

Public Compensation for Public Enforcement

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Public enforcement actions frequently result in the distribution of money to people affected by violations of market protection laws. This “public compensation” returns billions of dollars to consumers, investors, and others each year. The law of public compensation appears confusing at first impression because of inconsistent use of nomenclature and conceptual confusion. However, courts have developed a discernible set of principles that allow for presumptions and loosened proof standards in awarding this relief. This buried, but clear, doctrine held for decades despite repeated challenges by business defendants. Supreme Court decisions in Liu v. SEC¹ in June 2020 and FTC v. AMG Capital Management, LLC² in April 2021 have unsettled the law.

This Article offers two contributions to the development of the law of public compensation. First, we analyze decades of judicial decisions across federal and state public enforcement agencies and identify consensus legal principles for awarding two different forms of public compensation: disgorgement and public restitution. We extend the less-developed doctrine of public restitution by suggesting a proportionality test to provide guidance for more difficult cases. Second, we propose legislation to create uniform statutory authority for public enforcers that would reverse restrictions that have been or may be imposed on public compensation by recent and pending Supreme Court decisions. Both the doctrine and the proposed legislation are grounded in the unique position and authority of public enforcers, including discretion to select between civil penalties and public compensation as monetary remedies, as well as the deterrence rationale of public enforcement. An appendix includes model legislation Congress could adopt to clarify and restore public compensation authority across enforcement agencies.

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1. 140 S. Ct. 1936 (2020).

2. 141 S. Ct. 1341 (2021).

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Introduction

Consumers, investors, workers, homeowners, tenants, and others have received substantial amounts of money as a result of civil public enforcement actions for decades. The Securities and Exchange Commission (SEC) alone consistently returns over a billion dollars a year to investors. The Consumer Financial Protection Bureau (CFPB), the Federal Trade Commission (FTC), and the Food and Drug Administration (FDA) return to consumers billions more each year. State attorneys general also obtain sizeable awards of public compensation, often by joining together in multistate enforcement actions.³

Given this lengthy record of voluminous payments, one would imagine that courts would have established clear principles for determining when, as well as to whom, compensation is properly awarded. Although there is a discernable doctrine of public compensation, it is difficult to perceive on an initial reading of the case law. Both courts and public enforcers use terminology inconsistently. Most of the basic concepts are shrouded in confusion in the case law and the ever-evolving patchwork of federal and state legislation. Further deepening the confusion, public compensation lies abreast of, and shares policy goals with, money penalties imposed in civil law enforcement, and abuts claims brought by private litigants.

Our goal in this Article is to bring clarity to this distinct area of the law in two ways. First, we propose a restatement of the doctrine of public compensation. Public compensation rests on two distinct theories of redress: *disgorgement*, which is measured by the unjust gain of the violator, and *public restitution*, which is measured by the loss of the people affected by the violation. The clarified doctrine identifies the common principles in existing law defining when each of these two forms of public compensation should be available, how much judges should award, against whom the award can be made, and to whom the money should be distributed.

A coherent statement of the law of public compensation is long overdue. Difficult doctrinal questions had previously been waved away by the courts in favor of a practical approach favoring the issuance of compensation. No longer. In June 2020, the United States Supreme Court issued a decision in *Liu v. SEC*, which restricted the agency's authority to obtain public compensation in enforcement proceedings.⁴ The Court then promptly granted certiorari in *FTC v. AMG Capital Management, LLC*, and in April 2021 abrogated the primary authority employed by the FTC to return money to consumers.⁵ The Court's actions, together with recent decisions of the Third and Seventh Circuits overturning decades of precedent, have swiftly unsettled the law of public compensation.⁶

3. See *infra* Section I.B.

4. 140 S. Ct. 1936, 1940-41 (2020).

5. 141 S. Ct. 1341 (2021).

6. See *infra* Section IV.A.

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This nascent trend reversing the longstanding judicial approach to public enforcement remedies lends additional urgency to our second goal for this Article. We argue for legislative action that would create a consistent set of legal principles for the award of public compensation across different public enforcers, and we propose a model law to achieve this purpose. Under the current state of the law, no two public enforcers have the same statutory authority to award public compensation. Some enforcers have vastly less authority than others, even though there are no clear reasons for the discrepancy. The model law draws from the doctrine of public compensation, and provides Congress and state legislatures with a roadmap for creating a common statutory public compensation authority for all enforcement agencies.

Public compensation is rooted in the unique rights and obligations that accompany the executive branch's duty to implement the law and preserve functioning commerce by deterring violations of market protection schemes. Accordingly, disgorgement and public restitution are forms of relief that have no application to the law governing private claims. Courts use pro-enforcement presumptions and burden-shifting in ways foreign to disputes between private litigants. This is the case even when claims of the private plaintiffs arise under the same market protection statutes utilized by the government.

Additionally, public compensation law is typically—and, in the absence of contrary statutory authority, should be—consistent across enforcement agencies. The key tenets of public compensation law should apply to the full range of civil public enforcement agencies, not just to one public enforcer or another. A primary reason the current law is difficult to navigate is that courts sometimes treat the regulatory scheme of the enforcer seeking public compensation as a discrete area of law, while also unthinkingly borrowing from private law doctrines or other public enforcement regimes. This segmented and episodic development of case law without a cross-enforcer theory of public compensation has obscured the principles that would render the law coherent.

The Supreme Court's recent unsettling of the law of public compensation comes at a time when private actions are less likely to compensate people affected by violations of market protection laws. In recent years, arbitration clauses have increasingly barred the courtroom doors to millions of Americans, while at the same time, courts have steadily restricted the circumstances under which class actions can be certified. Limiting public compensation awards means that there may be no redress for patterns of illegal activity, especially in situations involving large numbers of victims suffering relatively modest harm. Less public compensation, coupled with restricted access to private rights of action, brings us closer to a world in which businesses are able to violate civil marketplace protection laws with impunity.

Part I of the Article describes the practice of public compensation and its growing importance as class actions recede in the face of legislative and judicial narrowing of access to the courts. Part II lays out the law of public compensation. This Part explores the confusion that arises in cases awarding public compensation under the various statutory market protection regimes. We center

our analysis on the differences between two theories allowing for public compensation—disgorgement and public restitution. Both theories are linked to a particular form of statutory authority. Disgorgement arises from statutory injunctive authority, while restitution arises from an express grant of statutory authority to the enforcer.

We propose our restated doctrine of public compensation in Part III. We describe the common presumption of causation and the reasonable approximation framework employed by courts in determining an enforcer's right to the relief, which makes public compensation much easier to obtain than compensatory relief in private claims. We then separate this doctrine into the two general theories of disgorgement and public restitution. For each theory, we identify when courts award public compensation, as well as how the courts determine both the amount of that award and the eligibility of individuals for monetary relief. We also extend the doctrine to cover difficult cases of public restitution that have received less development in the case law. This Part concludes with examples of how the doctrine would resolve public compensation questions in different types of cases.

Part IV examines why recent decisions limiting or abrogating the use of public compensation will invite years of protracted litigation by defendants in enforcement actions aiming to restrict the remedies that public enforcers may seek. Federal courts have long rested the law of public compensation on the deterrence rationale of public enforcement and the special position of public enforcers in marketplace-protection schemes. Recent decisions treat the propriety and limits of public compensation as a question of implied statutory equitable authority, no different than if the matter was raised in a dispute between private litigants. We make a normative argument that public compensation law should remain grounded in the critical distinction between public enforcement remedies and the law for adjudication of private claims.

In Part V, we argue that Congress should act to both restore the law of public compensation and create uniform remedial authority across enforcement agencies. We identify three concepts that underlie both our proposed model law and our view that no public policy rationale justifies the existing distinctions among various statutory authorities of public enforcers. The Appendix contains the proposed legislation.

I. The Practice of Public Compensation

Public compensation is a particular form of money relief available only in public enforcement actions. Section I.A places public compensation within the context of remedies available to public enforcers and provides examples of typical public compensation awards. Section I.B provides an overview of the federal and state public enforcers most active in procuring this type of relief. In Section I.C, we look at the rising importance of public compensation in light of federal judicial decisions restricting private plaintiffs' access to the courts.

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A. Public Compensation as a Public Enforcement Remedy

Almost all public civil law enforcement agencies seek and obtain injunctions restraining future violations.⁷ These enforcers obtain two types of money relief. First, civil penalties akin to fines are available to public enforcers in almost all cases. Public enforcers regularly use this authority and have collectively recover billions annually.⁸ Civil penalty money often is put in the public treasury, but it is sometimes directed into public accounts dedicated to particular uses, including public education and future public enforcement.⁹

Our concern in this Article is with the second type of money relief—an award of money to be distributed to people affected by the conduct at issue in the enforcement action. Legal scholars have called this type of relief “public compensation.”¹⁰

Public compensation affects the daily lives of hundreds of millions of Americans by providing direct financial redress to those wronged by illegal activity, as well as by creating (or sometimes failing to create) incentives to obey the law. Two examples below illustrate how enforcers use public compensation in policing violations across different markets and circumstances.

The FDA is empowered under the Food, Drug and Cosmetic Act (FDCA) to obtain redress for consumers victimized by tainted food, harmful medical devices, or poisonous medicine.¹¹ In *United States v. Universal Management Services, Inc.*, the FDA’s professional staff identified a company marketing a device called “The Stimulator,” which the business claimed would alleviate pain from migraine headaches, swollen joints, allergies, and other ailments.¹² In fact,

7. See Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement Law*, 82 U. CIN. L. REV. 505, 515 (2013) (noting that injunctions are typical in SEC settlements); Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 69-70 (2018) (finding that, of the cases resolved under unfair and deceptive practices (UDAP) laws in 2014, all FTC and CFPB cases, as well as 96 percent of such cases brought by state attorneys general, included injunctive relief).

8. See *Enforcement by the Numbers*, CONSUMER FIN. PROT. BUREAU (Jan. 2021), <https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/enforcement-database> [https://perma.cc/A9F3-E6UV] (reporting that the CFPB has collected \$1.6 billion in civil penalties through 2020); Theresa A. Gabaldon, *Equity, Punishment, and the Company You Keep: Discerning A Disgorgement Remedy Under the Federal Securities Laws*, 105 CORNELL L. REV. 1611, 1633 (2020) (presenting a history of SEC civil penalty authority); Cox et al., *supra* note 7 at 73-74 (noting that state attorneys general obtain civil penalties or other forms of government payment in 73 percent of cases). The FTC, however, has limited civil penalty authority. See *Adjustments to Civil Penalty Amounts*, 86 Fed. Reg. 2539 (Jan. 13, 2021) (to be codified at 16 C.F.R. pt. 1).

9. Governments sometimes use the same legal authority employed in public enforcement actions to seek recovery of money for damage to the public fisc. A notable example of this type of action is the group of cases against the tobacco industry brought in the 1990s under consumer protection and antitrust laws by state attorneys general, which were based on the theory that violations caused states to expend money for medical costs. See Anthony J. Sebok, *Pretext, Transparency and Motive in Mass Restitution Litigation*, 57 VAND. L. REV. 2177, 2197 (2004).

10. See, e.g., Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC’s Fair Fund Distributions*, 67 STAN. L. REV. 331 (2015).

11. See, e.g., *United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 223 (3d Cir. 2005) (affirming disgorgement as an appropriate remedy for false advertising in violation of FDA regulations).

12. *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 754 (6th Cir. 1999).

“The Stimulator” was just an electric gas grill igniter with a handle attached to it that cost about a dollar to produce. Americans searching for a cure to their chronic pain purchased about 800,000 Stimulators for nearly \$90 each.¹³ The district court ordered Universal to offer all purchasers the opportunity to obtain a full refund of the purchase price of The Simulator, and the Sixth Circuit affirmed.¹⁴

Public compensation has also been used to address poverty and racism. For example, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act¹⁵ (DFA) after the 2008 financial crisis and gave the newly-created CFPB express public compensation authority, but also extended similar authority to state attorneys general, state banking regulators, and tribal governments.¹⁶ *CFPB v. S/W Tax Loans* concerned an installment-loan company that was co-located with an H&R Block income tax preparation franchise just over the border of the Navajo Nation reservation.¹⁷ The company marketed 240-percent-interest-rate loans to low-income Native Americans to be repaid out of the proceeds of their federal income tax refunds—including many taxpayers who qualified for the Earned Income Tax Credit anti-poverty program.¹⁸ S/W Tax Loans misled its customers by falsely understating interest rates on its loans and lied about whether the company had received customer income tax refunds from the IRS in order to sell unnecessary second or third loans.¹⁹ When the CFPB and the Navajo Nation jointly sued the company, the district court ordered the company to return nearly half a million dollars to victims of its illegal activity.²⁰

13. *Id.* at 763. Under FDA regulations, manufacturers must submit “valid scientific evidence” of safety and effectiveness to the FDA prior to sale of a medical device like The Simulator. 21 C.F.R. § 860.7(d)-(e) (2020).

14. *Universal Mgmt. Servs., Inc.*, 191 F.3d at 754.

15. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7 U.S.C., 12 U.S.C., 15 U.S.C., 22 U.S.C., 31 U.S.C., and 42 U.S.C.).

16. *See* 12 U.S.C. § 5564(a) (2018) (authorizing the CFPB to pursue civil penalties and equitable relief); *id.* § 5565 (expounding on available relief); *id.* § 5552 (providing that states may still bring enforcement actions); *id.* § 5481(27) (defining “state” to include “any federally recognized Indian tribe”); *see also id.* § 5563 (authorizing the CFPB to undertake cease and desist proceedings).

17. Complaint ¶¶ 7-8, *CFPB v. S/W Tax Loans, Inc.*, No. 15-cv-00299 (D.N.M. Apr. 14, 2015), https://files.consumerfinance.gov/f/201504_cfpb_complaint-sw-tax-loans.pdf [<https://perma.cc/TBA4-KUQU>].

18. *Id.* ¶¶ 12, 22. For a discussion of the role the Earned Income Tax Program plays in preventing poverty, see *Briefing Book*, TAX POL’Y CTR., URBAN INST. & BROOKINGS INST. 286 (2020), https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc_briefing_book_2020.pdf [<https://perma.cc/L5TA-RC8A>] (“The EITC is the single most effective means tested federal antipoverty program for working-age households—providing additional income and boosting employment for low-income workers.”).

19. Complaint ¶ 29, *CFPB v. S/W Tax Loans, Inc.*, No. 15-cv-00299 (D.N.M. Apr. 14, 2015).

20. Stipulated Judgment & Final Order, *CFPB v. S/W Tax Loans, Inc.*, No. 15-cv-00299 (D.N.M. Apr. 16, 2015), https://files.consumerfinance.gov/f/201504_cfpb_stipulation-sw-tax-loans.pdf [<https://perma.cc/P6UX-VSDP>].

B. Government Enforcers of Market Protection Laws

The above examples point to the role that public compensation plays in determining how Americans communicate, travel, work, save, borrow, heal, and eat—all aspects of government’s role in protecting markets. The prevalence and the dollar volume of these awards is notable. There are four areas of market regulation in which public compensation regularly occurs: consumer protection, investor protection, worker protection, and antitrust enforcement.

Consumer Protection. The FTC, the CFPB, and state attorneys general are prolific contributors to the recovery of public compensation. These enforcers primarily rely on broad Unfair and Deceptive Acts and Practices (UDAP) statutes.²¹ By the middle of 2017, the CFPB had obtained more than \$11.5 billion for consumers in enforcement actions since its first recovery in 2012.²² The FTC has returned over \$1 billion to consumers since 2018, and it has participated in large cases with other enforcers resulting in over \$10 billion in public compensation during that period.²³ State attorneys general return hundreds of millions more each year, including large public compensation awards in multi-state actions by groups of state attorneys general.²⁴ Other enforcers obtaining public compensation for consumer protection violations include the FDA,²⁵ HUD,²⁶ the DOJ,²⁷ the ICC,²⁸ and federal prudential banking regulators, as well as state regulators with authority over banks, insurers, real-estate brokers and other financial markets.²⁹

21. See generally Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, NAT’L CONSUMER L. CTR. (2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf [<https://perma.cc/YBT5-62QG>]. In consumer financial services, the Dodd-Frank Act added another A to “UDAP” by proscribing “abusive” practices alongside deceptive and unfair acts. See 12 U.S.C. § 5531(d) (2018).

22. *Enforcing Federal Consumer Protection Laws*, CONSUMER FIN. PROT. BUREAU 2 (2017), https://files.consumerfinance.gov/f/documents/201707_cfpb_factsheet_enforcing-federal-consumer-protection-laws.pdf [<https://perma.cc/99DW-B7QL>].

23. Fed. Trade Comm’n, *FTC Refunds to Consumers*, TABLEAU PUBLIC (updated Sept. 24, 2021), https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_1579795840200/RefundsbyCase [<https://perma.cc/5D4C-FZ27>].

24. See PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* 19-30 (2015); Cox, et al., *supra* note 7, at 52.

25. See, e.g., *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750 (6th Cir. 1999).

26. See, e.g., *HUD v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 927 (4th Cir. 1995).

27. See, e.g., Off. of Pub. Affs., Press Release, U.S. DEP’T OF JUSTICE, U.S. Trustee Program Reaches Agreements with Three Mortgage Servicers Providing More than \$74 Million in Remediation to Homeowners in Bankruptcy (Dec. 7, 2020), <https://www.justice.gov/opa/pr/us-trustee-program-reaches-agreements-three-mortgage-servicers-providing-more-74-million> [<https://perma.cc/2T56-H4D4>]; *United States v. Rent Am., Corp.*, 734 F. Supp. 474, 478 (S.D. Fla. 1990) (awarding public compensation in a Fair Housing Act enforcement action).

28. See, e.g., *ICC v. B&T Transp. Co.*, 613 F.2d 1182, 1186 (1st Cir. 1980).

29. See generally MARC LABONTE, CONG. RSCH. SERV., R44918, *WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK* (2020); *Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs.*, 108th Cong. 6-7 (2004) (testimony of Gavin M. Gee, Idaho Dir. of Fin., on behalf of the Conf. of State Bank Supervisors) (describing the dual banking system and listing examples of restitution in

Investor Protection and Securities. The SEC has been active in obtaining public compensation since 1971.³⁰ Public compensation returned to investors by the SEC regularly averages more than \$1 billion per year.³¹ The Commodity Futures Trading Commission (CFTC) has become increasingly active in obtaining public compensation, ordering \$1.3 billion in monetary relief in 2019.³² State securities regulators enforcing state “blue sky” securities laws have added hundreds of millions more in investor recoveries.³³

Worker Protection. The Equal Employment Opportunity Commission (EEOC) occasionally obtains public compensation for violations of federal employment discrimination laws, but typically represents only a single individual or a small group of identifiable employees.³⁴ State attorneys general are increasingly active in the area of wage theft and worker protection, with eight state attorneys general having established specific units to bring enforcement actions.³⁵ Massachusetts, for example, recovered \$6.7 million in restitution for workers in 2019-2020.³⁶ State attorneys general in California and Massachusetts have sought public compensation for misclassification of “gig economy” workers.³⁷

Antitrust. Consumers receive public compensation in antitrust cases, although enforcers in this area have shown more reticence in obtaining this relief, and antitrust law authority for consumer recoveries is split between federal and state enforcers in a peculiar fashion. The two primary federal enforcers are the FTC and the DOJ, and neither has consistently sought public compensation in

enforcement actions by numerous state banking commissioners); Theodore Allegaert, *Derivative Actions by Policyholders on Behalf of Mutual Insurance Companies*, 63 U. CHI. L. REV. 1063, 1069 (1996) (noting that “[s]tates regulate insurance more than almost any other industry, due in part to a near total absence of federal insurance regulation” and that “fines and restitution” are common remedies obtained by state insurance commissioners).

30. See *infra* Section II.C.2.

31. See Enft Div., *Annual Report: A Look Back at Fiscal Year 2017*, U.S. SEC. EXCH. COMM’N 11 (2017) (reporting that \$1.07 billion was disbursed to investors in 2017); see also Gabaldon, *supra* note 8, at 1621 (citing the 2017 Annual Report); Velikonja, *supra* note 10, at 332-33 (“Since 2002, the SEC has deposited \$14.46 billion for defrauded investors into 243 distribution funds . . .” (footnote omitted)).

32. Press Release, CFTC, CFTC Division of Enforcement Issues Annual Report for FY 2019 (Nov. 25, 2019), <https://cftc.gov/PressRoom/PressReleases/8085-19#:~:text=Highlights%20from%20the%20FY%202019,highest%20total%20in%20CFTC%20history> [<https://perma.cc/MJ7E-9C72>].

33. See *The Role of State Securities Regulators in Protecting Investors: Hearing Before the S. Comm. on Banking, Hous. & Urb. Affs.*, 108th Cong. (2004) (testimony of Joseph P. Borg, Dir., Ala. Sec. Comm’n) (citing a survey of state securities regulators which found that there was over \$660 million in “restitution, rescission and disgorgement” awarded in 2002 and 2003).

34. See Angela D. Morrison, *Duke-ing out Pattern or Practice after Wal-Mart: The EEOC as Fist*, 63 AM. U. L. REV. 87, 120 (2013).

35. Terri Gerstein, Report, *Worker’s Rights Protections and Enforcement by State Attorneys General*, ECON. POL’Y INST. 4-5 (Aug. 27, 2020), <https://files.epi.org/pdf/207014.pdf> [<https://perma.cc/ZY9F-B6U2>].

36. Press Release, Off. of Atty. Gen. Maura Healey, AG Healey Issues Labor Day Report on Office’s Efforts to Combat Wage Theft, Protect Workers (Sept. 7, 2020), <https://www.mass.gov/news/ag-healey-issues-labor-day-report-on-offices-efforts-to-combat-wage-theft-protect-workers-1> [<https://perma.cc/Z4E8-TTY3>].

37. Gerstein, *supra* note 35, at 13.

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civil antitrust actions.³⁸ State attorneys general have an important and unusual role in obtaining public compensation in antitrust enforcement, including the power to obtain public compensation for Clayton Act antitrust violations, which was granted in recognition of the limits on federal authority and private class recoveries.³⁹ Given the peculiarities of the law and practice of antitrust public compensation, we focus on the other types of enforcers in the remainder of the Article.

C. *The Rising Importance of Public Compensation in Policing the Market*

In recent decades, public compensation has become increasingly important to the credibility and effectiveness of civil law market protection regimes. The vast majority of Americans cannot afford to retain private counsel to assist them in dealing with civil legal problems.⁴⁰ Nearly 90 percent of low-income Americans with civil legal problems report receiving “inadequate or no legal help” leaving them without practical access to the court system in civil cases.⁴¹ And the federally-funded Legal Services Corporation (LSC) turns away more than 50 percent of qualifying consumers seeking legal help because of a lack of resources.⁴² Most low-income Americans feel so excluded from the justice system that they do not try to obtain access to counsel, even though seven-in-ten individuals who have had recent, personal experiences with a civil legal problem say it has “significantly affected their lives.”⁴³ Moderate-income Americans do

38. Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 *Antitrust L.J.* 79, 81 (2009) (“[W]hile its formal availability is clear, there is also no doubt that disgorgement has, so far, rarely been pursued in antitrust cases. The DOJ apparently has done so only in two contempt actions. Although the FTC regularly pursues equitable monetary remedies for consumer protection violations, it has done so in only eleven antitrust cases.”). Unlike UDAP enforcement, the FTC has an inconsistent history of pursuing public compensation in antitrust actions. See Gerald A. Stein, *Understanding the FTC’s Monetary Equitable Remedies Under Section 13(b) for Antitrust Violations*, 34 *ANTITRUST* 59, 60 (Fall 2019) (“The FTC brought only two actions for monetary equitable remedies involving alleged antitrust violations during the 30-year period from 1973 to 2003.”). Compare Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 *Fed. Reg.* 45,821 (Aug. 4, 2003) (indicating reticence to pursue public compensation), with FTC Statement of the Commission Effecting the Withdrawal of the Commission’s Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 *Fed. Reg.* 47,070 (Aug. 7, 2012) (rescinding the 2003 statement). Since 2012, the FTC has sought public compensation in at least six cases and has obtained about \$1.8 billion in those cases, Stein, *supra* at 61, although a recent appeal overturned \$448 million of this amount, *FTC v. Abbvie, Inc.*, 976 F.3d 327, 338 (3d Cir. 2020).

39. 15 U.S.C. § 15c (2018); Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 *FORDHAM L. REV.* 361, 376-79 (1999); New York *ex rel.* Vacco v. Reebok Int’l Ltd., 96 F.3d 44, 46 (2d Cir. 1996) (“Congress empowered state attorneys general to investigate and prosecute antitrust abuses on behalf of consumers stymied by Rule 23’s certification and notification hurdles.”). See generally *ANTITRUST DIV., U.S. DEP’T. OF JUST., ANTITRUST DIVISION MANUAL*, at VII-10 (5th ed. 2016) (discussing state antitrust enforcement).

40. Ian Weinstein, *Access to Civil Justice in America: What Do We Know?*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA* 3-4 (Samuel Estreicher & Joy Radice eds., 2016).

41. *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*, *LEGAL SERVS. CORP.* 6 (Jun. 2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/428F-2Y3H>].

42. *Fiscal Year 2017 Budget Request*, *LEGAL SERVS. CORP.* at 4-5 (2016), <https://lsc-live.app.box.com/LSCFY2017BudRequest> [<https://perma.cc/28MV-4K3T>].

43. *The Justice Gap*, *supra* note 41, at 7.

not fare much better. LSC attorneys can only serve those with incomes of no more than 125 percent of the federal poverty line.⁴⁴ Most middle-income families face civil legal problems without counsel, and the COVID pandemic will strain already inadequate pro-bono and low-bono resources for years to come.⁴⁵

Even when people with valid claims do obtain a lawyer, forced confidential arbitration hobbles private enforcement of market protection regimes. The Federal Arbitration Act makes arbitration agreements binding as a matter of federal law.⁴⁶ Although Congress adopted the statute in 1925, only in recent decades has the prevalence of arbitration clauses throughout many markets begun to fundamentally reshape the ability of individual Americans to use private rights of action. A 2015 CFPB study found evidence suggesting about 92 percent of the prepaid card market, 99 percent of the mobile wireless carrier market, 86 percent of the private student loan market, and 99 percent of loans originated by storefront payday loan companies were subject to arbitration clauses.⁴⁷ The same CFPB study found no evidence that arbitration clauses lead to lower prices, and the study revealed that three out of four consumers were unaware that their product or service included a forced arbitration clause.⁴⁸ In addition to closing off judicial recourse, forced arbitration reduces the opportunity for private development of a traditional Anglo-American jurisprudence of market protection law based on *stare decisis*.⁴⁹ Because consumer arbitrations are usually confidential, each individual consumer is left to her own devices and is forced to relitigate the same theories of liability and redress in each arbitration.⁵⁰

Private enforcement of market protection laws also is increasingly hobbled by class action restrictions. In 1997, the Supreme Court explained:

[T]he very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.⁵¹

44. 45 C.F.R. § 1611.3(c)(1) (2021).

45. See, e.g., Kathryn Joyce, *No Money, No Lawyer, No Justice: The Vast Hidden Inequities of the Civil Legal System*, NEW REPUBLIC (Jun. 22, 2020), <https://newrepublic.com/article/158095/civil-legal-system-no-money-no-lawyer-no-justice> [<https://perma.cc/7VWN-KDBQ>] (detailing the lack of representation in civil cases and stating that “[t]he pandemic and the economic catastrophe it unleashed will exacerbate almost every difficulty facing both legal aid as an institution and the clients it represents”).

46. 9 U.S.C. § 2 (2018).

47. *Fact Sheet: Consumer Financial Protection Bureau Study Finds That Arbitration Agreements Limit Relief for Consumers*, CONSUMER FIN. PROT. BUREAU 1 (March 15, 2015), https://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf [<https://perma.cc/YXL6-C6M3>] [hereinafter *CFPB Arbitration Fact Sheet*]. The CFPB's data on storefront payday loan agreements were drawn from sample locations in Texas and California. *Id.*

48. *Id.* at 2-4.

49. See Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 419-20 (2016).

50. See Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 210-11 (2000).

51. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F. 3d 338, 344 (7th Cir. 1997)).

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Yet today, in many markets, class actions no longer solve *any* problem because they are nearly extinct. The CFPB’s study found that over 90 percent of arbitration agreements expressly prohibit class arbitrations.⁵² In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the Federal Arbitration Act preempted state law, including judicial doctrines such as unconscionability, that might otherwise prohibit these boilerplate contracts from disallowing class-wide representation in arbitration.⁵³ As Myriam Gilles observed, “class actions brought by or on behalf of low-income consumers and employees are on the verge of disappearing.”⁵⁴

In the remaining pockets of law where class actions are still viable, courts have erected new and expanding barriers to certification. The Class Action Fairness Act of 2005 made it easier for defendants to remove class actions asserting state law claims to federal court, preventing state courts from applying law that may make class certification more likely.⁵⁵ In 2011, the Supreme Court adopted a narrow and highly-restrictive interpretation of the commonality requirement for class certification in *Wal-Mart Stores, Inc. v. Dukes*.⁵⁶ Class action defense litigators argue that the decision, when “[p]roperly understood . . . represents a fundamental change in class action jurisprudence that will have a wide-ranging effect on class actions for years to come.”⁵⁷ Further, many courts now follow an increasingly muscular jurisprudence of class ascertainability, which prohibits class certification where there is not “reliable

52. CFPB *Arbitration Fact Sheet*, *supra* note 47, at 3. What’s more, the arbitration agreements that did not prohibit class arbitrations were drafted by smaller companies that together represented a meager 3 percent or less of their respective markets. *Id.*

53. 563 U.S. 333 (2011); *see also* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 636-39 (2012) (analyzing the *Concepcion* decision).

54. Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1535 (2016). One civil docket in which low- and moderate-income Americans are still found in abundance are small claims courts, where debt collection lawsuits often make up an overwhelming majority of claims. In some states, arbitration clauses preserve the ability of creditors to sue in small claims court where they can obtain bench warrants to arrest debtors who do not respond to collection subpoenas. *See, e.g.*, CHRISTOPHER L. PETERSON & DAVID MCNEILL, CONSUMER FEDERATION OF AMERICA, UNWARRANTED: SMALL CLAIMS COURT ARREST WARRANTS IN PAYDAY LOAN DEBT COLLECTION 2-3 (2020) (showing that payday lenders and other high-cost creditors account for over 68 percent of all Utah small-claims court hearings leading to thousands of arrest warrants for low-income borrowers each year).

55. 28 U.S.C. § 1453 (2018) (allowing for removal); *see also* Elizabeth J. Cabraser, *The Consequences of CAFA: Challenges and Opportunities for the Just, Speedy, and Inexpensive Determination of Class and Mass Actions*, 13 SEDONA CONF. J. 181, 183 (2012) (“CAFA shifted the field of class action battle from state to federal court The cynical view, among CAFA opponents, was that this was not merely a change of scene; it was designed to remove state law class actions to less favorable, more hostile federal courtrooms, where the cases would be denied certification, or simply ignored.” (footnotes omitted)).

56. 564 U.S. 338, 367 (2011) (rejecting the use of statistical sampling to establish commonality under Rule 23 as an impermissible “trial by formula”).

57. Theodore J. Boutsros, Jr. & Bradley J. Hamburger, *Three Myths About Wal-Mart Stores, Inc. v. Dukes*, 82 GEO. WASH. L. REV. ARGUENDO 45, 58 (2014).

proof of purchase or a knowable list of injured plaintiffs,” with the result that fewer class actions arise from small retail purchases.⁵⁸

Collectively, these trends make private enforcement of market protection laws increasingly unreliable and leave public civil law enforcement agencies as a last line of defense in market protection. Accordingly, public enforcement has become an indispensable backstop to remedy market inefficiency, harm, and illegal practices when private enforcement is not viable.

II. The Current Law of Public Compensation

With limited exceptions, public compensation is rooted in statutory grants of authority to public enforcers.⁵⁹ This statutory authority, however, does little to clarify the requirements for, and limits on, obtaining public compensation. Rather, the statutes incorporate broad grants of authority that courts have shaped into particular rights to seek public compensation.

Section II.A looks at the confusion in nomenclature that envelops this area of law. The two most common terms employed are disgorgement and restitution. Public enforcers and courts, however, mix and match these terms—along with other labels, like unjust enrichment and consumer redress—resulting in confusion about how public compensation should be determined and how this determination relates to the statutory authority for public compensation. In Section II.B, we explain why the case law, muddled as it is, justifies the rationalization of public compensation into two distinct categories borne of two different types of statutory authority, and measured in two distinct ways:

- (1) Statutory injunctive authority provides for disgorgement, which is measured by the unjust gain of the law violator.
- (2) Statutory express compensation authority provides for public restitution, which is measured by the loss of the consumer resulting from the law violation.

Sections II.C and II.D examine disgorgement and public restitution, respectively, as so defined.

58. Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 310 (2010). For an example of such a case, see *Carrera v. Bayer Corp.*, 727 F.3d 300, 304 (3d Cir. 2013) (refusing to certify a class for a lawsuit brought under New Jersey state law).

59. Federal enforcers rely exclusively on statutory authority. State attorneys general also overwhelmingly rely on statutory authority for UDAP enforcement, but New Mexico uses general common law power. *See* 1 DEE PRIDGEN & RICHARD ALDERMAN, CONSUMER PROTECTION AND THE LAW 651-53 app.7A (2016-2017 ed.) (showing that only New Mexico lacks some form of statutory authority for consumer restitution). Even in state antitrust enforcement—the odd duck of public compensation sometimes based on *parens patriae* authority—statutory authority still predominates. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 386-88 (D.D.C. 2002) (determining that thirty of the fifty one states sought public compensation based on statutory authority).

A. Confusion in Public Compensation Law

Scholars, judges, and practitioners often express bewilderment when first encountering the law of public compensation. Courts and enforcers use terms to mean different things, while those terms have yet other meanings in the law governing private claims.

Nowhere is this confusion more pronounced than in use of the terms “disgorgement” and “restitution.”⁶⁰ Some courts maintain that these terms have distinct meanings.⁶¹ Many courts use the terms interchangeably or are explicitly disinterested in making a distinction.⁶² Still other courts refer to “damages” when awarding restitution or disgorgement.⁶³ The Second Circuit has described the existing case law as plagued by “conceptual bleed” in the use of these terms.⁶⁴ The First Circuit noted the confusion in the use of these terms and stated that “[w]e urge the district court to more clearly define these concepts in the future.”⁶⁵ In the aforementioned FDA case, the agency and the district court grappled with whether to characterize the relief as disgorgement or restitution, with the court deciding that the term “restitution” was a better fit to deter violations.⁶⁶

Even more confusing, some enforcers have multiple sources of statutory authority for public compensation, the FTC being the most prominent.⁶⁷ Most courts distinguish between the different types of authority, but numerous courts cite to cases using one type of authority for support of a legal principle of the other type of authority, either knowingly or without noting the category confusion.⁶⁸ Courts have allowed enforcers to choose among their various grants

60. See George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 *FORDHAM J. CORP. & FIN. L.* 1, 6 (2007) (analyzing FTC, SEC, CFTC, Department of Energy, and FDA cases and noting that inconsistencies in outcomes can be “traced back to the widespread confusion about the meanings of specific terms pertaining to either remedies in equity, at law, or both”).

61. See, e.g., *Tex. Am. Oil Corp. v. U.S. Dep’t of Energy*, 44 F.3d 1557, 1569-70 (Fed. Cir. 1995); *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993).

62. See, e.g., *CFPB v. Consumer First Legal Grp., LLC*, 6 F.4th 694, 711 (7th Cir. 2021) (“The Bureau’s argument also founders because it assumes that equitable restitution and disgorgement are two different animals. The Court, however, expressed doubts on this point in *Liu v. SEC*.” (citing 140 S. Ct. 1936, 1942-43 (2020))); *SEC v. First Pac. Bancorp.*, 142 F.3d 1186, 1192-93 (9th Cir. 1998) (“We need not engage in a rather scholastic argument about whether restitution and disgorgement are really just about the same thing.”); *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997) (using disgorgement, restitution, and damages interchangeably); see also Verity Winship, *Fair Funds and the SEC’s Compensation of Injured Investors*, 60 *FLA. L. REV.* 1103, 1112 (2008) (noting that courts sometimes use the terms “disgorgement” and “restitution” interchangeably in SEC cases).

63. See, e.g., *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *SEC v. Brown*, 658 F.3d 858, 860 (8th Cir. 2011).

64. *FTC v. Bronson Partners, LLC*, 654 F.3d 359 (2d Cir. 2011).

65. *CFTC v. JBW Cap., LLC*, 812 F.3d 98, 111 n.21 (1st Cir. 2016).

66. *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 762-64 (6th Cir. 1999); *United States v. Universal Mgmt. Servs., Inc.*, 999 F. Supp. 974, 980-982 (N.D. Ohio 1997).

67. See Rohit Chopra & Samuel A. A. Levine, *The Case for Resurrecting the FTC Act’s Penalty Offense Authority*, U. PENN. L. REV. (forthcoming 2021) (manuscript at 14) <https://ssrn.com/abstract=3721256> [<https://perma.cc/6XQC-B4NG>] (providing an overview of Federal Trade Commission Act provisions allowing for monetary relief).

68. See, e.g., Roach, *supra* note 60, at 14-15 (discussing how some courts have imported concepts across differing remedial authorities for the FTC).

of authority. Recent decisions have taken a contrary position, however, most notably the Supreme Court's abrogation of the FTC's long-established section 13(b) disgorgement authority in *AMG* because of the existence of a parallel restitution authority in section 19 of the FTC Act.⁶⁹

The practice of the CFPB adds another dimension to the puzzle. The agency uses the terms "restitution" or "redress" to mean public compensation, but cases adjudicating CFPB public compensation rely on both disgorgement and restitution case law from the FTC and other enforcers. And the CFPB uses the term disgorgement exclusively when referring to money returned to the government rather than consumers.⁷⁰

State enforcers typically have express statutory authority to obtain public compensation, but it is common for state court decisions to borrow from federal law in analyzing the scope of that relief.⁷¹ For example, in a recent case awarding public compensation to defrauded trade school students, the Minnesota Supreme Court called the relief sought "equitable restitution . . . not money damages," and justified the relief on a disgorgement theory that public compensation was "intended to force a wrongdoer to divest money improperly gained."⁷² The court referenced the following as support for its holding:

(1) The court cited CFTC and FTC cases as authority for public compensation based on the illegal gain of the law violator, but also relied heavily on a case about the FTC's statutory authority to order redress measured by consumer loss;⁷³

(2) The court noted that the state Attorney General and defendants agreed that the case law interpreting the authority of private parties to obtain damages on proof of a "causal nexus" was relevant for determining public compensation, while emphasizing that the proof required here was lesser because the case "was brought by the Minnesota Attorney General rather than by a private plaintiff;"⁷⁴ and

(3) The court observed that the award allowed a Special Master to make individual determinations on consumer reliance when the defendant objected to a claim filed by the consumer, while noting that the public compensation ordered here was "aimed as much (or more) at preventing the wrongdoer from profiting from its misdeeds as it is to make the injured party whole."⁷⁵

69. See *infra* Section V.A.

70. See *infra* Section II.D.1.

71. See, e.g., *State ex rel. Kidwell v. Master Distribs., Inc.*, 615 P.2d 116, 122-24 (Idaho 1980) (interpreting a state statute based on FTC express statutory authority, while also referencing SEC disgorgement authority based solely in equity).

72. *State v. Minn. Sch. Bus., Inc.*, 935 N.W.2d 124, 138-39 (Minn. 2019).

73. See *id.* at 134, 136, 139 (citing, *inter alia*, *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993); *CFTC v. Crombie*, 914 F.3d 1208, 1216 (9th Cir. 2019)).

74. *Id.* at 136.

75. *Id.* at 139.

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None of this is to suggest that the court’s reasoning was incorrect—quite the contrary, as the decision is more thoroughly reasoned than almost any comparable state court decision—but rather that the doctrine underlying public compensation currently presents a confusing mix of terminology and concepts.

Finally, the term “restitution” has meaning in other areas of law, which adds to the difficulty of making sense of this law. It is a claim in the law of unjust enrichment.⁷⁶ It is a form of remedy in contract law.⁷⁷ Many states also have statutory schemes allowing criminal prosecutors to seek civil restitution for crime victims following criminal convictions.⁷⁸ Although this law is of doubtful relevance to public compensation, it is occasionally applied in public compensation, further complicating attempts to make sense of the law.⁷⁹

The remainder of this Part is aimed at bringing a base-level clarity to the law of public compensation by defining disgorgement and public restitution as distinct forms of public compensation typically linked to distinct forms of statutory authority.

B. Disgorgement and Restitution Defined

The predominant and best use of the term “disgorgement” refers to public compensation measured solely by the gains of the law-violator and authorized by statutory injunctive authority.

In *Liu v. SEC*, discussed below, the Supreme Court observed that, initially, “courts determined that the SEC had authority to obtain what it called ‘restitution,’” while “[o]ver the years, the SEC has continued to request this remedy, later referred to as ‘disgorgement,’ and courts have continued to award it.”⁸⁰ The SEC has developed policies that expressly distinguish disgorgement measured by the violator’s gain from restitution measured by investor loss.⁸¹

76. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011) (“A person who is unjustly enriched at the expense of another is subject to liability in restitution.”); see also Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001).

77. See RESTATEMENT (SECOND) OF CONTRACTS § 371 (AM. L. INST. 1981).

78. See, e.g., OR. REV. STAT. ANN. § 137.106 (West 2021); ARIZ. REV. STAT. ANN. § 13-603 (2018); LA. CODE CRIM. PROC. ANN. art. 895.1 (2020).

79. See *infra* Section IV.B.1.

80. 140 S. Ct. 1936, 1940-41 (2020) (citations and footnote omitted).

81. REPORT PURSUANT TO SECTION 308(C) OF THE SARBANES-OXLEY ACT OF 2002, U.S. SEC. EXCH. COMM’N 1 n.2, <https://www.sec.gov/news/studies/sox308creport.pdf> [<https://perma.cc/Q6SK-WCC9>] (“Courts may at times use the terms disgorgement and restitution interchangeably and may on occasions equate them However, the concepts are distinct. Restitution is intended to make investors whole, and disgorgement is meant to deprive the wrongdoer of their ill-gotten gain.” (citations omitted)). See Urska Velikonja, *Public Enforcement After Kokesh: Evidence from SEC Actions*, 108 GEO. L.J. 389, 399-400 (2019) (“Unlike restitution, which aims to make investors whole, disgorgement aims to deprive the wrongdoer of ill-gotten gain.”).

Courts cite to disgorgement cases across types of enforcers in awarding and defining disgorgement.⁸²

While some courts and litigants confusingly label disgorgement as restitution, the reverse rarely occurs, suggesting some agreement that disgorgement is a narrower term, consistent with the meaning defined here.

The alternative to measuring public compensation by the unjust gain of the defendant is to award this relief based on the loss of the consumer.⁸³ The best use of the term “public restitution” is for public compensation so measured and authorized by express statutory authority. This term reflects two considerations. We use the term “restitution” because the overwhelming weight of judicial decisions use this term when referring to public compensation based on consumer loss.⁸⁴ We add the word “public” to clarify that this remedy, as authorized in the law governing public enforcement actions, is not available as a remedy for private litigants.

In the DFA, Congress constructed explicit statutory authority for the CFTC consistent with this dichotomy between disgorgement and restitution. The CFTC now has statutory authority to obtain “equitable remedies including—(A) restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses); and (B) disgorgement of gains received in connection with such violation.”⁸⁵ In determining remedies in CFTC cases, courts have emphasized that disgorgement is to be measured by the ill-gotten gain of the violator and restitution by investor loss.⁸⁶

Assigning these meanings to disgorgement and public restitution allows for a clear, consistent link between the measure for awarding public compensation and the sources of statutory authority for that award. Section II.C describes how disgorgement is a unique remedy available only in public enforcement that has developed from seventy-years of case law interpreting statutory injunctive authority granted to public enforcers. Section II.D describes the more diverse and less-defined public restitution authority expressly granted in statutes empowering public enforcers.

82. See, e.g., *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (FTC action citing SEC and CFTC case law); *CFPB v. Gordon*, 819 F.3d 1179, 1195 (9th Cir. 2016) (CFPB case citing SEC and FTC cases); *FTC v. Zurixx, LLC*, 441 F. Supp. 3d 1216, 1223 (D. Utah 2020) (FTC action citing FDCA case); *SEC v. Durante*, No. 01 Civ. 9056(DAB)(AJP), 2013 WL 6800226, at *12 (S.D.N.Y. Dec. 19, 2013) (SEC case citing FTC cases).

83. See *infra* Section II.D.

84. See *infra* Section II.D. For purposes of this Article, we use “consumer loss” as short-hand for the loss of any person affected by the law violation, including an investor, worker, homeowner, or tenant.

85. 7 U.S.C. § 13a-1(d)(3) (2018); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 744, 124 Stat. 1376, 1735 (2010). The CFPB authority for public compensation also created in the Dodd-Frank Act generally comports with this distinction, and the CFPB has construed disgorgement and restitution to have different meanings. See *infra* Section II.C.1.

86. See *CFTC v. JBW Cap., LLC*, 812 F.3d 98, 111 (1st Cir. 2016); see also *CFTC v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1331-32 (11th Cir. 2018) (denying restitution to the CFTC for lack of the requisite “proximate cause” for investor loss, but encouraging the district court to “consider on remand whether disgorgement is appropriate”).

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C. Statutory Injunctive Authority and Disgorgement

Statutory injunctive authority is available to all enforcers. Although courts have inherent authority to issue an injunction to restrain violations, courts and scholars generally conclude that statutory authorization eliminates the prerequisites of traditional equitable relief or otherwise loosens standards for issuing an injunction.⁸⁷ Beginning in 1946 with the Supreme Court's seminal decision in *Porter v. Warner Holding Co.*,⁸⁸ courts have recognized that statutory injunctions also authorize disgorgement.

1. All Roads Lead to *Porter*

The Office of Price Administration (OPA) was an agency created in World War II and entrusted with enforcement of the Emergency Price Control Act of 1942 (EPCA).⁸⁹ Porter, the OPA Administrator, brought an action against a landlord charging rents in excess of the price controls and sought a return of money to the tenants in the amount of the excess rent. The lower courts rejected the claim for public compensation in the absence of express statutory authority. The Supreme Court reversed, holding that “a decree compelling one to disgorge profits, rents or property acquired in violation of the EPCA may properly be entered by a District Court once its equity jurisdiction has been invoked under [the Act].”⁹⁰ The Court based its holding on the broad equity powers of the courts, invoked under section 205 of the EPCA, to grant “a permanent or temporary injunction, restraining order, or other order.”⁹¹

Central to the Court's holding was the fact that the lawsuit was a public enforcement action. The Court stated that “since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.”⁹² The Court determined that the grant of statutory authorization to a public enforcer, and the consequent public purpose of deterrence through enforcement actions, underlie the propriety of public compensation: “In framing such remedies under [section 205(a)], courts must act primarily to effectuate the

87. Cf. Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513, 545 (1984) (“The issues in injunctive enforcement of environmental statutes relate less to the special requirements of the judicial role and more to the question of what forms of compliance were mandated by Congress.” (footnotes omitted)); Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 527 (1982) (“When the classic doctrines of equitable discretion confront the reality of clear statutory violations, the time-honored dogma of balancing cannot survive without some sympathetic analytical retooling.”); Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 488 (2010) (“[E]quitable balancing in statutory cases should be abandoned because it conflicts with separation of powers principles.”).

88. 328 U.S. 395 (1946).

89. Pub. L. No. 77-421, 56 Stat. 23.

90. *Porter*, 328 U.S. at 398-99.

91. *Id.* at 399.

92. *Id.* at 398.

policy of [EPCA] and to protect the public interest while giving necessary respect to the private interests involved.”⁹³

The Court followed *Porter* with two decisions that extended the reach of disgorgement. In *United States v. Moore*, the Court held that return of excess rent was properly ordered under the EPCA even when an injunction was improper because the price controls had been rescinded after the violations of the Act had occurred.⁹⁴ In *Mitchell v. Robert DeMario Jewelry, Inc.*, the Court held, consistent with *Porter*, that DOL had authority under the Fair Labor Standards Act to order “reimbursement” to employees subject to retaliation for reporting violations.⁹⁵

2. Enforcers Using Statutory Injunctive Authority

Federal enforcers rely heavily, and often exclusively, on disgorgement to obtain public compensation. The SEC initiated the modern era of disgorgement in 1971 by obtaining this remedy in its enforcement action against Texas Gulf Sulphur.⁹⁶ In affirming the remedy, the Second Circuit cited to *Porter*, *Moore* and *Mitchell* as authority:

[T]he Supreme Court has upheld the power of the Government without specific statutory authority to seek restitution, and has upheld the lower courts in granting restitution, as an ancillary remedy in the exercise of the courts’ general equity powers to afford complete relief.⁹⁷

Indeed, the SEC has multiple sources of statutory equitable authority permitting it to apply to federal courts to obtain an injunction.⁹⁸

All of the other federal public enforcers use disgorgement authority traceable to *Porter* and *Texas Gulf Sulphur*. In 1979, the Seventh Circuit became the first court to recognize the CFTC’s disgorgement authority, citing *Porter* and *Texas Gulf Sulphur*.⁹⁹ The FTC disgorgement authority exists in section 13 of the Federal Trade Commission Act (FTC Act), which authorizes courts to issue a permanent injunction “in proper cases.”¹⁰⁰ For decades, federal courts have awarded the FTC disgorgement based on this statute and the Court’s reasoning in *Porter*, repeatedly rejecting challenges to the contrary until recently.¹⁰¹ The

93. *Id.* at 400.

94. 340 U.S. 616 (1951).

95. 361 U.S. 288, 296 (1960).

96. SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301 (2d Cir. 1971); *see also* Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317, 320 (2008).

97. *Tex. Gulf Sulphur Co.*, 446 F.2d at 1307.

98. *See* Gabaldon, *supra* note 8, at 1616-19 (describing the development of SEC statutory injunctive authority used to obtain disgorgement).

99. CFTC v. Hunt, 591 F.2d 1211, 1221-23 (7th Cir. 1979).

100. 15 U.S.C. § 53(b) (2018).

101. David C. Vladeck, *Time to Stop Digging: Failed Attacks on FTC Authority to Obtain Consumer Redress*, 31 ANTITRUST 89, 89-91 (Fall 2016); J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST 1, 24 (2013). In 2020, two circuits overturned precedent allowing FTC disgorgement, and the question is now before the Supreme Court. *See infra* Section IV.A.

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FDA relies on statutory authority to “restrain violations” and obtain injunctive relief in support of its ability to seek disgorgement.¹⁰² The FDA’s initial attempts to obtain this remedy failed before district courts, but in 1999 the Sixth Circuit, citing *Porter* and *Mitchell*, rejected these cases and awarded disgorgement to consumers.¹⁰³ Federal courts have also invoked *Porter* in awarding disgorgement to the Department of Housing and Urban Development¹⁰⁴ (HUD) and the Federal Energy Regulatory Commission¹⁰⁵ (FERC) in civil law enforcement actions. Although most state attorneys general rely on express statutory authority, some state courts have relied on *Porter* in holding that a statutory injunction provision authorizes public compensation in actions brought by attorneys general and other state enforcers.¹⁰⁶

Courts rarely reject—and only occasionally trim—federal enforcer requests for disgorgement.¹⁰⁷ Although courts have rejected the full amount of enforcer requests for public compensation, that is the exception rather than the rule.¹⁰⁸

102. 21 U.S.C. § 332 (2018).

103. *United States v. Universal Mgmt. Servs., Corp.*, 191 F.3d 750, 761, 763-64 (6th Cir. 1999); *see also United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 223 (3d Cir. 2005) (“Though the FDCA does not specifically authorize restitution, such specificity is not required where the government properly invokes a court’s equitable jurisdiction under this statute. Although recent cases have tested the propositions upon which we rely, we believe that the FDCA grants district courts sitting in equity the authority to order restitution.”); *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1061 (10th Cir. 2006) (noting that “disgorgement is authorized by the FDCA”).

104. *See Pierce v. Amaral*, 938 F.2d 94, 95-96 (8th Cir. 1991).

105. *FERC v. Powhatan Energy Fund, LLC*, 345 F. Supp. 3d 682, 688 (E.D. Va. 2018).

106. CAROLYN CARTER & JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES §13.5.4.1 (8th ed. 2012) (“[An] overwhelming majority of courts find it within their equitable power to grant restitution as relief even when this is not provided for in the UDAP statute.”). State public enforcement cases often cite *Porter* as authority for awarding disgorgement based on statutory injunctive authority. *See, e.g., CashCall, Inc. v. Morrissey*, No. 12-1274, 2014 WL 2404300, at *19 (W. Va. May 30, 2014); *Commonwealth ex rel. Terry v. Va. Telemarketing, Inc.*, 15 Va. Cir. 489 (1989) (finding disgorgement proper in charities fraud); *State v. Bob Chambers Ford, Inc.*, 522 A.2d 362, 366-67 (Me. 1987) (“The court’s equitable powers assume an especially broad and flexible character when, as here, the public interest is involved.”); *State ex rel. Day v. Sw. Min. Energy, Inc.*, 617 P.2d 1334, 1338 (Okla. 1980) (“[T]he State of Oklahoma may require those violating the Securities Act to disgorge themselves of their unlawful profits.”); *Seaboard Sur. Co. v. Ralph Williams’ Nw. Chrysler Plymouth, Inc.*, 504 P.2d 1139, 1142 (Wash. 1973). *But see State v. Jonathan Logan, Inc.*, 482 A.2d 1, 6 (Md. 1984) (refusing to apply *Porter* absent a state statute expressly authorizing public compensation).

107. Only the CFPB has been denied any requested public compensation in a substantial number of its public enforcement cases. *See, e.g., CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-CV-02106-RS, 2017 WL 3948396, at *11 (N.D. Cal. Sept. 8, 2017); *CFPB v. CashCall, Inc.*, No. CV1507522JFWRAOX, 2018 WL 485963, at *14 (C.D. Cal. Jan. 19, 2018); *see also FTC v. Amrep Corp.*, 705 F. Supp. 119, 128 (S.D.N.Y. 1988) (denying summary judgment to the FTC because of variation in defendant conduct).

108. There are only a few courts that accept an enforcer’s right to disgorgement while still rejecting the full request for disgorgement. *See FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 69-70 (2d Cir. 2006) (trimming slightly FTC award because it failed to account for funds received by middlemen rather than directly paid to defendant); *SEC v. Wyly*, 56 F. Supp. 3d 260, 269 (S.D.N.Y. 2014) (finding “no evidence here that the defendants’ unlawful conduct—that is, the scheme to hide beneficial ownership by failing to disclose transactions—resulted in any market distortion, price impact, or profit tied to the violation,” yet remanding to allow the SEC to present further proof); *SEC v. Seghers*, 404 F. App’x 863, 864 (5th Cir. 2010) (agreeing that looser proof requirements apply, but affirming that the district court did not abuse its discretion in holding that the SEC failed to provide sufficient proof after initial reversal and remand of district court decision).

3. *Liu*: Disruption and Reaffirmation, With Limits

Despite *Porter* and subsequent decades of favorable judicial decisions arising across multiple market protection enforcement schemes, scholars and other commentators have repeatedly questioned whether a statutory grant of authority to an enforcer to seek an injunction can empower courts to award disgorgement.¹⁰⁹ The Supreme Court’s 2020 decision in *Liu v. SEC* should end that debate in favor of allowing disgorgement as public compensation, but the decision also establishes limits on obtaining such relief.¹¹⁰

In 2013 and 2017, the Supreme Court decided two cases limiting SEC enforcement authority. The first case, *Gabelli v. SEC*, held that the five-year limitation period on civil penalties should be measured from the time of the commission of the violation, rather than from the time that the violation is discovered by the SEC.¹¹¹ The second case, *Kokesh v. SEC*, extended this holding to disgorgement awards.¹¹² The Court determined that “SEC disgorgement [] bears all the hallmarks of a penalty,”¹¹³ with the consequence that the remedy was subject to the same five-year limitations period imposed in *Gabelli*.¹¹⁴ Footnote 3 in *Kokesh* ominously stated that “[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings.”¹¹⁵

In July 2020, *Liu* settled the question left dangling in *Kokesh*. It established two “principles” for understanding disgorgement as public compensation. “First, equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy.”¹¹⁶ The Court firmly grounded disgorgement in the equity powers of courts. In doing so, it waved away distinctions between different labels of equitable remedies, holding that disgorgement of ill-gotten profits was a proper result “[n]o matter the label” or “whatever the name.”¹¹⁷ *Liu* therefore rejects the position of commentators who argued that public compensation under statutory injunctive authority does not comport with the nuance of claims and remedies in equity.¹¹⁸

109. See *infra* Section IV.C.

110. 140 S. Ct. 1936, 1947-50 (2020).

111. 568 U.S. 442, 454 (2013).

112. 137 S. Ct. 1635 (2017).

113. *Id.* at 1644.

114. *Id.* at 1644-45. Scholars immediately began estimating the impact of *Kokesh* on SEC disgorgement recoveries. See Velikonja, *supra* note 81, at 408 (suggesting that the *Kokesh* decision may impact about 34 percent of cases, such as potentially precluding a disgorgement award in about 3 percent of cases, and comparing this finding to other scholars who estimated “minimal” effect or a decrease of disgorgement of about 20 percent in insider trading cases).

115. *Kokesh*, 137 S. Ct. at 1642 n.3; see generally Stephen M. Bainbridge, *Kokesh Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 WASH. U. J.L. & POL’Y 17 (2018) (arguing that *Kokesh* cast doubt on the future of SEC disgorgement).

116. *Liu v. SEC*, 140 S. Ct. 1936, 1942 (2020).

117. *Id.* at 1943.

118. *Id.*; cf. Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1, 11 (2013) (“[T]he federal securities laws explicitly include disgorgement among the many

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The second principle enunciated in *Liu* is that, “to avoid transforming an equitable remedy into a punitive sanction” that exceeds the proper bounds of equity, disgorgement is subject to three limits that the Court suggests some prior SEC disgorgement awards may have exceeded: (1) disgorgement should only “be awarded for victims” and not “deposited in Treasury funds;”¹¹⁹ (2) the amount should be no more than an “individual wrongdoer’s net profits,” after deducting “legitimate expenses from the receipts of fraud;”¹²⁰ and (3) disgorgement is not a remedy appropriate where the defendant’s liability is solely based on joint-and-several liability, but rather must be awarded based on individual wrong-doing.¹²¹

The first limit—that disgorgement must be awarded to victims—was based on particular language in the SEC statutory injunctive authority limiting equitable relief to that which “may be appropriate or necessary for the benefit of investors.”¹²² Accordingly, it is unclear that this restriction has meaning in actions by public enforcers other than SEC.

But the holding in *Liu* as to the other two limits—that disgorgement is based in traditional equity and is therefore limited to net profits and individual wrong-doing as defined by common law—should reshape the law of disgorgement in public enforcement.¹²³ *Liu* suggests a closer alignment of disgorgement with the traditional doctrines of equity found in private law, rather than with the public-enforcement-rooted remedies first enunciated in *Porter* and subsequently broadened through decades of court decisions. As one commentator concluded, *Liu* likely will make disgorgement “more difficult to obtain,” and when it is awarded, it will be “for more limited sums.”¹²⁴

4. *AMG*: Disgorgement Authority Depends on Statutory Context

The Court’s ruling in *AMG* unsettles disgorgement law in a different way.¹²⁵ Unlike *Liu*, the *AMG* opinion showed little interest in the nuance of a disgorgement award; indeed, the opinion falls into the category of cases that blithely mix-up the terms disgorgement and restitution. Instead, the Court focused solely on the question of whether disgorgement could issue under general statutory injunctive authority in the face of an enforcer’s alternative express statutory authority to seek public compensation.

Section 19 of the FTC Act authorizes the FTC to seek a court order “necessary to redress injury to consumers,” and “[s]uch relief may

remedies the SEC is empowered to order administratively . . . [which means that] Congress must have recognized that disgorgement is not an equitable remedy.”)

119. *Liu*, 140 S. Ct. at 1946.

120. *Id.* at 1949-50.

121. *Id.* at 1949.

122. 15 U.S.C. § 78u(d)(5) (2018).

123. See generally Jennifer J. Schulp, *Liu v. SEC: Limiting Disgorgement, But by How Much?*, 2019-2020 CATO SUP. CT. REV. 203.

124. *Id.* at 226.

125. *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

include . . . rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice.”¹²⁶ Unlike its disgorgement authority under section 13 of the FTC Act, the agency can only seek restitution if the defendant is found to have violated FTC rules, or in a judicial proceeding following FTC issuance of an administrative cease and desist order resulting from conduct “which a reasonable man would have known under the circumstances was dishonest or fraudulent.”¹²⁷

Despite decades of federal appellate court decisions holding that section 13 disgorgement authority and section 19 public restitution authority are non-exclusive alternatives available to the FTC, the Court in *AMG* held that the detailed statutory authority in section 19 for public restitution obviated the Commission’s right to obtain disgorgement on behalf of consumers.¹²⁸ The Court framed the issue as whether section 13 disgorgement was being used by the FTC to “effectively bypass[] the process” for public compensation under section 19.¹²⁹ Treating the question as one of statutory interpretation, the Court held that Congress did not intend section 13 to authorize disgorgement given the express authority for public restitution in section 19.¹³⁰ The Court distinguished *Porter* and *Mitchell* as arising under differently-structured statutes and as not providing “a universal rule of interpretation.”¹³¹

While *Liu* and *AMG* most directly affect the rights of the enforcement programs of SEC and the FTC respectively, they also will shape the of broader law of public compensation in the coming years. *Liu* generally reaffirmed the right to disgorgement in public enforcement but unsettled the scope and process for determining particular disgorgement awards, while *AMG* unsettled the long-held assumption that the right to seek disgorgement necessarily flows from the statutory injunctive authority of the enforcer.

5. Express Disgorgement Authority and SEC Fair Funds

While disgorgement has been a creature of judicial interpretation of broad statutory grants of injunctive authority dating back to *Porter* in the 1940s, many enforcers have more recently obtained some form of express statutory authority to obtain disgorgement. This authority has mostly laid fallow. The Court’s holding in *AMG*, however, likely will place the spotlight on this alternative statutory authority for enforcers seeking disgorgement.

In the DFA, Congress gave the CFTC and the CFPB a parallel form of express disgorgement authority. In practice, this has yet to change the law of disgorgement. In 2010, the DFA granted the CFTC express disgorgement

126. 15 U.S.C. § 57b(b) (2018).

127. 15 U.S.C. § 57b(a) (2018).

128. *AMG Cap. Mgmt., LLC*, 141 S. Ct. at 1349.

129. *Id.* at 1347.

130. *Id.* at 1349.

131. *Id.* at 1350.

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authority, even though the CFTC had previously been obtaining disgorgement under its statutory injunctive authority. The DFA provided the CFTC with statutory authority to obtain “disgorgement of gains received in connection with such violation.”¹³² A part of the DFA’s creation of the CFPB was a list of remedial authorities that included the right to obtain “disgorgement or compensation for unjust enrichment.”¹³³ A few state statutes also expressly provide for the state attorney general to obtain disgorgement.¹³⁴

However, these grants of express statutory authority to the CFTC and the CFPB for disgorgement have not led to changes in judicial approaches to disgorgement. In CFTC cases, courts have either ignored the express statutory authority for disgorgement in favor of the well-used statutory injunctive authority,¹³⁵ or have cited the express statute but treated it as simply a congressional recognition of the statutory injunctive authority and used pre-DFA case law to shape the terms of the award.¹³⁶ The CFPB has not yet explicitly relied on this express disgorgement authority for public compensation.¹³⁷ Whether the restrictions imposed on disgorgement in *Liu* will drive the CFTC or CFPB to seek an interpretation of their express disgorgement authority that is broader than the limits of traditional equity is an open question.

Congress swiftly responded to *Liu* with a change to SEC statutory authority in January 2021, with an amendment “[t]ucked away in the 1,400-page” legislative “override [of] a presidential veto of the National Defense Authorization Act.”¹³⁸ This amendment added two provisions aimed at clarifying and strengthening the SEC’s disgorgement authority in light of *Liu*. First, it added a new paragraph (7) to the SEC’s remedial authority stating that “the Commission may seek, and any Federal court may order, disgorgement.”¹³⁹ Second, it provided jurisdiction to courts to “require disgorgement under paragraph (7) of any unjust enrichment by the person who received such unjust enrichment as a result of such violation.”¹⁴⁰ Given this vague incorporation of

132. 7 U.S.C. § 13a-1(d)(3)(B) (2018).

133. 12 U.S.C. § 5565(a)(2)(D) (2018). The CFPB has generally only characterized an enforcement action remedy as disgorgement when exercising its discretion to remit collected funds to the federal treasury. *See, e.g.*, Consent Order at ¶ 29, *In re Taylor*, CFPB No. 2013-CFPB-0001 (May 17, 2013). However, the plain language of the DFA includes no explicit requirement that the Bureau direct disgorged funds to the federal treasury instead of consumers. *See* 12 U.S.C. § 5565 (2018). Presumably the Bureau would be within its discretion to award disgorged funds to consumers affected by the defendant’s illegal act.

134. *See, e.g.*, ARIZ. REV. STAT. ANN. § 44-1528 (2021).

135. *See, e.g.*, CFTC v. Arrington, 998 F. Supp. 2d 847, 874 (D. Neb. 2014), *aff’d sub nom.* CFTC v. Kratville, 796 F.3d 873 (8th Cir. 2015); CFTC v. 4X Sols., Inc., No. 13CV2287-RMB-FM, 2015 WL 9943241, at *3 (S.D.N.Y. Dec. 28, 2015).

136. *See, e.g.*, CFTC v. Amerman, 645 F. App’x 938, 943-944 (11th Cir. 2016); CFTC v. Dupont, No. 8:16-CV-03258-TMC, 2018 WL 3148532, at *12 (D.S.C. June 22, 2018).

137. *See infra* Section II.D.1.

138. Thomas Krysa & Peter Fetzer, *Congress Passes NDAA Legislation Extending SEC’s Disgorgement Powers*, NAT’L L. REV. (Jan. 11, 2021), <https://www.natlawreview.com/article/congress-passes-ndaa-legislation-extending-sec-s-disgorgement-powers> [<https://perma.cc/2BBE-G2MR>]; *see also* H.R. 6395, 116th Cong., § 6501 (2020) (enrolled).

139. H.R. 6395, 116th Cong., § 6501 (2020) (enrolled).

140. *Id.*

authority, and especially in light of the use of an explicit reference to “unjust enrichment,” it is unclear how this law materially changes the tying of disgorgement to a general evocation of traditional equity set forth in *Liu*.¹⁴¹ It also is unclear if courts will consider this congressional action in applying *Liu* to other federal enforcers relying on disgorgement. Perhaps the only certainty is that SEC enforcement actions face a future of litigation to resolve these questions.

Since 2002, the SEC has had parallel express statutory authority of a wholly different sort, which allows it to add to disgorgement awards. The Sarbanes-Oxley Act, enacted in the wake of the Enron scandal, created a unique authority for the SEC, known as Fair Funds. Under the Fair Funds provision, the SEC may use civil penalty money for public compensation.¹⁴² The SEC obtained over \$8.28 billion in Fair Funds disgorgement in the first eleven years of using this authority, more than the \$6.19 billion it was awarded in direct disgorgement based on its statutory injunctive authority.¹⁴³ The unique feature of Fair Funds—that it allows the SEC to use civil penalty recoveries as disgorgement in a given case—could provide the SEC with an incentive to respond to limits imposed by *Liu* by shifting the recovery to a penalty amount in appropriate cases. In a recent case, for instance, the SEC withdrew a request for disgorgement in a pending enforcement action in favor of relying on a possible civil penalty award, citing the impact of *Liu* in its request to make this change in preferred remedy.¹⁴⁴

D. Statutory Express Compensation Authority and Public Restitution

Public enforcers rely on express authorization to obtain public compensation based on consumer loss, known as public restitution. Section II.D.1 reviews this express statutory authority for the FTC, CFTC and CFPB. Section II.D.2 describes public restitution in enforcement actions by state attorneys general. Unlike their federal counterparts, state attorneys general rely heavily on public restitution rather than disgorgement.

1. Federal Enforcers with Restitution Authority

As noted above, section 19 of the FTC Act provides the FTC with express authority to obtain the “refund of money or return of property” and other forms of public restitution.¹⁴⁵ The FTC rarely employs this authority, instead relying primarily on its (now abrogated) statutory injunctive authority to seek

141. The amendment expressly overturned the limitations period on SEC disgorgement in *Kokesh*. *See id.*

142. 15 U.S.C. § 7246 (2018); *see also* Black, *supra* note 96, at 320-22 (tracing the history of Fair Funds).

143. Velikonja, *supra* note 10, at 351.

144. SEC v. Govender, No. 1:18-CV-7685 (ALC), 2020 WL 5758997, at *2 (S.D.N.Y. Sept. 28, 2020).

145. 15 U.S.C. § 57b(b) (2018).

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disgorgement.¹⁴⁶ It is unclear whether this disuse of section 19 was the result of the restricted conditions on its application or the relative ease of using its disgorgement authority. The *AMG* decision, of course, should cause the FTC to give renewed attention to its section 19 authority.

The DFA expressly authorizes the CFTC to obtain “equitable remedies including restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses).”¹⁴⁷ In contrast to the FTC, the CFTC regularly employs this authority.¹⁴⁸ Courts have reaffirmed that the restitution authority in this statute provides for full recovery of investor losses, rejecting arguments that the use of the “equitable relief” prefatory language limits the CFTC to something less.¹⁴⁹

Unlike other federal enforcers, the CFPB nominally relies only on its express statutory authority for restitution. Because it is the new agency among federal market protection enforcers, Congress drew from existing law when providing the CFPB with comprehensive express authority for relief. The CFPB’s authorizing statute allows courts to “grant any appropriate legal or equitable relief,” including five specific items that could be categorized as public restitution.¹⁵⁰ The specific list repeats almost verbatim the four items noted above from section 19 of the FTC Act, plus adds the naked word “restitution.”¹⁵¹ Courts have employed the statute in a way that blurs the line between disgorgement and restitution, predominantly referring to the award as “restitution,” but interchangeably citing to FTC and SEC disgorgement case law, as well as FTC public restitution cases.¹⁵² Thus, while the CFPB obtains public compensation based on express statutory authority, in practice it seeks relief that is not clearly governed by either a theory of disgorgement or public restitution.

146. See Vladeck, *supra* note 101 (reviewing section 13 cases); Erik Quattro, *Is This the End of FTC Restitution and Disgorgement under Section 13(B)?*, 9 GLOBAL BUS. L. REV. 201, 229-32 (2021) (explaining why the FTC section 13 authority is much easier to use for public compensation than the FTC section 19 authority).

147. 7 U.S.C. § 13a-1(d)(3)(A) (2018).

148. See, e.g., *CFTC v. Brown*, No. 3:15-CV-354-J-39MCR, 2018 WL 6920384, at *3 (M.D. Fla. Mar. 12, 2018) (listing cases in which the CFTC uses restitution authority).

149. *CFTC v. JBW Cap., LLC*, 812 F.3d 98, 111 (1st Cir. 2016); *CFTC v. Reisinger*, No. 11-CV-08567, 2017 WL 4164197, at *6 (N.D. Ill. Sept. 19, 2017); *CFTC v. U.S. Bank, N.A.*, No. 13-CV-2041-LRR, 2014 WL 6474183, at *36 (N.D. Iowa Nov. 19, 2014); see also *CFTC v. Miklovich*, 687 F. App’x 449, 453 (6th Cir. 2017) (concurring that consumer loss is the measure of restitution, but holding that the defendant waived argument).

150. 12 U.S.C. § 5565(a)(1)-(2) (2018).

151. 12 U.S.C. § 5565(a)(2) (2018). The other two items on this list are civil penalties and a descriptive of injunctive authority (“limits on the activities or functions of the person”). § 5565(a)(2)(G)-(H).

152. See, e.g., *CFPB v. Gordon*, 819 F.3d 1179, 1195 (9th Cir. 2016) (awarding restitution, citing primarily SEC and FTC disgorgement cases); *CFPB v. Mortg. Law Grp., LLP*, 420 F. Supp. 3d 848, 853 (W.D. Wis. 2019) (awarding restitution, citing SEC and FTC disgorgement cases, and other CFPB cases); see also *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-CV-02106-RS, 2017 WL 3948396, at *12 (N.D. Cal. Sept. 8, 2017) (denying restitution, primarily citing FTC public restitution case); *CFPB v. CashCall, Inc.*, No. CV1507522JFWRAOX, 2018 WL 485963, at *14 (C.D. Cal. Jan. 19, 2018) (same).

2. State Enforcers

Most state attorneys general have express statutory authority for public compensation.¹⁵³ Unlike federal public compensation law, state law is dominated by measuring relief in terms of consumer loss.¹⁵⁴ Although state public enforcement cases occasionally refer to disgorgement or cite to *Porter*, some state courts have rejected the use of disgorgement when it is not expressly authorized by statute or when state law provides for restitution or another remedy.¹⁵⁵

A typical state statute providing for public restitution awards to the state attorney general will authorize a court to “restore to any person in interest any moneys or property, real or personal which may have been acquired by means of any practice herein declared to be unlawful,” or the like.¹⁵⁶ Other state statutes refer specifically to an award of restitution.¹⁵⁷ Some states include a requirement that the consumer loss be “ascertainable.”¹⁵⁸ Colorado allows for public restitution orders “necessary to completely compensate or restore to the original position of any person injured” by a violation.¹⁵⁹ Although statutes authorizing state attorneys general to obtain restitution are even more varied than federal law, it is not clear that differences in statutory language substantially drive state court

153. See CAROLYN L. CARTER, JONATHAN SHELDON, JONATHAN W. ALST & JEREMIAH BATTLE, JR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 13.6.4.1 (10th ed. 2021).

154. *Id.* (concluding that “[t]he purpose of restitution is to restore the victim, not the offender, to the status quo” in state attorney general enforcement of UDAP laws); see also *People v. Sarpas*, 172 Cal. Rptr. 3d 25, 44 (Ct. App. 2014) (“Where restitution is ordered as a means of redressing a statutory violation, the courts are not concerned with restoring the violator to the status quo ante. The focus instead is on the victim.” (quoting *People ex rel. Kennedy v. Beaumont Inv., Ltd.*, 3 Cal. Rptr. 3d 429, 455 (Ct. App. 2003))).

155. See *State ex rel. Horne v. Autozone, Inc.*, 275 P.3d 1278, 1279 (Ariz. 2012); *State ex rel. Miller v. Santa Rosa Sales & Mktg., Inc.*, 475 N.W.2d 210 (Iowa 1991), *superseded by statute as stated in State v. Hagen*, 840 N.W.2d 140, 152-53 (Iowa 2013). Even when authorizing public compensation under general equitable authority, states typically refer to it as restitution. CARTER, ET AL., *supra* note 153, at § 13.6.4.1 n.360 (collecting cases).

156. N.J. STAT. ANN. § 56:8-8 (West 2021); see, e.g., ARIZ. REV. STAT. ANN. § 44-1528(A)(2) (2021) (stating that the state attorney general has the authority to, *inter alia*, “[r]estore to any person in interest any monies or property, real or personal, which may have been acquired by means of any practice in this article declared to be unlawful, including the appointment of a receiver”); IOWA CODE § 714.16(7) (2021) (“The court may make orders or judgments as necessary to prevent the use or employment by a person of any prohibited practices, or which are necessary to restore to any person in interest any moneys or property, real or personal, which have been acquired by means of a practice declared to be unlawful by this section, including the appointment of a receiver in cases of substantial and willful violation of this section.”); WASH. REV. CODE § 19.86.080(3) (2021) (“[T]he court may also make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired, regardless of whether such person purchased or transacted for goods or services directly with the defendant or indirectly through resellers.”).

157. See, e.g., CONN. GEN. STAT. ANN. § 42-110m(a) (2021); 815 ILL. COMP. STAT. 505/7 (2021); MD. CODE ANN., COM. LAW § 13-403 (West 2021).

158. See, e.g., TENN. CODE ANN. § 47-18-108(b)(1) (2021) (“The court may make such orders or render such judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act, or practice, any money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, which may have been acquired by means of any act or practice declared to be unlawful by this part.”); ME. REV. STAT. ANN. tit. 5, § 209 (West 2021) (speaking in terms of “any ascertainable loss”).

159. COLO. REV. STAT. § 6-1-110(1) (2021).

interpretations of the requisites for this relief. Rather, state courts typically use the term restitution and the concept of consumer loss as a measure of relief regardless of the nomenclature in the underlying statute.¹⁶⁰

Additionally, state enforcers can rely on federal law to obtain public compensation. As of 2011, twenty-four federal statutes authorized state attorneys general—and sometimes state financial regulators—to enforce federal consumer protection laws.¹⁶¹ Many of these statutes provide express authority for public compensation for violations.¹⁶²

III. A Restated Public Compensation Doctrine

As Part II illustrates, public compensation effectively has its own unrecognized legal doctrine rooted in the rationales of public enforcement. Courts and Congress (or state legislatures) have sketched the outlines of this doctrine by shaping two distinct categories of public compensation—disgorgement and restitution. In this Part, we integrate decades of judicial decisions across the various federal and state public enforcement schemes into a more coherent expression of existing doctrine. In doing so, we emphasize points of commonality in judicial decisions. We extend this consensus with a proposed test to resolve difficult public restitution cases involving variation in conduct or partial benefit to victims of illegal activity. A key feature of the doctrine we describe is that it is designed solely as a remedy in public enforcement.

Section III.A states the scope of our proposed doctrine and notes the public enforcement remedies that are beyond our concern in this Article. Section III.B then identifies a core interpretative principle common to both disgorgement and restitution, which is a causation presumption that allows the court to measure public compensation by a reasonable approximation and burden-shifting framework. Sections III.C and III.D elaborate on the parts of the doctrine specific to disgorgement and restitution, respectively. In Section III.E, we provide examples of how the doctrine would be applied. That Section looks at situations in which disgorgement would apply but not restitution, and vice versa, and provides examples of when public enforcers have incentives to use one theory versus the other based on likely results and difficulty of proof.

A. Defining Public Compensation

Public compensation, as that term is employed here, has three attributes: (1) an award of money to people, (2) resulting from a government entity enforcing

160. See, e.g., *State v. Minn. Sch. Bus., Inc.*, 935 N.W.2d 124 (Minn. 2019) (using or citing to cases that use various terms but basing public compensation on an analysis of consumer loss).

161. Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 *CARDOZO L. REV.* 53, 56-57 (2011).

162. Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 *MINN. L. REV.* 2313, 2328 (2016).

a civil market protection law, and (3) awarding compensation to a substantial number of people. We describe each of these criteria below.¹⁶³

(1) *Money to People, Not Governments.* Public enforcement can result in non-monetary relief that directly benefits people. For instance, federal environmental suits have provided for clean-up projects that benefit residents of a particular locale and UDAP suits can result in an order of specific performance.¹⁶⁴ We focus our discussion here on the award of money to people because the overwhelming majority of public compensation involves the distribution of money, and the award of non-monetary relief can raise a different set of issues as to measurement and distribution of the relief. We also are concerned only with money awards distributed to people affected by a violation, and not money obtained in enforcement actions retained by the government or dedicated to another use. Thus, civil penalty awards not re-directed to people impacted by a law violation are not within the scope of this doctrine. We also do not include as public compensation an award of money to governments for pecuniary harm resulting from public civil enforcement of market protection laws, such as the tobacco cases brought by state attorneys general in the 1990s alleging UDAP and antitrust violations that resulted in payments to the states.¹⁶⁵

(2) *Government Enforcement of Civil Market Protection Laws.* Public compensation concerns civil actions brought by public enforcers for violations of market protection laws. Not within the type of public compensation of concern here are government awards of money to people through the administration of compensation programs, such as the 9/11 fund, oil spill funds or the like.¹⁶⁶ Criminal prosecutions can also result in restitution awards that are not within the scope of our article.¹⁶⁷

(3) *Substantial Number of People.* Finally, the public compensation doctrine proposed here is concerned with awards of money to large numbers of people in a public enforcement action. Some public enforcers regularly obtain relief for individuals or small groups. The CFPB and state attorneys general mediate consumer disputes that often result in return of money to individual complainants.¹⁶⁸ State attorneys general bring enforcement actions that obtain

163. We also limit our analysis to the award of public compensation by courts. Some enforcers have authority to direct public compensation be paid through administrative proceedings.

164. For background on remedies in federal environmental law, see Seema Kakade, *Remedial Payments in Agency Enforcement*, 44 HARV. ENV'T L. REV. 117 (2020). See also *State ex rel. Guste v. Orkin Exterminating Co.*, 528 So. 2d 198, 201 (La. Ct. App. 4th Cir. 1988) (ordering a seller to honor long-term contracts).

165. For background on such enforcement actions, see, for example, Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 30-35 (2000); and PRIDGEN & ALDERMAN, *supra* note 59, at § 7:13.

166. See Michael D. Sant' Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2032-33 (2012).

167. See generally CHARLES DOYLE, CONG. RSCH. SERV., RL34138, RESTITUTION IN FEDERAL CRIMINAL CASES (2019) (discussing the titular subject).

168. See, e.g., Angela Littwin, *Why Process Complaints? Then and Now*, 87 TEMP. L. REV. 895, 895 (2015) (noting that the CFPB, like the EEOC, has adopted the practice of processing consumer complaints).

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compensation for a single individual or a small group of people with identifiable dollar amounts of loss,¹⁶⁹ as does the EEOC.¹⁷⁰ State governments also operate professional malpractice compensation funds for, or can alternatively issue awards to, specific individuals harmed by such misconduct.¹⁷¹ Return of money to specific individuals or small groups in these circumstances does not raise serious doctrinal concerns. The difficult questions with public compensation arise from the complexities of determining how much public compensation should issue in the face of conduct affecting mass numbers of people, especially when there are dissimilarities in conduct as to, or experience within, that population.

B. Reasonable Approximation Framework

Although disgorgement and restitution are based on different measures—ill-gotten gain versus consumer loss, respectively—they present common problems of the proof required for causation and determination of the proper amount of public compensation due. Courts have developed a consensus position to address these problems of proof. Causation is presumed on proof of the law violation if the public enforcer can present a reasonable approximation of ill-gotten gain (disgorgement) or consumer loss (restitution). If the enforcer makes this requisite showing, the burden shifts to the law violator to prove the amount was not a reasonable approximation.

1. Disgorgement

This reasonable approximation framework was first articulated by the D.C. Circuit in *SEC v. First City Financial Corp.* in 1989.¹⁷² The defendants in *First City* violated federal securities law by failing to timely disclose their purchase of more than 5 percent of Ashland Oil as part of a hostile takeover attempt, which allowed them to continue to accumulate stock in the company at a lower cost than would have been the case if the takeover was revealed by proper disclosure. After citing to *Porter* and *Texas Gulf Sulphur* in brushing aside a challenge to the validity of disgorgement, the court tackled the issue of determining the amount of the ill-gotten gain, and thus the amount of public compensation under disgorgement law. The district court had ordered \$2.7 million in disgorgement by calculating the profit defendants received on stock purchased after the disclosure that was subsequently repurchased by Ashland Oil at a higher price following discovery of the takeover attempt.

169. Cox, et al., *supra* note 7, at 76.

170. Morrison, *supra* note 34, at 121.

171. See, e.g., *Wisconsin's Injured Patients and Families Compensation Fund*, INS. J. (July 24, 2017), <https://www.insurancejournal.com/magazines/mag-features/2017/07/24/458079.htm> [https://perma.cc/3CS3-2BHW].

172. 890 F.2d 1215 (D.C. Cir. 1989).

In affirming this disgorgement award, the D.C. Circuit started with the public purpose rationale of disgorgement, observing that “[t]he remedy may well be a key to the SEC’s efforts to deter others from violating the securities laws.”¹⁷³ The court also noted the causation problem presented by the principle of equity that relief must not be punitive, and thus “the SEC generally must distinguish between legally and illegally obtained profits.”¹⁷⁴ Defendants argued that the measure of full profits ordered by the district court was “simplistic, quite unrealistic,” and offered expert testimony suggesting causes for the rise in stock price unrelated to the violation of failing to disclose its purchases.¹⁷⁵ The D.C. Circuit saw the problem as one of decision-making amid “imprecision and imperfect information,” which meant that “[r]ules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task.”¹⁷⁶

The court resolved this problem by stating the reasonable approximation framework for evaluating causation between the violation and the measure of ill-gotten gains:

Although the SEC bears the ultimate burden of persuasion that its disgorgement figure reasonably approximates the amount of unjust enrichment, we believe the government’s showing of appellants’ actual profits on the tainted transactions at least presumptively satisfied that burden. Appellants, to whom the burden of going forward shifted, were then obliged clearly to demonstrate that the disgorgement figure was not a reasonable approximation.¹⁷⁷

The court emphasized that “the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.”¹⁷⁸

The reasonable approximation framework enunciated in *First City* has developed into a consensus position for establishing the amount of disgorgement in SEC cases.¹⁷⁹ It has been adopted for SEC enforcement by courts in nine circuits and has not been rejected by any circuit.¹⁸⁰ The Second Circuit has stated that this framework relieves the SEC of the burden of establishing its approximation “with exactitude.”¹⁸¹ In adopting the reasonable approximation

173. *Id.* at 1231.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 1232.

178. *Id.*

179. See Ryan, *supra* note 118, at 11 (“[T]he SEC is required to proffer only a ‘reasonable approximation’ of the alleged ill-gotten gains, at which point the evidentiary burden shifts to the defendant to disprove the SEC’s calculation.”).

180. Seven circuit courts of appeals have adopted this framework. See SEC v. Happ, 392 F.3d 12, 31-32 (1st Cir. 2004); SEC v. Contorinis, 743 F.3d 296, 305 (2d Cir. 2014); SEC v. Teo, 746 F.3d 90, 105-06 (3d Cir. 2014); Bear Ranch, LLC v. Heartbrand Beef, Inc., 885 F.3d 794, 805 (5th Cir. 2018); SEC v. Platforms Wireless Int’l Corp., 617 F.3d 1072, 1096-97 (9th Cir. 2010); SEC v. Curshen, 372 F. App’x 872, 883 (10th Cir. 2010); SEC v. Calvo, 378 F.3d 1211, 1217 (11th Cir. 2004). The reasonable approximation framework also has been used by district courts in the Sixth and Eighth Circuits. See SEC v. Kilpatrick, No. 12-12109, 2014 U.S. Dist. LEXIS 104307 (E.D. Mich. July 31, 2014); SEC v. Quan, No. 11-723 ADM/JSM, 2014 U.S. Dist. LEXIS 131618 (D. Minn. Sep. 19, 2014).

181. SEC v. Razmilovic, 738 F.3d 14, 31 (2d Cir. 2013).

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approach, the Third Circuit also held that the burden-shifting element of this framework applied to a law violator's claim of intervening causes, reasoning that "intervening causation is not an element of the SEC's evidentiary burden in setting out an amount to be disgorged that reasonably approximates illegal profits;" rather, "if the issue of an intervening cause is to be raised, it will normally be the defendant's burden to do so."¹⁸²

Circuit courts also have broadly adopted, and without disagreement, the use of reasonable approximation with burden-shifting in FTC cases seeking disgorgement.¹⁸³ Courts have also used reasonable approximation when determining public compensation in enforcement actions brought by all the other federal public enforcers regularly obtaining this relief, including the CFPB,¹⁸⁴ HUD¹⁸⁵ and CFTC.¹⁸⁶ Across market protection schemes, courts have cited cases using reasonable approximation to measure disgorgement.¹⁸⁷

2. Public Restitution

The reasonable approximation framework also applies in public restitution cases. In the oft-cited Ninth Circuit case on public restitution under section 19 of the FTC Act, *FTC v. Figgie International, Inc.*, the defendant deceptively sold heat detectors.¹⁸⁸ The court rejected Figgie International's argument that restitution should be limited to consumers who proved that they relied on the deceptive statements. Just as the D.C. Circuit did in *First City*, the court began by distinguishing the FTC's demand for public compensation from private fraud actions, noting that requiring the FTC to demonstrate "proof of individual reliance by each purchasing customer" on misleading statements would thwart effective civil law enforcement. The court held that "[a] presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product."¹⁸⁹ The Ninth Circuit then adopted the

182. *Teo*, 746 F.3d at 105-06.

183. *E.g.*, *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. BlueHippo Funding, LLC*, 762 F.3d 238, 245 (2d Cir. 2014); *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997); *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004); *see also* *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991) ("To satisfy the reliance requirement in actions brought under section 13(b) of the Act, the FTC need merely show that the misrepresentations or omissions were of a kind usually relied upon by reasonable and prudent persons, that they were widely disseminated, and that the injured consumers actually purchased the defendants' products.").

184. *E.g.*, *CFPB v. Gordon*, 819 F.3d 1179, 1195 (9th Cir. 2016).

185. *E.g.*, *HUD v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 927 (4th Cir. 1995) ("*First City* and the district court set a practical standard for the government's initial burden of coming forward.").

186. *E.g.*, *CFTC v. Am. Bullion Exch. Abex, Corp.*, No. SACV101876DOCRNBX, 2014 WL 12603558, at *8 (C.D. Cal. Sept. 16, 2014); *see also* *CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 78 (3d Cir. 1993) (permitting courts to engage in a "reasonable approximation" of violator gain on remand).

187. *See, e.g.*, *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997) (citing SEC, HUD and CFTC cases when ruling on the calculation of equitable relief).

188. 994 F.2d 595, 605 (9th Cir. 1993).

189. *Id.* at 605-06.

reasonable approximation framework with burden-shifting from disgorgement cases for determining the proper amount of public restitution, finding that the “same reasoning is applicable to [s]ection 19,” and holding that “[b]ecause Figgie has presented no evidence to rebut the presumption of reliance, injury to consumers ha[d] been established.”¹⁹⁰

Likewise, courts awarding restitution to state attorneys general have relied on the reasonable approximation framework or similar principles. Precision in determining the amount of a restitution award is not required.¹⁹¹ A New York appellate court, for example, upheld a restitution award and rejected defendant General Electric’s argument about the value of the service, stating that “GE, whose deceptive practices caused damages to so many consumers, can now hardly complain that petitioner has not quantified actual damages with exactitude.”¹⁹² State cases awarding public compensation also have overwhelmingly rejected the argument that state attorneys general must show consumer reliance and that consumers must testify to be awarded public compensation.¹⁹³ As with disgorgement, fundamental differences between public compensation and private relief underlie these relaxed proof standards.¹⁹⁴

The causation presumption in the reasonable approximation framework obviates the need for the public enforcer to present evidence of individual reliance to obtain public restitution. Defendants in public enforcement cases often argue that a prerequisite of public compensation is that each consumer testify as to their reliance on the conduct underlying the violation, but courts routinely reject this argument.¹⁹⁵ To hold otherwise would make public compensation impossible to award in most cases.

190. *Id.* at 606. Despite the Supreme Court’s decision in *AMG*, which we discuss in more detail in Part IV, the burden-shifting framework used by courts in these cases remains a viable foundation upon which to build public compensation doctrine. This is because *AMG* only unsettled the procedural pathway through which an agency imposes its remedial authorities, not the method that courts had, for decades, used to set awards. *See AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1352 (2021) (“Nothing we say today, however, prohibits the Commission from using its authority under § 5 and § 19 to obtain restitution on behalf of consumers.”). Moreover, the FTC’s framework was taken directly from the SEC. Neither *Liu* nor *AMG* addressed in any way the issue of how to determine public compensation. Rather, they addressed statutory interpretation questions on the availability of the remedy.

191. *See, e.g., State v. Bob Chambers Ford, Inc.*, 522 A.2d 362, 366 (Me. 1987) (“[F]air market value may be established by approximation as long as the fact finder can reach a specific conclusion.”); *State ex rel. Slatery v. HRC Med. Ctrs., Inc.*, 603 S.W.3d 1, 30 (Tenn. Ct. App. 2019) (rejecting the idea that an attorney general must show “mathematically precise computation of reasonably identifiable alleged direct losses incurred by consumers”).

192. *People ex rel. Spitzer v. Gen. Elec. Co.*, 756 N.Y.S.2d 520, 525 (App. Div. 2003).

193. *Infra* Section III.D.1.

194. *E.g., Kugler v. Romain*, 279 A.2d 640, 649 (N.J. 1971) (“If the only available route has been pursuit of a private remedy by individual victims of the unfair practices . . . such a rule would require an unrealistic expenditure of judicial energy.”); *see also Bob Chambers Ford*, 522 A.2d at 367 (“The UTPA, by providing for actions by the Attorney General, seeks to provide an efficient, inexpensive and broad solution to the alleged wrong.”); *Consumer Prot. Div. Office of Atty. Gen. v. Consumer Pub. Co.*, 501 A.2d 48, 74 (Md. 1985) (describing case law in which state courts have held that proof requirements for restitution are relaxed in public enforcement cases).

195. *See e.g., CFTC v. McDonnell*, 332 F. Supp. 3d 641, 726 (E.D.N.Y. 2018); *CFTC v. Hunter Wise Commodities, LLC*, 21 F. Supp. 3d 1317, 1352 (S.D. Fla. 2014); *State v. Minn. Sch. Bus., Inc.*, 935

C. Particular Principles of Disgorgement

Unlike adjudication of a private right to unjust enrichment, which is premised on the relationship between the litigants, disgorgement in public enforcement is based on deterring the violator, and thus should be available in any public enforcement action in which the enforcer can approximate the violator's monetary gain. The bar here is low. Almost all public protection civil law violations occur when a business seeks to gain an illegal market advantage. Wage theft allows the business to obtain labor without paying the cost of full compliance with wage laws. Deceiving investors as to business fundamentals adds to the stock issuer's capital an amount that would not have been gained at the same stock price if the businesses' performance were properly disclosed.

Section III.C.1 details widely-held principles for measuring the amount of a disgorgement award that are consistent with the Court's holdings in *Liu*. Section III.C.2 looks at areas of discord in the law, or where *Liu* has shifted or clarified the law.

1. Agreed Principles for Measuring the Amount of Disgorgement

Several principles for measuring the violator's gain are clear. Courts do not require tracing of the funds improperly gained by the defendant.¹⁹⁶ Similarly, it is well-settled that clear records from a law-violator are not needed to establish the amount of improper gain.¹⁹⁷ These results flow partly from the burden-shifting process in the reasonable approximation framework. Courts typically permit revenue received by the law-violator to be used as a proxy for profits in the initial stage of the enforcer's duty to reasonably-approximate loss. The burden falls on the law-violator to disprove this approximation, and its own failure to maintain adequate records is not an excuse for failing to produce proof to meet its burden during this second stage of the process.

Money refunded to consumers is excluded in calculating the amount of disgorgement.¹⁹⁸ This is true whether revenue is used as a proxy for profit or the

N.W.2d 124, 135-38 (Minn. 2019); *State ex rel. Kidwell v. Master Distribs., Inc.*, 615 P.2d 116, 125 (Idaho 1980); *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 553 P.2d 423, 439 (Wash. 1976); *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 637 (Mo. Ct. App. 1988). *But see* *People v. Shifrin*, 342 P.3d 506, 519-20 (Colo. Ct. App. 2014) (rejecting public compensation for non-testifying consumers because restitution was sought for only 37 consumers, they were locally available witnesses, and the amount sought by the attorney general—more than \$3 million—was substantial).

196. *See, e.g.*, *SEC v. Faulkner*, No. 3:16-CV-1735-D, 2021 WL 75551, at *5-6 (N.D. Tex. Jan. 8, 2021), *appeal docketed*, No. 21-10222 (5th Cir. Mar. 9, 2021) (citing FTC and SEC case law when rejecting a tracing requirement).

197. *See, e.g.*, *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 374 (2d Cir. 2011) (“[I]t is unsurprising that Bronson can point to no case in which a public agency seeking to obtain equitable monetary relief has been required to satisfy the tracing rules.”); *SEC v. Quan*, 817 F.3d 583, 594 (8th Cir. 2016).

198. *See, e.g.*, *FTC v. Primary Grp., Inc.*, 713 F. App'x 805, 808-09 (11th Cir. 2017) (“Disgorgement . . . is based on net revenue, which is calculated by subtracting any refunds from a company's gross receipts.”); *SEC v. Tropikgadget FZE*, 146 F. Supp. 3d 270, 281-82 (D. Mass. 2015) (finding no error with an SEC accountant's disgorgement calculation, which excluded funds “likely related to investor refunds and/or returns”).

enforcer instead introduces direct evidence of the amount of profit. If the law-violator returns money to victims of the violation, it cannot have profited in that amount. If known to the enforcer, these amounts should be excluded at the initial stage of the enforcer's approximation of gain.

Money paid by the consumer but not received by the law-violator can also be excluded when determining disgorgement. In *FTC v. Verity International, Ltd*, the Second Circuit distinguished between two similar schemes for collecting money billed to phone carriers as international calls.¹⁹⁹ In one scheme, the phone service companies took a share of the revenue paid by the consumer and the violators were paid the remainder. In the second scheme, the “payment structure flowed differently,” with all revenue going to the violators, who then paid the service providers.²⁰⁰ The Second Circuit held that disgorgement should be measured by the amount of money received by the violators, so that the amounts retained by the service providers in the first scheme were excluded from the disgorgement award and the amounts paid to the service providers in the second scheme were not deducted from disgorgement.

2. *Liu*'s Reshaping and Unsettling of the Law

The Court's decision in *Liu* resolves at least one area of discord in public compensation law, though it unsettles the doctrine in other ways. Before *Liu*, a substantial body of case law held that disgorgement could be measured by consumer loss rather than the violator's gain. In *FTC v. Febre*, for instance, the Seventh Circuit affirmed an award of over \$16 million in public compensation to the FTC under its section 13 statutory injunctive authority—and hence via disgorgement—based solely on consumer loss.²⁰¹ Defendants had argued that no disgorgement was proper because there was “conflicting testimony whether documents existed which would allow the calculation of profits.”²⁰² The court rejected this argument because “these documents would have no impact upon the calculation of damages” for the reason that “profits were not taken into consideration,” as the district court relied solely on a consumer loss measure.²⁰³ The consumer loss measure of disgorgement has been used in other FTC cases brought under section 13, but the method has been rejected by some courts.²⁰⁴

199. 443 F.3d 48, 67-68 (2d Cir. 2006).

200. *Id.* at 68.

201. 128 F.3d 530, 536 (7th Cir. 1997).

202. *Id.*

203. *Id.* The *Febre* court could have reached the same result by following the well-established principles of using revenue as a reasonable approximation of gain, shifting the burden to defendants to document profits were lower than revenue, and then denying resort to poor record-keeping as a basis for disproving the FTC's reasonable estimate.

204. Compare *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009) (“Equity may require a defendant to restore his victims to the status quo where the loss suffered is greater than the defendant's unjust enrichment.”), and *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991) (awarding loss where the amount exceeds violator gain is proper in disgorgement), with *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006) (holding that it was error to measure disgorgement by consumer

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Other securities enforcement cases have seen disgorgement measured by victims' loss.²⁰⁵

Liu forecloses this approach to measuring disgorgement, unequivocally stating that ill-gotten net profits is the only measure of disgorgement. This holding is consistent with the essential distinction between disgorgement and public restitution detailed in carefully reasoned decisions over decades. Accordingly, it is unlikely to be disturbed by the National Defense Authorization Act amendments adding express disgorgement authority to SEC remedial powers.

Violators often contend that their expenses should be excluded when measuring profits to be disgorged. Courts routinely reject these arguments, holding that such expenses are not deductible, and that the measure of disgorgement is “net revenue (gross receipts minus refunds), rather than the amount of profit (net revenue minus expenses).”²⁰⁶ *Liu* makes this broad proposition untenable and introduces uncertainty as to when expenditures by violators can be used to reduce a disgorgement award.

Liu also should constrain disgorgement awarded based on joint-and-several-liability principles. The Court noted three SEC enforcement actions in which courts awarded disgorgement on a joint-liability theory in a “manner sometimes seemingly at odds with the common-law rule requiring individual liability for wrongful profits.”²⁰⁷ As with the deduction of expenses, the Court’s opinion creates the possibility of years of litigation to find the contours of this limit. For example, one of the questioned cases, *SEC v. Whittemore*, was a D.C. Circuit opinion in a “pump and dump” stock price scheme.²⁰⁸ One of the defendants, Cahill, was held jointly-and-severally liable for the disgorgement award, which he argued was improper because the SEC failed to establish both his collaboration and close relationship with the primary defendants. The court held that close collaboration was enough, and then applied the reasonable approximation framework in holding: “Once the Commission established the close collaboration between Cahill and the Whittemore defendants in the fraudulent scheme, the burden was on Cahill to establish that apportionment was

loss), and *FTC v. Wash. Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013) (finding that “a damages award based on consumer losses would be improper” when the FTC sought disgorgement).

205. See, e.g., *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 1996) (“[W]e reject the challenge to the district court’s order that appellants disgorge all of the profits they received from trading in Haas securities during the several-month period in question. Appellants argue that any disgorgement should have been limited to profits from transactions with the other parties to the manipulation agreement, who guaranteed appellants’ profits, and that appellants should not be required to turn over their profits from sales to others. We disagree.”); *CFTC v. PMC Strategy, LLC*, 903 F. Supp. 2d 368, 382 (W.D.N.C. 2012) (ordering public compensation based on amount of investor loss when using statutory injunctive authority and disgorgement theory); *CFTC v. Crombie*, 914 F.3d 1208, 1216 (9th Cir. 2019) (finding it proper to award disgorgement based on consumer loss).

206. *Wash. Data Res.*, 704 F.3d at 1327 (citing FTC cases from the First, Second and Seventh Circuits holding the same).

207. *Liu v. SEC*, 140 S. Ct. 1936, 1949 (2020) (citing *SEC v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014); *SEC v. Clark*, 915 F.2d 439, 454 (9th Cir. 1990); and *SEC v. Whittemore*, 659 F.3d 1, 10 (D.C. Cir. 2011)).

208. *Whittemore*, 659 F.3d at 10-13.

warranted . . . and Cahill failed to do so.”²⁰⁹ It is unclear exactly which part of the D.C. Circuit’s analysis was of concern to the Court in *Liu*. Nor is it clear what the Court’s expressed displeasure with SEC case law on joint-and-several liability means for the common practice of finding “relief defendants” liable for disgorgement.²¹⁰

3. To Whom a Disgorgement Award Should be Distributed.

Because disgorgement is a remedy premised on depriving gain rather than compensating loss, questions concerning the distribution of disgorged money should not demand precision. Assuming the absence of statutory language to the contrary, distribution of ill-acquired gain for any public benefit is in the broad discretion of the court.²¹¹ In disgorgement, courts care less about whether some victims receive a windfall (or, conversely, go uncompensated), because depriving wrong-doers of ill-gotten gains is proper when it blunts the incentive to compete through illegal activity, and receipt of public compensation does not preclude victims from recovering in a private suit.

Consistent with the purpose of the remedy, it is almost always appropriate to allow enforcers to control the specifics of allocating money to consumers who were subject in some way to the illegal practice. The typical disgorgement order for both the FTC and the SEC is a fund to be distributed to consumers at the sole discretion of the agency.²¹² Any distribution of the money that reasonably relates to the reason for disgorgement would be proper, because this distribution is a method of ensuring enforcement of the law rather than a compensation device. Absent a statutory restriction, it should be proper for enforcers to use disgorged money for purposes other than public compensation, such as for public education or to support future public enforcement.

Additionally, placing the money in a public treasury is reasonably related to a public purpose for disgorgement.²¹³ As previously noted, *Liu*’s holding prohibiting the SEC from disgorging funds to the U.S. Treasury was based on

209. *Id.* at 11.

210. *Compare* SEC v. Colello, 139 F.3d 674, 676 (9th Cir. 1998) (finding the relief defendant liable and holding that equity permits joint liability for “one who has received the proceeds after the wrong”), *with* FTC v. LeadClick Media, LLC, 838 F.3d 158, 176-178 (2d Cir. 2016) (finding no liability where the alleged relief defendant had legitimate claim to funds).

211. *See, e.g.,* SEC v. First Pac. Bancorp, 142 F.3d 1186, 1192 (9th Cir. 1998) (“Once the primary purpose of disgorgement has been served by depriving the wrongdoer of ill-gotten gains, the district court has broad discretion in determining the disposition of the disgorged funds.” (citing SEC v. Fischbach Corp., 133 F.3d 170, 175 (2d Cir. 1997))).

212. *See, e.g.,* Velikonja, *supra* note 10, at 343 (explaining that except in “rare cases,” the SEC “creates and oversees a distribution fund . . . [which] includes developing a plan to administer and distribute the funds and overseeing the distribution”); Cox, et al., *supra* note 7, at 76 (noting that, in 2014, 83 percent of FTC public compensation awards were distributed according to the agency’s discretion).

213. *See* SEC v. Fischbach Corp., 133 F.3d 170, 175-76 (2d Cir. 1997) (“The primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains. . . . Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly secondary goal. . . . Thus, the measure of disgorgement need not be tied to the losses suffered by defrauded investors, . . . and a district court may order disgorgement regardless of whether the disgorged funds will be paid to such investors as restitution” (citations omitted)).

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particular language in the SEC statutory injunction provision.²¹⁴ Even after *Liu*, it seems likely that the long-approved SEC practice of disbursing to the Treasury money leftover in a disgorgement fund, due to an inability to locate recipients, would survive.²¹⁵

D. Particular Principles of Public Restitution

Public restitution is based on express statutory authority, and thus the restrictions imposed on disgorgement by the bounds of traditional equity do not constrain the use of this remedy absent specific statutory language to the contrary. Equitable limits on joint-and-several liability do not necessarily apply in public restitution. The problem of whether to consider money never received by the defendant in calculating the award, or to deduct the expenses of the violator from the award, also should have no application in deciding public restitution because it is based on consumer loss.²¹⁶

Conversely, the shift in focus of restitution from ill-gotten gain to consumer loss complicates the determination of the amount of, as well as the distribution of, the award a relative to disgorgement. The broad outline of public restitution law is clear, but the case law in this area is less abundant and less coherent than judicial decisions on disgorgement. Sections III.D.1 and III.D.2 identify the issues in a public restitution theory of public compensation, paying particular attention to the remedy's application in situations when the loss is less readily discernable due to the presence of partial benefit to consumers from the transaction, variation in conduct of the violator, and differences in the experience of consumers. Section III.D.3 suggests a proportionality test to determine the amount of the award and the eligibility of particular people for the award in such difficult cases.

1. Complications in Determining Public Restitution

The early FTC and state-enforcement cases did not ask much from a legal doctrine of public restitution. Under any reasonable legal standard, uniformly selling goods and services of no value should result in an order to provide full restitution to all consumers. The work of the public compensation doctrine, by contrast, arises in situations that complicate this narrative.

A common issue in determining the proper amount of restitution is accounting for any value received by the consumer resulting from the transaction in which the law violation occurred. This issue arose in *Figgie*, where the Seventh Circuit rejected the argument that a full refund is improper when a

214. See *supra* Section II.C.3.

215. For cases approving of and discussing the practice of sending disgorgement benefits to the Treasury, see, for example, *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985) (*per curiam*); and *FTC v. Febre*, 128 F.3d 530, 537 (7th Cir. 1997).

216. See *infra* Section V.B.2.

product has more than *de minimis* value to consumers.²¹⁷ The court made the following analogy in support of this holding:

Customers who purchased rhinestones sold as diamonds should have the opportunity to get all of their money back. We would not limit their recovery to the difference between what they paid and a fair price for rhinestones. The seller's misrepresentations tainted the customers' purchasing decisions The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or to refunds for each detector that is not useful to them.²¹⁸

Other courts have held similarly.²¹⁹

In *CFPB v. Nationwide Biweekly Administration, Inc.*, the court noted that “[r]elatively little guidance exists as to how a court should exercise discretion” in cases involving conduct not found egregious.²²⁰ Despite acknowledging the holding in *Figgie* that some benefit to consumers does not obviate a full refund, the court denied any restitution where there may have been a benefit to consumers and they may have chosen to purchase the service even if fully-informed.²²¹ Rejecting any restitution in this circumstance makes *Nationwide Biweekly* an outlier decision, especially given the reasonable approximation framework, but other courts have expressed concern about how much restitution to award in situations of varying violator conduct or consumer experience.²²²

A federal district court decision on a request by the FTC for public restitution under section 19 provides an example of a difficult case for determining consumer loss. The court denied summary judgment to the FTC for public compensation, in part because of variation in the defendant's conduct and consumer experience.²²³ The defendant made false representations “in a variety of written and filmed sales materials, as well as in oral presentations at dinner parties that varied from instance to instance.”²²⁴ The consumer experience also

217. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993).

218. *Id.*

219. *FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1235 (11th Cir. 2014) (citing *Figgie* and holding that possible “residual value” is not a defense to asset freeze because fraud had tainted the buying decision); *People ex rel. Spitzer v. Applied Card Sys., Inc.*, 834 N.Y.S.2d 558, 563 (2007) (citing *Figgie* and upholding restitution despite consumers receiving some value from credit card); *State v. Cottman Transmissions Sys., Inc.*, 587 A.2d 1190, 1201 (Md. Ct. Spec. App. 1991) (“The proper standard here is not whether the customers received an inspection for their money; it is whether the merchant induced the consumers to pay for the inspections through deception [T]o hold otherwise would make the restitution procedure meaningless in every case where something is provided, through deceptive practices, to those being deceived.”).

220. *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-CV-02106-RS, 2017 WL 3948396, at *11 (N.D. Cal. Sept. 8, 2017).

221. *Id.* at 12.

222. *See, e.g., State ex rel. Coffman v. Ctr. for Excellence in Higher Educ.*, No. 14-CV-34530 (Colo. D. Ct. August 21, 2020), *aff'd in part, rev'd in part sub nom., State ex rel. Weiser v. Ctr. for Excellence in Higher Educ.*, 2021 COA 117, — P.3d —, *reh'g denied*, (Sept. 30, 2021) (denying award of public restitution because some students obtained value from the for-profit college degree); *cf. Consumer Prot. Div. v. Morgan*, 874 A.2d 919, 941 (Md. 2005) (“[I]n the instant case, to support a specific restitution order, because many of the consumers were complicit in the unlawful scheme, the Division must call them as witnesses either before the Division or in some other comparable proceeding to show that they in fact relied on the misrepresentation to their detriment.”).

223. *FTC v. Amrep Corp.*, 705 F. Supp. 119 (S.D.N.Y. 1988).

224. *Id.* at 128.

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varied, as the record on summary judgment did not show which consumers were subject to which particular representations. The court contrasted this type of deception with a “false newspaper ad or prospectus[,] [for which] . . . each and every purchaser who responded to the ad or the prospectus would have been a recipient of the same false representation.”²²⁵

State attorneys general are more likely to seek, and state courts are more likely to award, public restitution that includes a claim procedure. These state court cases sometimes require consumers to affirm some form of reliance as a condition of receiving an award, or involve the appointment of a special master to adjudicate individual consumer disputes as part of the restitution process.²²⁶ The public restitution in *Figgie* relied on a claim procedure that required consumers return the heat detectors to obtain a refund.²²⁷

Like disgorgement, determining the amount of public restitution is almost always held to be a discretionary determination of the trial court.²²⁸ This provides the court with an opportunity to construct public restitution awards that fit the particular conditions of each case. In the following Sections, we discuss the need for a common set of principles to guide a pragmatic solution in difficult cases, and we propose a multi-factor test for use in such circumstances.

2. Need for Clarifying Law in Difficult Cases

Consumers benefitting from the transaction or variations in consumer experience should usually be of little consequence to disgorgement, which is measured solely by violator gain. Concern with partial benefit and conduct or experience variation are more salient problems in public restitution because there is a direct link between these circumstances and measuring the amount of consumer loss. Requiring detailed proof of consumer loss is in tension with the need for a rough-justice approach that allows public restitution to issue for deterrence purposes and the employ of an efficient, broad relief procedure that courts have favored in public enforcement actions. The relatively sparse case law

225. *Id.*

226. *See, e.g.,* *State v. Minn. Sch. of Bus., Inc.*, 935 N.W.2d 124, 138-40 (Minn. 2019) (upholding a restitution order that was to be overseen by a Special Master); *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 637 (Mo. Ct. App. 1988) (requiring on remand testimony of witnesses as to reliance); *Consumer Prot. Div. Office of Atty. Gen. v. Consumer Pub. Co.*, 501 A.2d 48, 74 (1985) (“Although we reject the Company’s broad argument that proof of reliance is necessary before a general restitution order may issue, we do recognize that some of those purchasing the Company’s products may not have relied on the false impressions created by the advertisements. Some of these consumers may not want refunds. Accordingly, we believe that the Division’s order was defective because it did not provide a procedure for processing individual consumer claims. We agree with the cases in other jurisdictions which, under statutes like Maryland’s, require that a restitution order provide a procedure for individual determination of consumer restitution claims.”); *see also* *Cox, et al., supra* note 7, at 76 (noting that 22 percent of state attorney general enforcement actions in 2014 involved a claims procedure)

227. *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993).

228. *See, e.g.,* *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016); *CARTER & SHELDON, supra* note 106 (observing that state “[c]ourts have displayed significant flexibility in making restitution awards”).

on public restitution does not offer a substantial amount of guidance in balancing these concerns.

The initial question is whether the court faces a difficult determination at all, and based on past case law, the answer typically is “no.” Under the reasonable approximation framework, most cases cannot be categorized as difficult. When a lender markets a loan that contains an illegal fee, courts should order the lender to refund the fee to the borrower absent extraordinary circumstances. When a consumer buys a product for which the seller promoted a key benefit that does not actually exist, there is no need to go further, even if there is some residual value in the product.

But what happens when the law violator can rebut the reasonable approximation? Some violators can establish that people affected by the violation obtained substantial benefit from the transaction or other market conduct, or can show a significant non-uniformity in conduct by the violator or non-uniformity in the experience of the people affected that would impact the amount of consumer loss. The case law does not provide much guidance in these situations. There also is a need for a pragmatic test when the amount of consumer loss can be determined, but the distribution of that loss to particular people is hard to assess. This issue is of peripheral concern in disgorgement because the basis of the award is the deprivation of ill-gotten gain, and any reasonable distribution process is proper. Public restitution is grounded in consumer loss, so the distribution of that award is integral to its purpose.

3. Proportionality Test

We propose a four-factor balancing test for difficult public restitution cases. The test would measure the public restitution award in a manner proportionate to the effect of the violation on consumer loss. The proportionality concept is modeled on Rule 26(b)(1) of the Federal Rules of Civil Procedure, which is employed by courts in deciding the availability of discovery in litigation.²²⁹ That rule makes otherwise relevant information available in discovery if it is “proportional to the needs of the case,” based on six factors to be balanced by the court.²³⁰ Like a determination of public restitution, discovery decisions using the Rule 26(b)(1) proportionality test requires the exercise of discretion and a pragmatic, case-specific approach to each matter.²³¹ The four factors we identify below are derived from—or are consistent with—judicial decisions determining the propriety of, and measuring the amount of, public restitution when some form of difficult problem is present in determining public restitution.

229. FED. R. CIV. P. 26(b)(1).

230. *Id.*

231. *Id.*; see also FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment (“The court’s responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.”); Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 32 (2016) (“[T]he committee note to Rule 26 anticipates a suitably pragmatic approach to resolving discovery disputes.”).

(1) Value, Difficulty and Cost of Determining Harm and Distributing Compensation to Individuals.

The ease of identifying potential beneficiaries will vary in difficult cases. The same is true of the amount of the loss when there is variation in value of the benefit received by the consumer. A key factor in any difficult case will be the determination of the practicality and cost of making award amounts that reflect the impact of variation in consumer experience. For example, the Maine Supreme Court confronted this problem of variation in conduct and experience in *State v. Bob Chambers Ford, Inc.*, in which an auto dealer sold rustproofing but then failed to actually apply the product.²³² The dealer argued that the district court improperly used a value of \$125 for each customer because the product was sold as part of a package of services at a price often negotiated with the customer, and the “rustproofing was often ‘included’ in the price of the automobile or ‘thrown in’ by Chambers.”²³³ The Maine Supreme Court affirmed the \$125 value as a reasonable approximation in light of the evidence presented as to cost of the service to customers.²³⁴ This result is consistent with a small dollar loss for which the cost of detailed proof would have been disproportionate to the task at hand.

The aim of public restitution is rough justice consistent with public enforcement purposes, and thus the size of the restitution amount sought will impose limits on the burden of the court to evaluate the impact of variations in underlying conduct or experience. Rule 26(b)(1) uses similar factors, allowing for discovery to be scaled to “the amount in controversy . . . and whether the burden or expense of the proposed discovery outweighs its likely benefit.”²³⁵ Relative loss amount matters in terms of both the overall and per capita award. For instance, a total consumer loss of \$1 million argues in favor of a detailed examination of consumer loss when there are thirty workers who were illegally deprived of wages, but against elaborate identification procedures when 20,000 people bought a \$50 piece of software.

(2) Usefulness and Cost of a Claims Process or Similar Mechanism to Identify Loss Amount.

There are reasons to avoid claims procedures in public restitution cases. The claim rates often are quite low, and the cost of the procedure can be substantial. Claims procedures can require consumers, many of whom may be unsophisticated, to read paperwork and engage with a legal process that will often confuse them about how to obtain relief or what impact such procedures have on their rights to claim relief. Claims procedures also can complicate the long and consistently-stated desire for a public restitution process that is unencumbered by private law doctrines and which authorizes broad but efficient

232. 522 A.2d 362, 364 (Me. 1987).

233. *Id.* at 366.

234. *Id.*

235. FED. R. CIV. P. 26(b)(1).

remedial relief. Nonetheless, courts should weigh the costs and benefits of such mechanisms in difficult public restitution cases.

Claim procedures are appropriate when it appears likely that a substantial number of consumers would have completed the transaction even in the absence of the violation, when a choice between a full refund and a return of a product is the best resolution for balancing these concerns, or when an additional compensation might be appropriate for a subset of consumers. Claims procedures would likely be less proper in cases involving small-dollar losses, because the cost of such procedures would almost always exceed any value that would accrue from differentiating consumers by amount of loss. Nor would a claims procedure add value if variation in consumer loss arises from an issue that is hard to state in simple terms on a claim form, such as whether a borrower relied on compliance with a complex legal scheme.

(3) Likelihood of Victims Recovering in A Private Action.

Public compensation sometimes occurs in enforcement actions for which there is a parallel private lawsuit, often a class action, seeking compensation for consumers.²³⁶ Any recovery stemming from a private action would obviously be excluded from the calculation of public restitution in a public enforcement case. Further, when a parallel private action is pending, it may be appropriate to consider the *possibility* of such private relief when determining public restitution in a difficult case. For instance, in an enforcement action in which the law violator lacks the resources to make full public restitution, if a subgroup of consumers is part of a certified class action that includes a co-defendant capable of making those consumers whole, the court might structure the award accordingly to give these consumers a lower priority for payment.

(4) Egregiousness of the Law Violation.

Because deterrence underlies all public enforcement remedies, courts may consider the egregiousness of the underlying law violation in shaping public restitution. A company that targets homeowners to strip their equity by falsely representing that it can save the homeowner from foreclosure should have a high burden in challenging an enforcer's reasonable approximation of consumer loss.²³⁷ The public interest demands a strong response in all remedies awarded against such a scheme. Conversely, deterrence is not promoted by placing as heavy a burden on a small business that violates a disclosure requirement not core to their its business operations, where there is no evident intent, and the violation is caused by a lack of compliance resources.

236. Velikonja, *supra* note 10, at 369 (noting that a parallel private class action existed in 65% of SEC cases with Fair Fund awards).

237. See Steve Tripoli & Elizabeth Renuart, *Dreams Foreclosed: The Rampant Theft of Americans' Homes Through Equity-Stripping Foreclosure "Rescue" Scams*, NAT'L CONSUMER L. CTR. 48-49 (2005), https://www.nclc.org/images/pdf/foreclosure_mortgage/scam/report-foreclosure-rescue-scams-2005.pdf [<https://perma.cc/TEQ8-AQ22>].

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Using the severity of the violation as a factor in shaping the amount of a public restitution award is not the same as suggesting that the issuance of the award should depend on the egregiousness of the violator's conduct. In one of the few cases rejecting a request for public compensation entirely, a district court did so on the grounds that the CFPB had failed to establish "that [d]efendants acted in bad faith, resorted to trickery or deception."²³⁸ This is clearly erroneous. The CFPB, like almost all other public enforcers, is not required to establish intent, much less bad faith, and no other court has held that public compensation depends on such proof.²³⁹ But nothing prevents egregiousness of the violation from being considered as one factor in determining an appropriate amount of public restitution.

E. Examples

This Section provides four examples of how courts could determine awards using the principles of public compensation identified in this Part. We begin each example by placing it in the context of the broader public compensation doctrine we have elaborated. For each example, we also analyze whether the award would differ under disgorgement or public restitution, how the reasonable approximation framework might be used in this circumstance, and how the proportionality test might be used in determining public restitution if it is applicable.

Example #1. *A professional sports team hires 60 high school students to take tickets and act as ushers in the stands during games. It calls these people "interns" and provides them a "stipend" equal to \$3 per hour worked. The enforcer sues for violation of state minimum wage law due to misclassification of employees as interns, and it prevails on liability.*

Like many enforcement cases, this example presents an easy situation for determining the amount of public compensation. It would make no difference here whether the enforcer used a disgorgement or public restitution theory in seeking public compensation: the difference between the amount paid to the workers and the amount that should have been paid under the minimum wage law is both the ill-gotten gain to the sports team and the amount of loss to the workers. A reasonable approximation for the calculation can be made under either form of relief. The proportionality test has no role, because reasonable approximation is not rebuttable upon the determination that the workers were employees under the state wage law and so that minimum wage requirements

238. CFPB v. CashCall, Inc., No. CV1507522JFWRAOX, 2018 WL 485963, at *13 (C.D. Cal. Jan. 19, 2018).

239. Scienler is not a consideration in liability for UDAP violations. *See People by Abrams v. Am. Motor Club, Inc.*, 179 A.D.2d 277, 283 (N.Y. App. Div. 1992); *see also* CFTC v. Amerman, 645 F. App'x 938, 944 (11th Cir. 2016) (rejecting the argument that scienler is required for disgorgement even though it is not required for liability, and stating that the defendant "cites no legal authority [for the point], and we have found none").

applied. This type of ready substitution between the two types of public compensation is common in many enforcement cases such as the sale of worthless stock or useless products. That a large number of demands for public compensation present these sorts of easy cases has no doubt contributed to the conceptual sloppiness that has led to the doctrinal confusion of disgorgement and restitution described in Section II.A.

Example #2. A drug company makes misleading statements to physicians about possible negative side effects of a competing prescription pharmaceutical. The result of this conduct is an increase in market share for the company engaging in the violations. A substantial number of patients would have purchased the company's drug regardless of this deception, while a number of other patients would have been prescribed the drug as a result of the violation. It would be very difficult to differentiate one group from the other given that the deception worked at the level of the prescribing physician. It would also be difficult to identify which specific drug users were affected by the deception given that drug fulfillment would typically happen through yet another channel and because of the confidentiality concerns involved in prescription drugs.

This example shows the importance of expressly authorizing enforcers to employ both disgorgement and restitution authority. Such dual authorization allows for discretion in seeking a public compensation remedy to fit the circumstances of each case. Here, disgorgement is a viable means of providing public compensation, while public restitution would be difficult or impossible to award. Given the Supreme Court's decision that the FTC can no longer employ its section 13(b) disgorgement authority in typical UDAP cases, an FTC enforcement action in this scenario would not allow for public compensation, whereas UDAP enforcement by a state attorney general with disgorgement authority would allow for such relief. As we argue in Section V.A, there is no normative justification for affording some public enforcers full use of public compensation authority and depriving others of such authority.

Disgorgement offers a viable basis for public compensation in this situation. A reasonable approximation of ill-gotten gain can be made by estimating the increase in company market share before and after the conduct. Such an estimate may require expert testimony to determine the increase and translate that data into dollar gain. Once this amount is translated into a dollar gain, a reasonable distribution scheme to the drug users would be possible if it is a drug regularly taken for a chronic condition by requiring the violator to distribute the contribution through rebates to future users. It may be necessary to forfeit the money to a public treasury or fund if it is not possible to develop such a distribution scheme.

Public restitution, however, is not realistically obtainable in this scenario. The costs and uncertainty of even a rough approximation of consumer loss would be daunting, thus invoking the proportionality test. Given the indirect nature of the deception through physicians, a claim procedure would add little value

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because the drug users would not have directly encountered the deception. The same problems facing a public enforcer would likely make a class not possible to ascertain and certify, thus making it unlikely that private recourse would be an alternative means of enforcement. If the deception of physicians was egregious and resulted in huge gains to the violator, such as a doubling of market share, a pragmatic rough justice approach may allow measuring the loss by unjust gain and distributing in the same manner as disgorgement. Otherwise, an enforcer lacking disgorgement authority likely would be able to obtain monetary relief only in the form of civil penalties.

Example #3. A seller of discount-buying-club memberships who sells through telemarketing enters into a contract with a hotel chain allowing it to sell subscriptions to former guests of the hotel. The hotel provides the seller with the names, contact information and credit card numbers of former guests. The seller agrees to pay the hotel 25 percent of all revenue it collects for telemarketing sales of these memberships. The seller pays a third-party telemarketer to conduct the solicitations. The enforcer sues the hotel and the seller. It alleges that the telemarketing solicitations were deceptive about both membership benefits and the fact that the full annual cost of \$100 for the membership would accrue after the expiration of a free trial period. The seller and the hotel are found jointly and severally liable for violations of the Telemarketing Sales Rule (TSR), 16 C.F.R. Part 310. The enforcer introduces evidence from a survey sample showing that at least 90 percent—and up to 98 percent—of the former hotel guests charged for the memberships had no awareness that their credit card had been charged \$100 per-year for the membership. The seller and hotel do not present any evidence rebutting this fact. The court issues an injunction against both defendants.

This example shows how application of *Liu*'s command to adhere to traditional equitable limits can shift incentives for enforcers to rely on public restitution in certain cases. Under case law prior to *Liu*, disgorgement of the full amount of the revenue by the hotel to all the former hotel guests would have been the likely result.²⁴⁰ It is reasonable for the enforcer to estimate that if more than 90 percent of the customers were not aware they were paying for the product, then essentially all of this revenue is an ill-gotten gain.

Liu, however, may change this outcome for two reasons. The hotel received only 10 percent of the revenue, and thus as an initial matter is likely to be held liable only for the profits it received.²⁴¹ The hotel is jointly-and-severally liable under the TSR substantial assistance provision,²⁴² but joint-and-several liability

240. See *supra* Section III.B.1.

241. See *SEC v. Liu*, 140 S. Ct. 1936, 1945 (2020) (approvingly citing cases limiting recovery for ill-gotten gains to revenue actually received by the defendant).

242. The “assisting and facilitating” provision of the Telemarketing Sales Rule (TSR) makes it a violation of the TSR “for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is

as to disgorgement for the seller and the hotel may run afoul of the limitations enunciated in *Liu* unless the enforcer can establish that the hotel is jointly liable under traditional equitable principles. The court's authority to award full disgorgement against the hotel in this situation, therefore, turns on this now-murky legal issue, which is further complicated by any possible interpretative interplay between the TSR joint and several liability provision and the uncertain meaning of *Liu* in this context. Obtaining a disgorgement award of the full amount of the charge against the seller also would encounter some uncertainty as to whether the appropriate calculation is gross or net revenue. Under *Liu*, deduction of "legitimate expenses" is to be made, but expenses can be ignored in calculating disgorgement if "fueling a fraudulent scheme." The third-party telemarketer costs would seem to fall into the fraudulent scheme category, but again, *Liu* has unsettled the law here.

Public restitution is a more promising avenue for use by an enforcer to obtain an award of public compensation in the full amount of the charge. The same reasonable approximation applies here, as consumers were unaware of the charge and thus suffered a loss in the full amount of the charge. As no evidence by the defendant rebuts that a full refund is proper, there is no need to invoke the proportionality test. Nor is public restitution, as an expressly authorized remedy, subject to the limits of traditional equity. Accordingly, any liability theory for holding the hotel jointly liable, such as the assisting and facilitating liability provision of the TSR, would be sufficient to impose joint liability for public restitution.²⁴³

Thus, prior to *Liu*, disgorgement and public restitution may have been equally viable alternatives in this example. But now, enforcers subject to *Liu*'s interpretation of disgorgement would have an incentive to invoke public restitution in this scenario.

Example #4. A company replaces roofs on residential homes. The company generally receives no complaints about the pricing or quality of its basic roof replacement service, but it engages in a pattern of falsely telling homeowners that the company has found an unexpected problem with the homeowner's roof, using this to obtain a "work order" that increases the price of the roof replacement when no defect actually existed. An enforcer sues for UDAP violations. Evidence from a trial establishes the following: (1) about 10,000 homeowners had their roofs replaced and were subject to at least one work order, with an average of 2.4 orders per homeowner (or a total of 24,000 work orders), with 30 percent of homeowners subject to only one order and 10 percent of homeowners paying for five or more orders; (2) corporate level employees testified that "about half" of the work change orders were based on legitimate

engaged in any act or practice that violates [certain provisions of the TSR]." 16 C.F.R. § 310.3(b) (2021). Courts have held that this provision creates joint or several liability for those providing substantial assistance. *E.g.*, *FTC v. WV Universal Mgmt., LLC*, 877 F.3d 1234, 1240-41 (11th Cir. 2017).

243. 16 C.F.R. § 310.3(b).

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problems with the house, and the other half were bogus, although “that percentage varied tremendously by which crew was working the house, as about a quarter of the crews almost always employed the fraud scheme for more pay, about the same number would never do it, and the rest were in between;” (3) the average cost of the work order to the homeowner was \$3,000, and there was no credible evidence that this cost varied between legitimate and bogus work orders; (4) there is no means to definitively determine whether any particular work order was bogus by just looking at the documentation, but rather a professional inspection of the roof with knowledge of the work order history would reveal the bogus orders in the vast majority of cases.

Here is an example of how enforcers can employ the selection of disgorgement versus public restitution as a means to match their relief requests to enforcement goals. Disgorgement works more efficiently here, but public restitution offers a means to more closely align public compensation payment with loss. Either mechanism works to deter violations, but providing authority for both forms of public compensation would allow enforcers the option to expend additional resources to obtain a more careful match between consumer loss and consumer compensation. This example also shows an application of the proportionality test.

In this case, an enforcer could easily make a reasonable approximation of the ill-gotten gain for disgorgement purposes by estimating the total homeowner payments for bogus work orders at \$36 million (24,000 orders * 50 percent bogus * \$3,000). Based on the trial evidence, it is difficult to discern how the roofing company could present detailed evidence to rebut this presumption. Any costs incurred by the company in completing a total bogus work change order qualifies as an expense “fueling a fraudulent scheme,” and thus are not excludable from the disgorgement amount.²⁴⁴ Pro rata distribution of this money based on the number of work orders for which the homeowner paid, or the dollar value of those work orders, would be reasonable, although there would be a variety of reasonable schemes for distributing the disgorgement money.

A reasonable estimate of consumer loss for public restitution would be the same amount. The revenue to the roofing company from bogus orders, without deduction for expenses, is the same amount as the unnecessary payments made by homeowners. The need to relate public restitution to consumer loss more closely, however, complicates the situation. A substantial number of consumers, perhaps about 15,000 (30,000 homeowners with one work change order * 50 percent bogus), may have had no loss. Conversely, about 1,000 homeowners paid for five or more work orders, and perhaps some homeowners paid much more than \$3,000/order for bogus orders, suggesting a possibility of a large uncompensated loss for a few people.

The proportionality test may be applied to resolve this situation. All the factors weigh in favor of ignoring any concern that some homeowners without a

244. *Liu*, 140 S. Ct. at 1950.

loss might be compensated. There is no cost-efficient means of determining these homeowners given the cost and disruption of scheduling thousands of professional inspections. A claims process would be of little use without information from a professional inspection, and a private right of action is infeasible for the small dollar loss. The egregiousness of a completely bogus charge supports the rough justice of paying homeowners who might not have experienced loss.

The test suggests a different result with the small number of homeowners who suffered noticeably larger losses than would be compensated by a pro rata distribution. The fact of the larger dollar loss changes the relative value of expending money to more accurately determine the amount of the loss. Private actions still would be unlikely in this dollar range. A claims process might be useful in this narrow context, however. For example, homeowners who paid over a determined dollar amount in work change orders could be given the opportunity to apply for a home inspection to determine if the pro rata distribution under-compensated them. The costs of this process would be ancillary to determining the loss, and thus would properly be treated as an additional expense imposed on the roofing company. The court could exercise its discretion about how much of a fund should be reserved by reducing the pro rata distribution, and whether it would be proper to make the roofing company pay any claims in excess of this fund amount.

While an enforcer would distribute the same amount of money under either disgorgement or public restitution, each has particular advantages. Disgorgement would be simpler, less time-consuming for the courts and all entities and people involved, and thus would also be less expensive to administer. Public restitution would more precisely compensate consumers in the amount of their loss.

IV. Public Enforcement Defines Public Compensation

The law of public compensation had a consistent arc for decades. Writing in 1969, John Wade and Robert Kamenshine recognized that public compensation in market protection civil law enforcement should rely upon relaxed standards of proof.²⁴⁵ And in more recent years, empirical scholarship on public compensation has provided a baseline of knowledge about the use of this remedy by public enforcers and how it fits into public enforcement strategies, confirming the broad availability of this relief in public enforcement lawsuits.²⁴⁶ Even commentators opposing this consensus recognize the liberal framework courts have employed in deciding public compensation. In arguing for more

245. John W. Wade & Robert D. Kamenshine, *Restitution for Defrauded Consumers: Making the Remedy Effective Through Suit by Government Agency*, 37 GEO. WASH. L. REV. 1031, 106 (1969) (noting that “on balance, it is better for a court to keep the consumer’s burden at a minimum, even though in rare cases some injustice to the defendant might result,” in referring to a state attorney general restitution award).

246. See, e.g., Velikonja, *supra* note 10, at 336; Velikonja, *supra* note 81, at 402; Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1076 (2016); Cox, et al., *supra* note 7, at 55.

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restrictions on public compensation, for instance, George Roach observes that “[r]eading the case opinions in the FTC and FDA cases seem to indicate an increasing inclination of the court to devise remedies, equitable or not, that will help the deceived consumer the most,”²⁴⁷ leading him to ask: “Why do federal agencies win revenue disgorgement and other remedies based on uniquely favorable measures?”²⁴⁸

In Section A, we examine how a handful of recent court decisions are unsettling the traditionally-favorable measures of public compensation by shifting the law closer to the legal principles for resolving private claims. This Section describes how recent decisions of federal courts, mostly within the last year, have begun to undermine the consensus doctrine by more closely aligning public compensation with the law governing private claims. Then, in Section B, we set out the characteristics of public enforcement that underlie why courts have afforded public compensation “uniquely favorable” treatment and highlight four normative considerations that favor this traditional law of public compensation.

A. *Shift Toward Treating Public Compensation Synonymously with Private Rights*

Liu unsettled the law of disgorgement with two somewhat contradictory moves. In affirming the SEC’s right to disgorgement—the issue left hanging in *Kokesh*—the Court explicitly found irrelevant the distinctions among various forms of private rights to equitable relief, holding that disgorgement was properly grounded in general principles of traditional equity, “[n]o matter the label” or “whatever the name.”²⁴⁹ The Court did not require that the SEC identify a particular form of equitable relief that would apply in private suits, but accepted the idea that “disgorgement” described a cognizable form of equitable relief in public enforcement.²⁵⁰

At the same time, in warning that federal courts had been too lax in awarding disgorgement, *Liu* describes disgorgement without reference to public enforcement. The concept of deterrence goes unmentioned in *Liu*. Instead, the Court cites almost exclusively to precedent grounded in specific forms of equitable relief familiar for the resolution of disputes among private litigants; for instance, a suit for breach of trust by an actuary,²⁵¹ and a nineteenth-century case regarding partnership accounting.²⁵² Justice Thomas argued in dissent in *Liu*, although from an entirely different perspective than presented here, that

247. Roach, *supra* note 60, at 73.

248. *Id.* at 114. Roach further states: “This article is an outgrowth of the author’s ongoing survey of the consistency of the definition and measurement of restitutionary monetary remedies in all areas of commercial litigation. It became apparent early in the survey that the measurement of agencies’ remedies under the doctrine of implied jurisdiction differs substantially both between the different agencies and in comparison to other areas of the law that measure restitution.” *Id.* at 4.

249. *Liu v. SEC*, 140 S. Ct. 1936, 1943 (2020).

250. *Id.*

251. *Id.* at 1942, 1948 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993)).

252. *Id.* at 1945, 1949 (citing *Ambler v. Whipple*, 87 U.S. 546, 547 (1874)).

equitable concepts like accounting have “a well-accepted definition,” unlike the use of disgorgement as a term to describe public compensation.²⁵³

Recent decisions upending the law governing FTC rights to relief present differently than *Liu*. In *AMG Capital Management v. FTC*, the Supreme Court overturned decades of precedent by holding that section 13 of the FTC Act authorized the FTC to obtain disgorgement.²⁵⁴ But in a curious way, a Seventh Circuit decision two years earlier in *FTC v. Credit Bureau Center, LLC* is instructive.²⁵⁵ The critical commonality between *Liu* and *Credit Bureau* is reliance on the law of equity in resolving private claims, with no regard for the construction of remedies consistent with the rationale of public enforcement. The *Credit Bureau* opinion framed the problem as a question of “modern implied-remedies jurisprudence.”²⁵⁶ It concluded that the FTC Act’s section 13 injunctive provision language, read together with section 19’s express authority for restitution, provides no implied authority for the FTC to obtain disgorgement. However, the court never uses the word disgorgement to describe this relief.²⁵⁷ It describes the relief sought by the FTC as restitution and, more importantly, it treats decades of FTC decisions in federal appellate courts as a superficially-reasoned subset of the law of implied remedies, making no reference to and according no importance to the public enforcement rationales repeatedly emphasized in those decisions.

The *Credit Bureau* decision identified the Supreme Court’s decision in *Meghrig v. KFC W., Inc.* as the main pillar of its reasoning.²⁵⁸ *Meghrig* involved a dispute between a Kentucky Fried Chicken franchisee and the prior owner of the real estate in which the franchisee argued for an equitable remedy in restitution for a violation of the Resource Conservation and Recovery Act (RCRA).²⁵⁹ In refusing to recognize such a private right to equitable relief, the Court distinguished the remedial scheme for public enforcement by the EPA under statutes such as RCRA from the private right to relief under RCRA. The Court noted that, under RCRA, the private right of action was circumscribed by federal enforcement, with the consequence that “no citizen suit can proceed if either the EPA or the State has commenced, and is diligently prosecuting, a separate enforcement action.”²⁶⁰ The Court concluded: Without considering whether a private party could seek to obtain an injunction requiring another party to pay cleanup costs which arise after a RCRA citizen suit has been properly commenced, *cf.* *United States v. Price*, 688 F.2d 204, 211–213 (C.A.3 1982) (requiring funding of a diagnostic study is an appropriate form of relief in a suit brought by the Administrator under § 6973), or otherwise recover cleanup costs paid out after the invocation of RCRA’s statutory

253. *Id.* at 1951 (Thomas, J., dissenting).

254. 141 S. Ct. 1341 (2021).

255. 937 F.3d 764 (7th Cir. 2019).

256. *Id.* at 779.

257. The opinion makes two references to “restitution and disgorgement” in parentheses summarizing the holdings in cases between private litigants. *Id.* at 782.

258. *Id.* at 783–86 (discussing *Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996)).

259. 42 U.S.C. § 6972 (2018).

260. *Meghrig*, 516 U.S. at 486.

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process, we agree with the *Meghrigs* that a private party cannot recover the cost of a *past* cleanup effort under RCRA.²⁶¹

Indeed, the majority opinion in *Credit Bureau* approvingly quoted from a portion of *Meghrig* distinguishing *Porter*, in which the *Meghrig* Court twice observed that it was adjudicating a case involving a private dispute.²⁶² The *Credit Bureau* court referred to a “spectrum” of cases where implied equitable remedies were denied or granted, but actually contrasted only two cases where private litigants were denied equitable relief with two cases brought by the FDA allowing disgorgement as public compensation.²⁶³ In both of those FDA cases, the courts had noted the importance of the public enforcement context in their decisions.²⁶⁴ The court in *Credit Bureau* then cited the only federal case in which federal courts denied disgorgement as an equitable remedy to an enforcer—the DOJ seeking disgorgement for RICO violations.²⁶⁵ Not mentioned in any of this discussion are the dozens of decisions over decades consistently allowing disgorgement under a broad range of public enforcement statutes based on the need to create deterrence.²⁶⁶

After reaching its conclusion that the FTC lacks disgorgement authority, the court in *Credit Bureau* addressed and dismissed the fact that it is deciding a public enforcement action, stating that “the difference in plaintiffs—private citizens in *Meghrig* and a federal agency here—isn’t material.”²⁶⁷

For the FTC, the Supreme Court’s decision in *AMG Capital Management, Inc. v. FTC* yielded the same outcome as the Seventh Circuit’s *Credit Bureau* case. But the Supreme Court was a bit more circumspect in its rationale. In *AMG* the Supreme Court granted certiorari to review both the *Credit Bureau* case as well as a Ninth Circuit decision reaching the opposite conclusion on the FTC’s direct compensation authority under section 13(b). In the Ninth Circuit case, the

261. *Id.* at 488. Notably, the Third Circuit decision in *United States v. Price*, 688 F.2d 204 (3d Cir. 1982), involved a public enforcement action in which the court required the defendant to pay for testing sought by the EPA. The court justified imposition of this remedy as “preventive rather than compensatory” because “[t]he qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs.” *Id.* at 211-12.

262. *E.g.*, *Credit Bureau Ctr.*, 937 F.3d at 781 (“Congress did not intend for a private citizen to be able to undertake a cleanup and then proceed to recover its costs under [the] RCRA . . . [I]t cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute.” (quoting *Meghrig*, 516 U.S. at 487-88)).

263. *See id.* at 782-83.

264. The *Credit Bureau* court drew on cases such as *United States v. Lane Labs-USA Inc.*, which stated that “[t]hough the FDCA does not specifically authorize restitution, such specificity is not required where the government properly invokes a court’s equitable jurisdiction under this statute.” 427 F.3d 219, 223 (3d Cir. 2005); *see also id.* at 224 (citing to FTC, SEC, CFTC, and ICC cases permitting public compensation). The *Credit Bureau* court also cited to *United States v. Rx Depot, Inc.*, which stated that “*Meghrig* is distinguishable from the present case, and from *Porter* and *Mitchell*, because it involved a controversy between private parties relying on a statutory provision for private causes of action, not an enforcement action by the government to protect the public.” 438 F.3d 1052, 1057 (10th Cir. 2006).

265. *Credit Bureau Ctr.*, 937 F.3d at 783 (citing *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005)).

266. *See, e.g., id.* at 783.

267. *Id.* at 784.

FTC had prevailed based on prior Ninth Circuit authority.²⁶⁸ But the Ninth Circuit's *AMG* decision included a special concurrence by the judge writing the opinion that expressed sympathy with the Seventh Circuit's view.²⁶⁹ The Supreme Court initially granted certiorari for both cases, but later vacated its decision to review *Credit Bureau*, ultimately deciding only *AMG*.²⁷⁰

Writing for a unified Court in *AMG*, Justice Breyer held that several aspects of the FTC Act, taken together, indicated that Congress did not authorize the Commission directly to obtain court-ordered monetary relief under its section 13(b) enforcement authority.²⁷¹ Yet Justice Breyer's relatively spare reasoning culminated in a limited statutory interpretation holding rather than a more broadly-restrictive vision of courts' inherent equitable power. And, unlike the Seventh Circuit, the Supreme Court did not explicitly assert an equivalence between private and public enforcement in terms of remedial jurisprudence. Nothing in Justice Breyer's opinion called into question the long-standing New Deal-era line of cases dating back to *Porter v. Warner Holding Co.*²⁷² On the other hand, the *AMG* decision did cite to its holding in *Meghrig v. KFC W., Inc.*, suggesting that Congress can, if it explicitly chooses to do so, place the remedial power of an agency of the executive branch of the United States government on the same footing as a fast-food franchise.²⁷³

Liu, the Seventh Circuit's *Credit Bureau* decision, and *AMG* (in effect, if less clearly so in reasoning) are all part of a very recent trend of courts using private law concepts to restrict the ability of enforcement agencies to obtain public compensation.²⁷⁴ For example, the Eleventh Circuit held that the "proximate cause" requirement for public restitution in the CFTC statute should be read as imposing on the CFTC the causation burden of proof to which private litigants are held under common law tort principles.²⁷⁵ The court reversed a trial court award of restitution to investors who had lost money after investing money in precious metals futures through traders unregistered with CFTC in violation of registration requirements.²⁷⁶ The court analogized the situation to paying an attorney who lacked a legal license, stating that "a client might well prevail in court despite the lawyer's unlicensed status."²⁷⁷ And, in a post-trial order, the

268. *AMG Cap. Mgmt., LLC v. FTC*, 910 F.3d 417, 427 (9th Cir. 2018), *rev'd and remanded*, 141 S. Ct. 1341 (2021).

269. *Id.* at 429 (O'Scannlain, J., specially concurring).

270. *Credit Bureau Ctr.*, 937 F.3d at 777, *cert. granted*, 141 S. Ct. 194 (July 9, 2020), *cert. vacated*, 141 S. Ct. 810 (Nov. 9, 2020).

271. *AMG Cap. Mgmt.*, 141 S. Ct. at 1347.

272. 328 U.S. 395 (1946).

273. *AMG Cap. Mgmt.*, 141 S. Ct. at 1350.

274. *See, e.g.*, *FTC v. AbbVie Inc.*, 976 F.3d 327, 375 (3d Cir. 2020) (holding that section 13 of the FTC Act did not authorize the FTC to obtain disgorgement in an antitrust case). The FTC relies on the same statutes—sections 13 and 19 of the FTC Act—in both UDAP and antitrust enforcement actions. *See* Stein, *supra* note 38, at 60-62 (describing the development of FTC policy on disgorgement in antitrust cases and a 2019 Third Circuit case presaging *AbbVie*).

275. *CFTC v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1328-33 (11th Cir. 2018).

276. *Id.*

277. *Id.* at 1330.

U.S. District Court for the Central District of California held that the CFPB could not obtain restitution for consumers who made loan payments they did not owe without first proving the defendants “set out to deliberately mislead consumers . . . or otherwise intended to defraud them.”²⁷⁸ In both cases, courts imported private tort law concepts—causation in the former and scienter in the latter—into federal statutory public compensation proceedings.

These recent cases restricting public compensation came after a decade of scholarship debating the statutory foundation of the public compensation authorities of the SEC, FTC, and the FDA.²⁷⁹ In affirming the SEC’s disgorgement power in *Liu*, the Supreme Court put to rest the notion that public compensation cannot be based on a public enforcer’s statutory authority, while inviting years of litigation by enforcement defendants to narrow the reach of that authority.²⁸⁰ The Supreme Court’s decision in *AMG* stripped the FTC of the public compensation authority that it had relied on for almost forty years.²⁸¹ Unless Congress acts, the *AMG* decision will force the FTC to choose between abandoning money relief entirely or forcing its enforcement actions into a cumbersome multi-stage process of administrative proceedings followed by a

278. CFPB v. CashCall, Inc., No. CV1507522JFWRAOX, 2018 WL 485963, at *12 (C.D. Cal. Jan. 19, 2018). The CFPB initially appealed the *CashCall* court’s order to the Ninth Circuit, but after a transition to leadership under Trump Administration appointees, the Bureau voluntarily withdrew its appeal. See CFPB v. CashCall, Inc., No. 18-55407, 2019 WL 5390028, at *1 (9th Cir. Oct. 21, 2019).

279. The writing in this area reflects a mix of practitioners, heavily weighted toward the defense bar, and legal scholars. With respect to the SEC, compare Ryan, *supra* note 118, at 11, which argues that “the federal securities laws explicitly include disgorgement among the many remedies the SEC is empowered to order administratively . . . [which means that] Congress must have recognized that disgorgement is not an equitable remedy,” with Donna M. Nagy, *The Statutory Authority for Court-Ordered Disgorgement in SEC Enforcement Actions*, 71 SMU L. REV. 895, 901 (2018), which argues that “Congress never intended its express grants of authority for civil monetary penalties to supplant a court’s general equitable power to order the disgorgement of ill-gotten gains from a securities law violator.” For the FTC, compare Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1143 (1992) (“Court decisions that allow the FTC to circumvent statutory procedures for obtaining consumer redress under section 19 are offensive to the constitutional separation of legislative and judicial authority”), and Beales & Muris, *supra* note 101, at 21, which also questions the legitimacy of FTC disgorgement, with Vladeck, *supra* note 101, arguing that courts have properly allowed disgorgement in FTC cases. Additionally, in the years immediately before the Third Circuit decided *Lane Labs*, practitioners of FDA law wrote a bevy of articles debating the merits of that agency’s authority to obtain disgorgement. See William V. Vodra & Arthur N. Levine, *anchors Away: The Food and Drug Administration’s Use of Disgorgement Abandons Legal Moorings*, 59 FOOD & DRUG L.J. 1, 1 n.4 (2004) (citing numerous articles in the same journal on the issue of FDA disgorgement authority).

280. The Seventh Circuit’s decision in *CFPB v. Consumer First Legal Group, LLC*, 6 F.4th 694 (7th Cir. 2021), is an early step along the obscure, contentious, and restrictive trail likely blazed by *Liu*. In *Consumer First Legal Group*, the Seventh Circuit brusquely overturned a district court’s \$21 million remediation order in favor of the CFPB on the grounds that the award exceeded the defendants’ net profits. The Bureau argued the award was a legal restitution remedy that Congress specifically authorized in the Dodd-Frank Act. But the Seventh Circuit reached the puzzling conclusion that Supreme Court’s statutory interpretation of section 78u(d)(5) of the Securities Exchange Act of 1934 in an SEC case seeking disgorgement somehow restricted a CFPB enforcement case seeking restitution under the Dodd-Frank Act of 2010. *Id.* at 7, 10-11. The *Consumer First Legal Group* opinion did not acknowledge decades of federal case law built on a distinction between disgorgement and restitution, nor did it provide any statute-specific analysis of the Dodd-Frank Act itself. See *id.*

281. See *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112-13 (9th Cir. 1982); see also Beales & Muris, *supra* note 101, at 23 (noting that *Singer* was the first case determining the FTC’s disgorgement authority).

separate judicial action seeking public restitution with an additional proof.²⁸² This result is likely to widen an already-noticeable gap in enforcement authority between the lesser remedies afforded to the FTC, which has more limited civil penalty powers, and the authority of other enforcers.²⁸³ Moreover, the *AMG* ruling signals an ominous future for the public compensation authority of the FDA and other market protection civil enforcement agencies, which may now come under sustained attack by enforcement defendants facing courts that have abandoned the public enforcement rationales for liberal public compensation awards.

B. Private Rights Should Not Define Public Compensation

In establishing the traditional reasonable approximation framework, courts routinely cited the rationale of deterrence and the special position of public enforcers as justifying the loosened proof standard and causation presumptions. Indeed, disgorgement as a form of compensation has had little purchase outside of public compensation.²⁸⁴ As the Second Circuit has put it, “disgorgement is a distinctly public-regarding remedy, available only to government entities seeking to enforce explicit statutory provisions,”²⁸⁵ and other courts have held the same.²⁸⁶ In this Section, we examine the unique attributes of public enforcement that have shaped, and should continue to shape, the practice of public compensation in courts. In particular, we highlight four key differences between public compensation and private law in market protection regimes: the statutorily-authorized position of public enforcers, deterrence as the touchstone of public enforcement, the exercise of enforcer discretion in seeking remedies, and the absence of class procedure.

282. See *supra* Section II.C.4.

283. Recognizing the potential disruption to their law enforcement program from the *AMG* appeal, the FTC has already testified before Congress about the potential need to remedy this situation following the Seventh Circuit’s decision in *Credit Bureau*. See Press Release, FTC, FTC Testifies at an Oversight Hearing before the Senate Commerce Committee (Aug. 5, 2020), <https://www.ftc.gov/news-events/press-releases/2020/08/ftc-testifies-oversight-hearing-senate-commerce-committee> [<https://perma.cc/XH7H-L5BT>].

284. Cf. Melvin A Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 597-99 (2006) (arguing that a disgorgement interest should be available in private breach of contract cases, but noting its conspicuous rarity in case law).

285. *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 372 (2d Cir. 2011).

286. See *FTC v. LoanPointe, LLC*, 525 F. App’x 696, 698 (10th Cir. 2013) (citing *Bronson Partners*, 654 F.3d 359); *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006) (noting that “disgorgement” is not available primarily to compensate victims,” and citing a district court holding that disgorgement as public compensation “springs out of the policy of public enforcement of the provisions of the securities laws” (citing *SEC v. Petrofunds, Inc.*, 420 F. Supp. 958, 960 (S.D.N.Y. 1976))); *State v. Macko*, No. HHDCV126031858S, 2016 WL 4268383, at *11 (Conn. Super. Ct. Aug. 1, 2016) (citing *Bronson Partners*, 654 F.3d 359).

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1. Statutorily Authorized Position of Public Enforcers

Article II of the U.S. Constitution vests “executive Power” in the President,²⁸⁷ who in turn appoints the various ministers, officers, and heads of the departments of government with the advice and consent of the Senate.²⁸⁸ The Constitution does not expressly define executive power, but the founders envisioned an energetic executive branch empowered to vigorously implement the laws of the United States. For example, in the *Federalist Papers*, Alexander Hamilton explained:

Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. . . . A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.²⁸⁹

Or, as James Madison wrote, “the natural province of the executive magistrate is to execute laws.”²⁹⁰

While a full scholarly treatment of the limits of this executive power “might well take thirty years and 7,000 pages,”²⁹¹ the Constitution clearly requires the executive branch to “take Care that the Laws be faithfully executed”²⁹² Although all power in the American constitutional order derives from the consent of the people, the executive branch acts as a “caretaker of the public good” by responding to the opportunities and emergencies that arise in the course of events.²⁹³ As Louis Fisher explained, the Framers “were not primarily theoreticians,” but rather “had served in public life and wanted a government that would function effectively.”²⁹⁴ Officials implementing executive power who are duly selected through our process of elections, nominations, advice, consent, and appointment take on a qualitatively-different role and authority to execute law than any private litigant.

Over time, Congress has seen fit to expand the number, complexity, and independence of administrative agencies within the executive branch. In 1913, Congress adopted the Federal Reserve Act, creating a decentralized, hybrid

287. U.S. CONST. art II, § 1.

288. *Id.* § 2, cl. 2.

289. THE FEDERALIST No. 70 (Alexander Hamilton).

290. James Madison, *Letters of Helvidius No. 1* (Aug.-Sept. 1793), in 6 THE WRITINGS OF JAMES MADISON 138, 145 (Gaillard Hunt ed., 1906); see also Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 664 (1994) (arguing that “[a]n Executive without the power to execute is gibberish linguistically and bears no relationship to the Chief Executive Magistrate created by the Constitution.”).

291. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

292. U.S. CONST. art II, § 3.

293. JEREMY D. BAILEY, THOMAS JEFFERSON AND EXECUTIVE POWER 10 (2007).

294. LOUIS FISHER, THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER 4 (2014).

public-private central bank in order to balance the competing interests of private banks and populist fear of their economic power.²⁹⁵ In 1914, Congress adopted the FTC Act and so created a five-member commission charged with stopping “unfair methods of competition”²⁹⁶ In the Great Depression, New Deal legislation strengthened the authorities of these agencies and forged the SEC and the FDIC in their mold.²⁹⁷ Congress created the FDA, HUD, the National Credit Union Administration, the CFTC, and, most recently, the CFPB to protect and enhance the markets through which the American people conduct their commercial affairs.

In the modern administrative state, Congress (and, for their part, state legislatures) wrote market protection statutes that envisioned these administrative agencies as integral structures of the law.²⁹⁸ For the enabling legislation creating each of these aspects of executive power, a public enforcer is a central feature of the legal regime.²⁹⁹ Administrative agencies recruit and train a professional civil service staff with broad mechanisms of information acquisition and evaluation, including public requests for information, notice and comment rulemaking, complaint-taking, market-monitoring, and business, community, and scientific advisory boards. The statutory frameworks of market protection laws presume access to this type of regulatory and enforcement expertise as a baseline component of congressional vision.³⁰⁰ While some statutes afford members of the public a private cause of action, public civil law enforcement plays a statutory role that does not have an analogue in private cases.³⁰¹ In the words of the Eight Circuit, “an organ of the government acting in the public interest to enforce specific statutory and regulatory provisions and prevent violators from keeping their ill-gotten gains” does not “resemble[] a traditional suit at law.”³⁰² Despite centuries of change, the executive role of modern civil public law enforcement draws upon the same exercise of executive power George Washington cited in putting down the Whiskey Rebellion: “It is my duty to see the Laws executed: to permit them to be trampled upon with

295. PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* 6, 21-23 (2017).

296. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified at 15 U.S.C. §§ 41-58); *see also* PETER C. WARD, *FEDERAL TRADE COMMISSION: LAW, PRACTICE AND PROCEDURE* § 1.02 (2021) (detailing the legislative history of the Act).

297. *See* David M. Kennedy, *What the New Deal Did*, 124 POL. SCI. Q. 251, 253-54 (2009) (discussing the historical origins of New Deal executive agencies).

298. *See, e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (Warren, C.J.) (“When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.”).

299. *See, e.g.*, 15 U.S.C. § 78d (establishing the SEC); 12 U.S.C. § 5491 (establishing the CFPB).

300. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551 (1985) (pointing out that “it is a defining characteristic of the modern administrative state that most statutes are not direct commands to the public enforced exclusively by courts, but are delegations to administrative agencies to issue and enforce such commands”).

301. *See* SEC v. Quan, 817 F.3d 583, 594 (8th Cir. 2016) (“[T]he SEC seeking disgorgement is not analogous to a private plaintiff suing for money it is owed under a contract.”).

302. *Id.*

impunity would be repugnant to [that duty].”³⁰³ The “uniquely favorable” position of public enforcement agencies seeking public compensation is based on the constitutional duty of the executive branch to implement law.³⁰⁴

2. Deterrence Rationale of Public Enforcement Justifies Liberal Public Compensation Principles

Deterrence of violations of market protection statutory schemes is the fundamental purpose of civil public enforcement, while the pursuit of compensation for harm primarily drives private claims. Courts and scholars agree on these points.³⁰⁵ Yet there is no shortage of judicial opinions and scholarly literature muddying the picture and pointing out the deterrent effect of private actions and the compensatory effect of public enforcement.³⁰⁶ Public compensation combines violator deterrence with compensation to individuals, contributing to this blurring of purpose. The underlying deterrence rationale of public enforcement nonetheless applies to public compensation and shapes its use.

Both public enforcers and the courts have repeatedly pointed to deterrence as the primary purpose of public compensation. This position is obvious in disgorgement cases, as the measuring stick for the award is an amount needed to deprive the defendant of unjust gain rather than the loss suffered by the potential beneficiary of public compensation.³⁰⁷ As the Court held in *Porter*: “[f]uture compliance may be more definitely assured if one is compelled to restore one’s illegal gains.”³⁰⁸ The SEC has stated since the 1970s that its disgorgement

303. *To the Secretary of the Treasury* (Sept. 7, 1792), in 32 WRITINGS OF GEORGE WASHINGTON 143, 144 (John C. Fitzpatrick ed., 1939); cf. Ted Cruz, *The Obama Administration’s Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL’Y 63, 69 (2015) (arguing that selective non-enforcement violates Article II’s Take Care Clause).

304. Cf. Roach, *supra* note 60, at 114 (acknowledging that “federal agencies win revenue disgorgement and other remedies based on uniquely favorable measures”).

305. See, e.g., *Kokesh v. SEC*, 137 S. Ct. 1635, 1643 (2017) (“[T]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains.”); Velikonja, *supra* note 10, at 359 (“The primary purpose of the SEC’s enforcement activity is deterrence.”); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 952 (2001) (noting that government agencies “seek to deter by fines, injunctions, and orders for disgorgement and restitution”); Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1285 (1999) (“Furthermore, unlike public enforcement regimes, private enforcement generally has as its primary purpose compensation of victims, with only a secondary purpose of preventing or deterring violations.”); Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 570-71 (1981) (noting that private enforcement of the securities acts may be “ill-suited” to the deterrence objectives of those statutes, but also recommending devices for making private suits serve “a legitimate compensatory purpose”).

306. See Bradley J. Bondi, *Dangerous Liaisons: Collective Scienter in SEC Enforcement Actions*, 6 NYU J. L. & BUS. 2 (2009); Jared N. Jennings, Simi Kedia & Shivaram Rajgopal, *The Deterrent Effects of SEC Enforcement and Class Action Litigation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 25, 2011), <https://corpgov.law.harvard.edu/2011/07/25/the-deterrence-effects-of-sec-enforcement-and-class-action-litigation> [<https://perma.cc/Q5HF-KKZ7>].

307. *Supra* Section III.C.

308. *Porter v. Warner Holding Co.*, 328 U.S. 395, 400 (1946).

remedy primarily is based on deterrence, and courts have repeatedly affirmed that deterrence justifies disgorgement in SEC cases.³⁰⁹ Similarly, courts have held that deterrence is the purpose of disgorgement in FTC cases³¹⁰ and in state attorneys general cases.³¹¹ Courts also have cited deterrence as the basis for restitution awards based on consumer loss.³¹²

Public compensation's deterrence rationale supports a much more liberal interpretative frame for determining when it should be awarded. The Second Circuit described this link between deterrence and lower proof requirements in disgorgement cases:

[B]ecause 'the primary purpose of disgorgement orders is to deter violations of the [] laws by depriving violators of their ill-gotten gains,' . . . a regulatory agency seeking disgorgement need not identify specific victims to whom payment is due 'in good conscience,' as it would be required to do if seeking to impose a constructive trust [in a private dispute].³¹³

Professor Garry Gabison cited the economic justification for this position as follows: "[Public compensation] also force[s] the lawbreaker to internalize the cost of lawbreaking, which deters inefficient future lawbreaking—much like civil penalties."³¹⁴ Gabison concludes that "[s]ince private and public actors value deterrence differently, they approach enforcement different."³¹⁵

309. See REPORT PURSUANT TO SECTION 308(C) OF THE SARBANES-OXLEY ACT OF 2002, U.S. SEC. EXCH. COMM'N 20, <https://www.sec.gov/news/studies/sox308creport.pdf> [<https://perma.cc/Q6SK-WCC9>] ("While the Commission may seek to return disgorged funds to injured investors, the main objective of disgorgement is to take the profits away from wrongdoers and thereby make violations unprofitable."); Gabaldon, *supra* note 8, at 1637-39 ("In 1972, the Commission's Annual Reports to Congress began to disclose both that it regarded disgorgement as a part of its arsenal and that the purpose of disgorgement was deterrence rather than compensation for particular victims."); Velikonja, *supra* note 81, at 402 (observing that "the Court held [in *Kokesh*] disgorgement is imposed to deter violations"); see, e.g., SEC v. Contorinis, 743 F.3d 296, 301 (2d Cir. 2014) ("Because disgorgement's underlying purpose is to make lawbreaking unprofitable for the law-breaker, it satisfies its design when the lawbreaker returns the fruits of his misdeeds, regardless of any other ends it may or may not accomplish."); see also Gabaldon, *supra* note 8, at 1628 (collecting cases in which courts held that SEC disgorgement is based on a deterrence rationale).

310. FTC v. LoanPointe, LLC, 525 F. App'x 696, 702 (10th Cir. 2013) ("[T]he two purposes of disgorgement [are] stripping the wrongdoer of ill-gotten gains and deterring improper conduct, without penalizing appellants.")

311. State *ex rel.* Kidwell v. Master Distributions, Inc., 615 P.2d 116, 124-25 (Idaho 1980) ("Only a substantial likelihood that defendants who have engaged in unfair or deceptive trade practices will be subject to restitutionary orders will deter many with a mind to engage in sharp practices."); State v. Fonk's Mobile Home Park & Sales, Inc., 343 N.W.2d 820, 824 (Wis. Ct. App. 1983) ("[T]he injunction is tied with restitution in order to assure that the merchant is deprived of the illegal fruits of past practices and to deter future illegal conduct.")

312. *Masters Distributions, Inc.*, 615 P.2d at 124-125 ("Only a substantial likelihood that defendants . . . will be subject to restitutionary orders will deter many with a mind to engage in sharp practices."); *Id.* ("The Idaho Consumer Protection Act indicates a legislative intent to deter deceptive or unfair trade practices and to provide relief for consumers exposed to proscribed practices . . . Only a substantial likelihood that defendants who have engaged in unfair or deceptive trade practices will be subject to restitutionary orders will deter many with a mind to engage in sharp practices.")

313. FTC v. Bronson Partners, LLC, 654 F.3d 359, 373 (2d Cir. 2011) (internal citations omitted).

314. Garry A. Gabison, *Public Enforcement of Private Rights*, 18 FLA. COASTAL L. REV. 207, 215-16 (2017).

315. *Id.* at 218.

Public Compensation for Public Enforcement

The distinction between public compensation as a remedy and the right to compensation linked to the elements of a private claim is related to the critical role of deterrence in shaping public compensation law. As the statutorily-authorized entity enforcing a market protection law, public enforcers almost always have the right to bring an action solely on proof of a law violation. Private plaintiffs, with narrow exceptions, can bring claims only when they can allege they were injured by the violation, or the like.³¹⁶ For example, there is no private right of action under federal UDAP laws—only the FTC, the CFPB, or a financial institution’s prudential regulator can bring claims for violation of these laws—but every state has a private right of action for a UDAP violation.³¹⁷ Yet these UDAP laws mostly require proof of injury or damage as an element of the claim.³¹⁸ Compensation, therefore, is not only central to the purpose of private claims, but is typically a requirement of most private claims. In a public action, the enforcer only has the burden to prove a violation; having done so, public compensation arises as one of the remedies appropriate to promote deterrence of future violations.

Understanding public compensation as justified by deterrence also makes sense because public compensation is almost always accompanied by forward-looking injunctive relief, whereas private suits—even class actions—typically do not obtain prospective relief.³¹⁹ A study of one year of all consumer protection case resolutions by the CFPB, FTC, and state attorneys general underscores this point. The only situations in which public enforcers did not universally obtain injunctive relief comprised a tiny set of cases brought by state attorneys general who relied almost exclusively on outside counsel to prosecute the actions, resulting in large sums of money returned to the government, but which obtained injunctive relief in only 25 percent of cases.³²⁰ That public compensation is almost invariably accompanied by prospective relief illustrates the sharp distinction between compensation to people as a part of the deterrence remedies of public enforcement and private suits focused primarily on obtaining compensation.

316. Standing in federal courts requires that a private plaintiff establish injury in fact and that the injury be “concrete and particularized.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). Statutory claims by private plaintiffs also routinely require proof of injury. *See, e.g.*, 15 U.S.C. § 15(a) (2018) (Clayton Act antitrust violations); *James v. Meinke*, 778 F.2d 200, 205 (5th Cir. 1985) (securities claims under Rule 10b-5 require injury); *see also infra* notes 317-318 (noting that private UDAP claims under state law mostly require showing of injury).

317. CARTER, ET. AL., *supra* note 153, § 12.2.1.

318. *Id.* § 11.4.2.1.1.

319. *See generally*, CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (Mar. 2015).

320. Cox, et al., *supra* note 7, at 90.

3. Public Compensation as a Discretionary Money Remedy

The discretion typically afforded public enforcement agencies in exercising executive power over money remedies further supports the doctrine of public compensation developed by courts.

Enforcers can obtain civil penalties or public compensation, or both. The amount of these awards, however, are sometimes in tension, as an award of public compensation often will decrease the amount of money that can be obtained as a civil penalty. The ability to substitute one form of money relief for another shows why the “uniquely favorable” terms of the public compensation doctrine are explained by the unique structure and rationales of public enforcement.

The factors used in determining the amount of civil penalties substantially overlap with the bases for determining public compensation. Factors used by courts to determine civil penalty amounts in FTC cases, which also have been used in state attorneys general enforcement actions, include injury to the public and whether the penalty eliminates the violator’s benefits from the violation.³²¹ One of the two primary factors employed by the SEC in deciding the amount of a civil penalty is depriving the violator of unjust gain, and the SEC also considers the need to deter and the degree of injury to innocent people.³²² Because civil penalties and public compensation have substantial overlap in purpose, they can be substitutes, at least in a one-way direction for most enforcers. If an enforcer decides to forego possible public compensation, the enforcer has a basis for seeking more in civil penalties.³²³

This substitution between money remedies becomes express in the enforcement authority of the SEC and CFPB. Civil penalty money usually is directed to the government treasury, while public compensation is paid to people affected by the violation.³²⁴ With SEC Fair Funds, civil penalties can be converted into public compensation in the same enforcement action.³²⁵ Congress authorized the CFPB to use civil penalties in a way that further muddies this distinction between civil penalties and public compensation. With its Civil Penalty Fund (CPF), the CFPB can use money collected as civil penalties to pay

321. *United States v. Reader’s Digest Ass’n*, 662 F.2d 955, 967 (3d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982); *State v. Mandatory Poster Agency, Inc.*, 398 P.3d 1271, 1281 (Wash. Ct. App. 2017) (citing *Reader’s Digest*, 662 F.2d 955); *State by Humphrey v. Alpine Air Prod., Inc.*, 490 N.W.2d 888, 897 (Minn. Ct. App. 1992), *aff’d*, 500 N.W.2d 788 (Minn. 1993).

322. See Press Release, SEC, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), <https://www.sec.gov/news/press/2006-4.htm> [<https://perma.cc/W76C-WUMM>] (“[C]orporate penalties are an essential part of an aggressive and comprehensive program to enforce the federal securities laws, and that the availability of a corporate penalty, as one of a range of remedies, contributes to the Commission’s ability to achieve an appropriate level of deterrence through its decision in a particular case.”).

323. This is especially true because settlements overwhelm fully-litigated cases as a share of public enforcement cases, meaning enforcers agree to the specific allocation between civil penalties and public compensation rather than the result occurring by a court order.

324. *Civil Penalty Fund*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/civil-penalty-fund> [<https://perma.cc/6W9M-LVTZ>].

325. See *supra* Section II.C.5.

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public compensation in future cases where the Bureau is unable to collect the amount of a public compensation award, typically because of the defendant's insolvency.³²⁶

Substitution of money remedies again distinguishes public enforcement from private actions. Private actions have no similar substitution of money remedies. Even when statutory penalties are present, the penalties add money relief to the private litigants in addition to private compensation, as any such additional relief is paid to the same private litigant. In public enforcement, by contrast, civil penalties are paid to some form of government fund, except with SEC Fair Funds.

A recent CFPB enforcement action brought during the Trump Administration is illustrative. In *CFPB v. Omni Financial of Nevada*,³²⁷ the Bureau sued a lender for violating the Military Lending Act in collecting installment loans made to military service members. In settling the case, the CFPB obtained a civil penalty of over \$2 million, but no public compensation for the service members, even though the Military Lending Act treats loans made in violation of the statute as void *ab initio*. Although from 2012 to 2016 the CFPB obtained nearly \$12 billion in restitution for consumers, by 2020 the agency shifted to follow the highly-restricted view of when the agency is entitled to restitution seen in the Central District of California's *CashCall* post-trial order.³²⁸ Under the settlement, Omni thus was able to continue collecting *void* loans from service members who received no public compensation at all from the enforcement action. Ironically, the money Omni paid in civil penalties went into the Bureau's CPF to be held for the benefit of future victims *in other cases*.³²⁹

By imposing upon itself a higher burden for seeking public compensation, the CFPB created a result that shows why the uniquely favorable public compensation doctrine traditionally used by courts produces remedial results consistent with the purposes of public enforcement. For the CFPB, its drift away

326. See generally Craig Cowie, *Putting Money Back into Consumers' Pockets: An Empirical Study of the CFPB's Civil Penalty Fund*, 2021 U. ILL. L. REV. 1417 (2021).

327. *In re Omni Fin. of Nevada, Inc.*, CFPB No. 2020-BCFP-0028 (December 30, 2020), https://files.consumerfinance.gov/f/documents/cfpb_omni-financial-of-nevada-inc_consent-order_2020-12.pdf [<https://perma.cc/U9V7-S54C>].

328. MAJORITY STAFF OF THE H. COMM. ON FIN. SERVS., 116TH CONG., *SETTLING FOR NOTHING: HOW KRANINGER'S CFPB LEAVES CONSUMERS HIGH AND DRY* at 5, 21 (2019); Christopher L. Peterson, *Dormant: The Consumer Financial Protection Bureau's Law Enforcement Program in Decline*, CONSUMER FED'N OF AM. 25-26 (March 12, 2019), <https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Decline.pdf> [<https://perma.cc/R7NJ-YNH9>]; *CFPB v. CashCall, Inc.*, No. CV 15-07522-JFW, 2018 WL 485963 at *11-12 (C.D. Cal. Jan. 19, 2018).

329. Press Release, CFPB, *Consumer Financial Protection Bureau Settles with Omni Financial of Nevada, Inc. for Violations of the Military Lending Act, Electronic Fund Transfer Act, and Consumer Financial Protection Act* (Dec. 30, 2020), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-settles-with-omni-financial-of-nevada-inc-for-violations-of-the-military-lending-act-electronic-fund-transfer-act-and-consumer-financial-protection-act> [<https://perma.cc/SF3D-7R38>]; see also 12 U.S.C. § 5497(d) (2018) (establishing CFPB's civil money penalty fund); 12 C.F.R. § 1975.104 (2021) (directing the CFPB to use funds in the civil penalty fund to compensate victim's uncompensated harm).

from awarding public compensation has created an ironic glut in its CPF.³³⁰ The shift led the Bureau to begin hoarding money penalties collected in its enforcement actions in the fund established by Congress to provide redress to victims of insolvent defendants, because the agency would not allow itself to distribute these funds under its narrow view of its statutory mandate to compensate consumers affected by violations of the law.

For civil enforcement agencies across a range of market protection regimes, tighter requirements for public compensation would simply incentivize enforcers to forego public compensation in favor of higher penalties deposited into the public treasury or another fund. Money obtained from either form of relief rests on a desire to deter future violations and the duty to implement the law. There is no policy reason to prefer civil penalties over public compensation; in fact, Congress has made express a preference for money obtained in enforcement actions to be used for public compensation in creating Fair Funds and the CPF.³³¹ The uniquely favorable posture of enforcement agencies in seeking public compensation is partly justified by the discretion they are typically afforded in choosing between money penalties or public compensation.

4. The Absence of Class Procedure

Historically, civil law enforcement actions seeking public compensation have not been subject to the procedural restrictions of class actions. Nevertheless, a body of relatively recent scholarship argues that public compensation essentially converts public enforcers into class-action counsel.³³² These authors compare the participatory deficiencies and conflicts of interest for enforcers in awards of public compensation to those found in class actions. While this view has little support in the case law, the blurring between class actions and public compensation did leak into the Seventh Circuit's *Credit Bureau* decision. In

330. See Kate Berry, *What Will Incoming CFPB Chief do with \$570 Million Consumer Aid Fund?*, AM. BANKER (Jan. 25, 2021 9:00 PM ET), <https://www.americanbanker.com/news/what-will-incoming-cfpb-chief-do-with-570-million-consumer-aid-fund> [<https://perma.cc/DV2P-G77N>]; Dara Duguay, *Let Non-Profits Tap Residual CFPB Penalty Funds: The Time to Put this Money to Use is Now*, THE HILL (Feb. 12, 2021 2:00 PM ET), <https://thehill.com/blogs/congress-blog/politics/538636-let-non-profits-tap-residual-cfpb-penalty-funds-the-time-to-put> [<https://perma.cc/NM5H-J5YQ>].

331. Conversely, money awarded for public compensation can end up in a government treasury. When an enforcer is unable to identify or locate recipients, or the costs of identifying recipients outweighs the benefit, courts have allowed the money to be directed to the government treasury, public accounts dedicated for particular purposes, or a nonprofit for educational or other public purposes.

332. See, e.g., Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 518 (2011) (arguing that public compensation “mimics” class actions); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 493 (2012) (arguing that state attorneys general suits seeking public compensation are “public aggregate litigation” that “bear[] a striking resemblance to the much-maligned damages class action.”); Michael D. Sant’Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992 (2012) (describing public compensation as an “agency class action”); Winship, *supra* note 62, at 1108 (describing the SEC as “public class counsel” when obtaining public compensation); see also Elysa M. Dishman, *Class Action Squared: Multistate Actions and Agency Dilemmas*, 96 NOTRE DAME L. REV. 291, 295 (2020) (arguing that, in state attorneys general multistate actions, “the analogy to the class action compounds, and a second ‘class action’ of a sort emerges”).

particular, the Seventh Circuit cites the Supreme Court’s decision *Wal-Mart Stores, Inc. v. Dukes* as support for its holding.³³³

Chief Judge Wood wrote a lengthy dissent in *Credit Bureau* that is relevant to the broader scholarly debate about the role of public compensation cases in law enforcement. Unlike class actions, in a public civil enforcement action “there is only one plaintiff.”³³⁴ The FTC and other public enforcement agencies are authorized to obtain relief even when it would not be available to private litigants. Unlike class actions, public compensation is typically paid in one lump-sum with discretion afforded to the enforcer on how to distribute the money.³³⁵ And, “in contrast to *Wal-Mart*,” public compensation awarded to the FTC or other enforcers does not “present the problem of internal conflict within a class.”³³⁶ As Chief Judge Wood recognized, disgorgement as a form of public compensation is supported by the unique position of public enforcers as civil law enforcement, and she finds support in the fact that “this understanding of disgorgement permeates the case law of our sister circuits” in SEC enforcement actions.³³⁷ The dissent repeatedly criticized the majority for relying on cases involving private litigants, observing that a line of cases concerned “implied private rights of action—a problem we surely do not have here.”³³⁸ Although the Supreme Court in *AMG* disagreed with Chief Judge Wood as a matter of statutory construction of the FTC Act, one suspects the Supreme Court reached a unanimous decision in *AMG* by restricting itself to the limited reasoning in Justice Breyer’s context-specific opinion. As a more general matter, Chief Judge Wood is right.

The scholarship equating private class actions and public compensation never grapples with the core problem that public compensation rests on different statutory authority based on different rationales unique to public enforcement.³³⁹ Class concerns are a nullity in public enforcement because class action prerequisites under civil procedure rules exist to overcome the impracticability of mass joinder of a numerous class of similarly situated plaintiffs with private claims.³⁴⁰ Because a public enforcer seeking public compensation, in the words of the Eight Circuit, “is not analogous to a private plaintiff suing for money it is

333. *FTC v. Credit Bureau Ctr. LLC*, 937 F.3d 764, 772 (7th Cir. 2019). For discussion of *Wal-Mart*’s restrictive views of Rule 23’s commonality requirement in class certification, see *infra* notes 56-57 and accompanying text. In contrast, Justice Breyer did not cite to *Wal-Mart Stores, Inc. v. Dukes* in the unanimous *AMG* decision. See *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 *passim* (2021).

334. *Credit Bureau Ctr.*, 937 F.3d at 791 (Wood, C.J., dissenting from denial of rehearing en banc).

335. See, e.g., *SEC v. Quan*, 817 F.3d 583, 594 (8th Cir. 2016) (“Indeed, disgorged funds are paid not to the SEC, but to the district court, which has discretion over how to disburse them.”).

336. *Credit Bureau Ctr.*, 937 F.3d at 791 (Wood, C.J., dissenting from denial of rehearing en banc).

337. *Id.* at 793.

338. *Id.* at 789.

339. Cf. Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1254 n.167 (2018) (describing how both Prentiss Cox and Howard Erichson reject the analogy between class actions and public compensation, and quoting Erichson as arguing that “the nature of the litigative representation differs significantly in the two types of cases”).

340. See FED. R. CIV. P. 23.

owed,”³⁴¹ it is even less analogous to *a group* of private plaintiffs suing for money they are owed. The procedural problem of joinder is simply not relevant when a public enforcer exercises its discretion in deciding whether to implement law through seeking public compensation, or not.³⁴² “A lawsuit by an organ of the government acting in the public interest to enforce specific statutory and regulatory provisions and prevent violators from keeping their ill-gotten gains” only bears a passing resemblance to a traditional lawsuit.³⁴³

Or, as Chief Judge Wood said, “[t]he presence of the government as a litigant is especially important to the public-interest component of the analysis when the government seeks remedies.”³⁴⁴ This is because for the government, public compensation as a remedy lies “uniquely within its toolbox” and “is aimed squarely at undoing public harms and preventing future ones through deterrence.”³⁴⁵ The absence of class-procedural prerequisites from the substantive doctrine of public compensation is not indicative of a substantive defect in that law. Rather it is a feature of the constitutional order which tasks executive power with implementing the rule of law.

V. Unified Public Compensation Law

An alternative to a reversal in the judicial trend toward conflating the law of public compensation with the law governing private claims is the legislative enactment of statutes that clarify and unify the authority of enforcers. In the Appendix, we propose model federal legislation to create uniform opportunities to seek public compensation across enforcers. State legislatures can adapt the language of this proposed legislation to accomplish the same goals at the state level. Section V.A makes the case for uniform authority. Section V.B examines the concepts underlying our proposed legislative reform.

A. *The Need for Uniform Authority*

Almost no two federal enforcers regularly obtaining public compensation have identical authority. The SEC has the right to obtain disgorgement and has its statutory Fair Funds power to convert civil penalties into public compensation—a right that likely will be exercised more frequently in light of the invitation to litigate limits on disgorgement unleashed by *Liu*. The CFTC also protects investors, yet it has express statutory authority to use either type of public compensation measure, but not the power to substitute civil penalties for public compensation. The likely litigation surge testing the limits on implied

341. SEC v. Quan, 817 F.3d 583, 594 (8th Cir. 2016).

342. See SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 95 (2d Cir. 1978) (“[T]he court is not awarding damages to which plaintiff is legally entitled but is exercising the chancellor’s discretion to prevent unjust enrichment.”).

343. *Quan*, 817 F.3d at 594.

344. FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 793 (7th Cir. 2019) (Wood, C.J., dissenting from denial of rehearing en banc).

345. *Id.*

equitable disgorgement authority will raise untested questions about the application of these limits to the CFTC's express authority. The CFPB may face the same questions if it attempts to situate its public compensation requests squarely within its express disgorgement authority. And while the CFPB shares with the SEC a right to substitute civil penalties for public compensation, it operates with completely opposite restrictions, and compensation is available only in other cases and not the action for which the penalties were collected. The FTC's public compensation authority has been reshaped by the *AMG* decision, but regardless the FTC still retains public restitution and civil penalty authorities, albeit accessible only through hobbling procedural hurdles imposed on no other enforcer.³⁴⁶ Agencies that obtain public compensation less frequently, such as the FDA or HUD, rely on implied statutory equitable powers that will no doubt be challenged in light of the recent judicial movement to restrict public enforcers' use of this remedy.

Taking a step back to observe the broad sweep of public compensation across enforcers raises the question of whether these disparities exist for a persuasive reason. Investors subject to loss due to insider trading can be made whole through civil penalties converted to disgorgement under SEC Fair Funds authority, while the *AMG* decision against the FTC means that homeowners subject to a foreclosure scam will often receive no public compensation. Why are investors treated differently—in fact, better—than consumers in these situations? Why does the CFPB have broader direct public compensation remedies for UDAP violations in consumer finance than the agencies with UDAP authority over other types of goods or services? Why do certain enforcers have the right to shift money awarded as civil penalties to public compensation, but not other enforcers?

Tracing the history of all of these differences in authority is beyond the scope of this Article, but it is readily apparent that the differences in the market protection rationales of the various enforcers do not justify the vast discrepancies in public compensation authority among them.³⁴⁷ The variation in statutory authority for public compensation appears mostly to be the result of historical happenstance and the ad hoc, iterative development of the law through statutory authorization and case law.

These differences in statutory authority obscure the long-established judicial consensus that allows for the statement of a public compensation doctrine. The tendency of courts to cite to public compensation cases across enforcers, and the application of common causation presumptions and loosened-proof requisites, show a decades-long judicial inclination to view public

346. Cf. Chopra & Levine, *supra* note 67, at 47 (proposing a suite of creative administrative reforms to facilitate expanded monetary relief in FTC enforcement actions under the Commission's penalty offense authority instead of section 13(b)).

347. See Beales & Muris, *supra* note 101, at 6 (describing the development of FTC remedial provisions in the 1970s); Donna M. Nagy, *The Statutory Authority for Court-Ordered Disgorgement in SEC Enforcement Actions*, 71 SMU L. REV. 895, 896 (2018) (providing a history of the SEC's remedial authority).

compensation as a common element across market protection schemes. Given the broad similarities in purpose and function among market protection enforcers, the burden should be on those opposing enforcers' authority to justify why uniformity in public compensation should not be available to those affected by market protection law violations.

The rapid reaction to *Liu* by Congress in creating new statutory authority for the SEC is consistent with a congressional consensus to support the liberal award of public compensation. Congress has steadily expanded enforcers' statutory authority for public compensation over the last few decades. It recognized public compensation in amendments over the years to the remedial statutes of the SEC and FTC.³⁴⁸ Congress created SEC Fair Funds authority in the Sarbanes-Oxley Act of 2002 and expanded CFTC public compensation authority in the DFA in 2010.³⁴⁹ When it created the CFPB, Congress gave the new agency remedial authority expressly incorporating a right to both forms of public compensation and the authority to convert civil penalties into public compensation through the civil penalty fund.³⁵⁰ Congressional action to retrench public compensation powers which were previously granted is entirely absent from this history of evolving public compensation statutory authority. Similarly, two state legislatures, Arizona and Iowa, reacted to state supreme courts' rejection of state attorney general power to obtain disgorgement through a statutory injunctive provision by amending state law to expressly provide that authority.³⁵¹

The Supreme Court's upheaval of the FTC's public compensation authority is helpful in at least one respect. Justice Breyer noted that "[i]f the Commission believes . . . [its] authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority."³⁵² The need for such authority is now urgent because the public relies on the FTC to compensate victims of scams and other unfair or deceptive practices. Congress must, however, recognize that reform should not be limited to the FTC, because the recent retreat from public enforcement rationales in cases determining public compensation is part of a larger trend affecting the remedial authority of all enforcers. As we described earlier, federal courts have sharply restricted access to the courts for private claims.³⁵³ A constriction of public compensation brings us closer to a regime where violations of market protection laws are consequence-free, or at least a judicial system that has curtailed its own authority to provide any recompense to people affected by those violations.

348. *Id.*

349. *See supra* Section II.C.5.

350. *See supra* notes 150, 326.

351. *State ex rel. Horne v. AutoZone, Inc.*, 275 P.3d 1278, 1283 (Ariz. 2012) (distinguishing the validity of disgorgement FTC authority because it is in a separate section of the statute, and also noting the change in Iowa law resulting from a prior court decision limiting state attorney general restitution authority); *State ex rel. Miller v. Santa Rosa Sales & Mktg., Inc.*, 475 N.W.2d 210, 219 (Iowa 1991); ARIZ. REV. STAT. § 44-1528 (amended to add parallel express disgorgement authority).

352. *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1351-52 (2021).

353. *See supra* Section I.C.

B. Concepts Supporting Model Legislation

The proposed legislation would eliminate these senseless disparities. Congress can strengthen public enforcement, thus deterring violations of market protection schemes, while also building law that is clearer for courts and enforcers to apply, improving both efficiency and fairness of civil law enforcement. In this subpart, we identify three key concepts which shape our proposed legislation.

1. Clarify Alternative Availability of Both Forms of Public Compensation

Disgorgement currently is largely based on ancillary equitable authority, or at least a general statutory incorporation of that equitable authority, while public restitution almost always is based on express authority. This difference creates difficult interpretative questions for the courts. In *Liu*, those issues arose as an existential question of whether disgorgement is authorized by a statutory injunction, and resulted in holdings contravening the use of disgorgement as employed by some courts. In *AMG*, the issue was whether disgorgement is authorized based on the specific language in the statutory injunction provision when that statute also authorizes public restitution. All of these issues would be avoided by making the implied express. Enforcers should be able to seek, and courts should be able to award, either form of public compensation as dictated by the circumstances of the enforcement action.

Our proposed model law replicates most of the language in the DFA's express authority for the CFTC.³⁵⁴ This language authorizes the CFTC to use either disgorgement or public restitution in seeking public compensation. The restrictions on calculating disgorgement awards imposed in *Liu* may shift the relative benefits of using public restitution rather than disgorgement for enforcers with access to both forms of public compensation. And as we have shown in above examples, public restitution can be a better measure of the harm caused by certain violations. In *Figgie*, the seminal FTC public restitution case, this gap was quite substantial. The court determined that disgorged profits amounted to about \$7.5 million, while possible consumer loss exceeded \$49.9 million.³⁵⁵ Allowing enforcers the discretion to choose between seeking either measure based on the circumstances of each case would allow courts to consider awarding public compensation under the measure of the harm caused by the violation. This comports with the public policy goal of having businesses internalize the social costs of law violation in weighing the potential costs to themselves, which is the essence of public compensation as deterrence.

354. We omit the reference to "proximate cause" for public restitution, which led the Eleventh Circuit to impose common law tort proof standards. *See supra* note 86.

355. *FTC v. Figgie, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993).

2. Preserve What Works

The proposed legislation replicates the judicial consensus embodied in public compensation doctrine. It expressly incorporates the reasonable approximation framework for determining the proper amount to award in public compensation. Courts are familiar with applying this framework and the abundant case law provides a grounding for the meaning of this text. The legislation incorporates the proposed proportionality test for difficult public restitution cases—an area in which courts have articulated a need for guidance.

The legislation addresses the changes and uncertainties in the law created by the Court's decision in *Liu*. The legislation includes a clear divide between measuring disgorgement by gain and public restitution by loss. The authority to award either disgorgement or public restitution preserves the flexibility to adapt public compensation to the circumstances of each case, but settles an area of discord in the case law, consistent with the holding of *Liu*. The legislation also would clarify, consistent with past judicial practice, that expenses incurred in creating a violation are not deductible from a public compensation award, and joint and several liability can be imposed when a person knew or should have known about the violation.

The proposed legislation would make clear that enforcers have the authority to reallocate public compensation money that they are unable to distribute into a fund that would operate like the CFPB civil penalty fund, permitting fulfillment of public compensation awards in other cases involving insolvent defendants. The empirical scholarship validates the effectiveness of this type of funds.³⁵⁶ When such distributions are impractical, this provision of the proposed legislation would allow for depositing the funds in the Treasury, removing any possible restrictions imposed on SEC use of residual public compensation funds in *Liu*.³⁵⁷

Finally, the legislation makes explicit that public compensation is solely for public enforcement, which is consistent with decades of case law developing a doctrine uniquely available to public enforcers. A provision clarifies that the new law does not allow for a private right of action to force an agency to seek public compensation or a private right of action to force allocation of public compensation to any person.³⁵⁸

356. Cowie, *supra* note 326. Although the proposed legislation does not include the use of substitution of civil penalties into public compensation for all enforcers, a good case can be made for doing so. The justifications for SEC Fair Funds authority and CFPB civil penalty fund authority would seem to have equal force in other market protection enforcement sectors.

357. The proposed legislation includes a savings clause for existing public compensation authority to make clear that it is designed to provide supplemental statutory authority available for use in the enforcement of the identified market protection laws. The law is designed to bring a minimum level of authority to all public enforcers, not abrogate existing tools that have proven effective.

358. *Infra* Appendix (Sec. 3, § 2417(h))

3. Decouple Public Compensation from Equity

Perhaps most importantly, a legislative enactment would save public enforcers, courts, and business defendants countless millions in litigation costs to resolve arcane questions of equity jurisprudence. The issues raised—but left mostly unresolved—in *Liu* concern how to measure a disgorgement award, and on whom to impose a disgorgement obligation, so that it does not constitute a penalty and thus contravene the traditional limits of equity. By incorporating vague references to “disgorgement” in creating express authority for the CFTC and CFPB, and by adopting an express SEC right to obtain disgorgement as “unjust enrichment,” Congress left unresolved questions about whether these statutes alter the Supreme Court’s interpretation of traditional equity limits on disgorgement. The expenditure of time and creativity by attorneys and courts to resolve these questions would be neither necessary nor useful in the context of public enforcement.

The model legislation directly addresses and resolves this problem. It commands use of an equity-like “broad and flexible construction . . . in favor of deterrence of violations . . . and the practical implementation of the remedial goal of compensating people.”³⁵⁹ The legislation provides that “public compensation is not subject to the traditional limits imposed on judicial authority in equity.”³⁶⁰ The proposed legislation also addresses the issues of joint liability, calculation of net profit without expense deduction, and use of residual public compensation funds. In other words, the proposed legislation would make judicial determination to award disgorgement a question resolved by statutory interpretation without reference to the perplexing cross-currents of traditional equity.

Decoupling disgorgement from traditional equity makes sense because the limits of traditional equity derive from the law governing private claims that has little meaning in the context of public enforcement. Why should courts be concerned about stepping over the line into punishment in a public enforcement action? Enforcers’ alternative remedies are to seek actual civil penalties and, in the case of the SEC and CFPB, to then repurpose that money as public compensation, either in the same case (SEC Fair Funds) or in other cases (the CFPB’s Civil Penalty Fund). It makes no sense to debate the fine points of ancient principles of equity—or in the case of Justice Thomas’s dissent in *Liu*, the question of whether the principles as applied to disgorgement are sufficiently ancient—when Congress or state legislatures can resolve the question of the proper function of public compensation as a public enforcement remedy.

359. *Id.* at § 2417(a)(2).

360. *Id.*

Conclusion

Though often an opaque and muddled area of law, public compensation has been an effective civil law enforcement tool for more than seventy years. It has delivered billions of dollars in relief to millions of investors, consumers, workers, and others, and strengthened deterrence against law violations. In this Article, we have distilled a doctrine that reflects the consensus position of courts. Public compensation is awarded under broad and flexible standards that are alien to judicial resolution of private claims. This occurs because public compensation is a remedy guided by the rationales of public enforcement and the unique position afforded public agencies under the U.S. Constitution and federal statutes, and similar authority given to state attorneys general and state agencies under state laws. We have extended the doctrine to suggest the use of a multi-factor test when courts encounter difficult public restitution cases for which there is less case law guidance.

After decades of effective use, the law of public compensation has been unsettled by recent judicial decisions. This disruption comes at a time when access to class actions has been restricted, often leaving public compensation as the only option for people to recover money lost to companies violating market protection laws.

Congress and state legislatures can resolve this disruption by enacting laws that would clarify public compensation law. Our proposed legislation would create uniform authority across public enforcers and allow the use of either disgorgement or public restitution as appropriate to the circumstances of the enforcement action. Market protection laws achieve their purpose in direct relation to the effectiveness of their enforcement.

Public Compensation for Public Enforcement

Appendix: Model Federal Legislation

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. Short title.

This Act may be cited as the “Civil Public Compensation Act.”

SEC. 2. Findings.

Congress finds that—

(1) civil law enforcement agencies of the United States have obtained court orders directing compensation to victims of unlawful acts for more than seventy years;

(2) recently some courts have questioned the authority of agencies to obtain compensation for victims of unlawful activity in civil law enforcement actions; and

(3) the rule of law requires that civil law enforcement agencies of the United States must deter unlawful activity and provide public compensation to victims.

SEC. 3. Remedial authority of administrative agencies.

Chapter 161 of Title 28, U.S. Code is amended by adding at the end the following:

“§ 2417. Public compensation in civil law enforcement actions of the United States

“(a) Authority to Award Public Compensation.—

“(1) Wherever a court of the United States has jurisdiction to hear a civil action brought by or on behalf of an agency, board, bureau, commission, or department of the United States to enforce a civil market protection law, the court may order a person found to have violated such law to pay public compensation to persons in connection with the unlawful act.

“(2) In awarding public compensation, courts shall afford a broad and flexible construction of this section in favor of deterrence of violations of the civil market protection law and the practical implementation of the remedial goal of compensating people affected by violations of civil market protection law, and public compensation is not subject to the traditional limits imposed on judicial authority in equity.

“(b) Definitions.—As used in this section:

“(1) Public Compensation.—Means disgorgement or public restitution awarded against a person who violates a civil market protection law.

“(2) Disgorgement.—Means an order of compensation measured by the gains received in connection with a person’s unlawful act without offset for the person’s expenses incurred as part of the violation of a civil market protection law.

“(3) Public Restitution.—Means an order of compensation measured by the victims’ losses suffered in connection with a person’s violation of a civil market protection law.

“(4) Civil Market Protection Law.—Means a law of the United States promoting fairness, transparency, or efficiency of interstate commerce including but not limited to laws promoting: consumer, investor, or worker protection; and food, drug, cosmetic, and transportation safety; but not civil law enforcement of antitrust laws.

“(c) Reasonable Approximation; Rebuttable Presumption.—

“(1) A prima facie determination of public compensation may be established by a reasonable approximation of the disgorgement or restitution owed.

“(2) Upon a prima facie showing of disgorgement or restitution owed, the person found to have violated a civil market protection law may rebut the approximation of public compensation with specific, admissible evidence demonstrating that the approximation is manifestly unreasonable.

“(3) Where the subject of a civil law enforcement action has rebutted the reasonable approximation of public restitution owed, the court may determine public restitution owed through a balancing test including the following factors:

—
“(A) the value, difficulty and cost of determining harm and distributing compensation to individual victims;

“(B) the usefulness and cost of a claims process or similar mechanism to identify loss amount;

“(C) the likelihood of victims recovering loss through a past, pending, or future private action; and

“(D) the egregiousness of the subject’s illegal activity.

“(d) Double Recovery Prohibited.—Based on the government’s reasonable approximation, a court may award either disgorgement, restitution, or in appropriate circumstances, both. However, a person may not receive a double recovery through public compensation after considering past recovery from return of money in connection with the violation or payments received as a result of a private action.

“(e) Joint and Several Liability.—Where two or more persons are found liable for violation of a civil market protection, a court may in the interest of justice hold one or more of the subjects jointly and severally liable for public

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compensation if the subject knew or should have known the act violated a civil market protection law of the United States.

“(f) Distribution and Preservation of Public Compensation; Establishment of Victim Relief Funds.—

“(1) Where a court orders public compensation in a civil law enforcement action, the prevailing agency, board, bureau, commission, or department of the United States shall exercise reasonable efforts to distribute compensation to victims of the unlawful act.

“(2) An agency, board, bureau, commission, or department of the United States eligible to obtain public compensation for victims of unlawful acts under this section may establish by rule a victim public compensation fund to be maintained at a Federal Reserve bank in accordance with such requirements as the Board of Governors may impose and:—

“(A) Where the court finds that the government is unable after reasonable efforts to direct collected public compensation to the victims of an illegal act, the court shall order such remaining compensation deposited into the agency, board, bureau, commission, or department’s victim public compensation fund; and

“(B) Amounts in a victim compensation fund shall be available to that agency, board, bureau, commission, or department without fiscal year limitation, for court ordered payments to uncompensated victims of unlawful activity in other past or future civil law enforcement actions. To the extent that such victims cannot be located, or such payments are otherwise not practicable, the agency, board, bureau, commission, or department may direct such funds to be returned to the United States Treasury.

“(g) Relation to Other Laws.—No provision of this section shall be construed as modifying, limiting, or superseding the operation of any other law that affords greater, different, or more specific relief where the government prevails in a civil law enforcement action.

“(h) No Private Right of Action. Nothing in this section shall be construed as authorizing a private right of action to require a government entity to seek public compensation or to require allocation of public compensation in any particular amount or in favor of any person.