

State AG Consumer Protection Shift Isn't An Election Fad

By **O.H. Skinner** (November 18, 2022, 3:34 PM EST)

We are starting to see the first, early signs of a new potential state attorney general consumer enforcement paradigm emerge, driven primarily by particularly conservative attorneys general on the Republican side of the aisle.

The avowedly partisan voice of these first movers has led some commentators to treat the shifts in consumer protection as a political phenomenon, another example of how partisan issues and partisan maneuvers dominate headlines during election seasons. A recent Law360 guest article by thoughtful experts featured shades of this type of analysis.

But this explanation overlooks how the emerging changes run deeper than an election fad. These shifts in consumer protection address broader frustrations with the existing state attorney general consumer enforcement apparatus.

And the politics-centered analysis of these changes also overlooks how the shifts in consumer priorities are primed to bring positive results not just for the officials pushing the changes but for consumers in their states as well.

With this context in mind, it is easier to see this early set of changes as the start of a powerful paradigm shift that is unlikely to end when the last ballot is counted for the 2022 election.

The Emerging Consumer Protection Paradigm

The changing consumer protection landscape is being fueled — and defined — by the greater willingness of attorneys general to break away and act independently on consumer protection issues, and by creative use of most favored nation clauses as structural tools to help remove obstacles to independent settlements by one state or a handful of states.

For an example of this new breakaway mentality, look no further than the criticism of the National Association of Attorneys General, which has been building for over a year such that over half of the Republican attorneys general are now either out of NAAG or on record with strident public criticism of the organization and its operations.[1]

Or consider how conservative attorneys general and their staff have been increasingly vocal about the need for consumer investigations to resolve more quickly.[2]



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A prime example has been Texas Attorney General Ken Paxton and his staff, who have used recent meetings with other Republican attorneys general to make public statements about a new focus on expeditiously breaking away to bring independent suits or settlements if a multistate investigation does not show timely progress.[3]

And there is growing evidence of this being put into action, with several single-state settlements of high-dollar cases by Republican attorneys general hitting the newswires in recent months.

In February, Texas announced a nine-figure, single-state settlement with opioid-maker Teva Pharmaceutical Industries Ltd.[4] In May, Florida announced a nine-figure, single-state settlement with Walgreens Co. over opioids.[5] And in October, Florida announced another nine-figure, single-state settlement with Walmart Inc.[6]

The Florida Walmart settlement is particularly striking because it did not result from litigation — it is a single-state, presuit settlement on a matter of national scope that might have in years past been rolled into a traditional nationwide, or nearly nationwide, multistate investigation and settlement.[7]

Perhaps most notably, a most-favored-nation clause was deployed by the state in each of these single-state settlements.[8] MFN clauses ensure that if another state later obtains more in settling the same claims, then the state that moved first, and obtained the MFN, will get its settlement value raised up to the higher level.

Seeing MFN clauses in these single-state settlements is a strong signal of where things are going for consumer protection, as MFN clauses are a structural tool that can help facilitate breakaway settlements by defusing fear in the breakaway state that a marginally superior settlement might come to another state in the immediate aftermath of the breakaway; with more use of MFN clauses likely comes more breakaway settlements.

The Emerging Paradigm Addresses Existing Frustrations And Benefits Consumers

A desire to focus on more politically salient consumer initiatives — like the legality of environmental, social and governance investing techniques and claims — is no doubt playing a part in the changing landscape of state attorney general consumer protection.[9]

But it matters a great deal that the new breakaway mentality in state attorney general consumer protection helps resolve frustrations with the existing infrastructure of the consumer protection landscape and that breakaway settlements like those we have been seeing have direct benefits for consumers, which gives the emerging changes greater long-term viability.

As I saw repeatedly in my time in the Arizona Attorney General's Office working on consumer cases, a serious problem with the existing multistate investigation apparatus is its slow pace.

Look no further than the recent multistate settlement in California v. Ford Motor Co., which resolved claims in May that were essentially a decade old, involving model years 2011-2014.[10] Or consider the multistate student loan settlement in New York v. Navient Corp., which in January resolved claims from as far back as 2009, almost 15 years ago.[11]

When I was involved in these types of cases, there was a constant sense that speed was not on the

minds of most staff.

It often felt as though the investigation itself had become the point of the exercise — not resolution of the matter — and that case maximization was too often the focus of multistate efforts, with states willing to push on for years in pursuit of adding a metaphorical nickel per violation to the settlement terms, even if multiple other cases worth far more than a nickel per violation were languishing or entirely overlooked due to lack of resources.

For those attorneys general and staff that share this sense of the belabored multistate process, the single-state settlement with an MFN clause is a fantastic way to cut through the existing bureaucracy, reach a settlement on their own terms, and guarantee a swifter resolution.

And the benefits of these speedier resolutions flow directly to consumers.

Too often, consumers receive unacceptably little in the way of restitution from multistate settlements. In part, this is a product of the investigations being so slow — when you are settling claims from 10 years in the past it becomes very hard to find the affected consumers and direct meaningful money to them.

With faster resolution of cases through breakaway settlements, state attorneys general have a greater chance to deliver real restitution — real money — into the pockets of more of their consumers.

And when attorneys general act independently to resolve cases faster, and not let case maximization and the metaphorical last nickel drive resource allocation, they are able to increase their cadence of cases, meaning more consumers can benefit from consumer protection efforts.

Conclusion: A Serious Shift, With Positive Ramifications

There will always be cases that resolve through the traditional, bipartisan multistate investigation process, with global or near-global resolution of almost all state claims in one agreement. We have seen examples of this just earlier this month, with announcements about opioid settlements with national pharmacy chains.[12]

But change is coming to state attorney general enforcement efforts, in part because the breakaway mentality we are seeing in some states has too many benefits, for states and their consumers.

And it is notable that this year's multistate settlements with pharmacies and Teva were preceded by the breakaway settlements mentioned above. It would not be surprising to eventually learn that the precursor breakaway settlements played a role in helping wrap up the multistate investigations.

Regardless, if the breakaway states ultimately keep level with, or outperform, the final terms of these multistate settlements, it will only fuel the momentum behind independent, breakaway settlements going forward.

One thing does seem certain right now: Even after the victors are crowned, and we all move on from the 2022 election, we will still be at the beginning of this evolving situation in consumer protection, not the end, and things will likely be accelerating, not slowing down. Stay tuned.

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[1] See, e.g., Susan Crabtree, "GOP Attorneys General Pres To Return \$280 Million To States," RealClearPolitics (September 18, 2022).

[2] See, e.g., Paul Singer & Beth Chun, "State Attorneys General Lay Out consumer Protection Priorities For 2022," Kelley Drye AdLaw Access (November 10, 2021).

[3] See, e.g., Panel Remarks By Attorney General Ken Paxton at RAGA Winter National Meeting, January 2022; Panel Remarks By First Assistant Attorney General Brent Webster at Rule of Law Defense Fund Senior Staff Meeting, October 2022.

[4] Emily Field, "Texas Strikes \$225M Deal With Teva Over Opioid Crisis," Law360 (February 7, 2022).

[5] Carolina Bolado, "Florida And Walgreens End Opioid Trial With \$683M Deal," Law360 (May 5, 2022).

[6] Lauren Berg, "Walmart To Pay \$215M In Fla. AG's Latest Opioid Deal," Law360 (October 20, 2022).

[7] Florida Walmart Settlement at 2 ("WHEREAS, the Office of the Attorney General brought lawsuits against other major chain pharmacies regarding their prescription opioid medication practices but not against Walmart").

[8] Texas Teva Settlement, Section XII, Paragraph D; Florida Walgreens Settlement, Section H, Paragraph 20, Florida Walmart Settlement, Section G, Paragraph 20.

[9] Paul Singer & Beth Chun, "State AG Consumer Protection Priorities Beyond The Election," Law360 (October 26, 2022).

[10] Morgan Conley, "Ford Inks \$19.2M Deal To End States'False Ad Claims," Law360 (May 24, 2022).

[11] Dean Seal, "Navient Reaches \$1.85B Deal To End Student Lending Probes," Law360 (January 13, 2022)

[12] Jeff Overley, "CVS, Walgreens Offer \$10B To End Nationwide Opioid Suits," Law360 (November 2, 2022).