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SEARLE CIVIL JUSTICE INSTITUTE
STATE CONSUMER PROTECTION ACT LITIGATION:
UPDATE ON TRENDS

JUNE 2016

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SEARLE CIVIL JUSTICE INSTITUTE

STATE CONSUMER PROTECTION ACT LITIGATION: UPDATE ON TRENDS

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June 2016

LAW & ECONOMICS CENTER
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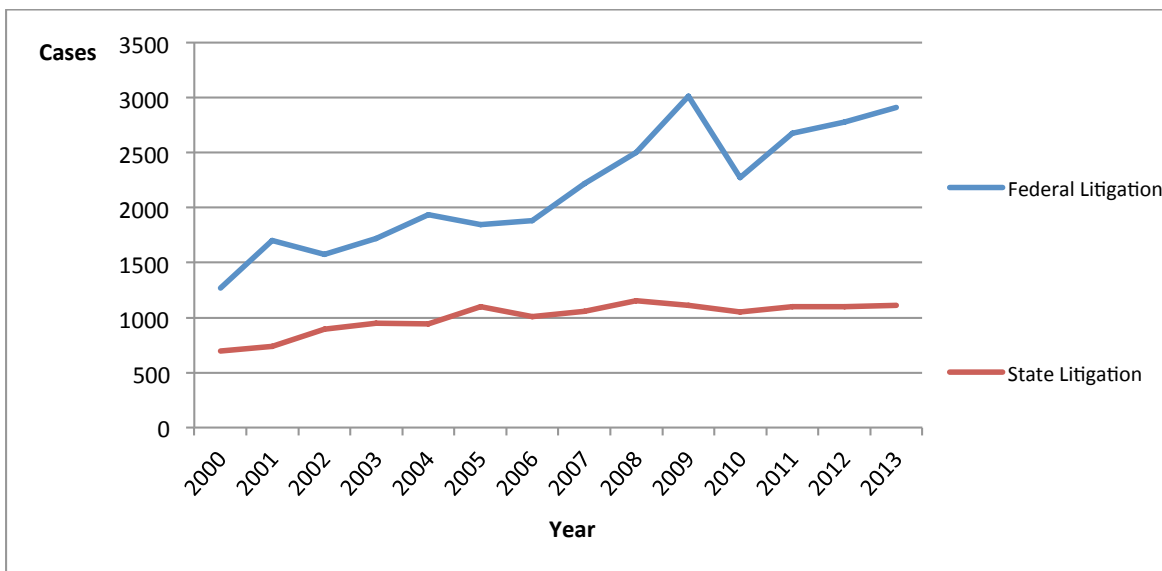
Executive Summary

In 2009, the Searle Civil Justice Institute (SCJI) conducted the first large-scale empirical examination of consumer protection acts (CPAs). The 2009 Report found that CPAs were becoming more favorable to consumers and there was a pronounced upward trend in state CPA litigation from 2000-2007. It also found a positive association between more consumer-friendly statutes and the number of reported cases. This Report picks up where the 2009 Report left off, examining trends in CPA statutes and litigation from 2008-2013.

Several major findings emerge from the data:

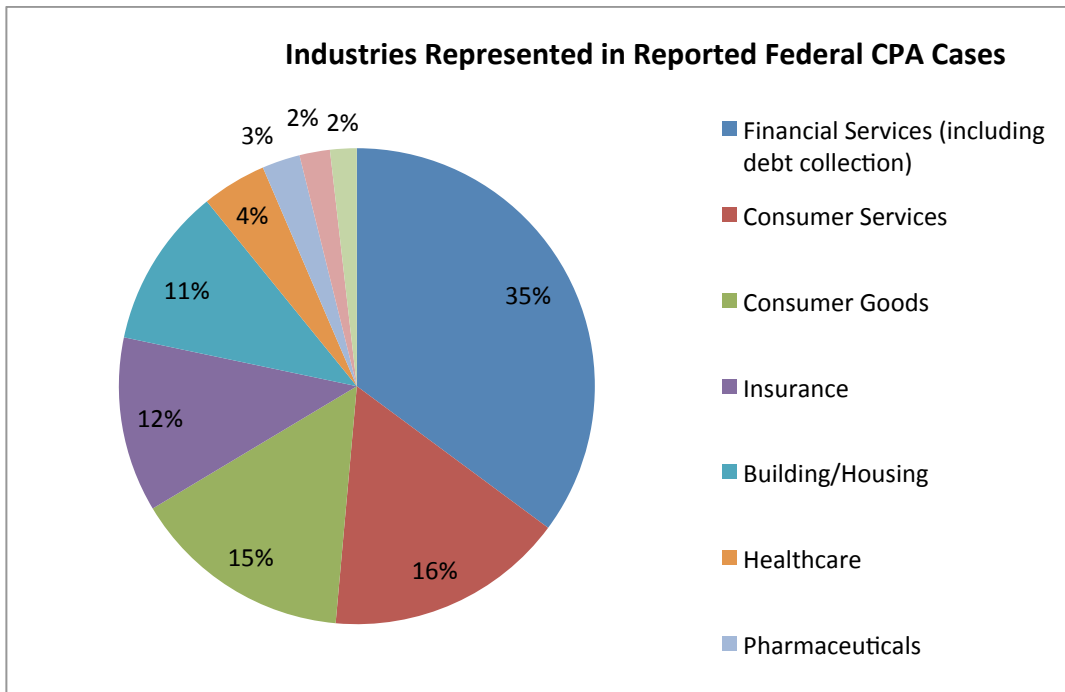
- There is a steady upward trend in CPA litigation, especially in federal court. The compounded annual growth rate (CAGR) for cases in state court was 3.4%, and that for cases in federal court was 6.1%.
- Although the general upward trend in litigation continued, there was a 21% decline in reported federal CPA cases from 2009-2010, reflecting an impact from the financial crisis.
- Total state court litigation has fallen slightly from 2008-2013 (CAGR -.6%), but federal litigation has risen by 2.5% per year on average.

REPORTED STATE AND FEDERAL CPA CASES: 2000-2013

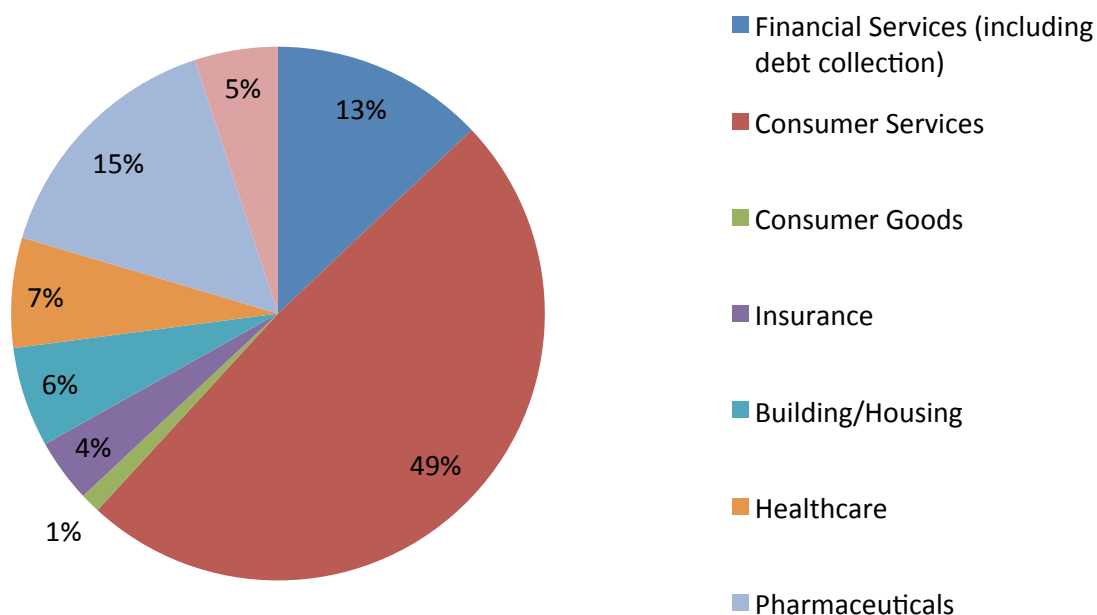


- The increase in growth in reported cases around 2006 and the large number of removal cases based on diversity jurisdiction found in the sample suggest that the Class Action Fairness Act (CAFA) played a role in the increasing volume of CPA cases in federal court.
- The financial crisis appears to have played a large part in shaping recent CPA litigation. The financial industry is the most common target of private reported

cases sampled, and it is the second largest single industry targeted by state AG investigations. Further, 32 percent of federal cases sampled involve some underlying debt-collection action, and 21 percent involve a federal lending or housing statute.

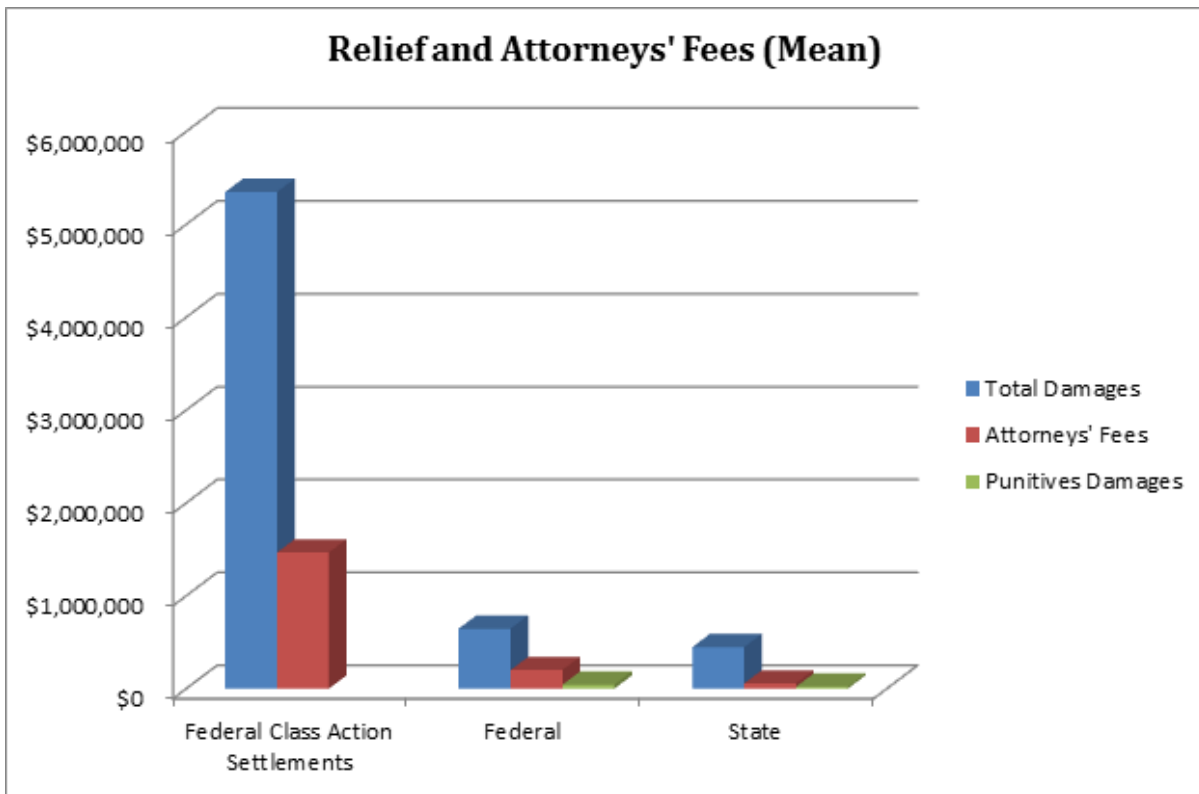


Industries Represented in Reported State Attorney General Investigations



Notes: COLUMBIA LAW SCHOOL, NATIONAL STATE ATTORNEYS GENERAL PROGRAM, *Consumer Protection Report*, <http://web.law.columbia.edu/attorneys-general/policy-areas/consumer-protection/resources-and-publications/consumer-protection-newsletter> (last visited Apr. 11, 2016).

- The average (median) damages are \$546,000 (\$81,000), with average (median) attorney fees of \$138,000 (\$25,000), between 25 and 30 percent of total damages awards. An examination of relevant filings from federal class action settlements finds a similar ratio (.27) of average attorneys' fees (\$1.5 million) to average awards (\$5.3 million).



1. INTRODUCTION

In the 1960s, U.S. states began to enact consumer protection acts (CPAs) in an attempt to address what legislators saw as problems associated with an increasingly impersonal marketplace, an ineffective Federal Trade Commission (FTC), and insufficient common law protections.¹ Today, all states and the District of Columbia have CPAs—many modeled after the FTC Act, which broadly prohibits “unfair and deceptive acts and practices.”² There are, however, several key differences between CPAs and the FTC Act. First, unlike the FTC Act, which only the FTC can enforce, all CPAs confer a private right of action. Second, the FTC Act allows only equitable relief (including injunctions and disgorgement), but a majority of CPAs provide private plaintiffs the ability to collect damages. Third, most state CPAs have been amended over time to broaden consumers’ ability to bring suit. For example, more than a third of states currently allow class actions and do not require a showing of actual consumer injury.

Not surprisingly, as the ability of consumers to use CPAs has expanded, so have concerns that litigants are abusing CPAs by bringing frivolous claims that involve no consumer harm. In 2009, the Searle Civil Justice Institute (SCJI) conducted the first large-scale empirical examination of CPAs (2009 Report).³ The 2009 Report found that CPAs were becoming more favorable to consumers, and that there was a pronounced upward trend in state CPA litigation from 2000-2007. It also found a positive association between more consumer-friendly statutes and the then number of reported cases.

This Report picks up where the 2009 Report left off, examining trends in CPA statutes and litigation from 2008-2013. Both trends continue. On average, statutes have continued to become more plaintiff-friendly over the time period, but with wide variation. CPA litigation—measured as reported cases—has a compounded annual growth rate (CAGR) of around two percent a year since 2008, with most of the growth being in federal court.⁴ Total state court litigation has fallen slightly from 2008-2013 (CAGR -.6%), but federal litigation has risen by 2.5% per year on average.

¹ For a detailed history of the evolution of state CPA acts, see SEARLE CIVIL JUSTICE INST., *State Consumer Protection Acts: An Empirical Investigation of Private Litigation*, 5-6 (2009), available at http://www.masonlec.org/site/rte_uploads/files/CPA%20Prelim%20Report%20Dec%202009.pdf.

² 15 U.S.C. Sec. 45(a).

³ See SEARLE CIVIL JUSTICE INST., *supra* note 1.

⁴ The CAGR of a data series measures the average rate of a series’ growth over a variable period of time. Due to the variation within a data series, the year-to-year growth of a data series may be difficult to interpret. For example, a series may grow by 8% in one year, decrease in value by 2% the following year, and then subsequently increase by 5% in the next. With inconsistent annual growth, the CAGR is used to give a broader picture of a time series. The CAGR is calculated by

the following formula: $CAGR = \left(\frac{EndingValue}{BeginningValue} \right)^{\left(\frac{1}{\# of years} \right)} - 1$.

Although the general upward trend in litigation continued, there was a marked decline in reported CPA cases from 2009-2010, reflecting an impact from the financial crisis. An examination of a random sample of 387 reported CPA cases from 2010-2013 reinforces this finding. Defendants in the financial services industry are the most common targets, and federal statutes concerning credit or housing are the most common additional claims. In addition, almost a third of all federal cases have an underlying debt action.

Review of the dockets for 276 reported federal district court cases provides more detail on these actions. Over one-third (108) of the federal cases were removed from state court. This finding, along with an upward trend in federal litigation beginning in 2006, suggests that the Class Action Fairness Act (CAFA) had an impact on the volume of state CPA claims in federal court.⁵

Of those cases that result in reported opinions, plaintiffs do not appear to fare very well. Slightly more than half of state CPA claims in federal court are dismissed (140). Further, plaintiffs lose 80 percent of the summary judgment motions in our sample. However, given the sample selection that is at work—our sample contains only those cases that were filed and made it to a stage in litigation in which a court wrote an opinion—these win rates are likely to vastly overstate defendant success, as they will miss all the cases that settle before the court decides a dispositive motion.

The limited information in our sample on monetary awards finds that average (median) damages are \$546,000 (\$81,000), with average (median) attorney fees of \$138,000 (\$25,000) between 25 and 30 percent of total damages awards. An examination of Rule 23(e) reports from federal class action settlements finds a similar ratio (.27) of average attorneys fees (\$1.5 million) to average awards (\$5.3 million).

Because the large majority of investigations by state attorneys general (AG) settle, relying on a search of reported cases would certainly undercount state AG enforcement activity. In an attempt to provide some context, we collected data on state AG litigation activity for the six states with highest volume of private CPA litigation in 2013 (California, Florida, Illinois, Massachusetts, New York, and Texas). There was significant variation between the six states in the number of investigations, with New York having 194 and California and Texas having 42 each. There was additional significant variation within the civil penalty/remedies amounts, with Massachusetts averaging a high of \$25 million and Texas averaging a low of \$2.9 million.

⁵ 28 U.S.C. §§ 1332(d), 1711(e). CAFA's major feature was to expand federal courts' ability to exercise diversity jurisdiction over class actions by altering the amount in controversy and diversity of citizenship requirements.

The remainder of this Report is organized as follows. Section 2 explains the data collection process. Section 3 presents the main empirical results, and Section 4 concludes.

2. DATA COLLECTION

The data collection proceeded in four primary phases.⁶ First, the SCJI research team began with a list of CPA statutes identified in the 2009 Report.⁷ The researchers examined the statutes for any changes since 2007—the last year of analysis in the 2009 Report. The major attributes we examined were: the scope of the statute (e.g., was it vague or limited to specific conduct?); who can bring an action (e.g., is there a private right of action? are class actions available?); and the elements of a claim (e.g., was consumer injury required?). The statutes also were examined for additions to lists of specific conduct that violates the CPA at issue.⁸

The next step involved examining CPA litigation. Researchers searched the Lexis database for all state trial or appellate, and all federal district court cases that satisfied a broad search criteria used in the 2009 Report designed to capture CPA cases.⁹ After a pool of cases was identified, researchers examined each case to assure that it actually involved a claim under a CPA. Researchers included in the database any decisions that mentioned claims directly related to consumer protection but did not mention a specific CPA citation or title. For example, we included claims on “unfair competition,” “deceptive trade practices,” and “consumer fraud” that are directly related to consumer protection. Duplicate cases (i.e., multiple reported opinions from the same underlying case) were also removed to avoid over counting. This process resulted in 14,995 state and federal district cases for the years 2009 – 2013, and when combined with the previous sample, a total of 34,962 state and federal district cases for the years 2000 - 2013.

The next step in the data collection process was to identify a random sample of cases on which to conduct a more detailed analysis. After screening, a final sample of 387 cases (1.1 percent of the full sample) was left for researchers to code across 97 dimensions. One drawback of relying on information from reported decisions is that these opinions almost surely lack

⁶ Because one goal of this Report is to update the analysis from the 2009 Report, the collection and coding methods used in the 2009 Report have been followed as closely as possible to render comparisons meaningful and to allow the new data to be appended to the existing dataset.

⁷ The full list of state consumer protection acts by state is listed in the Appendix of the 2009 Report. See SEARLE CIVIL JUSTICE INST., *supra* note 1, at 53 – 55.

⁸ The full coding sheet is listed in the Appendix of the 2009 Report. See SEARLE CIVIL JUSTICE INST., *supra* note 1, at 53 – 66.

⁹ The search string used to identify cases in this update was the same strategy as the one used in the 2009 Report: “We began by using the following over-inclusive search string: [(consumer w/3 decept! or protection or practice! or uniform or “false pretense” or “false promise” or unconscionable) or (misrep! w/p consumer and fraud!) or (deceptive w/3 consumer! or trade or practices or act) or “consumer fraud” or “fraud and unlawful credit practice!” or (unfair w/3 competition or practice!) or “consumer protection” or “little FTC act” or “deceptive business practice!” or “unlawful trade practices act” or (“legal remedies act” w/s California) or (“fair business practices act” w/s Georgia) or “merchandising practices act” or “Wisconsin consumer act” and date aft 2008 and bef 2014].”

certain details of the case. For example, these opinions often will not contain jurisdiction, information about removal, or list all accompany claims. Perhaps more importantly, the outcome of a sampled opinion provides only a snapshot in the timeline of a case, often not providing information on the ultimate resolution. To remedy this problem, researchers were able to retrieve and examine the dockets and relevant filings for 276 federal cases in more detail.

A reliance on reported decisions will understate state AG enforcement activity, as most of their investigations never lead to litigation.¹⁰ In order to estimate the level of activity, the research team examined the *Consumer Protection Report* published by the National State Attorneys General Program at Columbia Law School.¹¹ California, Florida, Illinois, Massachusetts, New York, and Texas were examined since they are the top six states in terms of private CPA litigation activity in 2013. Data were collected from the sections entitled “Consumer Protection Cases, Settlements, and Advocacy Statements” and “Multistate Cases and Settlements.”

Before proceeding, it is important to note some limitations that stem from the sample of private actions being based on reported cases. As is well known, reported cases represent only a small portion of all cases; the sample will not capture cases that are filed, but settled or dropped prior to the court having to issue an opinion, or cases that involve an unreported decision. Importantly, not only will we undercount total CPA cases, but also the reported decisions we do capture will not be representative of the underlying distribution of CPA cases, as they have not been randomly selected into litigation.¹² Further, reported cases will also understate AG actions, the vast majority of which are resolved with a consent order and thus will not show up as reported decisions.¹³ With these caveats in mind, focusing on reported cases still appears to be the best way to

¹⁰ See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 498 (2012) (noting that it is difficult to identify state AG suits “in part because they almost always settle.”); Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation In Multi-State Lawsuits*, 59 Pol. Res. Q. 609, 609 (2006) (noting with respect to class actions brought by state AGs “Rather than spend a protracted length of time in court, most defendants choose to settle cases quickly.”). We attempt to ameliorate this shortcoming in Section 3.5 by examining press releases involving AG actions from states with high volumes of private litigation.

¹¹ NAT’L STATE ATT’YS GEN. PROGRAM, COLUMBIA L. SCH., *Consumer Protection Report*, <http://web.law.columbia.edu/attorneys-general/policy-areas/consumer-protection/resources-and-publications/consumer-protection-newsletter> (last visited Apr. 11, 2016).

¹² For example, the cases that fail to settle before litigation commences are likely to be those with unsettled laws or heavily disputed facts so that the likelihood of plaintiff success at trial is close to 50. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEG. STUD. 1 (1984). Further, litigation cases may also be those in which one party has access to superior information. See Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEG. STUD. 187 (1993). For an empirical examination of the relationship between win rates of reported cases and the merit of underlying disputes, see Joel Waldfogel, *The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229 (1995).

¹³ See *supra* note 12.

identify CPA actions. For example, one obvious alternative would be to search dockets for all filed CPA claims. However, there are two shortcomings with this approach. First, most state dockets are unsearchable electronically. Second, although federal dockets are searchable through PACER, Westlaw, and Bloomberg Law, docket coversheets do not list CPA claims as a cause of action. Accordingly, any search would vastly undercount CPA claims, as it would pick up only sporadic mentions of state CPA claims on docket sheet entries. Trends in reported cases should be correlated with the underlying amount of CPA litigation activity. Moreover, studying the reported cases in detail should offer insight into the nature of claims and litigates involved in the disputes.

3. EMPIRICAL RESULTS

3.1 CPA Statutes

Table 1 shows the percentage of states with CPAs that contain certain provisions that are likely to make it easier for an aggrieved consumer to bring an action. Overall, the data indicate that CPAs have been relatively static since 2000. There has been no change in the number of states with vague¹⁵ CPA acts (15)¹⁶, or a requirement that the action be in the “public interest” (8)¹⁷, or a limitation to recovering only through the CPA (3)¹⁸. The availability of class actions was the provision with the largest movement (from 15 states to 18 states)¹⁹. There was a slight increase in the number of states with private rights of actions (from 48 states to 50 states and the District of Columbia)²⁰ and injury requirements (from 31 to 32 states)²¹. The only change since 2009 was one more state allowing class actions.

¹⁵ State statutes were coded as “vague” if the state consumer protection legislation consisted of vague definitions of illegal conduct instead of a specified list of illegal activities. For example, compare the consumer protection statutes of Arizona and Alabama. Arizona defines unlawful practices as “the act, use or employment by any person of any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely on such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.” See Ariz. Rev. Stat. Ann. §§ 44-1522.A. In contrast, Alabama’s statute has legislation consisting of 27 sections explicitly listing unlawful/illegal acts. See Ala. Code §§ 8-19-5.

¹⁶ States coded as vague were Arizona, Connecticut, Delaware, Florida, Illinois, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, New York, North Carolina, North Dakota, Vermont, and Washington.

¹⁷ States with a public interest requirement in their state consumer protection legislation were Georgia, Illinois, Massachusetts, Montana, Pennsylvania, Vermont, Washington, and Wyoming.

¹⁸ Alabama, Alaska, and West Virginia had exclusive remedy provisions within their state consumer protection statutes.

¹⁹ States with a class action provisions in their state consumer protection legislation include California, Colorado, Connecticut, District of Columbia, Idaho, Indiana, Kansas, Michigan, Missouri, New Hampshire, New Mexico, Ohio, Oregon, Rhode Island, Texas, Utah, Wisconsin, and Wyoming.

²⁰ Within the dataset, only Delaware and Iowa’s statutes changed from having no private right of action to having a private right of action.

²¹ States with a requirement to show injury to the consumer were Alabama, Alaska, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

TABLE 1
PRESENCE OF MAJOR PROVISIONS IN 2000, 2009, AND 2013

Provision	2000	2009	2013
Vague Act	15	15	15
Private Right of Action	49	51	51
Class Action	15	17	18
Public Interest	8	8	8
Injury to Consumers	31	32	32
Exclusive Remedy	3	3	3

As seen in Table 1, there has been little variation in the presence of major CPA provisions. An alternative method for examining the extent to which a statute is likely to encourage litigation is the Expected Value Index (EVI). The EVI was developed in the 2009 Report, and it is designed to measure the relative “plaintiff-friendliness” of a CPA.²² Higher EVI values correspond with a greater number of provisions that are likely to make it easier for a plaintiff—either a consumer or a state AG—to prevail in litigation, and hence more likely to bring a CPA case.²³ The first column in Table 2 lists the average EVI across states for the period 2000-2013, and shows an increase of nearly 26 percent (18.2 to 22.9).

²² See SEARLE CIVIL JUSTICE INST., *supra* note 1, at 28.

²³ Details on the calculation of the Expected Value Index (EVI) can be found in the 2009 Report. See *id.* at 28.

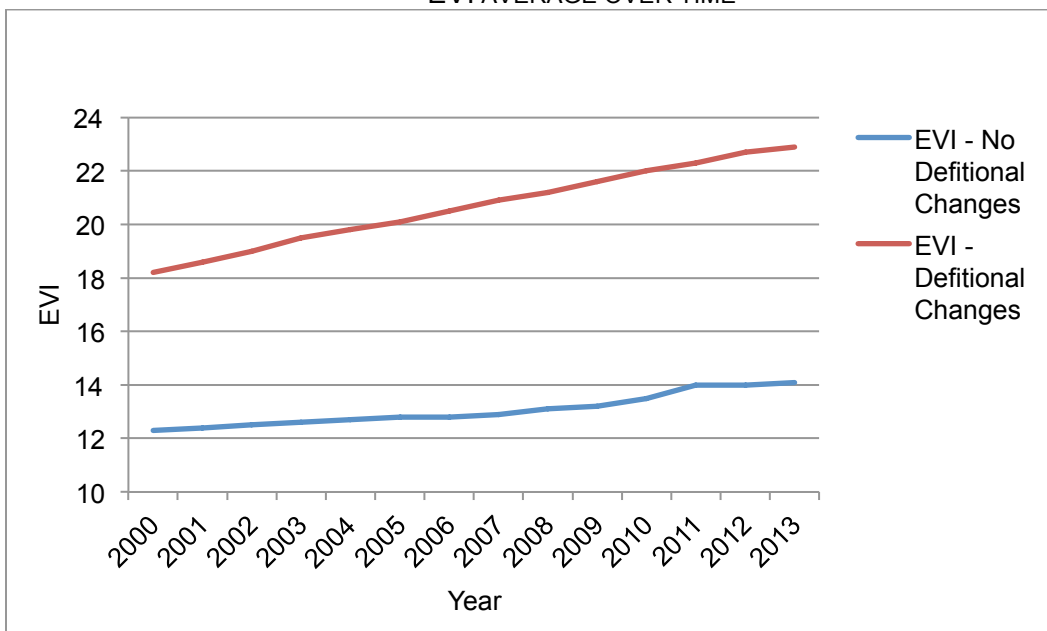
TABLE 2
AVERAGE US EVI BY YEAR

Year	EVI (with definitional changes)	EVI (without definitional changes)
2000	18.2	12.3
2001	18.6	12.4
2002	19.0	12.5
2003	19.5	12.6
2004	19.8	12.7
2005	20.1	12.8
2006	20.5	12.8
2007	20.9	12.9
2008	21.2	13.1
2009	21.6	13.2
2010	22.0	13.5
2011	22.3	14.0
2012	22.7	14.0
2013	22.9	14.1

A shortcoming of the EVI is that it does not assign weights to specific changes in CPAs. For example, an amendment providing the ability to bring a class action under the CPA would be treated the same as an amendment that adds one additional type of conduct to the list of prohibited acts and practice.²⁴ Clearly, the class action is likely to have a larger impact on litigation, yet both increase the index by one. Although it would be ideal to have a weighting scheme, it would necessarily be subjective. In an attempt to ameliorate this issue, the second column in Table 2 lists the average EVI that leaves out changes in the definition of prohibited practices, focusing instead on changes in major provisions. Not surprisingly, it shows a smaller growth of 14.6 percent (from 12.3 – 14.1). Figure 1 displays the trends in Table 2 graphically.

²⁴ Expansion of the definition of prohibited acts and practices include provisions related to Kosher foods, cathinone bath salts, soliciting assisted care living without a license, and gift cards. For example, see 815 Ill. Comp. Stat. Ann. 505/2PPP.

FIGURE 1
EVI AVERAGE OVER TIME



Although there has been little change in the average EVI over time, this masks significant variation across states. Figure 2 shows the 2013 EVIs (with and without definitional changes) for all states (and the District of Columbia). While states, such as Missouri, Illinois, and Oregon, have EVI values of 50, 46, and 45, respectively, Hawaii, Alabama, and Maine have EVI values of 8, 18, and 9, respectively. Figure 2 is also instructive by showing how inclusion of definitional changes can inflate a statute's EVI.

FIGURE 2
EVI BY STATE IN 2013

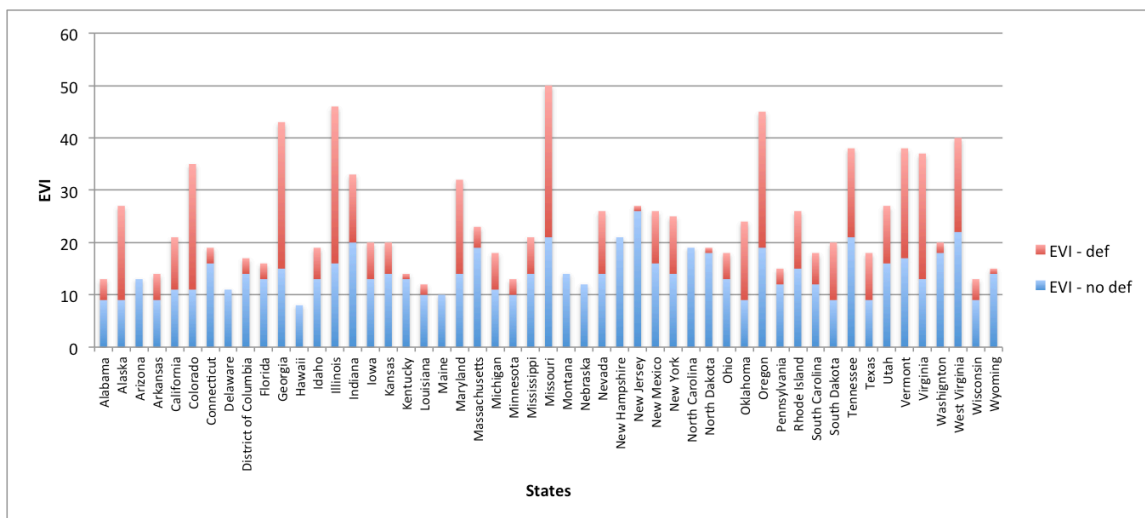
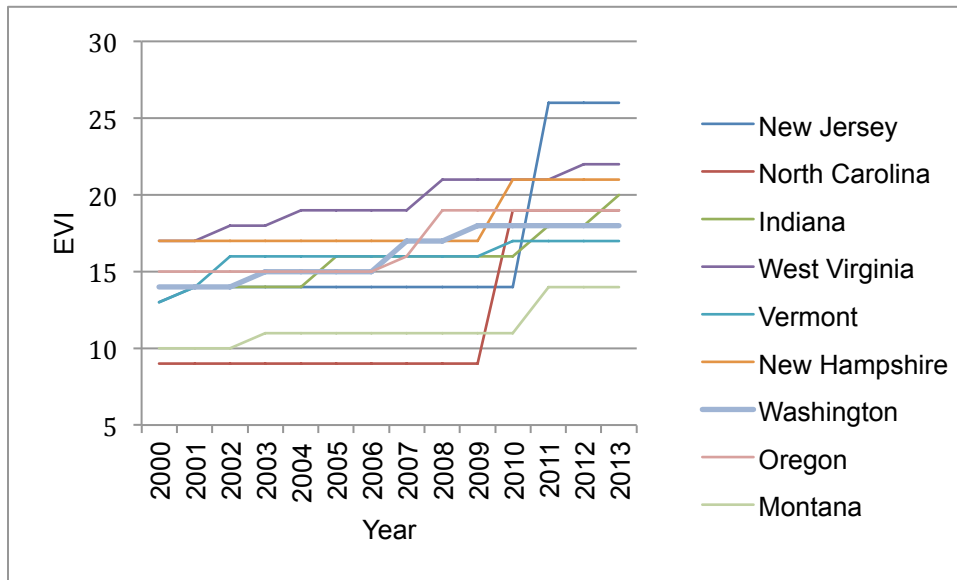


Figure 3 shows separate time series for the states with the top five absolute increases in EVIs (without definitional changes) over the time period.²⁵ New Jersey has the largest change in EVI, followed by North Carolina and Indiana. Most of the growth appears to come from one-time changes after the financial crisis, in 2010 or 2011.

FIGURE 3
TOP EVI GROWTH: WITHOUT DEFINITIONAL CHANGES



3.2 Litigation Trends

This section reports results of a search for reported state and federal opinions involving CPAs. As explained in Section 2, this measure of CPA litigation activity surely will be under-inclusive as it captures only those cases in which a complaint was filed and that reached a litigation stage requiring the court to issue an opinion. It will not capture cases that were filed, but settled or were dropped prior to a judicial decision. Nonetheless, because reported actions are undoubtedly correlated with underlying actions, the trends should reflect CPA litigation activity.

Figure 4 shows reported state and federal CPA cases from 2000-2013.²⁶ Although both state and federal cases have risen over the time period, the vast

²⁵ Nine states appear because of ties.

²⁶ The trend in reported federal district court cases is adjusted to reflect the fact that the E-government Act of 2002 required that all federal district court opinions be made available electronically beginning April 16, 2005. See 116 Stat. 2899, 2913 (2002). Previously, Lexis had access to only those courts designated for publication. Accordingly, the E-government act greatly expanded the number of reported opinions available in Lexis. In an attempt to account for this

majority of the increase has been in the federal district courts, with a CAGR of 6.1% (from 1,269 cases in 2000 to 2,909 cases in 2013) compared to a CAGR of 3.4% (from 696 cases in 2000 to 1,111 cases in 2013) for state litigation. Interestingly, state and federal litigation growth were similar until 2005, but reported federal cases began a much steeper trajectory in 2006. This finding may reflect the impact of the Class Action Fairness Act (CAFA),²⁷ which expanded federal courts' diversity of citizenship jurisdiction over class actions.²⁸ Another notable trend is the steep drop-off in federal litigation in the wake of the financial crisis, falling almost 21 percent from 2009-2010. State litigation also falls, but only by 5.4 percent. This finding suggests that CPA litigation is pro-cyclical, which would be consistent with fewer economic transactions giving rise to fewer potential CPA violations or smaller awards. The strong upward trend in federal litigation resumes in 2010-2013, reflecting renewed economic activity and—as suggested by the sample of cases examined in the next section—actions related to fallout from the financial crisis (e.g., debt collection, mortgage lending, and consumer lending).

factor, we constructed a multiplier based on the relationship between total tort filings in federal district courts and total reported tort cases for the 2000-2013 ranges. Tort filings were used because Federal District Court CPA filings are not reported. The effect of E-government is clear: the ratio of tort filings to reported cases for the 2006-2013 period is almost double that of 2000-2005 period. We used the average ratio of reported cases to filings from 2006-2013 to estimate the number of tort cases that *would have* been reported in the 2000-2005 range, had all cases been available. Next, we constructed a multiplier for each year defined as: estimated total reported cases/actual reported cases. The average multiplier is 1.78, ranging from 1.4 to 2. Finally, we used this multiplier to inflate the number of federal district CPA cases for 2000-2005.

²⁷ See 28 U.S.C. § 1332(d)

²⁸ See Emery G. Lee, III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PENN. L. REV. 1723 (2008) (finding an increase in tort and state CPA class actions filed in, or removed to, federal courts after CAFA).

FIGURE 4
REPORTED STATE AND FEDERAL CPA CASES: 2000-2013

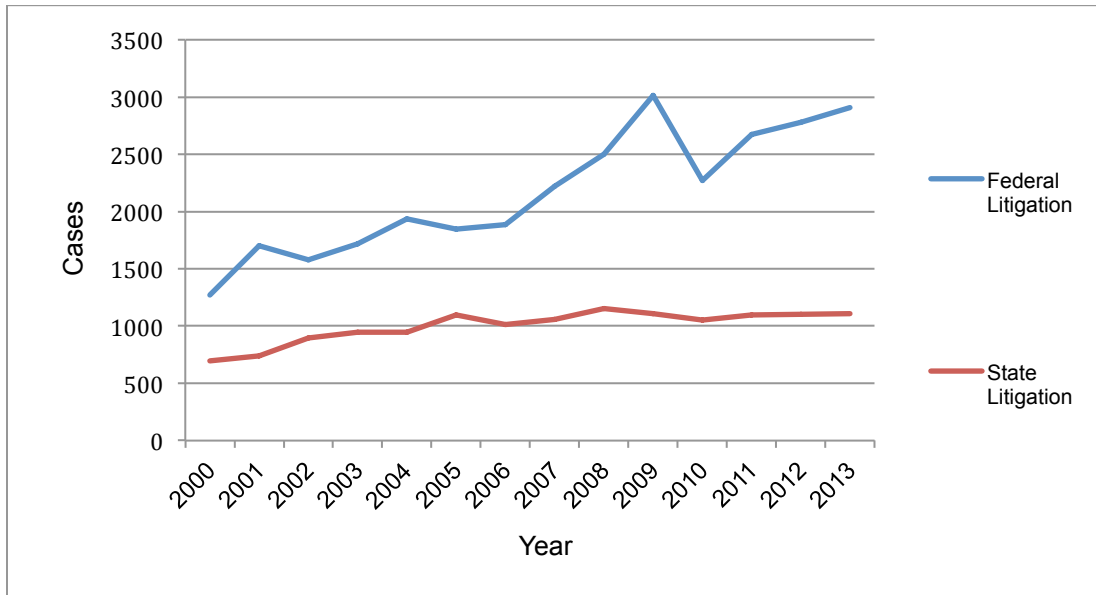


Table 3 lists the number of reported state and federal cases in 2013 and the CAGR for these series from 2000-2013, for all states and the District of Columbia. The largest growth rates for state litigation are Arkansas and DC, followed by West Virginia and Delaware. Hawaii, Florida, and South Carolina have the highest growth rates in federal litigation. There is significant interstate variation in litigation growth rates, but some of the large CAGR values are due to the small base of consumer protection cases within a state. For example, Alaska has a CAGR of -100%, but from a very small base.

TABLE 3
GROWTH IN REPORTED STATE AND FEDERAL CPA CASES, BY STATE

State	State Cases (2013)	State CAGR (2000 – 2013)	Federal Cases (2013)	Federal CAGR (2000 – 2013)	Total Cases (2013)	Total CAGR (2000 – 2013)
Alabama	3	0.0%	11	8.7%	14	5.7%
Alaska	0	-100.0%	2	N/A*	2	-2.9%
Arizona	4	0.0%	18	18.3%	22	10.1%
Arkansas	11	18.7%	21	13.9%	32	15.2%
California	151	11.0%	553	9.1%	704	9.5%
Colorado	8	5.1%	56	9.7%	64	8.9%
Connecticut	134	12.7%	35	-3.9%	169	4.9%
Delaware	9	17.0%	8	1.2%	17	5.7%

TABLE 3 (CONT.)

State	State Cases (2013)	State CAGR (2000 – 2013)	Federal Cases (2013)	Federal CAGR (2000 – 2013)	Total Cases (2013)	Total CAGR (2000 – 2013)
DC	11	18.7%	35	4.6%	46	6.2%
Florida	16	-1.6%	182	19.3%	198	13.1%
Georgia	6	0.0%	37	12.9%	43	9.0%
Hawaii	11	13.0%	36	24.4%	47	19.9%
Idaho	7	4.1%	15	N/A*	22	13.0%
Illinois	52	4.8%	198	3.1%	250	3.4%
Indiana	2	-2.9%	13	4.7%	15	3.1%
Iowa	3	N/A*	1	-15.3%	4	-6.5%
Kansas	12	5.1%	18	3.0%	30	3.8%
Kentucky	6	1.3%	26	12.3%	32	8.6%
Louisiana	19	8.6%	77	0.7%	96	1.7%
Maine	9	11.3%	7	-8.4%	16	-3.4%
Maryland	15	0.5%	78	10.7%	93	7.7%
Massachusetts	88	6.8%	153	9.0%	241	8.1%
Michigan	13	-3.0%	72	3.8%	85	2.2%
Minnesota	10	-5.5%	36	0.8%	46	-1.2%
Mississippi	0	N/A*	6	-4.8%	6	-4.8%
Missouri	21	9.4%	54	18.3%	75	14.6%
Montana	5	3.7%	8	11.7%	13	7.5%
Nebraska	1	-4.8%	9	2.0%	10	0.9%
Nevada	2	5.1%	31	17.1%	33	15.5%
New Hampshire	6	5.1%	19	0.1%	25	1.0%
New Jersey	14	0.0%	95	4.8%	109	4.0%
New Mexico	5	3.7%	14	7.5%	19	6.3%
New York	77	11.4%	130	1.2%	207	3.5%
North Carolina	46	1.6%	105	3.9%	151	3.1%
North Dakota	1	-7.6%	0	-100.0%	1	-10.5%
Ohio	51	-0.3%	76	7.6%	127	3.3%
Oklahoma	3	-4.8%	12	4.1%	15	1.1%
Oregon	2	5.1%	21	1.5%	23	1.8%
Pennsylvania	51	12.3%	103	-0.1%	154	2.2%
Rhode Island	5	N/A*	0	-100.0%	5	8.0%
South Carolina	14	6.2%	50	21.2%	64	14.7%
South Dakota	1	0.0%	3	-5.7%	4	-4.7%
Tennessee	24	1.7%	59	11.0%	83	6.9%
Texas	96	-5.6%	212	11.0%	308	1.1%
Utah	1	0.0%	8	11.7%	9	9.0%

TABLE 3 (CONT.)

State	State Cases (2013)	State CAGR (2000 – 2013)	Federal Cases (2013)	Federal CAGR (2000 – 2013)	Total Cases (2013)	Total CAGR (2000 – 2013)
Vermont	4	0.0%	3	-0.9%	7	-0.4%
Virginia	2	0.0%	17	-5.5%	19	-5.1%
Washington	53	3.9%	138	19.1%	191	11.3%
West Virginia	13	14.3%	28	6.3%	41	8.0%
Wisconsin	13	3.5%	20	19.2%	33	9.1%
Wyoming	0	N/A*	0	N/A*	0	N/A*

* - Notes: N/A* reflects the fact that states had no litigation in 200, making calculation of CAGR impossible.

For a clearer view of the trends, Figure A1 in the Appendix shows state and federal litigation trends for each state. For most states, state litigation exhibits either a steady or decreasing pattern, while federal litigation is almost universally increasing. Further, many of the states exhibit a reduction in federal litigation following the financial crisis. The only states with a substantial amount of litigation that exhibit opposite trends (i.e., a falling or stable federal litigation with rising state litigation) are Connecticut, New York, and Pennsylvania.

3.3 Sample of CPA Cases

Although the data presented above highlight some important trends in CPA litigation, many of the relevant policy questions—e.g., what industries are most represented, are cases private or brought by AGs, how prevalent are class actions—require taking a detailed look at the cases involved in the sample. To facilitate such analysis, a random sample of 387 cases from the cases filed during 2010 – 2013 was selected. The more recent time period was chosen to examine the composition of post-recession cases and to identify current trends. Figure 5 shows that there is a relatively equal distribution of cases over the sampled years.

FIGURE 5
DISTRIBUTION OF SAMPLED CASES OVER TIME

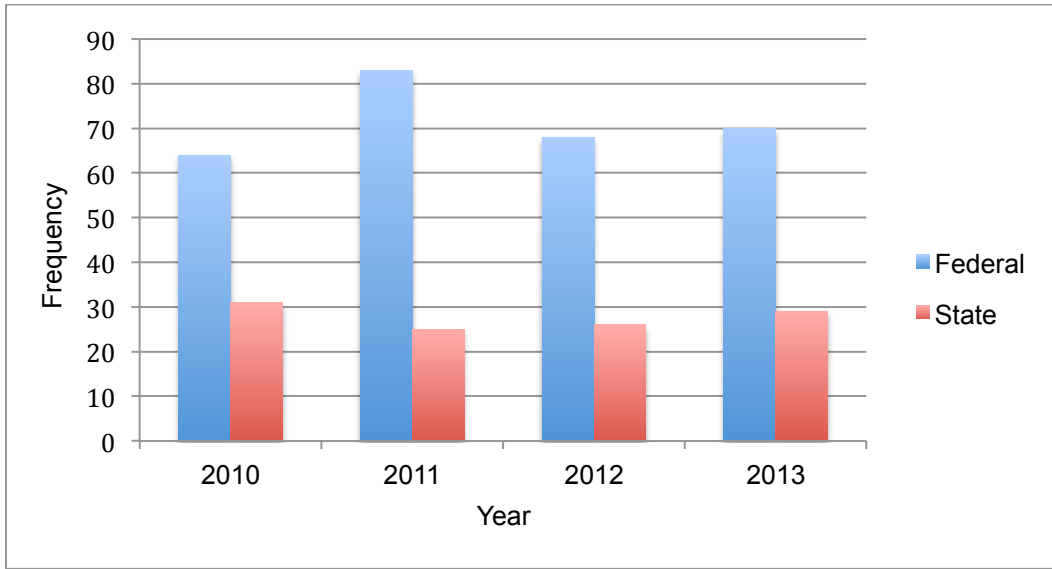
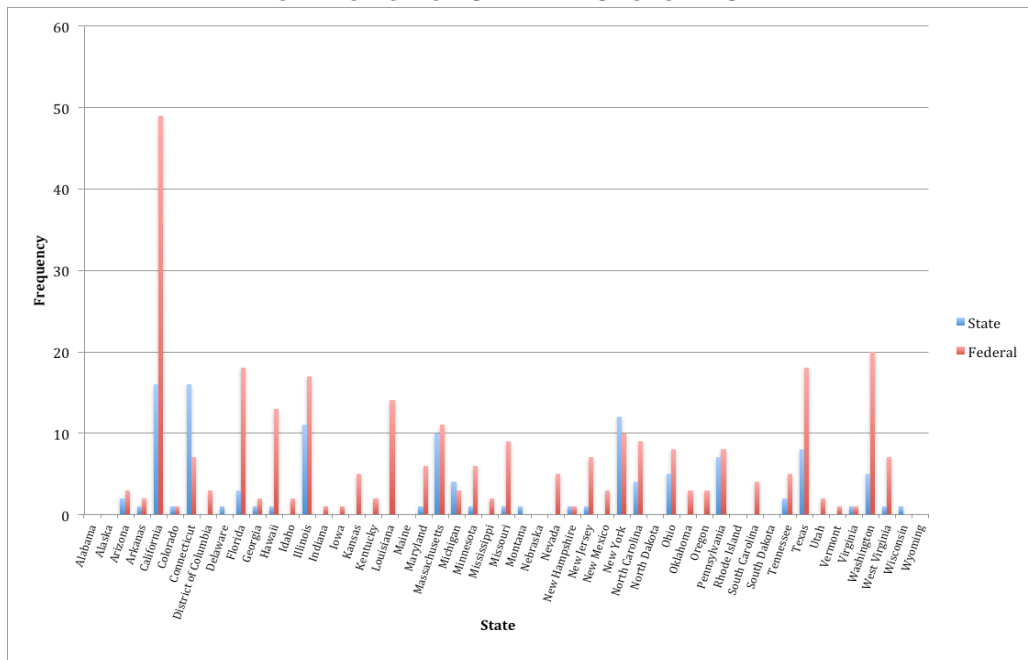


Figure 6 shows the distribution of cases across states. The small sample appears to be representative of the larger sample of reported cases: California is the most-represented state, with Florida, Illinois, Massachusetts, New York, and Texas also composing a large proportion of the sample.

FIGURE 6
DISTRIBUTION OF SAMPLED CASES BY STATE



3.3.1 Overview of Claims

Table 4 presents summary statistics from the coding of the sample. As noted in Section 2, we employed two strategies to extract information from the sample. First, law students coded reported opinions. Although this global coding provided a great deal of information about the cases, information gleaned from the opinion at one point in a case will seldom reveal information on the ultimate outcome.

For example, an opinion denying the defendant's motion for summary judgment does not provide any information on whether the case settled or proceeded to trial, and if so, who prevailed. Further, an opinion often will not reveal answers to questions such as type of jurisdiction (if a federal case), companion claims, or counterclaims. To get at these questions, we took advantage of the fact that a large portion of the sample involved federal district court cases, for which docket information was readily available. Docket sheets and pleadings (e.g., complaints, motions to dismiss, etc.) were available for 276 federal cases. Law students examined and coded the relevant documents.

Similar to the trends reported above, the federal cases comprise the majority of the sample (71%). Plaintiffs average 5.1 and 3.6 claims per case in federal and state courts, respectively. Parties tend to file more claims per case on average in federal court than state court, which may reflect the fact that plaintiffs in federal court are more likely to be bringing a federal cause of action in addition to the CPA claim. Indeed, over half of the federal cases involve federal question jurisdiction. Consistent with the trends shown in Figure 4, the coding also suggests that CAFA has played an increasing role in the number of CPA claims in federal court. For example, 45 percent of federal cases are based in whole or part on diversity jurisdiction. Although only 13 percent (22) of the cases based on diversity jurisdiction specifically reference CAFA, 28 percent (108) of the federal cases were removed from state court.

There are six times as many class actions in federal court than state court: 22 percent of federal cases are class actions compared to only 9 percent of state cases. Twenty cases are multidistrict litigation. Almost all cases are private actions: only two percent of the sample (9 cases) are brought by AGs.

TABLE 4
SUMMARY STATISTICS FOR RANDOM SAMPLE OF REPORTED DECISIONS

	Federal Cases	State Cases	Total
Number of Cases	276	111	387
Average Number of Plaintiff Claims	5.1	3.6	4.6
Federal Jurisdiction Type:			
Federal Question	94		
Diversity	126		
Both	50		
Removal from State Court	108		108
Class Actions:	62	10	72
Complaint mentions CAFA	22		
Multidistrict Litigation	20		
Private Action	271	107	378
State Attorney General	5	4	9

Table 5 presents a breakdown of the industries that were the subject of the CPA actions. By far, the most represented industry within the sample is financial services, again suggesting that the financial crisis played a role in CPA litigation. Consumer services, consumer goods, and insurance are grouped together in a second tier. State and federal cases have almost identical rankings of industries, but financial services comprise a much larger proportion of federal than state cases. This may be due to the fact that many financial institutions are likely to be out of state, giving rise to diversity jurisdiction. Further, accompanying claims under federal housing and lending statutes will give rise to federal question jurisdiction.

TABLE 5
REPRESENTED INDUSTRIES

Industry	Federal	State
Financial Services (including debt collection)	108	28
Consumer Services	44	19
Consumer Goods	40	18
Insurance	33	13
Building/Housing	19	23
Healthcare	12	5
Pharmaceuticals	8	2
Entertainment	6	2
Telecom/Internet	6	1

Notes: Cases classified under "Consumer Goods" consist of industries, such as aerospace, appliances, automobile, beverages, capital goods, container & packaging supply, cosmetics, electronics, food, kitchen appliances, nutritional supplements, software, sporting goods, sports franchise, footwear, fragrance, glass manufacturing, food, grocery, petroleum, retail, and tobacco. Cases classified as "Consumer Services" include advertising, consulting, direct marketing, distribution service, education, electric services, engineering, federal services, fitness, food services, hospitality, integrated marketing service, laundromat, law, manufacturing, marine, membership buying service, public transportation, restaurant, retail, security services, tax services, toy manufacturer, utility, civil services, non-profit, pool service, security service, and sports clubs. Cases classified under "Financial Services" include cases involving credit unions, banks, credit-card companies, accountancy companies, consumer-finance companies, stock brokerages, and investment funds.

Table 6 lists the types of claims that accompany both plaintiff and defendant CPA actions. Within our sample, for both state and federal cases, contracts are the most frequent type of accompany claim, followed by fraud cases. 21 percent of federal cases include a claim under a federal housing or lending statute. Other categories appearing frequently within the sample include property, antitrust, and intellectual property (copyright/patent/trademark).

The large number of federal lending and housing statutes appearing in CPA litigation coupled with the fact that the financial industry was the most frequent target of private litigation in the federal courts, suggests that the financial crisis' aftermath played a large role in shaping private CPA litigation. Indeed, 36 percent of federal actions involved an underlying foreclosure or debt

action, which is consistent with individuals using CPA actions as defenses to debt collection or other actions involving default.

TABLE 6
ACCOMPANYING CLAIMS

Type of Claim	Federal	State
Contract	113	51
Fraud	76	31
Federal Housing/Credit Statutes (FCRA, TILA, FDCA, RESPA)	57	8
Property	34	11
Antitrust	29	2
Copyright/Patent/Trademark	19	0
Federal Privacy Statutes	11	1
Constitutional		
Employment	2	2
Tort	1	1

Notes: 17 cases were also coded as "Other". Cases within this category consisted of ongoing cases, consent decrees, injunctions granted, or cases being transferred.

3.3.2 Case Dispositions and Awards

Extensive data on the dispositional outcomes of cases within the state courts were not available. For reported opinions that included an outcome of a dispositive motion, defendants won all 44 motions to dismiss and nearly 80 percent of summary judgment decisions. Plaintiffs won 67 percent of the six opinions that involved a trial.

As noted above, because we are able to view the dockets for most federal cases in our sample, we were able to determine how most of these cases terminated. Table 7 reports statistics on the disposition of the CPA claims brought in the federal courts. Within our sample, the defendant filed a motion to dismiss the CPA claims in 201 cases, and these motions were granted seventy percent of the time (140 cases). Thus, approximately half (50.7%) of CPA claims in our federal sample were dismissed. If they are not dismissed, the second most prevalent outcome is settlement between the two parties, 42 cases (or 15%). Twelve percent (33 cases) were decided at summary judgment, with 28 in favor of defendants and five in favor of the plaintiff. Seven percent (18 cases) of the cases ended in default judgment for either of the parties. Only two percent (6 cases) of the sample ended up going to trial, and the win rate for these is the same as state court, 67 percent.

TABLE 7
DISPOSITION OF STATE CPA CLAIMS IN COURTS

	Federal	State
Number of Cases	276	111
Motion to Dismiss State CPA Claims	201	44
Settled	42	N/A
Disposition of State CPA Claims:		
Default Judgment	18	N/A
Dismissed	140	44
Remanded Back to State Court	17	N/A
SJ for Plaintiff	5	7
SJ for Defendant	28	32
Jury Trial (Plaintiff Win Rate)	6 (.67)	6 (.67)
Other	17	N/A

Table 8 reports average relief awarded to parties who prevailed on their CPA claims. Only a handful of sampled cases reported relief, so one must be cautious when generalizing these summary statistics to the universe of CPA claims. Average (median) damages are \$546k (\$81,000). Of the 32 sampled cases that reported damages, only eight awarded punitive damages. Average and punitive damages are higher in federal court (\$42,000 vs. \$20,000); however, median punitive damages are higher in the state court (\$10,000 vs. \$4,000), respectively. Only five cases (1 in state court and 4 in federal court) reported injunctive relief.

Average (median) attorney fees are \$138k (\$25,000), which places them plausibly between twenty-five and thirty percent of total damages awards. Average federal awards and attorneys' fees are substantially larger than those associated with state litigation (\$646,000 vs. \$446,000 and \$200,000 vs. \$55,000, respectively). However, median state damages (\$110k vs. \$15k) and

attorneys' fees (\$28,000 vs. \$20,000) are substantially higher than those in federal court, suggesting that a few extreme awards are driving the federal averages.

TABLE 8
RELIEF AND ATTORNEYS FEES

		State	Federal	Total
Total Damages	Mean	\$445,785	\$646,019	\$545,902
	Median	\$109,526	\$14,531	\$80,517
	N	15	17	32
Punitive Damages	Mean	\$20,000	\$41,680	\$33,550
	Median	\$10,000	\$4,400	\$7,200
	N	3	5	8
Attorneys Fees	Mean	\$55,162	\$200,253	\$138,071
	Median	\$27,918	\$20,355	\$24,711
	N	10	12	22
Injunctions		1	4	5

With a focus on only reported cases, we are clearly missing the amount of money that defendants pay in settlements. Unfortunately, almost no settlement data are reported. However, when parties settle a certified class action in federal court, they are required to submit a report under Federal Rule of Civil Procedure 23(e) that includes, among other things, the amount of the settlement and attorneys' fees.³¹

Table 8 reports the information from the small number of cases that have Rule 23(e) reports or other settlement documents, such as court rulings concerning the settlement. Average and median awards are \$5.3 million and \$3.2 million, respectively. The lowest award in the database is for \$45k. However, four of the cases appear to report settlement amounts above \$9 million. The mean amount to named plaintiffs is considerably higher than the median (\$467,000 vs. \$30,000), with a range of \$5,000 to \$3 million. Average and median attorneys fees are \$1.5 million and \$280k, respectively with a range of \$3,920 to \$8-9 million. The ratio of average attorneys fees to average damages is a plausible .27.

³¹ Fed. R. Civ. P. 23(e)

TABLE 9
FEDERAL CLASS ACTION SETTLEMENTS

	Mean	Median	Frequency
Total Settlement Amount	\$5,347,818	\$3,191,782	9*
Attorneys' Fees	\$1,466,450	\$280,648	14
Amount to Name Plaintiffs	\$466,519	\$30,000	7**
Fund for Class Plaintiffs	\$6,252,500	\$6,252,500	2
Other	\$3,350	\$3,350	2***

Note: Data comes from available Rule 23(e) Reports. *One of the cases was allocating \$5,000 for each class claimant. However, the number of claimants was not specified within the legal documents. **For the category "Amount to Name Plaintiffs," one observation was excluded. Two of the observations reported specific amounts to each claimant. However, the numbers of plaintiffs in the suit were not specified. ***Three observations within the sample were listed as "other". Values included expenses, a specific class representative award, and court costs/post-judgment interest. No specific amounts were given for post-judgment interest/court costs.

3.4 State Attorneys General Actions

State AGs play an important role in enforcing CPAs, but most of their investigations end without litigation.³² Accordingly, because our sampling method relies on reported cases, it will vastly undercount the role of public enforcement. Ideally, the number of actions could be collected from state AG web sites. Unfortunately, there is wide variation across states with respect to systematic online reporting of their CPA cases. To provide a snapshot of AG activity, we collected the number of press releases concerning CPA investigations that settled for the top six states in terms of reported private CPA litigation in 2013: California, Florida, Illinois, Massachusetts, New York, and

³² See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 498 (2012) (noting that it is difficult to identify state AG suits "in part because they almost always settle."); Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation In Multi-State Lawsuits*, 59 Pol. Res. Q. 609, 609 (2006) (noting with respect to class actions brought by state AGs "Rather than spend a protracted length of time in court, most defendants choose to settle cases quickly.").

Texas. These are six states with the largest volume of private litigation. The data come from the Consumer Protection Report created by the National State Attorneys General Program at Columbia Law School.³³ Table 9 reports the number of investigations brought by these six states in the years 2014 and 2015. Reported, there is considerable variation within the activity of the state AG offices. While New York's AG reported 194 consumer protection cases, we find only 42 press releases involving California over the same timespan.

TABLE 10
REPORTED AG INVESTIGATIONS

	2014	2015	Total
California	19	23	42
Florida	40	49	89
Illinois	24	32	56
Massachusetts	40	48	88
New York	91	103	194
Texas	21	21	42
	235	276	511

Notes: Data derived from news releases reported in COLUMBIA LAW SCHOOL, NATIONAL STATE ATTORNEYS GENERAL PROGRAM, *Consumer Protection Report*, <http://web.law.columbia.edu/attorneys-general/policy-areas/consumer-protection/resources-and-publications/consumer-protection-newsletter> (last visited Apr. 11, 2016).

Table 11 reports the distribution of investigations over industries for the states California, Florida, Illinois, Massachusetts, New York, and Texas. Consistent with the sample of state courts, consumer services and financial services are two of the most frequent target industries. The mixture of targeted industries is slightly different than that in the reported decisions, which are almost solely private actions. For example, consumer goods and the pharmaceutical industry has a much higher likelihood of being investigated by the state AG office compared to the frequency in the sample of reported decisions. Further, financial services is a substantial part of AG's enforcement portfolio, but it is not as large proportionately as it is for private actions. This finding suggests that AG enforcement may act to some extent as a complement to private enforcement,

³³ COLUMBIA LAW SCHOOL, NATIONAL STATE ATTORNEYS GENERAL PROGRAM, *Consumer Protection Report*, <http://web.law.columbia.edu/attorneys-general/policy-areas/consumer-protection/resources-and-publications/consumer-protection-newsletter> (last visited Apr. 11, 2016).

perhaps targeting industries where they perceive private incentives to bring actions lacking.

TABLE 11
AG INVESTIGATIONS BY INDUSTRY FOR 2015

Industry	Frequency
Consumer Services	242
Pharmaceuticals	76
Financial Services	64
Healthcare	33
Building/Housing	30
Telecom/Internet	25
Insurance	19
Consumer Goods	6

Notes: "Consumer services" includes retail, non-profit, personal services, education, legal services, food services, publishing, services, tourism, utilities, advertising, transportation, labor, animal care, auto service, business scam, government, home based business scams, marketing, personal fraud, rental business, telemarketing, electronics manufacturer, federal contract scam, file storage, fraud recovery services, funeral home, id theft, magazine and newspaper sales, modeling agency, pet shop, puppy mill, talent company, theft, and radio. "Financial services" includes finance, investment, debt collection, and credit reporting services. The healthcare classification included investigations labeled as "medical waste disposal". "Building/Housing" includes real estate and construction investigations. "Consumer goods" includes herbal supplements, vitamins supplements, alcohol, and e-cigarettes.

Table 12 reports the average remedy/civil penalty for each of the state AG investigations. Within the six states that were sampled, there is considerable variation within the size of the financial remedy. Florida and Massachusetts report average civil monetary remedies over \$20 million, while both New York and Texas have average monetary remedies under \$5 million.

TABLE 12
SETTLEMENTS
AVERAGE REMEDY

	2014	2015	Average
California	\$6,081,717 (7)	\$4,587,511 (14)	\$5,085,580 (21)
Florida	\$8,138,237 (11)	\$28,834,190 (22)	\$21,935,539 (33)
Illinois	\$6,442,277 (12)	\$1,546,164 (6)	\$4,483,832 (18)
Massachusetts	\$57,348,519 (24)	\$1,627,649 (33)	\$25,089,068 (57)
New York	\$6,221,262 (48)	\$1,220,457 (75)	\$3,171,991 (125)
Texas	\$4,084,400 (6)	\$2,227,526 (10)	\$2,923,854 (8)
Avg. Award	\$17,675,921 108	\$5,422,646 162	\$10,323,556 270

4. CONCLUSION

This Report provides an update to SCJI's 2009 Report, examining trends in state CPA statutes and litigation from 2000-2013. There has been only modest change in state CPAs from 2008-2013. Indeed, major provisions that are likely to make litigation more attractive, such as private rights of actions, vague language, and the ability to bring class actions, have been nearly unchanged since 2000. Most of the change in CPA statutes has come from the addition of specific acts or practices to the definition of conduct that violates the statute. The data suggest that the upward trend in CPA litigation continued from 2008-2013, although there was a steep reduction in federal (and to a lesser extent, state) CPA litigation in the wake of the financial crisis.

Two major findings emerge from the data. First, CAFA appears to have played a role in the increasing volume of CPA cases in federal court given the large number of removal cases based on diversity jurisdiction. Second, the financial crisis appears to have played a large part in shaping recent CPA litigation. The financial industry is the most common target of private reported cases sampled, and it is the second largest single industry targeted by state AG investigations. Further, 32 percent of federal cases sampled involve some underlying debt-collection action, and 21 percent involve a federal lending or housing statute. Examination of pre-CAFA and pre-financial crises cases would be useful additional research to further explore these findings.

APPENDIX

TABLE A1
REPORTED FEDERAL AND STATE CPA LITIGATION BY STATE

CALIFORNIA

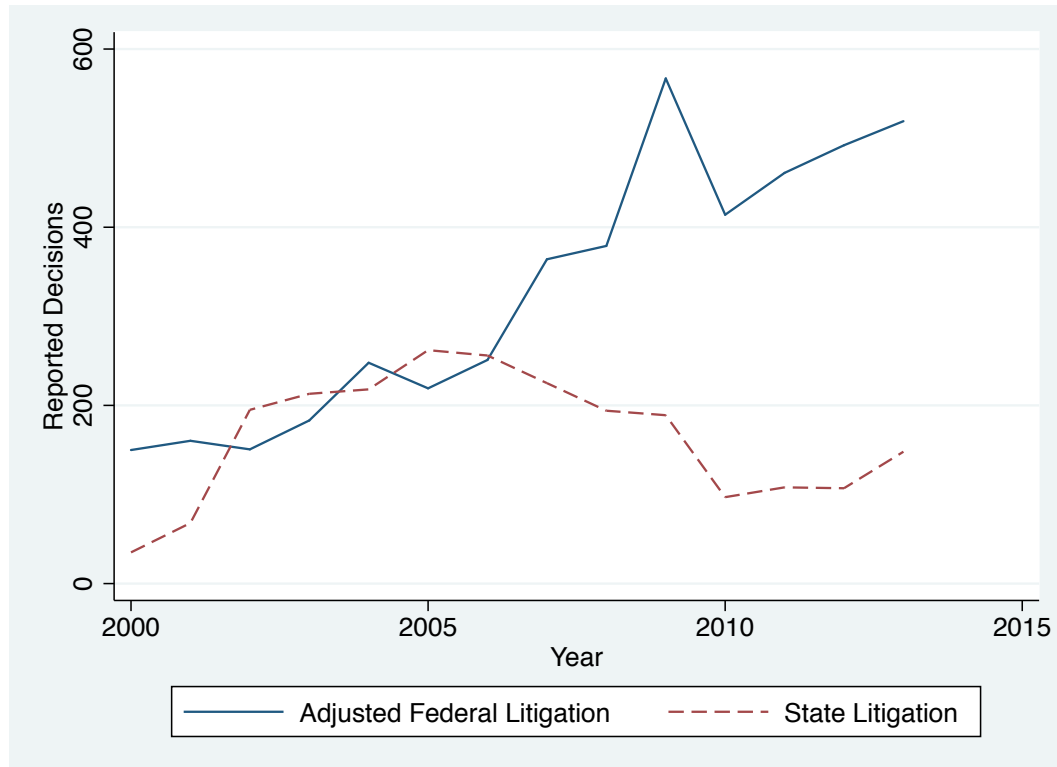
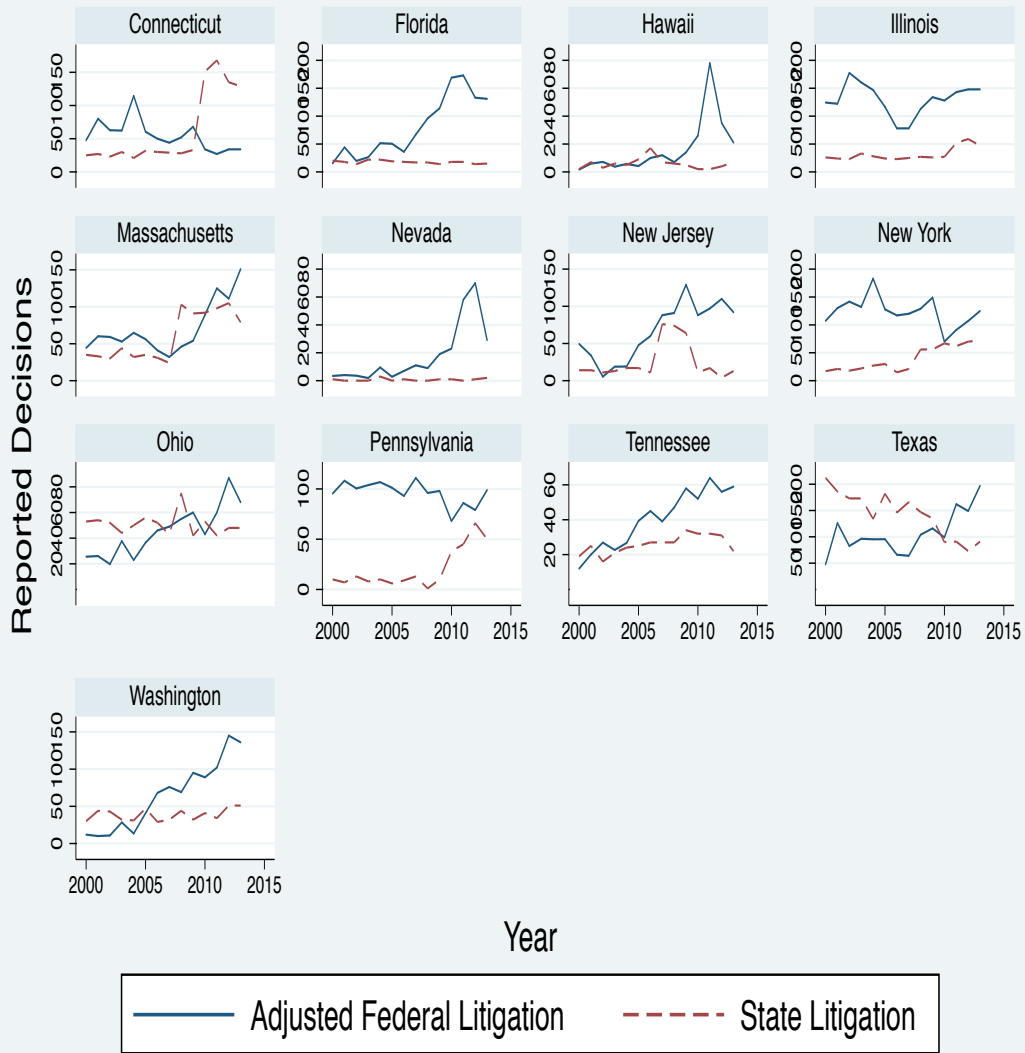
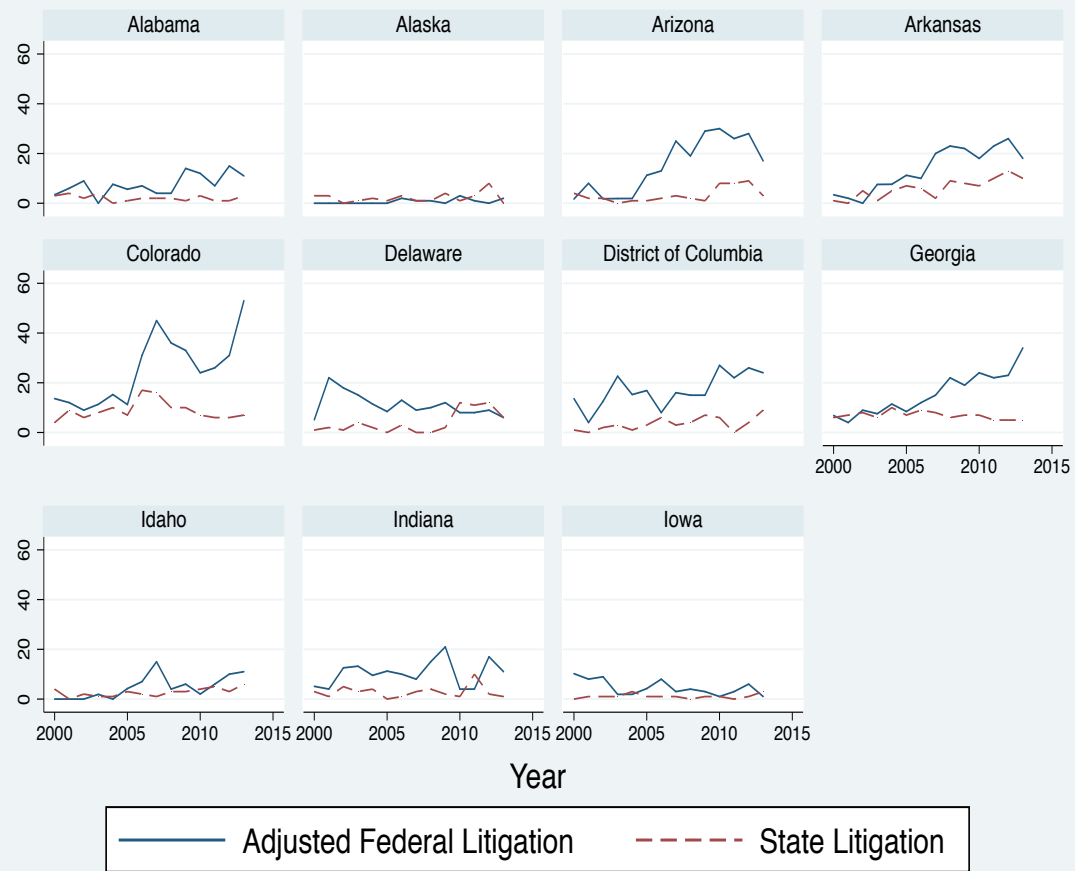


TABLE A1 (CONT.)



Graphs by State

TABLE A1 (CONT.)



Graphs by State

TABLE A1 (CONT.)

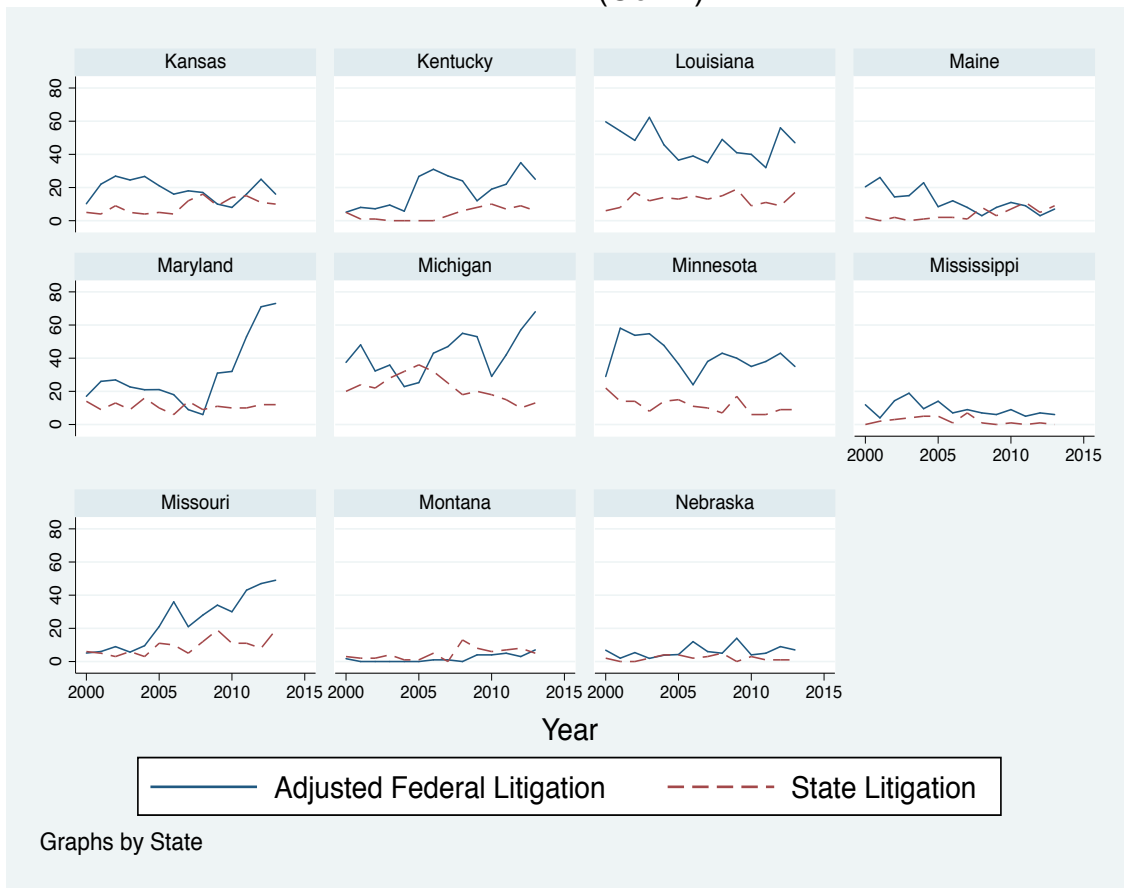
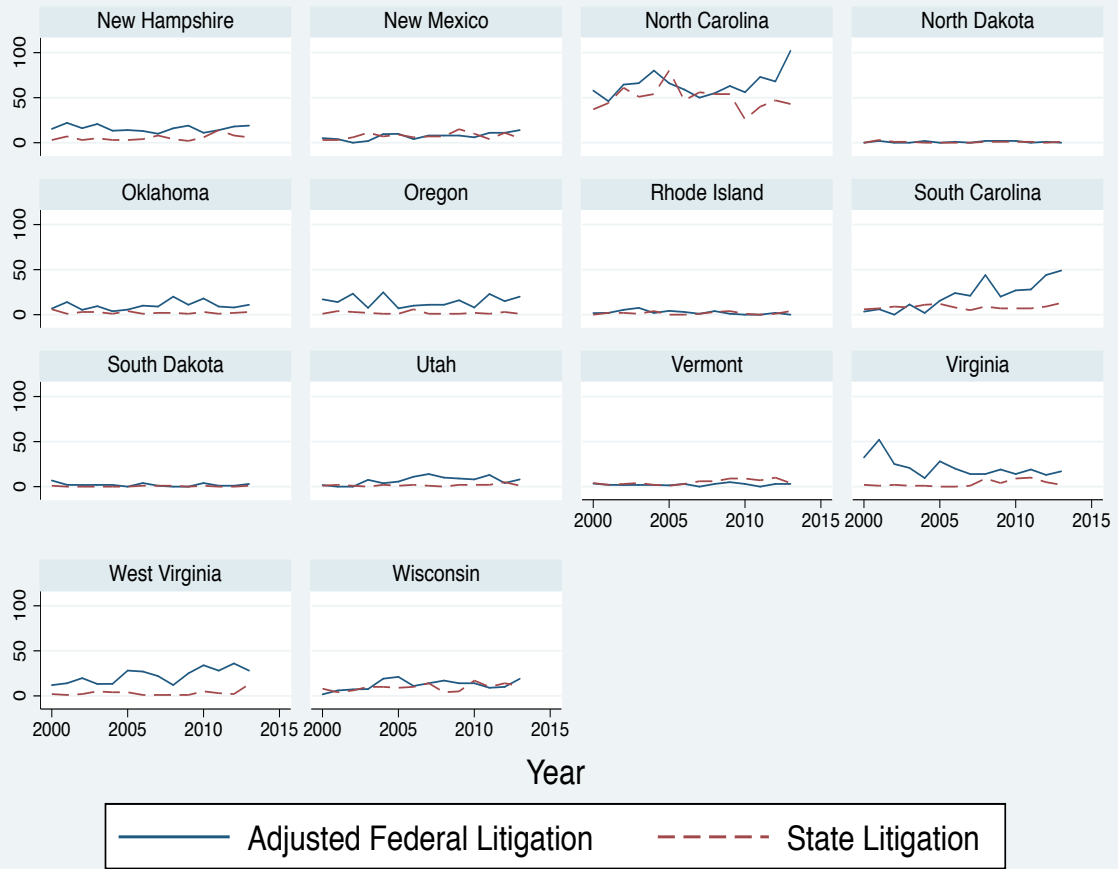


TABLE A1 (CONT.)



Graphs by State

GEORGE MASON UNIVERSITY SCHOOL OF LAW

