seeking compensation for the same people who received public compensation in the multistate action.<sup>224</sup> This overlap may be

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220. See *Rosenstein Remarks*, *supra* note 9.

221. See *Totten, The Enforcers*, *supra* note 10, at 1664.

222. See *Lemos, Privatizing Public Enforcement*, *supra* note 27, at 525.

223. See *Cox*, *supra* note 127, at 2352 (noting the current trend of public compensation for federal agencies and state AGs).

224. For a discussion about the reasons that public actions may not fully compensate injured people, see *Lemos, Aggregate Litigation*, *supra* note 26, at 535-38; *Dishman*, *supra* note 26.

necessary because the public compensation in AG actions may not be adequate to fully compensate injuries.<sup>225</sup> However, there may be an unfair second bite of the apple in terms of compensation when private enforcers piggyback on multistate actions that have provided public compensation.<sup>226</sup>

The multienforcer system is more prone to overenforcement when all of the enforcers are attracted to the same target. The targets of multistate actions tend to be large corporations that operate nationally because many states may be injured by major corporate fraud and there is jurisdiction in multiple states. Large corporations also tend to have enough resources to pay large settlements to many states. AGs may be attracted to large corporate targets because going after a large public company can garner media attention that may bolster an AG's future election prospects.<sup>227</sup> However, the large corporations that are often targeted by multistate actions also happen to be the same type of targets that federal and private enforcers are attracted to in their enforcement actions. Federal enforcers are attracted to enforcement actions against large corporations because they are concerned with actions of national scope and importance. Large corporations are also prime targets of private enforcers because they have deep enough pockets to pay large recoveries for plaintiffs, or at least large attorneys' fees. When all the enforcers in a multienforcer system are attracted to the same type of target, piggybacking is even more appealing and the potential for overenforcement increases.

But what are the problems with over-enforcing against large corporations, particularly when their misconduct makes them unsympathetic "victims"? First, a fundamental principle of fairness requires that corporations should only be punished for their wrongdoings in an amount equal to what is necessary to compensate injuries and deter future misconduct.<sup>228</sup> Excessive enforcement is not only unfair to the corporate entity but also to

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225. Dishman, *supra* note 26.

226. See Lemos, *Aggregate Litigation*, *supra* note 26, at 500.

227. See Burch, *supra* note 96, at 1924; Provost, *An Integrated Model*, *supra* note 32, at 2-3; Rose, *Contextual Approach*, *supra* note 10, at 1408.

228. See Rosenstein Remarks, *supra* note 9 ("We need to consider the impact on innocent employees, customers, and investors who seek to resolve problems and move on.").

corporate stakeholders who often foot the bill of enforcement settlements, such as shareholders and employees.<sup>229</sup>

Second, overenforcement also creates a drag on the economy by overdetering corporations and injecting uncertainty into settlements.<sup>230</sup> Overdeterrence causes corporations to take suboptimal risk or overinvest in self-monitoring. Ironically, overdeterrence creates some of the same social costs as corporate fraud, namely, “it can increase the cost of capital . . . and upset the allocative efficiency of the economy[.]”<sup>231</sup> The potential for duplicative actions also removes certainty from the settlement process and makes it harder for corporations to predict the universe of total liability that will arise from a particular event.<sup>232</sup> Piling on can deprive a company of the benefits of certainty and finality ordinarily available through a full and final settlement.<sup>233</sup> Corporations may have to hold litigation reserves for duplicative action that could be employed more effectively. While settlement is generally more economical for both enforcers and corporations, corporations may be less willing to settle if they cannot predict future liability. This uncertainty results in enforcers investing more resources to get corporations to agree to settlement, or lowering their settlement demands in order to make settlement more attractive.

Third, overenforcement is not only a drag on the economy, it also leads to inefficient uses of enforcement resources. The idea of a multienforcer system is to spread enforcement resources, allowing each enforcer to use its comparative enforcement advantages to broaden the reach of enforcement and also act as a check on other enforcers.<sup>234</sup> But if all enforcement resources are concentrated on the same type of actions against the same type of targets, it undermines the benefits of having a multienforcer system in the first place. If piggybacking has undermined the multienforcer system, then it would be more efficient and yield more optimal

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229. *Id.*; see also SEC v. Bank of America Corp., Nos. 09 Civ. 6829(JSR), 10 Civ. 0215(JSR), 2010 WL 624581, at \*5 (S.D.N.Y. Feb. 22, 2010).

230. See Rose, *Multienforcer Approach*, *supra* note 7, at 2176.

231. *Id.* at 2184.

232. See Rosenstein Remarks, *supra* note 9.

233. *Id.*

234. See Calkins, *supra* note 90, at 679–80; Rose, *Contextual Approach*, *supra* note 10, at 1402.



enforcement levels to have a single enforcer system.<sup>235</sup> Furthermore, if all enforcers are focused on a single type of action, they may disrupt each other's enforcement goals.<sup>236</sup> For example, federal enforcers may be seeking a settlement that prioritizes injunctive relief and corporate governance in lieu of greater financial penalties. But if a multistate group or private enforcement action is seeking a higher financial settlement or different injunctive remedies, it could jeopardize the federal enforcers' settlement.

Fourth, piggybacking and overenforcement against certain targets lead to underenforcement of other targets.<sup>237</sup> If all enforcers are incentivized to piggyback on the same targets, then other types of cases may be neglected in the process. Enforcement piggybacking devotes additional resources on fraud that has already been uncovered at the expense of investigating fraud that has not been exposed.<sup>238</sup> For example, enforcers may piggyback on more marginal investigations that are in the public's eye at the expense of pursuing more egregious fraud.<sup>239</sup> State enforcement is unique in that one of its advantages is its ability to target local and state-specific enforcement needs.<sup>240</sup> If AGs are increasingly focused on multistate actions, it may be that more local enforcement is neglected or under-resourced. This could lead to a situation where state enforcement does not deter small-scale fraudsters who think that the AG's office is solely focused on large national corporations. This could ironically lead to greater levels of local fraud, which is the very reason to have state enforcement in the first place.

Piggybacking in multistate actions may also lead to underenforcement because leading states may be disincentivized from leading multistate actions if other states can piggyback on the

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235. See Rose, *Multienforcer Approach*, *supra* note 7, at 2176.

236. See Lemos, *State Enforcement of Federal Law*, *supra* note 50, at 719 ("But federal enforcers cannot prevent the states from acting in ways that conflict with the federal enforcement strategy.").

237. See Rose, *Contextual Approach*, *supra* note 10, at 1364 (noting the risk of both underenforcement and overenforcement at the state level).

238. See *Rosenstein Remarks*, *supra* note 9.

239. See Stephen J. Choi et al., *Scandal Enforcement at the SEC: The Arc of the Option Backdating Investigations*, 15 AM. L. & ECON. REV. 542, 546-47 (2013) (finding empirical support for the hypothesis that the SEC pursued more marginal investigations into options backdating as the media frenzy surrounding that scandal persisted, at the expense of pursuing other more egregious securities law violations).

240. See Calkins, *supra* note 90, at 679-80; Totten, *The Enforcers*, *supra* note 10, at 1653-57.

action.<sup>241</sup> A reason that private enforcers in class actions often piggyback is that the “search costs” or investigation into a potential action is resource intensive. These search costs mean that no private enforcer is willing to invest too much in investigation when there is uncertainty about who will be named class counsel and be “paid” for their search costs.<sup>242</sup> Similarly, AGs who traditionally have led multistate actions may be disincentivized from leading these actions because more states are piggybacking on them. Or leading AGs may focus on multistate actions that already piggyback on federal or private enforcers’ actions in order to reduce their search costs, exacerbating the duplicative action problem.

### III. SOLUTIONS FOR STATE ENFORCEMENT PIGGYBACKING

Different potential solutions have been offered to manage the level of enforcement in a multienforcer system, but prior solutions do not consider states piggybacking on one another in multistate actions. There are procedural protections that exist to prevent duplicative private actions. But the solution is more complicated when there are several private and public enforcers, including multiple states. These solutions may be enforcer-based, preemption-based, preclusion-based, or partnership-based. Each type of solution has its benefits and drawbacks. That being said, partnership-based solutions are most likely to mitigate the potential overenforcement problems of multistate actions and the broader multienforcer system.

#### A. Enforcer-Based Solutions

Enforcer-based solutions to the piggybacking problem generally seek to consolidate the number of enforcers or specialize the efforts of enforcers.<sup>243</sup> When there are fewer enforcers or only a single enforcer, the piggybacking problem is substantially reduced, if not extinguished altogether, because there are fewer enforcers or no other enforcers to piggyback on. For example, securities enforcement could be consolidated to a single public enforcer like

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241. See Rose, *Contextual Approach*, *supra* note 7, at 1368.

242. See Coffee, *Entrepreneurial Litigation*, *supra* note 50, at 908.

243. See Rose, *Multienforcer Approach*, *supra* note 7, at 2176 (advocating a unitary enforcer approach instead of a multienforcer approach to securities fraud deterrence).

the SEC<sup>244</sup> or federal enforcement could be narrowed from multiple specialized agencies to a generalist enforcement agency, like the Department of Justice.<sup>245</sup>

Consolidating the number of enforcers has many benefits. In addition to reducing enforcement piggybacking because there are fewer enforcers, it is likely to be more efficient and economical. Enforcement would be more centralized, coordinated, and predictable. Calibrating the level of enforcement would also be simpler since it would not require the coordination of multiple enforcers to calibrate the level of enforcement.

However, consolidation of enforcers may have significant drawbacks. Fewer enforcers may also be more prone to capture by regulated parties.<sup>246</sup> Further, consolidating to a single enforcer system generally has been proposed to be a single, federal public enforcer. It may be costlier and less efficient to rely on a single public enforcer because the public must foot the bill for all the enforcement instead of relying, in part, on the privately funded system.<sup>247</sup>

Consolidating to a single, federal enforcer would likely extinguish state enforcement altogether. This means that states would not piggyback on one another in multistate actions, but it would also take away the ability of states to enforce their own state laws. This presents a significant federalism problem because it deprives states of the meaningful ability to define their own law.<sup>248</sup> A single, federal enforcer could theoretically enforce individual state laws but would not be politically accountable or responsive to individual states.

Another potential enforcer-based solution is to require specialization among enforcers to prevent overlap. This would mean that enforcers would be required to stay within their area of comparative advantage to prevent overlapping actions. A proposal in this vein calls for enforcers to specialize in the types of law they best enforce, with certain federal enforcers focusing on rules-based

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244. *See id.*

245. *See, e.g.,* Minzner, *supra* note 35, at 2150–60 (discussing the benefits and costs of specialized versus generalist enforcers).

246. *See* Minzner, *supra* note 34, at 2119.

247. *See supra* note 31.

248. *See* Lemos & Minzner, *supra* note 72, at 877–78.

enforcement and AGs and private enforcers focusing on principle-based enforcement.<sup>249</sup> Another type of specialization solution would be to limit federal enforcers to national enforcement and AGs to local enforcement. However, while the idea is simple to keep multiple enforcers within the sphere of their enforcement advantages, in practice, it is difficult to distinguish situations that call for rule-based and principle-based enforcement, or national and local enforcement. Misconduct by large national corporations may have significant local effects and violate state laws. Or a corporation predominately doing business in one state may violate federal environmental or employment laws. Both of these examples could support the case for enforcement that is local or national (or both).

Unlike enforcer consolidation solutions, specialization solutions may not address piggybacking in multistate actions. Multistate actions could theoretically address local problems that exist in many states, but once a multistate action is organized, there is an argument that enforcement is national in scope. However, at the same time, it may be that the only way a state can economically address the situation where a large corporation's misconduct deeply affects states may be through a multistate action.

### *B. Preemption-Based Solutions*

Preemption-based solutions are another other potential means to mitigate piggybacking problems in a multienforcer system. Like enforcer-based solutions, preemption-based solutions seek to consolidate the number of enforcers or specialize the enforcers who can initiate an enforcement action.

Preemption may be an avenue to reduce the amount of piggybacking vis-a-vis federal and state enforcers. An enforcement trend is to delegate enforcement of federal law to the states, in particular to AGs.<sup>250</sup> Many federal statutes allow states to enforce federal law.<sup>251</sup> For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act authorizes AGs to bring state *parens patriae* actions to enforce federal financial consumer protection

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249. See Park, *supra* note 137, at 178–81.

250. See NOLETTE, *supra* note 27, at 38–40; Lemos, *supra* note 51, at 742–43.

251. See NOLETTE, *supra* note 27, at 38–40.

law.<sup>252</sup> However, federal laws could stop delegating such authority to the states or revoke the authority that it has already delegated to the states. This could reduce the potential for states to piggyback on federal enforcers with respect to enforcing federal law. It could also reduce the amount of states piggybacking on each other in enforcing federal law because states would be deprived of the authority to enforce federal laws. Or federal laws could force states to coordinate with federal enforcers to prevent purely duplicative actions.<sup>253</sup>

In addition, federal law, in some instances, has expressly preserved the rights of states to enforce certain state laws that overlap with federal enforcement authority. This is the case with respect to the enforcement of federal securities laws, where the ability of states to enforce securities fraud is expressly protected by federal law.<sup>254</sup> Instead of expressly preserving state authority in the securities area, federal law could preempt state securities fraud laws. This preemption would deprive states of the authority to piggyback on federal securities fraud actions and consolidate the enforcers to federal and private enforcers. This preemption would also extinguish piggybacking in multistate actions based on state securities fraud statutes. This could be particularly significant in light of the fact that New York leads many multistate actions and has a powerful state securities fraud statute, on which the AG bases many enforcement actions.<sup>255</sup>

However, convincing Congress to preempt is a difficult task, and preemption is a “blunt instrument” that may lead to underenforcement of federal law.<sup>256</sup> Federal law has delegated enforcement of federal law to state enforcers in order to increase enforcement resources and allow states to vacuum-fill potentially lackluster federal enforcement.<sup>257</sup> State enforcement acts as a check

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252. See Dodd-Frank Act § 1036(a)(1)(B), 12 U.S.C. § 5538 (2012).

253. See Lemos, *State Enforcement of Federal Law*, *supra* note 51, at 763 (discussing requirements of states to notify federal agencies when states enforce federal laws).

254. See National Markets Improvement Act of 1996 (NSMIA), 15 U.S.C. § 77r(c)(1) (2012) (“[A]ny State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions, in connection with securities or securities transactions . . . with respect to – fraud or deceit . . .”) (footnote omitted); see also Rutheford B. Campbell, Jr., *The Role of Blue Sky Laws After NSMIA and the JOBS Act*, 66 DUKE L.J. 605, 618 (2016).

255. See *supra* note 121.

256. See Rose, *Contextual Approach*, *supra* note 10, at 1355.

257. See *id.* at 1356–57.

on federal enforcement and economically increases enforcement of federal law.

Further, increasing preemption of states enforcing federal law does not address the situation where states are enforcing their own law. And such restrictions would not address states piggybacking in multistate actions, which are often based on state law. Many multistate actions are based on state consumer protection laws, and preemption of states enforcing federal law would not apply to those actions.

### *C. Preclusion-Based Solutions*

Preclusion is a potential procedural means to reduce enforcement piggybacking. Preclusion rules could prevent subsequent enforcement actions, in particular if one enforcer has already brought action and received compensation for the same group of people. As public enforcers are increasingly seeking compensation in their enforcement actions, duplicative public and private actions may result in multiple recoveries for the same people for the same injuries. Greater preclusion would limit these types of duplicative actions.

With respect to multistate actions, AGs may seek public compensation for state residents in *parens patriae* actions. These actions could piggyback on private actions, or private actions could piggyback on multistate actions. Preclusion could potentially prohibit an AG from bringing an action on behalf of her state residents if a class action had already included state residents asserting the same type of claims against the same targets. Likewise, a multistate action made up of many states' *parens patriae* actions could potentially preclude a private class action if the state residents would be the same as the putative class members. In fact, certain state statutes prohibit subsequent private action if state residents receive restitution in *parens patriae* actions.<sup>258</sup>

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258. See, e.g., HAW. REV. STAT. § 487-12 (2018) (“[T]he consumer’s acceptance and full performance of restitution shall bar recovery of any other damages in any action on account of the same acts or practices by the consumer against the person or persons making restitution.”); N.M. STAT. ANN. § 57-12-9(B) (2018) (“[A person’s] acceptance of restitution bars recovery of any damages in any action by him or on his behalf against the same

Greater preclusion would prevent piggybacking between private and state enforcers. It would also, in turn, prevent states piggybacking off one another in actions replicating private actions and also private actions piggybacking on multistate action. It would promote fairness by ensuring that a corporation would not be paying double recoveries for the same people for the same injuries. But it would also create a first-past-the-post system where the first enforcer to file may be able to preclude other enforcers, leading to potential premature and frivolous lawsuits.

Scholars have raised concerns about the preclusive effects of *parens patriae* actions on subsequent private action.<sup>259</sup> Some courts have found that *parens patriae* actions have preclusive effects depending on the type of law at issue<sup>260</sup> and the remedy being sought.<sup>261</sup> There are also instances where the practical effect of a *parens patriae* action can preclude private causes of action and,

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defendant on account of the same unlawful practice.”). In contrast, other state statutes specifically preserve private rights. *See, e.g.*, TENN. CODE ANN. § 47-18-107(e) (2013) (“Assurance of voluntary compliance shall in no way affect individual rights of action which may exist independent of the recovery of money or property received pursuant to a stipulation in voluntary compliance . . .”).

259. Professor Lemos has argued that even though the case law is “surprisingly sparse, the prevailing view is that judgment in a state case is binding ‘on every person whom the state represents as *parens patriae*.’” Lemos, *Aggregate Litigation*, *supra* note 26, at 500 (quoting Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 *FORDHAM L. REV.* 361, 384 (1999)); *see also* Burch, *supra* note 96 (“Precluding private suits in the wake of a *parens patriae* action can be particularly problematic since those suits have not been subjected to Rule 23’s adequacy requirement and attorneys general may prioritize political agendas and quick resolution over private claimants’ interests.”); Davis, *supra* note 24, at 41 (arguing that state actions seeking public compensation that preclude later private claims wrest control from individual beneficiaries without providing procedural protections afforded by private actions).

260. For example, in the antitrust context, *parens patriae* actions under certain federal antitrust statutes provide preclusive effects for private actions. State courts have also found preclusive effects of state antitrust law. *See* *Bonovich v. Convenient Food Mart, Inc.*, 310 N.E.2d 710, 711 (Ill. App. Ct. 1974) (holding unsuccessful *parens patriae* action by attorney general under state antitrust statute precluded private antitrust action against the same defendant). That being said, antitrust *parens patriae* actions often have greater procedural requirements than other types of *parens patriae* actions. *See* Cox, *supra* note 127 at 2330–31.

261. Courts have also held that *parens patriae* actions have precluded subsequent claims for punitive damages. *See, e.g.* *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 553–54 (Ga. 2006) (“The State’s release of its punitive damages claim as *parens patriae* precludes plaintiffs from pursuing the same claim for punitive damages in this action.”); *Fabiano v. Philip Morris Inc.*, 862 N.Y.S.2d 487, 490 (N.Y. App. Div. 2008).

specifically, class actions.<sup>262</sup> Preclusion is also problematic in terms of private and public actions because the enforcers have different incentives and operate under different procedural regimes. As AGs are increasingly stepping into the traditional domain of private enforcers to compensate private injuries in *parens patriae* actions, there is reason for concern about inadequate settlements, particularly in light of their potential for preclusion.<sup>263</sup>

Inadequate settlements are particularly problematic if *parens patriae* actions preclude private action, because state residents may be stuck with inadequate compensation without receiving the procedural protections that class members receive before being bound to a settlement.<sup>264</sup> Unlike class actions, there are generally few procedural protections in place for *parens patriae* group members, even though they may be the real parties of interest in the action.<sup>265</sup> Notice of the action is generally not provided to *parens patriae* group members, nor do they have the opportunity to opt out of the action, as class members would in private class actions.<sup>266</sup> Courts are also required to approve class action settlements, whereas state law varies on whether courts play a role in the approval of state settlement, with many state courts playing no role at all in approving the settlement.<sup>267</sup> Because *parens patriae* actions do not have the procedural protections of class actions, it is problematic to preclude state residents from bringing private action, even if it might reduce piggybacking.

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262. For example, class actions may not be certified because a court may consider a *parens patriae* action to be “superior” to class actions. See FED. R. CIV. P. 23(b)(3); Cox, *supra* note 127, at 2369–73; Lemos, *Aggregate Litigation*, *supra* note 26, at 501–06. Another example is when AGs may negotiate settlements that require *parens patriae* members to waive their rights to private action as a condition of receiving compensation, which precludes subsequent private action. See Cox, *supra* note 127, at 2374–79.

263. See Lemos, *Aggregate Litigation*, *supra* note 26, at 491.

264. See *id.* at 501–06; Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 531 (2011) (discussing claims preclusion in the context of government agencies seeking settlements on behalf of citizens).

265. See Lemos, *Aggregate Litigation*, *supra* note 26, at 501–06. Others have also argued that there is a lack of procedural protections when federal agencies provide monetary compensation in public enforcement. See Zimmerman, *supra* note 264, at 571–72.

266. However, a notable exception is the antitrust context, which under federal law and several state statutes requires similar procedures as private class actions such as notice and the ability to opt out. See Cox, *supra* note 127, at 2346 n.179.

267. See Cox, *supra* note 127, at 2355, 2371; Dishman, *supra* note 26.



Preclusion of state action is also problematic because of the agency costs that arise in class actions that can leave class members undercompensated. Agency costs occur in a private class action when the entrepreneurial class counsel steps into the role of the principal, while the client takes on the attributes of the agent.<sup>268</sup> This role reversal becomes particularly problematic when attorneys are guided by their own self-interest and class members are in a poor position to monitor their attorney's opportunistic behavior.<sup>269</sup> When this occurs, class counsel may accept sweetheart deals. Because of the danger that class members may be inadequately compensated and corporations will not be deterred by the class action, precluding state action seeking compensation for state residents is also problematic.

#### *D. Partnership-Based Solutions*

The best potential solution to remedy the piggybacking problem is to have better enforcement partnerships and enforcement guidance among enforcers, including among states in multistate actions.<sup>270</sup> In particular, state and federal partnerships and guidance about coordination may be able to ameliorate the effects of enforcement piggybacking and piling on. When public enforcers coordinate together through policies and partnerships, they can reduce the harms of duplicative actions while at the same time enjoying the efficiencies of pooling resources and expertise in enforcement actions.

Federal-state working groups have been examples of cooperative federal-state enforcement that include coordination between multiple federal agencies, in addition to a multistate action. For example, the Residential Mortgage Backed Securities (RMBS) Working Group was a coordinated federal and state working group created in 2012 with a mandate to investigate and bring actions based on fraud and abuse in the RMBS market that helped lead to the 2008 financial crisis.<sup>271</sup> The RMBS Working

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268. See Coffee, *Entrepreneurial Litigation*, *supra* note 50, at 82–83.

269. See *id.*

270. See Minzner, *supra* note 34, at 2172 (“Enforcers need to collaborate and coordinate enforcement actions. Other scholars have strongly advocated for coordination of enforcement functions in specific contexts.”).

271. See Totten, *The Enforcers*, *supra* note 10, at 1648–49.

Group brought a series of enforcement actions during and in the wake of the Great Recession against Wall Street banks for their role in the packaging and securitizing of RMBS. In 2013, the RMBS Working Group settled its first action against JPMorgan for \$13 billion, which at the time was the largest settlement against a single entity in American history.<sup>272</sup> Following the JPMorgan settlement, the RMBS Working Group brought a quick succession of cases against other Wall Street banks based on similar RMBS theories. The RMBS Working Group settled with Citigroup in 2014 (\$7 billion),<sup>273</sup> Bank of America in 2014 (\$16.65 billion),<sup>274</sup> Morgan Stanley in 2016 (\$2.6 billion),<sup>275</sup> Goldman Sachs in 2016 (\$5.06 billion),<sup>276</sup> and Credit Suisse in 2017 (\$5.28 billion).<sup>277</sup> The RMBS Working Group is an example of a coordinated approach between a federal and a multistate group and could be a template for other joint law enforcement groups to handle other important issues.

Enforcers can create policies that encourage enforcement cooperation and address concerns about duplicative actions. For example, the Department of Justice recently included a new policy in its U.S. Attorney's manual regarding coordination among enforcers and DOJ departments to address concerns about piling on and piggybacking. The policy entitled "Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same

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272. *JPMorgan Press Release*, *supra* note 177.

273. *Federal and State Partners Secure Record \$7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages*, U.S. DEP'T JUST. (July 14, 2014), <https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement>.

274. *Bank of America Press Release*, *supra* note 177.

275. *Morgan Stanley Agrees to Pay \$2.6 Billion Penalty in Connection with Its Sale of Residential Mortgage Backed Securities*, U.S. DEP'T JUST. (Feb. 11, 2016), <https://www.justice.gov/opa/pr/morgan-stanley-agrees-pay-26-billion-penalty-connection-its-sale-residential-mortgage-backed>.

276. *Goldman Sachs Agrees to Pay More than \$5 Billion in Connection with Its Sale of Residential Mortgage Backed Securities*, U.S. DEP'T JUST. (Apr. 11, 2016), <https://www.justice.gov/opa/pr/goldman-sachs-agrees-pay-more-5-billion-connection-its-sale-residential-mortgage-backed>.

277. *Credit Suisse Agrees to Pay \$5.28 Billion in Connection with its Sale of Residential Mortgage-Backed Securities*, U.S. DEP'T JUST. (Jan. 18, 2017), <https://www.justice.gov/opa/pr/credit-suisse-agrees-pay-528-billion-connection-its-sale-residential-mortgage-backed>. Importantly, Credit Suisse has only settled with federal entities and has not yet settled with the states of New York and New Jersey.

Misconduct”<sup>278</sup> will address the “practice of different enforcement and regulatory agencies ‘piling on’ with duplicative financial penalties for the same corporate misconduct.”<sup>279</sup> The new policy aims to discourage piling on by instructing DOJ components—for example, the Civil and Criminal Divisions and U.S. Attorneys’ Offices—to coordinate with each other to avoid disproportionate fines and penalties in cases against corporate defendants. It reminds Department attorneys of their “ethical obligation” not to use enforcement authority “unfairly to extract” additional civil or administrative monetary payments.<sup>280</sup> In addition, the policy directs federal prosecutors to make efforts to coordinate with other federal regulators and, where practicable, with state, local, and foreign enforcement agencies and consider the amount of fines, penalties, and forfeitures paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct.<sup>281</sup> The policy also directs the DOJ to consider

all relevant factors in determining whether coordination and apportionment between Department components and with other enforcement authorities allows the interests of justice to be fully vindicated. Relevant factors may include, for instance, the egregiousness of a company’s misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company’s disclosures and its cooperation with the Department, separate from any such disclosures and cooperation with other relevant enforcement authorities.<sup>282</sup>

The DOJ also has a working group—DOJ Working Group on Corporate Enforcement & Accountability—that is responsible for the new policy on enforcement coordination.

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278. U.S. DEP’T OF JUSTICE, JUSTICE MANUAL, § 1-12.100 (May 2018), <https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings>.

279. *New DOJ Policy Will Curb “Piling On” Multiple Penalties for Same Corporate Misconduct*, LATHAM & WATKINS 1, (May 14, 2018), <https://www.lw.com/thought-leadership/doj-policy-curb-piling-on-multiple-penalties-same-corporate-misconduct>.

280. See U.S. DEP’T OF JUSTICE, JUSTICE MANUAL, § 1-12.100.

281. *Id.*

282. *Id.*

States could benefit from enforcement guidelines in multistate actions that encourage not only interstate cooperation but also cooperation with other enforcers. Such policies may also encourage leading states and multistate groups to consider the fines and penalties that have already been paid to other enforcers as they consider bringing action and proposed settlements. Policies could also provide guidance on how states should contribute to multistate actions, how to apportion settlements, and how to approach attorneys' fees in settlements. These policies could encourage greater transparency in multistate actions and reduce the amount of piggybacking in multistate actions. The National Association for Attorneys General (NAAG) has facilitated multistate actions such as the NAAG Multistate Antitrust Task Force. NAAG also has standing committees, such as the Consumer Protection Committee, that could play a role in coordinating multistate actions. NAAG could also form a task force or committee specifically to consider coordinating with other enforcers and with states in multistate actions. Such a task force could make recommendations on how multistate actions could avoid duplicative actions or piling on.

The main drawback to advocating greater partnerships and policies encouraging cooperation is that they are voluntary by nature. Further, coordination requires effort and is not costless and the effort and cost of coordination increases with the number of enforcers.<sup>283</sup> That being said, the successes of joint federal-multistate working groups and the Department of Justice policy may pave the way for future coordination among enforcers to prevent piggybacking in multistate actions and in the broader multienforcer system.

#### CONCLUSION

Achieving the optimal amount of enforcement in a multienforcer system is an ongoing issue of debate among scholars and policymakers. Enforcement piggybacking among federal, state, and private enforcers has played a major role in the debate. However, this debate has not adequately considered the rise of multistate actions and this unique form of state enforcement

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283. See Rose, *Multienforcer Approach*, *supra* note 7, at 2205.

piggybacking. The piggybacking that occurs in multistate actions considered in the multienforcer system can serve to over-enforce in certain types of cases and underenforce in others, threatening to undermine the traditional comparative advantage of states in a multienforcer system. However, better enforcement coordination and partnerships can help better utilize multistate action to serve the purposes of deterrence and compensation and better calibrate the levels of enforcement in a multienforcer system.