

Multistate Rulemaking

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I. Introduction

It is a well-understood strength of multistate litigation¹ that together, state attorneys general can influence corporate business practices in ways one state acting alone cannot. But multistate litigation is not a perfect enforcement mechanism, and legitimate criticisms can be made, especially regarding the vagaries of the process by which settlements (for multistate litigation nearly always results in settlement) are reached. Since the advent of modern multistate litigation in the last twenty years, state attorneys general have coordinated their substantive work almost exclusively in the pursuit of litigation. But attorneys general have other tools in their belts: In addition to litigation and prosecution powers, many, in certain spheres, also have substantial rulemaking authority.

One such sphere is that of unfair and deceptive trade practices, or “UDAP,” statutes, which are the statutory basis of much multistate litigation.² This paper argues that the time has come for state authorities to begin to engage in systematic multistate rulemaking, and that doing so will lay the foundation for more efficient, more effective, more open and more fair multistate litigation of UDAP-based consumer protection actions. Part II of this paper provides a brief overview of multistate litigation today, and identifies strengths and weaknesses of the current approach. Part III outlines state authority to issue rules pertaining to UDAP, reviews the benefits inherent in rulemaking as against litigation generally, describes how a coordinated multistate rulemaking might proceed, and suggests ways in which those benefits would be further enhanced by coordinated multistate efforts. Part IV addresses possible objections to multistate rulemaking, concluding that they are largely without merit.

II. Multistate Litigation Today

A. Occurrence

Multistate litigation is a relatively recent phenomenon. Only in the early 1980s did state attorneys general begin cooperating regularly in litigation against common defendants, in order to increase both the efficacy and the

[†] The author thanks Professor James E. Tierney, from whom the core idea of this paper sprang full-blown at the mere mention of the words “administrative law.”

¹ For the purposes of this paper, “multistate litigation” refers to litigation in which two or more state attorneys general engage in coordinated actions against a common defendant or defendants. Typically, defendants in multistate litigations are corporations which conduct business in more than one state.

² Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 Colum. L. Rev. 1998, 2024 (2001) (quoting from an interview with James E. Tierney, former Attorney General of Maine).

efficiency of their efforts.³ Today, multistate litigation is more commonplace, with attorneys general simultaneously engaged in multiple, coordinated actions at any given moment.

In recent years the National Association of Attorneys General, as well as less formal sub-networks of attorneys general and their staffs, have provided the necessary organization for such actions. Multistate litigations are usually born in these networks. One or more attorneys general might, in scheduled meetings or through informal communication, find that they have received common complaints about an entity or industry. Some may already have commenced with the early stages of research or litigation preparation, or the issue may remain relatively untouched prior to the decision to coordinate efforts. Usually there are already “victims,” since preemptive litigation imposes especially difficult obstacles and because attorneys general are usually first alerted to issues by constituent complaints. But given the decentralized nature of state attorneys general’s powers, and plus or minus the fact that there are some regularly scheduled meetings involving attorneys general and/or their staffs, the process of commencing with multistate litigation is relatively unstructured.

B. Strengths

Engaging large targets in a coordinated multistate manner rather than going it alone achieves significant benefits for state attorneys general and their constituents. Most importantly, due to the relative scarcity of financial and staff resources in most attorney general offices, coordination often produces results which would otherwise simply be unattainable, particularly against large corporations that often can buy enough lawyering power to far outgun even the largest attorney general’s office.⁴ This enables state attorneys general to fill vacuums not infrequently left by state legislative and/or federal failure to intervene, most commonly in the fields of consumer protection and antitrust. Furthermore, by sharing not only expenses, but also legal theories, discovery materials, court filings, and staff,⁵ attorneys general accrue not only resource efficiencies, by spreading the cost across many states’ offices, but also the less quantifiable advantages of teamwork: many heads are often better than one. Multistate litigation also encourages the targets of such litigation to engage with the attorneys general as a group, rendering outcomes more uniform than those achievable by an uncoordinated patchwork of single-state litigations. For these reasons, the short but active history of multistate litigation has proved to be of enormous value to the American consumer.

C. Weaknesses

The multistate litigation approach is not, however, without flaws. The goal of multistate litigation is often systemic change at the industry level – that is, to effect what is essentially a policy outcome (e.g., a change in an industry’s standard business practice) through mass adjudication (or, more often, merely the threat thereof). Many of the predictable disadvantages of litigation, therefore, appear commonly in administrative law discussions concerning the relative merits of using adjudication versus using rulemaking to achieve various types of goals. The bottom line in those discussions is usually this: Adjudication is favored when the intent is to decide only an individual, retroactive instance, but rulemaking is the superior vehicle for policymaking, i.e., for developing law applicable prospectively to any and all parties.⁶ This conclusion is especially true in the UDAP context.⁷

³ James E. Tierney, seminar presentation, Sep. 5, 2002.

⁴ Lynch, *supra* note 2, at 2004 (2001).

⁵ *Id.*

⁶ Brief summaries of this discussion can be found in most administrative law textbooks. For one such summary, see William F. Funk & Richard H. Seamon, *Administrative Law: Examples and Explanations* 138-40 (2001).

⁷ For an extended discussion of the merits of rulemaking as against adjudication, see Earl Bonfield, *The Federal APA and State Administrative Law*, 72 Va. L. Rev. 297, 325-35 (concluding that “[a]s a general proposition . . .

There are several reasons for this conclusion. One hinges on the problem of notice. One obvious potential complaint from businesses accused of UDAP violations is the lack of prior notice that their behavior was impeachable: Because UDAP laws are so admittedly and intentionally vague,⁸ this week's accepted industry standard practice might, in theory, be deemed unfair or deceptive next week, leaving businesses vulnerable to charges they were never aware could be lodged against them.⁹

A companion to the notice problem is the participation problem. Many interested parties may be either unable to participate in a multistate litigation for lack of standing (i.e., if the interested party in question is not the target of the action and has no grounds for intervention), and/or unwilling to speak up for fear of becoming the target of the next investigation. In either case, parties with significant stakes in the outcome of a multistate litigation may be on the outside looking in while their fate is decided.

Another significant weakness inherent in litigation as against rulemaking generally is the inability to act preemptively against injuries before they occur. Injury must precede litigation.¹⁰ The recent settlement between twenty attorneys general and Household International is paradigmatic. Record-breaking though the settlement was,

agencies should prefer rulemaking over adjudication as the means by which to elaborate agency law” and that “[i]n sum, agencies should proceed by rulemaking unless the balance *clearly* tips in favor of adjudication”). For analysis of substantive rulemaking in the UDAP context early in history of state UDAP laws, see John A. Sebert, Jr., *Enforcement of State Deceptive Trade Practice Statutes*, 42 *Tenn. L. Rev.* 689, 710-18 (1975) (“Rulemaking authority, of course, is not a panacea for all of the ills of state consumer protection enforcement, but it does offer some significant advantages when used sensitively in combination with case by case enforcement.”).

⁸ See *infra* note 15 and accompanying text.

⁹ This complaint can cut several ways. Seen in a light least favorable to the offenders, the complaint can boil down to “everybody was doing it.” While this may sometimes be hard to swallow, it must be admitted that there is nevertheless great merit in maintaining high standards of legal clarity whenever possible. Seen in a more balanced light, such charges might amount to an honest difference in opinion between attorneys general and businesses as to the fairness or deceptiveness of various practices. Most generously to the accused – and tending toward the more politically paranoid – there is potential for what one might describe as activist prosecutorial abuse of the open-endedness of the UDAP statutes. (Whether such fear is well-founded is beyond the scope of this paper.)

¹⁰ More precisely, standing to litigate requires injury or the eminent threat thereof. Due to the resource problems previously mentioned, attorneys general are extremely unlikely to be willing, let alone able, to act preemptively unless the injury is great and the threat certain. Even if those conditions are met, there is another brutal reality: Complex, coordinated litigation is often likely to be too slow to act preemptively.

“no affected consumers will be made 100% whole” by it;¹¹ indeed, the vast majority of Household victims were low-income homeowners who will never recover a significant portion of what is by far their most valuable asset. The problem of adequate consumer remedy is common in multistate litigation, and is most cleanly solved by prevention; but since it resulted from litigation, the settlement could only occur after lives had already been wrecked.

Litigation is also, of course, inherently inefficient and risky. The high cost and risk of litigation, let alone litigation of the massive complexity of most multistate matters – which often become multistate matters precisely *because* of their size and complexity – must be borne over and over by the states for each separate offender (even when cases can be consolidated to some degree). Attorneys general pick their multistate battles very carefully, but even they cannot always guarantee victory. And victory against one offender does not guarantee victory against the second and subsequent offenders. Risk is compounded when the statutory basis for prosecution is vague, as in the case of many UDAP statutes.¹²

One final, significant disadvantage is unique to multistate litigation: lack of outcome precedents. In practice, multistate litigation rarely goes to court, let alone to verdict. That no legal precedent is left by settlement is problematic for every subsequent analogous case. Even were a multistate litigation to end in verdict, the meaning of the precedent would be murky at best when applied to other, equally complex fact situations. Take again the Household case: When the next large deceptive lender is discovered, the states will essentially be back at square one, plus or minus newfound expertise in the subject area. They will have to make the same case again, state by state. The next offender may not be as eager as was Household to negotiate a comprehensive, 50-state settlement.¹³

Fortunately, many of the weaknesses inherent in the litigation-only approach can be mitigated or overcome through the use of rulemaking prior to commencing litigation.

III. Rulemaking and Multistate Rulemaking

A. Introduction to UDAP Laws and UDAP Rulemaking Authority

¹¹ Sally Peacock, *How the Household Settlement Uncorked a Law Enforcement Bottleneck*, 27 (Jan. 2003) (unpublished manuscript) (quoting from an e-mail interview with Kathleen Keest, Assistant Attorney General of Iowa and Deputy Administrator of the Iowa Consumer Code). The monetary relief of between \$387.5 million and \$484 million (depending on the number of states that eventually elect to participate in the settlement) is the largest recovery from a predatory lender in history, but at best, victims will get only a portion of what they lost in restitution. *Id.* (quoting from an interview with David Huey, Assistant Attorney General of Washington).

¹² See *infra* note 15 and accompanying text.

¹³ It was widely rumored that Household’s zeal to settle was due to its desire to remain an attractive investment to its then-prospective buyer, HSBC. HSBC purchased Household just one month after the settlement, for \$14 billion. *Id.* at 25-26.

UDAP laws are designed to provide state government with a broad swath of authority to ensure that businesses are run fairly and honestly.¹⁴ UDAP statutes are therefore intentionally open-ended, allowing for “the meanings of unfairness and deception ... to be developed over time, so that UDAP law can adapt to future business practices.”¹⁵ In twenty-seven states, the attorney general or other UDAP-enforcing authority is empowered to create regulations adding meat to the bones of the state’s UDAP statute.¹⁶

¹⁴ Glenn Kaplan & Chris Barry Smith, Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws to Make Handguns and Other Consumer Goods Safer, 17 Yale J. on Reg. 253, 278 (2000).

¹⁵ Id. at 276. Kaplan and Smith note that “several UDAP laws contain a *non-exclusive* list of commercial conduct that is prohibited,” id. at n.110 (emphasis added), and that “[s]everal state courts interpreting UDAP statutes have held that the laws were designed to reach future business conduct,” id. at n.111. For an example of a typically broad statute, see, e.g., Me Rev. Stat. Ann. tit 5, § 207 (West 2002) (“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful.”).

¹⁶ Seventeen states clearly grant broad UDAP rulemaking authority to their attorneys general. Alaska Stat. § 45.50.491 (Michie 2002); Colo. Rev. Stat. Ann § 6-1-108 (West 2002); Fla. Stat. Ann. § 501.205 (West 2002); Idaho Code § 48-604 (Michie 2002); 815 Ill. Comp. Stat. Ann. 505/4 (West 2002); Me. Rev. Stat. Ann. tit. 5, § 207 (West 2002); Mass. Gen. Laws Ann. ch. 93A, § 2 (West 2002); Mo. Ann. Stat. § 407.145 (West 2002); Neb. Rev. Stat. Ann. § 87-303.03 (Michie 2002); N.M. Stat. Ann. § 57-12-13 (Michie 2002); N.D. Cent. Code § 51-10-05.2 (2001); Ohio Rev. Code Ann. § 1345.05 (West 2002); Or. Rev. Stat. § 646.608 (2001); Pa. Stat. Ann. tit. 73, § 201-3.1 (West 2002); S.C. Code Ann. § 39-5-80 (Law. Co-op. 2002); Vt. Stat. Ann. tit. 9, § 2453 (2002); W. Va. Code § 46A-6-103 (2002). In nine more states, the same authority is granted to another enforcing agent, usually the commissioner or director of an agency charged with consumer protection duties. Conn. Gen. Stat. Ann. § 42-110b (West 2002); Haw. Rev. Stat. § 487-5 (2002); Iowa Code Ann. § 507B.12 (2002); MD Code Ann., Commercial Law, § 13-205 (2002); Mont. Code Ann. § 30-14-104 (2002); Nev. Rev. Stat. 598.0967 (2002); N.J. Stat. Ann. § 56:8-14.7 (West 2002); Utah Code Ann. § 13-2-5 (2002); Wis. Stat. Ann. § 426.104 (West 2002). In Louisiana, UDAP rulemaking authority is granted to the director of the Division of Consumer Protection, but only subject to approval by the Attorney General. La. Rev. Stat. Ann § 51:1405 (2003). Due to an ambiguous choice of statutory sentence construction, it is unclear whether Arizona’s statute extends the attorney general’s authority to promulgate regulations to substantive, or merely to procedural, regulations. Ariz. Rev. Stat. § 44-1526 (2002) (“[The attorney general may p]rescribe such forms and promulgate such procedural rules and regulations as may be necessary to

UDAP rulemaking abounds. Attorneys general have used UDAP statutes' rulemaking provisions to establish standards governing sales in mobile home communities, mortgage broker practices, automobile rustproofers, basement waterproofers, insulation installers, sales of defective meat and electrical equipment safety, to name just a few.¹⁷

B. Advantages of Rulemaking

As discussed above, rulemaking is preferable to litigation (and adjudication) for setting prospective policy.¹⁸ If an attorney general has at his or her disposal a clear, explicit rule which codifies as law an interpretation of how a UDAP statute applies to a particular fact situation, that attorney general's litigation work is all the easier. Such codification accrues several significant benefits:¹⁹

1. *Clarity.* Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁰ courts grant strong deference to statutorily authorized interpretations of ambiguous statutes. If the attorney general's interpretation of the statute is codified as a rule, judicial review of the interpretation will still apply, but under *Chevron*, there is little doubt that a court will grant great deference to the codified interpretation. Effectively, then, that rule becomes legally binding. A clear, binding rule makes everyone's jobs easier: Businesses know where they stand because unacceptable behaviors are explicitly enumerated, and attorneys general and courts have unambiguous law on which to base their actions and rulings, respectively.

2. *Notice and Comment.* Rulemaking is governed by state laws modeled on, or similar to, the federal Administrative Procedure Act.²¹ "Notice-and-comment" process is required for all substantive, or "legislative,"

enforce the provisions of this article . . ."). The remaining twenty-two states neglect to allow explicitly for the use of rulemaking to define the contours of their UDAP laws, although some of those states grant rulemaking authority for the purpose of establishing UDAP-related procedures. See, e.g., Kan. Stat. Ann. § 50-630(a)(2) (2001) ("[The attorney general may] adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available"). At least one state explicitly forbids the attorney general to engage in substantive UDAP rulemaking. Mich. Comp. Laws § 445.903(2) (2002) (enumerating specific unfair trade practices to which the state UDAP law applies, and then stating that while "[t]he attorney general may promulgate rules to implement this [UDAP] act," "[t]he rules *shall not* create an additional unfair trade practice not already enumerated by this section" (emphasis added)).

¹⁷ Kaplan & Smith, *supra* note 14, at 320-21.

¹⁸ See *infra* Part II.C.

¹⁹ The enumeration of benefits that follows draws in part on both Bonfield, *supra* note 7, at 325-35, and Sebert, *supra* note 7, at 710-718.

²⁰ 467 U.S. 837 (1984).

²¹ Bonfield, *supra* note 7, at 299-300.

rulemaking.²² The regulatory power to interpret UDAP statutes by establishing detailed regulations setting standards for commercial conduct has generally been held to be substantive, not merely interpretative,²³ and is therefore subject to notice-and-comment requirements. Notice-and-comment is invaluable in that it ensures that any and all interested parties will be made aware of, and will be able to participate in, the consideration of and creation of the rule. The rule is therefore protected from charges of having been railroaded through without providing interested parties an opportunity to be heard, and is likely to be more informed than a litigation in which only a limited number of parties participate.

3. *Efficiency.* With clarity and precedent comes efficiency: Thanks to *Chevron*, issues of statutory ambiguity, resolved once in an open notice-and-comment proceeding, are rarely, if ever, re-litigated, saving everybody time and money.

4. *Prevention.* Rulemaking, unlike litigation, need not wait for the first victim to be injured. Rules can be – in fact, are best – implemented *before* injury occurs. As noted above, once the context-specific interpretation of the UDAP statute (and, by extension, the possible threat of enforcement action) is clarified by a rule, the incidence of violations is likely to drop: Violators that might be comfortable pushing the envelope of acceptable practices when the lines are blurry will be less inclined to commit the same offenses once those offenses are clearly and explicitly codified as actionable.

C. Defining Multistate Rulemaking

Simply put, multistate rulemaking is the rulemaking analog of multistate litigation. Returning to the example of the Household International settlement, suppose that, in the wake of publicity from the landmark agreement, various attorneys general were to be made aware of other perpetrators of similar, but not exactly identical, practices in the lending business that could be construed as unfair and/or deceptive. The attorneys general would have to separately consider whether each of these new potential offenders’ practices reach the ambiguous threshold of unfair and/or deceptive. Accusations of arbitrariness and unfairness would likely soon follow from the targeted entities, which would claim that the attorneys general overstep their authority by working without a statutory net.

Suppose that, instead, a handful of attorneys general (and/or other UDAP-enforcing authorities) were to decide to settle the policy questions once and for all. They could pool their resources, agree upon a proposed rule, and, on the same day, begin their separate (but nearly identical) notice-and-comment proceedings. After the close of the last state’s comment period, they could share their gathered data, jointly consider changes to the proposed rule, and then, within days or weeks of each other, issue their (nearly identical) final rules. Such rules would be the result of “multistate rulemaking,” and their cumulative effect, as the next section will demonstrate, would be striking.

D. Advantages of Multistate Rulemaking

²² Generally speaking, under both federal and state administrative procedure statutes, rulemaking procedure must provide for notice-and-comment whenever an authority issues a legislative rule, but not when the authority issues what is deemed merely an interpretative rule, a general statement of policy, or a rule of agency organization, procedure, or practice. See, e.g., the federal version at 5 U.S.C. § 553(b)(A) (2002). The distinction is sometimes less than clear, but a rule interpreting a statute is a legislative rule when that interpretation “carries the force and effect of law,” *Air Transp. Ass’n of Am., Inc. v. FAA*, 291 F.3d 49 (2002), or if it “imposes any rights and obligations,” as opposed to “genuinely leav[ing] the agency and its decisionmakers free to exercise discretion,” *GE v. EPA*, 290 F.3d 377 (2002).

All of the benefits of rulemaking enumerated in Part III.B would be significantly magnified by multistate rulemaking. Consider, for instance, the enhanced clarity of laws interpreted through multistate rulemaking. Single-state rulemaking establishes clear rules in each state, but there might be dozens of them, and they might all be different. Such variations might be trivial, but they might cause unreasonable headaches, not just for affected parties, who must keep track of and abide by all the different rules, but also for the attorneys general, who in a multistate litigation would lose some of the efficiency of acting in concert if required to prosecute under substantially different statutes. If, on the other hand, a single, nationally consistent rule were to apply to parties that do business in multiple states, that rule would be even more clear to the affected parties and even more persuasive and clear to every court. This is desirable *ex ante*, as it would probably prevent violations and litigation in the first place, and *ex post*, since if and when litigation were to commence, with the multistate rule in place, any attorney general's office litigating or negotiating for settlement would begin from the much stronger position of having clear, explicit law on its side. The "two heads are better than one" benefit also recurs: Teamwork during the rulemaking process would likely enhance the overall quality of the final rules. (It is also worth noting that, even if an attorney general's rule were not legally binding in court, that fact would be less irrelevant in the multistate context, since the very fact that multiple states' consumer protection authorities engaged in coordinated rulemaking and agreed upon a single, optimized rule will itself carry substantial persuasive weight in any courtroom.)

The notice-and-comment and efficiency advantages inherent in rulemaking would also be enhanced in the multistate rulemaking scenario. Rulemaking would be much more obvious, and more obviously worth paying attention to, if several states were coordinating their rulemaking efforts and synchronizing their release dates; interested parties would have not one but several opportunities to be heard; and states' rulemaking proceedings would all be able to draw from a single pool of resources for rulemaking expertise, document generation, useful comments, and so on.

IV. Objections to Multistate Rulemaking

A. Objections to UDAP Rulemaking Generally

Potential objectors to multistate rulemaking draw from several already-visited pools. On the rulemaking side of the question, Massachusetts Assistant Attorneys General Glenn Kaplan and Chris Barry Smith exhaustively enumerate and dismiss possible objections to general attorney general use of UDAP rulemaking authority in an article supporting the use of their state's UDAP statute to establish gun safety regulations.²⁴ Their arguments lose

²³ Kaplan & Smith, *supra* note 14, at 295-98.

²⁴ See *id.* at 302-23. A brief overview of the objections and the article's ripostes follows:

1. Whether Generalized Rulemaking Loses the Benefit of an Evolving Standard for Commercial Unfairness:

Kaplan and Smith argue that any such loss is outweighed by the preventative benefits of rulemaking -- "litigation will necessarily be built on the bodies of innocent consumers" -- and by the more issue-focused nature of rulemaking as against evolving through a series of more or less randomly selected and timed, individual outcome-focused litigations. *Id.* at 303.

2. Whether Regulations Rob Manufacturers of Their Day in Court: "[F]airness counsels for, not against, a regulatory approach Would-be defendants in litigation do not lose their day in court under a regulatory approach. [Entities] affected by a UDAP . . . regulation not only can still challenge the regulation when it is applied

to them and their conduct, but they can also challenge the standard more generically while it is being promulgated (by participating in the hearing process)” Id. at 305.

3. *Whether the Regulatory Process Is Too Cumbersome, Slow, or Costly*: “When compared to litigation, the regulatory approach . . . is relatively streamlined, expeditious, and ultimately less resource intensive.” Id. at 307.

4. *Whether the Attorney General Has the Requisite Expertise To Regulate*: “A judge reaching product safety decisions must rely on admissible evidence presented by the adversaries and determine an answer somewhere between polar opposite views. The administrative agency, in contrast, can arrive at industry standards after hearing all views through extensive hearings.” Id. at 308-09.

5. *Whether Regulations Will Spawn Harmful Private Litigation*: “[P]rivate suits lack the two most important tools available under UDAP statutes: penalties and pre-suit investigative subpoenas. . . . What UDAP suits based on regulations can do, however, is help compensate consumers for losses caused by company misdeeds.” Id. at 310-11.

6. *Whether Consumers Are Better Off with the Status Quo*: “Product safety regulations may well constrain consumer choice, raise prices, and hinder innovation. However, if the standards are reasonable floors for safety, it is unlikely that the impact will be very great. Moreover, the impact is almost certainly outweighed by the consumer safety benefits that well-drafted regulations can provide.” Id. at 312.

7. *Whether Such Decisions Should Be Left to the State Legislature*: “Legislatures could have chosen a more limited delegation of authority, but instead they relied upon attorneys general to carry the specifics into prospective standards. . . . it would be more like an abdication of responsibility, rather than a demonstration of prudent deference, for an attorney general to resist this UDAP role.” Id. at 316.

8. *Whether This Is an Aggregation of Power Without Realistic Limits*: “attorney general regulatory powers under UDAP statutes are not practically so broad as to raise sustainable legislative concern. . . . While an attorney general could initially commence a rule-making proceeding with expansive regulatory goals, the result of hearing opposing views at length and of compiling facts to support his finished regulations will temper any such decisions. Moreover, the resultant regulatory provisions are still subject to judicial review.” Id. at 317-18.

9. *Whether Federal Inaction Should Mean Inaction by the State Attorney General*: “Federal silence, or even emphatic determinations not to act in the . . . arena, does not countenance state-level inaction . . . congressional or

none of their merit when more than one state engages in rulemaking. In fact, some have even more merit in the multistate rulemaking context, where even more efficiencies are realized and more opportunities for notice and participation in the rulemaking processes are provided.

B. Feasibility

On the multistate side of the equation, there is first the practical question of logistics: How feasible is a multistate rulemaking? Empirical evidence from multistate litigations suggests this is not an obstacle: “When compared to litigation, the regulatory approach . . . is relatively streamlined, expeditious, and ultimately less resource intensive.”²⁵ Surely a multistate approach to rulemaking, where the work consists merely of gathering and considering evidence in support of or against a proposed rule, is a simpler organizational problem than many of the vast, complex multistate litigations undertaken in recent years. As previously noted, the basic mechanisms already exist for coordination among state attorneys general, and recent experience shows that such coordination can be extended effectively to relevant state authorities other than attorneys general.²⁶ And when the resource efficiencies (as previously enumerated) are there for the gaining, offices have an obvious, strong incentive to coordinate. It is true that states’ attorneys general might, in the end, legitimately disagree as to the proper content of final rules, and in the end, that content will be each attorney’s general to decide. But with strong incentives for attorneys general to find common ground, it seems unlikely that serious differences would result.

C. Federalism and Separation of Powers Challenges

Multistate litigation has elicited a series of challenges on the grounds that state attorneys general have grown too big for their collective britches. Simply stated, the question is: Should state attorneys general be allowed to make national policy?

Attacks on the authority of state attorneys general to litigate multistate actions are almost interchangeably labeled as either federalism or separation of powers challenges.²⁷ The Federalism complaint typically suggests that any of several federal limits on state action preclude multistate litigation,²⁸ while the separation of powers complaint, when distinguishable, seems to argue against a federal grant of power to state attorneys general to

federal administrative decisions not to act in an area may be just a decision that the matter is best left to the states. . . . an attorney general’s primary responsibility is not to the preferences of Congress or federal regulators but to the state.” *Id.* at 319.

²⁵ *Id.* at 307.

²⁶ Informal networks already exist across various consumer protection authorities’ offices, dating back at least to the 1999 conference of the National Association of Consumer Advocates. Peacock, *supra* note 9, at 19. The multistate negotiating team in the Household litigation, for example, included not only attorneys from attorneys’ general offices, but also state banking regulators. *Id.*

²⁷ Lynch, *supra* note 2, at 2027.

²⁸ *Id.* at 2010-2024.

enforce federal antitrust law.²⁹ Neither challenge holds water, because fundamentally, in multistate cases, “the states simply do together what they could do alone.”³⁰

In truth, the charges aren’t really about doctrine. The doctrinal labels seem mostly to be ill-considered attempts to dress up a simpler, more ideological complaint in less nakedly political clothing.³¹ That complaint, of course, is that attorneys general too zealously advocate for consumer protection, and as a rule it is lodged only by those concerned not with the proper balance between federal and state powers, but with limiting restraints on business generally. On the question of UDAP laws, they fight a losing battle, because UDAP enforcement power is explicitly (and very obviously constitutionally) legislated to attorneys general (or other similarly-empowered enforcement authorities).³²

Regardless, multistate rulemaking is less, not more, problematic than multistate litigation for critics of expanding state power. Rulemaking processes are open to all affected parties and are subject to public review and scrutiny, and the resulting rules are almost certainly more clear and therefore more easily understood than the intentionally ambiguous underlying statute. Those fearing the secret cabal of attorneys general will be delighted by the utter, statutorily compelled openness of rulemaking.

D. Political Limits

As previously noted, initiating a rulemaking procedure generally results in increased visibility for the issue in question. Could this increased visibility lead to more politicized intervention from state legislatures, derailing the rulemaking process? Clearly the answer is yes, but this is, if anything, a benefit, not a problem. If political power is exerted to override rulemaking by statute, so be it; like any administrative grant of power, rulemaking allows attorneys general to fill regulatory voids, but it was not – could not be – meant to thwart the legislative will.³³

E. Conflicting Results

What happens if multistate rulemaking breaks down, resulting in a variety of conflicting rules of varying degrees of severity? It is useful to return to the observation that in multistate activity, “the states simply do together what they could do alone.” State rules reflect such conflicts already. At worst, conflicting results leave states in their current position; at best, they gain all the advantages enumerated above.³⁴

It is worth noting that, in the event of conflicting rules, affected entities are likely to simply adhere to the strictest rule or rules, for the sake of simplicity and safety. The incentive not to do so – to “walk the line” and risk enforcement action in some states – would have to be strong indeed.

V. Conclusion

²⁹ Id. at 2028-2032.

³⁰ Id. at 2032 (concluding). In the balance of the Note, Lynch makes short work of the various federalism and separation of powers complaints, systematically exposing their lack of merit. See *id.*

³¹ Please excuse the painfully mixed metaphor.

³² See *supra* note 13 and accompanying text.

³³ To legislatures are reserved all legislative powers. See, e.g., U.S. Const, Art I, § 1. Put perhaps more famously, “I brought you into this world, and I can take you out.” Bill Cosby, *The Cosby Show*, 1984 (on parenting).

³⁴ See *supra* Parts III.B, III.D.

The advantages of multistate rulemaking beg one last, obvious question: Why hasn't it been tried already? The answer may lie in the ad-hoc way in which most multistate litigations are born, and in the resource and time constraints felt by attorneys general. An offender is investigated, a sleazy business practice is uncovered, and the attorneys-general-as-prosecutors are off to the races. Multistate rulemaking would benefit and expedite the work of enforcement authorities, but requires planned, prior investment of time and energy.

It is, in fact, likely that it has been tried, on a far less formal basis than is suggested here, in one sense: States almost certainly consider existing rules in other states when confronting similar issues in single-state rulemaking. Indeed, not to do so would be negligent on the part of those researching a proposed rule.

But regularizing the process of multistate rulemaking provides a layer of benefits not yet enjoyed. By making it customary for states to engage in multistate rulemaking both preventatively and as a matter of course when non-industry-wide settlements are reached, attorneys general can wipe away some of the patina of capriciousness and political opportunism that discredits many multistate actions in the eyes of so-called federalists, while at the same time arming themselves with powerful new weapons for both the negotiating table and the courtroom.