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Public Compensation for Public Enforcement

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Public enforcement actions frequently result in the distribution of money to people affected by violation 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, but courts have developed a discernible set of principles that allow for presumptions and loosened proof standards in awarding this relief. This doctrine held for decades despite repeated challenges by business defendants. The Supreme Court's decision in Liu v. SEC *in June 2020, followed by its grant of certiorari in July 2020 to review enforcement actions brought by the Federal Trade Commission, have unsettled the law.*

This paper 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. 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, and 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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* Acknowledgements provision to be added

Introduction

Consumers, investors, workers, homeowners, tenants and others receive money as a result of civil public enforcement actions. Substantial amounts of money 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 prolific amounts of public compensation, often by joining together in multistate enforcement actions.[1]

Given this lengthy record of voluminous payments, one would imagine that courts have established clear principles for determining when compensation is properly awarded, and which individuals receive how much money in various circumstances. There is a discernable doctrine of public compensation, yet 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 in the ever-evolving patchwork of federal and state legislation. That public compensation lies abreast of, and shares policy goals with, money penalties imposed in civil law enforcement, and abuts claims brought by private litigants, deepens the confusion.

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 proposed doctrine identifies the common principles in existing law for when these two forms of public compensation should be available, how much to 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 mostly have been waved away by the courts in favor of a practical approach that favored the issuance of compensation. No longer. In June 2020, the United States Supreme Court issued a decision in an SEC enforcement action restricting the agency's authority to obtain public compensation.[2] The Court then promptly granted *certiorari* to review an FTC enforcement action that could lead to the abrogation of the primary authority employed by the FTC to return money to consumers.[3] 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.[4]

This nascent reversal of judicial approach to public enforcement remedies gives urgency to our second goal for this Article. We argue for legislative action to create a consistent set of legal principles for the award of public compensation across different public enforcers, and we

[1] *See supra* Part I.B.
[2] Liu v. SEC, 140 S. Ct. 1936, 1940–41, 207 L. Ed. 2d 401 (2020).
[3] F.T.C. v. AMG Capital Mgmt., LLC, 910 F.3d 417, 428 (Nev. 2018), cert. granted sub nom., AMG Capital Mgmt., LLC v. F.T.C., 141 S. Ct. 194, 207 L. Ed. 2d 1118 (2020)
[4] *See supra* Part IV.A.

propose a model law to achieve this purpose. No two public enforcers have the same statutory authority to award public compensation. Some enforcers having vastly less authority, even though there are no clear reasons for the discrepancy. The model law draws from the public compensation doctrine, and provides Congress and state legislatures a roadmap for creating a common statutory public compensation authority for all enforcement agencies.

Public compensation is rooted in the unique obligations and rights that accompany the executive branch 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 favorable presumptions and shift proof burdens to defendants in ways foreign to the law used by private litigants, even when claims of the private plaintiffs arise under the same market protection statutes.

Public compensation law also typically is and, in the absence of contrary statutory authority, should be cross-enforcer. The key tenets of public compensation law should apply to the full range of civil public enforcement agencies, not just 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, but also unmindfully borrow law from other public enforcement regimes, or the law for resolving private claims. This segmented and episodic development of caselaw without a cross-enforcer theory of pubic compensation has obscured the principles that would otherwise make the law coherent.

The 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 increasingly bar 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 mean patterns of illegal activity often will yield no compensation to victims of market wrongs, especially in situations involving large numbers of people suffering relatively modest harm. Less public compensation coupled with restricted access to private rights of action brings us closer to consequence-free violation of civil marketplace protection laws.

Part I of the Article describes the practice of public compensation at issue in this Article, and looks at the rising importance of public compensation 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 in cases awarding public compensation under the various statutory authorities of public enforcers. 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; restitution 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, making 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 the commonalities of when courts award the public compensation, how the courts determine the amount of the award, and the eligibility of individuals for the money 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 the recent decisions limiting or abrogating use of public compensation invite years of litigation by enforcement defendants to further restrict the remedial authority of public enforcers. 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. The 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 a public enforcement remedy 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 our proposed model law and the reasons supporting our view that no public policy rationale justifies the existing distinctions between the statutory authority afforded different 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. Subpart A places public compensation within the context of remedies available to public enforcers and provides examples of typical public compensation awards. Subpart B provides an overview of the federal and state public enforces most active in procuring this type of relief. In subpart C, we look at the rising importance of public compensation in light of federal judicial decisions restricting private plaintiff access to the courts.

A. Public Compensation as a Public Enforcement Remedy

Almost all public civil law enforcement agencies seek and obtain injunctions restraining future violations.[5] 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 collectively recover billions annually.[6] Civil penalty money often is put in the public

[5] Samuel W. Buell, Liability and Admissions of Wrongdoing in Public Enforcement Law, 82 U. CIN. L. REV. 505, 515 (2013) (injunctions typical in SEC settlements); Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEG. 37, 69-70 (2018) (all FTC and CFPB cases and 96% of state attorney general UDAP cases resolved in 2014 included injunctive relief).

[6] *See Enforcement Data Base*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/enforcement-database/ (CFPB has collected civil penalties of $1.5 billion); 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) (SEC); Cox, et al., *supra* note 5 at 73-74 (state attorneys general obtain civil penalties or other forms of government

treasury, but it can be directed into public accounts dedicated to particular uses, including public education and future public enforcement.[7]

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."[8]

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 law 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.[9] In *U.S. v. Universal Management Services, Inc*., the FDA's professional staff identified a company marketing a device called "The Stimulator" that the business claimed would alleviate pain from migraine headaches, swollen joints, allergies, and other ailments. In fact, "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.[10] Universal offered no scientific evidence that it was safe and efficacious, as required by the FDCA.[11] 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.[12]

Public compensation is an important tool in government efforts to address poverty and racism. For example, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act[13] ("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

payment in 73% of cases). The FTC, however, has limited civil penalty authority. *See* Adjustments to Civil Penalty Amounts 86, Fed. Reg. 2539 (proposed Jan. 13, 2021) (to be codified at 16 C.F.R. pt. 1).

[7] 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 government money is the cases against the tobacco industry brought by state attorneys general under consumer protection and antitrust laws in the 1990s based on the theory that violations caused the state 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).

[8] *See* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331 (2015) (using term in legal scholarship for first time, perhaps).

[9] *See, e.g.*, U.S. v. Lane Labs-USA Inc., 427 F.3d 219, 223 (3d. Cir. 2005) (affirming disgorgement for false advertising for FDA violations).

[10] U.S. v. Universal Management Services, Inc., Corp., 191 F.3d 750, 754 (6th Cir. 1999), *aff'd* United States v. Universal Mgmt. Servs., Corp., 191 F.3d 750 (6th Cir. 1999).

[11] *Id.* at 763. 21 U.S.C. § 331(a), (k). 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).

[12] *Id.* at 986 (Order ¶19).

[13] Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, 15, 22, 31, and 42 U.S.C. (2020)).

banking regulators, and tribal governments.[14] In *CFPB and Navajo Nation v. S/W Tax Loans*, an installment loan company co-located with an H&R Block income tax preparation franchise just over the border of the Navajo reservation.[15] 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.[16] The 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.[17] When the CFPB and the Navajo nation jointly sued the company, the district court ordered the company to return nearly half a million dollars in redress to victims of its illegal activity.[18]

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. Four areas of market regulation in which public compensation regularly occurs are 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 "UDAP" authority—statutes that prohibit the use of unfair and deceptive acts and practices in market conduct.[19] 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.[20] The FTC has returned over $1 billion to consumers since 2016, and it participated in large cases with other enforcers resulting in over $10 billion in public compensation during that period.[21] State attorneys general return hundreds of millions more each year, including large public compensation awards in multistate actions by

[14] 12 U.S.C. §§ 5552, 5563-5565; 12 U.S.C. § 5481(27) (defining "state" to include "any federally recognized Indian tribe.").
[15] CFPB & Navajo Nation v. S/W Tax Loans, Inc., No. 15-cv-00299, Complaint at ¶ 7-8(D.N.M. Apr. 14, 2015), http://files.consumerfinance.gov/f/201504_cfpb_complaint-sw-tax-loans.pdf.
[16] *Id*. at ¶ 12, 22. *See also* URBAN INSTITUTE & BROOKINGS INSTITUTION, TAX POLICY CENTER'S BRIEFING BOOK 286 (2020), https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc_briefing_book_2020.pdf ("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.").
[17] CFPB & Navajo Nation v. S/W Tax Loans, Inc., Complaint, *supra* note 15, at ¶ 29.
[18] CFPB & Navajo Nation v. S/W Tax Loans, Inc., No. 15-cv-00299, Stipulated Judgment and Final Order (D.N.M. Apr. 16, 2015), http://files.consumerfinance.gov/f/201504_cfpb_stipulation-sw-tax-loans.pdf.
[19] *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 Law Ctr. Feb. 2009). In consumer financial services, the Dodd-Frank Act added another A to "UDAAP" by proscribing "abusive" practices alongside deceptive and unfair acts. 12 U.S.C. § 5531(d).
[20] *See Consumer Financial Protection Bureau: Enforcing Federal Consumer Protection Law*, CONSUMERFINANCE.GOV (July 2017), https://files.consumerfinance.gov/f/documents/201707_cfpb_factsheet_enforcing-federal-consumer-protection-laws.pdf.
[21] FTC, *FTC Refunds to Consumers*, TABLEAU PUBLIC (Feb. 10, 2021), https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_15797958402020/RefundsbyCase.

groups of state attorneys general.[22] Other enforcers obtaining public compensation for consumer protection violations include the FDA,[23] HUD,[24] the DOJ,[25] the ICC,[26] and federal prudential banking regulators, as well as state regulators with authority over banks, insurers, real estate brokers and other financial markets.[27]

Investor protection/ Securities. Public compensation returned to investors by the SEC regularly averages more than $1 billion per year.[28] The SEC has been active in obtaining public compensation since 1971. The Commodity Futures Trading Commission ("CFTC") has become increasingly active in obtaining public compensation, ordering $1.3 billion in monetary relief in 2019.[29] State securities regulators enforcing state "blue sky" securities laws, have added hundreds of millions more in investor recoveries.[30]

Worker protection. The Equal Employment Opportunity Commission ("EEOC") occasionally obtains public compensation for violation of federal employment discrimination, but typically represents only a single individual or a small group of identifiable employees.[31] State attorneys general are increasing active in the area of wage theft and worker protection, with eight state AGs having established specific units to bring enforcement actions.[32] Massachusetts, for

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[22] *See* PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 19-30 (2015); Cox, et al., *supra* note 5 at 52 (2018).
[23] *See supra* note 10.
[24] U.S. Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Virginia, Inc., 64 F.3d 920, 927 (4th Cir. 1995).
[25] Press Release, Dep't of Justice, Office of Public Affairs, 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). United States v. Rent Am., Corp., 734 F. Supp. 474, 478 (S.D. Fla. 1990) (awarding public compensation in Fair Housing Act enforcement action).
[26] I. C. C. v. B & T Transp. Co., 613 F.2d 1182, 1186 (1st Cir. 1980).
[27] *See generally* MARC LABONTE, CONG. RESEARCH 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 Financial Servs.*, 108th Cong. 6-7 (2004) (testimony of Gavin M. Gee, Idaho Director Of Finance, on behalf of the Conference of State Bank Supervisors describing dual banking system and listing examples of restitution 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 "[s]tates regulate insurance more than almost any other industry, due in part to a near total absence of federal insurance regulation" and "fines and restitution" are common remedies obtained by state insurance commissioners).
[28] Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, *supra* note 8; U.S. SECURITIES AND EXCHANGE COMMISSION, ANNUAL REPORT: A LOOK BACK AT FISCAL YEAR 2017 11 (2017) (reporting that, in 2017, $1.07 billion was disbursed to investors.); Gabaldon, *supra* note 6 at 1621.
[29] Press Release, Commodity Futures Trading Comm'n, 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.).
[30] *The Role of State Securities Regulators in Protecting Investors: Hearing Before the Sen. Comm. on Banking, Housing, and Urban Aff., S. Hrg.* 108-884 (2004) (testimony of Joseph P. Borg) (citing survey of state securities regulators finding over $660 million in "restitution, rescission and disgorgement" in 2002 and 2003), available at http://www.nasaa.org/872/the-role-of-state-securities-regulators-in-protecting-investors- enforcement-overview/.
[31] *See* Angela D. Morrison, *Duke-ing out Pattern or Practice after Wal-Mart:The EEOC as First*, 63 AM. U. L. REV. 87, 120 (2013).
[32] Terri Gerstein, *Worker's Rights Protections and Enforcement by State Attorneys General*, ECONOMIC POLICY INSTITUTE (Aug. 27 2020), https://www.epi.org/publication/state-ag-labor-rights-activities-2018-to-2020/.

example, recovered $6.7 million in restitution for workers in 2019-2020.[33] State attorneys general in California, Massachusetts, New York and Pennsylvania filed lawsuits in 2020 seeking public compensation for underpayment and misclassification of "gig economy" workers.[34]

Antitrust. Consumers receive public compensation in antitrust cases, although enforcers in this area have shown more reticence in obtaining this relief and antitrust law has split authority for consumer recoveries 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 antitrust actions.[35] Unlike UDAP enforcement, the FTC has an inconsistent history of pursuing public compensation.[36] State attorneys general have an important and unusual role in obtaining public compensation in antitrust enforcement, including power to obtain public compensation for Clayton Act antitrust violations in recognition of the limits on federal authority and private class recoveries.[37] 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.[38] Nearly ninety 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.[39] And the federally-funded Legal Services Corporation turns away more than 50% of qualifying consumers seeking legal help because of lack resources.[40] Most low-income Americans feel so

[33] Press Release, Office of Attorney 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)
[34] Gerstein, *supra* note 32.
[35] Shari Ross Lahlou, Greg Luib & Michael Weiner, *High Stakes at the High Court: The FTC's Disgorgement Authority Comes Before the Supreme Court*, 35 ANTITRUST 71, 72 n.14 (Fall 2020);
[36] 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), 2003 WL 21780660 (stating 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). Since 2012, the FTC sought public compensation in at least six cases and has obtained about $1.8 billion in those cases. Stein, *supra* note 36 at 61, although a recent appeal overturned $448 million of this amount. *FTC v. Abbvie, Inc*., 976 F.3d 327, 338 (3d Cir. 2020).
[37] 15 U.S.C. §15c (2012); 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); State of N.Y. by 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* U.S. DEPT. OF JUSTICE, ANTITRUST DIVISION MANUAL VII-10 (5TH ED. 2016).
[38] Ian Weinstein, *Access to Civil Justice in America: What Do We Know?*, BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA at 3-20 (S. Estreicher & J. Radice, Eds., 2016).
[39] LEGAL SERVICES CORPORATION: THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS at 6 (2017) (hereinafter THE JUSTICE GAP).
[40] LEGAL SERVICES CORPORATION, FY 2017 BUDGET REQUEST (2016), https://lsc-live.app.box.com/LSCFY2017BudRequest.

excluded from the justice system they do not try to obtain access to counsel, even though seven in ten with recent personal experience of a civil legal problem say it has "significantly affected their lives."[41] Moderate-income Americans fare little better. LSC attorneys can only serve those with incomes of no more than 125% of the federal poverty line. 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.[42]

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 an agreement to submit a dispute to arbitration binding as a matter of federal law.[43] Although Congress adopted the statute in 1925, it has only been in recent decades that the prevalence of arbitration clauses throughout many markets has begun to fundamentally reshape the ability of individual Americans to use private rights of action. A 2015 CFPB study found at least 92 percent of the prepaid card market, 99 percent of the mobile wireless carrier market, 86 percent private student loan market, and 99 percent loans originated by storefront payday loan companies were subject to arbitration clauses.[44] The same CFPB study found no evidence arbitration clauses lead to lower prices, and that three out of four consumers were unaware their product or service included a forced arbitration clause.[45] 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*.[46] Because consumer arbitrations are almost always 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.[47]

Private enforcement of market protection laws also is increasingly hobbled by class action restrictions. In 1997, the Supreme Court explained that "the very core of the class action mechanism" is "to overcome the problem that small recoveries do not provide the incentive for an 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."[48] Today, in many markets, class actions no longer solve any problem because they do not exist. The CFPB's study found that over 90 percent of

[41] THE JUSTICE GAP, supra note 39, at 7 ("Low-income Americans seek professional legal help for only 20% of the civil legal problems they face.").
[42] Kathryn Joyce, *No Money, No Lawyer, No Justice: The Vast Hidden Inequities of the Civil Justice System*, NEW REPUBLIC, June 22, 2020, https://newrepublic.com/article/158095/civil-legal-system-no-money-no-lawyer-no-justice.
[43] 9 U.S.C. § 2.
[44] CFPB, Fact Sheet: Consumer Financial Protection Bureau Study Finds That Arbitration Agreements Limit Relief for Consumers at 1, March 15, 2015, https://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf (*hereinafter* CFPB Arbitration Fact Sheet).
[45] *Id.* at 2-4.
[46] Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 372 (2016).
[47] Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 206 (2000).
[48] Amchem Prods., Inc. v. Windson, 521 U.S. 591, 617 (1997).

arbitration agreements expressly prohibit class arbitrations.[49] In *AT&T v. Conception* the Supreme Court held that the Federal Arbitration Act preempted state laws, such as the unconscionability doctrine, that might otherwise prohibit these boilerplate contracts from disallowing class-wide representation in arbitration.[50] As Miryam Giles observed, "class actions brought by or on behalf of low-income consumers and employees are on the verge of disappearing."[51]

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 in state court to federal court, preventing state courts from applying law that may make class certification more likely.[52] In 2011, the Supreme Court decision in *Wal-Mart v. Dukes* adopted a narrow and highly restrictive interpretation of the commonality requirement for class certification.[53] Class action defense litigators argue the decision "[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."[54] And, many courts now follow an increasingly muscular jurisprudence of class ascertainability, prohibiting class certification in the absence of "reliable proof of purchase or a knowable list of injured plaintiffs," resulting in fewer class actions arising from small retail purchases.[55]

Collectively, these trends make private enforcement of market protection law 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.

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[49] CFPB Arbitration Fact Sheet, *supra* note 44, at 3. And, those arbitration agreements that did not prohibit class arbitrations were drafted by smaller companies that together represented 3 percent or less of their respective markets. *Id.* at 3.

[50] *See also* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Conception*, 79 U. CHI. L. REV. 623, 651 (2012).

[51] Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1535 (2016). One civil docket where low- and moderate-income Americans are still found in abundance are small claims courts where debt collection lawsuits often make up the 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 at 2-3 (February 2020) (study showing 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).

[52] 28 U.S.C. § 1453. 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).

[53] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (rejecting the use of statistical sampling to establish commonality under rule 23 as an impermissible "trial by formula").

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

[55] Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 310 (2010). *See, e.g.,* Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013).

II. THE LAW OF PUBLIC COMPENSATION

With limited exceptions, public compensation is rooted in statutory grants of authority to public enforcers.[56] This statutory authority, however, does little to clarify the requisites for, and limits on, obtaining public compensation. Rather, the statutes incorporate broad grants of authority that courts have shaped into particular rights to public compensation.

Subpart A looks at the confusion in nomenclature that envelopes this area of law. The two most common terms employed are disgorgement and restitution. Public enforcers and courts, however, mix and match these terms—and other labels, like unjust enrichment and consumer redress—which results in confusion about how public compensation should be determined, and confusion about how this determination relates to the statutory authority for public compensation. In Subpart B, we explain why the case law, muddled as it is, justifies the rationalization of public compensation into two distinct categories based on different measures and different types of statutory authority for the award, as follows:

(1) Statutory injunctive authority authorizes disgorgement, which is measured by the unjust gain of the law violator.

(2) Statutory express compensation authorizes public restitution, which is measured by the loss of the consumer resulting from the law violation.

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

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; and those terms have yet other meanings in the law governing private claims.

Nowhere is this confusion more pronounced than in use of "disgorgement" and "restitution."[57] Some courts maintain that these terms have distinct meanings.[58] Many courts use the terms interchangeably, or are explicitly disinterested in making a distinction.[59] Still other courts refer to

[56] 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. DEE PRIDGEN & RICHARD ALDERMAN, CONSUMER PROTECTION AND THE LAW app. 7A (2016-17) (showing 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. *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 386-388 (D.D.C. 2002) (determining that 30 of the 51 states sought public compensation based on statutory authority).

[57] 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, DOE 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.").

[58] *See, e.g.*, Texas 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).

[59] SEC v. First Pacific 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."). *See* Verity Winship,

"damages" when awarding restitution or disgorgement.[60] The Second Circuit has described the existing case law as plagued by "conceptual bleed" in the use of these terms.[61] 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."[62]. In the above-described 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.[63]

Even more confusing, some enforcers have multiple sources of statutory authority for public compensation; the FTC being the most prominent.[64] 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.[65] Courts have allowed enforcers to choose among their various grants of authority, but recent decisions have taken a contrary position.[66]

The practice of the CFPB adds another dimension to the puzzle. It 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 reserves the term disgorgement to connote money returned to the government rather than consumers.[67]

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.[68] 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 as based on a disgorgement theory that the public compensation was "intended to force a wrongdoer to divest money improperly gained."[69] It cited variously to the following as support for its holding: (1) CFTC and FTC cases as authority for public compensation based on the illegal gain of the law violator, but also relied heavily on a

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Fair Funds and the SEC's Compensation of Injured Investors, 60 FLA. L. REV. 1103, 1112 (2008) (courts sometimes use the terms "disgorgement" and "restitution" interchangeably in SEC cases). *See, e.g.*, F.T.C. v. Febre, 128 F.3d 530, 536 (7th Cir. 1997) (using disgorgement, restitution and damages interchangeably).

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

[61] F.T.C. v. Bronson Partners, LLC, 654 F.3d 359 (2d Cir. 2011).

[62] Commodity Futures Trading Comm'n v. JBW Capital, 812 F.3d 98, 111 n.21 (1st Cir. 2016)

[63] Universal Management Services, Inc., 191 F.3d at internal.

[64] *See* Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, U. PENN. L. REV. at 14, (*forthcoming* 2021), *available* at SSRN: https://ssrn.com/abstract=3721256 (providing an overview of Federal Trade Commission Act provisions allowing monetary relief).

[65] *See, e.g.*, Roach, *supra* note 57 at 14-15 (discussing cases in which an FTC case decided under its authority to obtain public compensation based on consumer law is cited in FTC cases based on its authority to obtain disgorgement).

[66] *See infra* Part V.A.

[67] *See infra* Part II.D.1.

[68] *See, e.g.*, State ex rel. Kidwell v. Master Distributors, Inc., 101 Idaho 447, 455, 615 P.2d 116, 124 (1980) (interpreting state statute based on FTC express statutory authority but citing to SEC disgorgement authority based solely in equity).

[69] State v. Minnesota Sch. of Bus., Inc., 935 N.W.2d 124, 138–39 (Minn. 2019).

case about the FTC's statutory authority to order redress measured by consumer loss;[70] (2) that the AG 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;"[71] and (3) 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."[72] None of this is to suggest that the reasoning of the court was incorrect—quite the contrary, as it is more thoroughly reasoned than almost any comparable state court decision—but rather that the doctrine underlying public compensation uses a confusing mix of terminology and concepts.

Finally, the term restitution has meaning in other areas of law, which adds to the difficulty in making sense of this law. It is a claim in the law of unjust enrichment.[73] It is a form of remedy in contract law.[74] Many states have statutory schemes allowing criminal prosecutors to seek civil restitution for crime victims following criminal convictions.[75] Although this law is of doubtful relevance to public compensation, it is occasionally applied in public compensation, further complicating the meaning of the law.[76]

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 linked (mostly) to distinct forms of statutory authority.

B. Disgorgement and Restitution Defined

The predominant and best use of the term "disgorgement" is to mean public compensation measured solely by the gains of the law violator and authorized by statutory injunctive authority. In *Liu*, discussed below, the Supreme Court observed that SEC public compensation was initially labelled "restitution," but that "[o]ver the years, the SEC has continued to request this remedy, later referred to as "disgorgement, and courts have continued to award it."[77] The SEC has

[70] *Id*. at 133.
[71] *Id*. at 136. (citing *FTC v. Figgie Int'l, Inc)*.
[72] *Id*. at 139.
[73] *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (2011); Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001).
[74] *See* RESTATEMENT (SECOND) OF CONTRACTS § 371 (1981); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT App. A No. 7 (2010).
[75] *See, e.g.*, OR. REV. STAT. ANN. § 137.106 (West); ARIZ. REV. STAT. ANN. § 13-603; LA. CODE CRIM. PROC. ANN. Art. 895.1.
[76] *Infra* Part IV.B.1.
[77] Liu v. SEC, 140 S. Ct. 1936, 1940–41, 207 L. Ed. 2d 401 (2020).

developed policies that expressly distinguish disgorgement and restitution in this way.[78] Courts cite to disgorgement cases across types of enforcers in awarding and defining disgorgement.[79] 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. The best use of the term "public restitution" is for public compensation so measured and authorized by express statutory authority. We use the term "restitution" because the overwhelmingly weight of judicial decisions use this term when referring to public compensation based on consumer loss.[80] 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."[81] In determining remedies in CFTC cases, courts have emphasized that disgorgement is to be measured by ill-gotten gain of the violator and restitution by investor loss.[82]

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. Subpart 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. Subpart D describes the more diverse

[78] U.S. SEC, REPORT PURSUANT TO SECTION 308(C) OF THE SARBANES-OXLEY ACT OF 2002, at 1 n. 2, available at https://www.sec.gov/news/studies/sox308creport.pdf ("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.")

[79] *See, e.g.*, F.T.C. v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996) (FTC action citing SEC and CFTC case law); Consumer Fin. Prot. Bureau v. Gordon, 819 F.3d 1179, 1195 (9th Cir. 2016) (CFPB case citing SEC and FTC cases); Fed. Trade Comm'n v. Zurixx, LLC, 441 F. Supp. 3d 1216, 1223 (D. Utah 2020) (FTC action citing FDA case); SEC v. Durante, 2013 WL 6800226, at *12 (S.D.N.Y. Dec. 19, 2013) (SEC case citing FTC cases).

[80] 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.

[81] 7 U.S.C. § 13a-1(d)(3). The CFPB authority for public compensation also created in the Dodd Frank Act generally comports with this distinction, also the CFPB has construed disgorgement and restitution to have different meanings. *See infra* Part II.C.1.

[82] Commodity Futures Trading Comm'n v. JBW Capital, 812 F.3d 98, 111 (1st Cir. 2016). *See also* U.S. Commodity Futures Trading Comm'n v. S. Tr. Metals, Inc., 894 F.3d 1313, 1331–32 (11th Cir. 2018) (denying restitution to the CFTC under this authority for lack of the requisite "proximate cause" for investor loss, but encouraging the district court to "consider on remand whether disgorgement is appropriate.").

and less-defined public restitution authority expressly granted in statutes empowering public enforcers.

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 prerequisites of traditional equitable relief, or otherwise loosens standards for issuing an injunction.[83] Beginning with the seminal United States Supreme Court 1946 decision in *Porter v. Warner Holding Co.*,[84] courts have recognized that statutory injunctions also authorize disgorgement of money by law violators.

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). 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. The Court held 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 OPA.[85] The Court based its holding on the broad equity powers of the courts invoked by section 205 of the EPCA, to grant "a permanent or temporary injunction, restraining order, or other order."[86]

Central to the Court's holding was 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."[87] 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: "[i]n framing such remedies under s 205(a), courts must act primarily to effectuate the policy of the Emergency Price Control Act and to protect the public interest while giving necessary respect to the private interests involved."[88]

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. In *Mitchell v. Robert DeMario Jewelry, Inc.*, the Court

[83] Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 488 (2010) (arguing that "equitable balancing in statutory cases should be abandoned because it conflicts with separation of powers principles"); Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513 (1984); Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524 (1982).
[84] 328 U.S. 395 (1946).
[85] *Id*. at 397.
[86] *Id*. at 399.
[87] *Id*. at 398.
[88] *Id*. at 400.

held that DOL had authority under the Fair Labor Standards Act to order "reimbursement," consistent with *Porter*, to employees subject to retaliation for reporting violations.[89]

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.[90] The Second Circuit cited to *Porter*, *Moore* and *Mitchell* as authority: "the 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."[91] The SEC has multiple sources of statutory equitable authority permitting the Commission to apply to federal courts to obtain an injunction.[92]

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 CFTC disgorgement authority, citing *Porter* and *Texas Gulf Sulphur*.[93] The FTC disgorgement authority exists in section 13 of the FTC Act, which provides the court authority to issue a permanent injunction "in proper cases."[94] Federal courts have for decades awarded the FTC disgorgement based on this statute and the Court's reasoning in *Porter*, repeatedly rejecting challenges to the contrary, until recent successful challenges.[95] The FDA relies on statutory authority to "restrain violations" and obtain injunctive relief as authority for disgorgement.[96] 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.[97] Federal courts also have invoked *Porter* in awarding disgorgement to the Department of Housing and Urban Development (HUD)[98] and the Federal Energy Regulatory Commission (FERC)[99] 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

[89] Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960).
[90] Barbara Black, *Should the SEC Be A Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317, 320 (2008).
[91] SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971).
[92] *See* Gabaldon, *supra* note 6 at 1616-1619 (describing the development of SEC statutory injunctive authority used to obtain disgorgement).
[93] Commodity Futures Trading Comm'n v. Hunt, 591 F.2d 1211, 1221-1223 (7th Cir. 1979)
[94] 15 U.S.C.§ 53(b).
[95] David C. Vladeck, *Time to Stop Digging: Failed Attacks on FTC Authority to Obtain Consumer Redress*, 31 ANTITRUST 89 (Fall 2016); J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 24 (2013). In 2020, two circuits overturned precedent allowing FTC disgorgement, and the question is now before the Supreme Court. *See infra* Part IV.A.
[96] 21 U.S.C. § 332.
[97] United States v. Universal Mgmt. Servs., Corp., 191 F.3d 750, 763 (6th Cir. 1999). *See also* U.S. v. Lane Labs-USA Inc., 427 F.3d 219, 223 (3d. Cir. 2005); U.S. v. Rx Depot, Inc., 438 F.3d 1052, 1061 (10th Cir. 2006) ("disgorgement is authorized by the FDCA.").
[98] *See* Pierce v. Amaral, 938 F.2d 94, 95-96 (8th Cir. 1991).
[99] Fed. Energy Regulatory Comm'n v. Powhatan Energy Fund, LLC, 345 F. Supp. 3d 682, 688 (E.D. Va. 2018), *aff'd and remanded*, 949 F.3d 891 (4th Cir. 2020).

statutory injunction provision authorizes public compensation for attorneys general and other state enforcers.[100]

Courts rarely reject, and only occasionally trim, federal enforcer requests for disgorgement.[101] Although courts have rejected the full amount of enforcer requests for public compensation, that is the exception rather than the rule.[102]

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

Despite *Porter* and decades of favorable judicial decisions thereafter across multiple market protection enforcement schemes, scholars and other commentators have repeatedly challenged whether a statutory grant of authority to an enforcer to a seek an injunction can empower courts to award disgorgement.[103] The Supreme Court's 2020 decision in *Liu v. SEC* should end that debate in favor of allowing disgorgement as public compensation, yet this decision also establishes limits on obtaining this relief.[104]

In 2013 and 2107, 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 by commission of the violation, not discovery by the SEC.[105] The second case, *Kokesh v. SEC*, extended this holding to disgorgement awards. The Court held that disgorgement

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[100] CAROLYN CARTER & JONATHON SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES §13.5.4.1 (8th ed. 2012). ("[O]verwhelming 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.*, State By & Through McGraw v. Imperial Mktg., 506 S.E.2d 799, 811-12 (W. Va. 1998); Commonwealth ex rel. Terry v. Virginia Telemarketing, Inc., 15 Va. Cir. 489 (1989) (disgorgement proper in charities fraud); State v. Bob Chambers Ford, Inc., 522 A.2d 362, 366–67 (Me. 1987) ("[t]he 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. Mineral Energy, Inc., 617 P.2d 1334, 1338 (1980) ("the 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., 81 Wash. 2d 740, 744, 504 P.2d 1139, 1142 (1973). *But see* State v. Jonathan Logan, Inc., 301 Md. 63, 72, 482 A.2d 1, 6 (1984) (refusing to apply *Porter* absent state statute expressly authorizing public compensation).

[101] Only the CFPB has been denied any requested public compensation in a substantial number of its public enforcement cases. Consumer Fin. Prot. Bureau v. Nationwide Biweekly Administration, Inc., No. 15-CV-02106-RS, 2017 WL 3948396, at *11 (N.D. Cal. Sept. 8, 2017); Consumer Fin. Prot. Bureau v. CashCall, Inc., No. CV1507522JFWRAOX, 2018 WL 485963, at *14 (C.D. Cal. Jan. 19, 2018). *See also* F.T.C. 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).

[102] Among the few courts accepting an enforcer right to disgorgement, but rejecting the full request for disgorgement are the following: F.T.C. 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, 268 (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).

[103] *See infra* Part IV.C.

[104] Liu v. SEC, 140 S. Ct. 1936 (2020).

[105] Gabelli v. SEC, 568 U.S. 442 (2013).

operated as a penalty as employed in that case, and thus was subject to the same five-year limitations period.[106] Importantly for our purposes, 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."[107]

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."[108] The Court firmly grounded disgorgement in the equity powers of courts. In doing so, it waived away an analysis of the 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."[109] *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.[110]

The second principle enunciated in *Liu* is that "to avoid transforming an equitable remedy into a punitive sanction," and thus exceeding the proper bounds of equity, disgorgement is subject to three limits that the Court suggests some prior SEC disgorgement awards may have exceeded: (1) that disgorgement "be awarded for victims" and not "deposited in Treasury funds;" (2) that the amount is no more than an "individual wrongdoer's net profits," after deduction for "legitimate expenses from the receipts of fraud;" and (3) that disgorgement does not impose joint-and-several liability, but rather liability is based on individual wrong-doing.

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."[111] Accordingly, it is unclear that this restriction has meaning in actions by public enforcers other than SEC.

But the holding in *Liu* that disgorgement is based in traditional equity, and therefore is limited to net profits and individual wrong-doing as defined by common law, should reshape the law of disgorgement in public enforcement.[112] *Liu* suggests a closer alignment of disgorgement with the traditional doctrines of private equity than the remedy strongly rooted in public enforcement enunciated in *Porter* and broadened through decades of court decisions. As one commentator

[106] Kokesh v. SEC, 137 S. Ct. 1635 (2017). Scholars immediately began estimating the impact of *Kokesh* on SEC disgorgement recoveries. *See* Velikonja, *Public Enforcement After Kokesh: Evidence from SEC Actions*, *supra* note 78 (finding that *Kokesh* will impact about 34% of cases, including precluding a disgorgement award in about 3% of cases; and comparing this finding to other scholars who estimated "minimal" effect or a decrease of disgorgement of about 20% in insider trading cases).
[107] *Kokesh*, 137 S. Ct. 1635, 1642 n.3 (2017). *See* 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).
[108] *Liu*, at 1942
[109] *Id*.
[110] *Id*.
[111] 15 U.S.C. § 78u(d)(5).
[112] *See generally* Jennifer J. Schulp, Liu v. SEC*: Limiting Disgorgement, but by How Much?*, CATO SUP. CT. REV., 2019-2020.

concluded, Liu likely will make disgorgement "more difficult to obtain," and when it is awarded, it will be "for more limited sums."[113]

4. Express Disgorgement Authority and SEC Fair Funds

Congress swiftly responded to *Liu* with a change to SEC statutory authority in January 2021. "Tucked away in the 1,400-page…override (of) a presidential veto of the National Defense Authorization Act (NDAA)," was an amendment to the primary SEC remedial authority.[114] This amendment added the following two provisions aimed at clarifying and strengthening the SEC's disgorgement authority in light of *Liu*: (1) adding a new paragraph (7) to its remedial authority stating that "the Commission may seek, and any Federal court may order, disgorgement;" and (2) providing 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."[115] Given this vague incorporation of authority, and especially given 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*.[116] It also is unclear if courts will consider this Congressional action in applying *Liu* to the other federal enforcers relying on disgorgement. Perhaps the only certainty is that SEC enforcement actions face a future of litigation to resolve these questions.

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. The CFTC express disgorgement authority was placed in the DFA, which was enacted in 2010, even though the CFTC previously had 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."[117] A part of the DFA creation of the CFPB was a list of remedial authority that includes the right to obtain "disgorgement or compensation for unjust enrichment."[118] A few state statutes also expressly provide for the state attorney general to obtain disgorgement.[119]

These grants of express statutory authority to the CFTC and the CFPB for disgorgement have not led to changes in judicial approaches to disgorgement. Courts in CFTC cases have either ignored the express statute authority for disgorgement in favor of the well-used statutory injunctive

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[113] *Id*. at 203, 226
[114] Thomas Krysa & Peter Fetzer, *Congress Passes NDAA Legislation Extending SEC's Disgorgement Powers*, THE NATIONAL LAW REVIEW (Jan. 11, 2021), https://www.natlawreview.com/article/congress-passes-ndaa-legislation-extending-sec-s-disgorgement-powers?amp; *see also* H.R. 6395, 116th Cong., 166 CONG. REC. § 6501 (2020).
[115] *Id*.
[116] The amendment expressly overturned the limitations period on SEC disgorgement in Kokesh. *Id*. at §6501.
[117] 7 U.S.C. § 13(1)-1(d)(3)(B).
[118] 12 U.S.C. § 5565(a)(2)(D). 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.*, In re Taylor, CFPB No. 2013-CFPB-0001 at ¶ 29 (May 17, 2013), http://files.consumerfinance.gov/f/291305_cfpb_consent-order-0001.pdf. But the plain language of the DFA includes no explicit requirement that the Bureau direct disgorged funds to the federal treasury instead of consumers. 12 U.S.C. § 5565. Presumably the Bureau would be within its discretion to award disgorged funds to consumers affected by the defendant's illegal act.
[119] *See, e.g.*, Ariz. Rev. Stat. Ann. § 44-1528.

authority,[120] or have cited the express statute as a recognition but treated it as simply a Congressional recognition of the statutory injunctive authority and use case law from prior to the enactment of the DFA to shape the terms of the award.[121] The CFPB has not explicitly relied on this express disgorgement authority for public compensation.[122] Whether the restrictions imposed on disgorgement in *Liu* drive the CFTC or CFPB to seek an interpretation of their express disgorgement authority as broader than the limits of traditional equity is an open question.

The SEC has since 2002 had parallel express 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, to use civil penalty money for public compensation.[123] The SEC obtained over $8.28 billion in Fair Funds disgorgement in the first eleven years of using this authority, which is more than the $6.19 billion it was awarded in direct disgorgement based on its statutory injunctive authority.[124] The unique feature of Fair Funds—allowing the SEC to use civil penalty recoveries as disgorgement in a given case—could provide the SEC an incentive to respond to limits imposed by *Liu* by shifting the recovery to a penalty amount in appropriate cases; again, subject to the recent amendment of the SEC's remedial statute. 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, and cited the impact of *Liu* in its request to make this change in preferred remedy.[125]

D. Statutory Express Compensation Authority and Public Restitution

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

1. Federal Enforcers with Restitution Authority

Section 19 of the FTC Act authorizes courts in FTC cases to issue an order "necessary to redress injury to consumers," and "[s]uch relief may include… rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification

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[120] *See, e.g.*, Commodity Futures Trading Comm'n v. Arrington, 998 F. Supp. 2d 847, 874 (D. Neb. 2014), aff'd sub nom. U.S. Commodity Futures Trading Comm'n v. Kratville, 796 F.3d 873 (8th Cir. 2015); U.S. Commodity Futures Trading Comm'n v. 4X Sols., Inc., No. 13CV2287-RMB-FM, 2015 WL 9943241, at *3 (S.D.N.Y. Dec. 28, 2015), report and recommendation adopted, No. 13CIV2287RMBFM, 2016 WL 397672 (S.D.N.Y. Jan. 29, 2016).
[121] *See, e.g.*, Commodity Futures Trading Comm'n v. Amerman, 645 F. App'x 938, 943-944 (11th Cir. 2016); Commodity Futures Trading Comm'n v. Dupont, No. 8:16-CV-03258-TMC, 2018 WL 3148532, at *12 (D.S.C. June 22, 2018).
[122] *See infra* Part II.D.1.
[123] 15 U.S.C.A. § 7246. Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 Bus. Law. 317, 320-22 (2008) (tracing history of Fair Funds). Fair Funds were initially limited to additional amounts added to disgorgement already ordered by the court, but in reacting to another financial scandal in the DFA, Congress extended the SEC's authority to use Fair Funds even when no direct disgorgement had been ordered.
[124] Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, *supra* note 8 at 351 (2015).
[125] SEC v. Govender, No. 1:18-CV-7685 (ALC), 2020 WL 5758997, at *2 (S.D.N.Y. Sept. 28, 2020).

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 obtain this relief only in limited circumstances. Restitution is available only 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] The FTC rarely employs this authority, instead relying almost exclusively on its statutory injunctive authority to seek disgorgement.[128] It is unclear whether this disuse of section 19 by the FTC is the result of the restricted conditions on its application, or the relative ease of using its disgorgement authority.

The CFTC's express authority in the DFA authorizes it to obtain "equitable remedies including-(A) restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses)."[129] Unlike the FTC, the CFTC regularly employs this authority.[130] 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.[131]

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 statutes and law in providing the CFPB with comprehensive express authority for relief. The CFPB authorizing statute allows courts to "grant any appropriate legal or equitable relief," including five specific items that could be categorized as public restitution.[132] The specific list repeats almost verbatim the four items noted above from section 19 of the FTC Act, plus adds the naked word "restitution."[133] Courts have employed the statute in a way that mixes the boundaries between disgorgement and restitution, predominantly referring to the award as "restitution," but interchangeably citing to FTC and SEC disgorgement case law, and FTC public restitution cases.[134] Thus, while the CFPB obtains public compensation

[126] 15 U.S.C. § 57b(b).
[127] 15 U.S.C. § 57b(a) (parenthetical in statute).
[128] *See* Maureen K. Ohlhausen, Commissioner of the Fed. Trade Comm'n, *Dollars, Doctrines, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission*, UNITED STATES OF AMERICA FED. TRADE COMM'N at 4 (Apr. 20, 2016).
[129] 7 U.S.C. § 13a-1(d)(3)(A).
[130] United States Commodity Futures Trading Comm'n v. Brown, No. 3:15-CV-354-J-39MCR, 2018 WL 6920384, at *3 (M.D. Fla. Mar. 12, 2018) (listing cases in which CFTC uses restitution authority)
[131] Commodity Futures Trading Comm'n v. JBW Capital, 812 F.3d 98, 111 (1st Cir. 2016); U.S. Commodity Futures Trading Comm'n v. Reisinger, No. 11-CV-08567, 2017 WL 4164197, at *6 (N.D. Ill. Sept. 19, 2017), on reconsideration in part, No. 11 CV 08567, 2019 WL 4464387 (N.D. Ill. Sept. 18, 2019); U.S. Commodity Futures Trading Comm'n v. U.S. Bank, N.A., No. 13-CV-2041-LRR, 2014 WL 6474183, at *36 (N.D. Iowa Nov. 19, 2014). See also Commodity Futures Trading Comm'n v. Miklovich, 687 F. App'x 449, 453 (6th Cir. 2017) (concurring that consumer loss is the measure of restitution, but holding that defendant waived argument).
[132] 12 U.S.C. § 5565(a)(1).
[133] 12 U.S.C. § 5565. 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"). Id. at (G) and (H).
[134] *See, e.g.*, Consumer Fin. Prot. Bureau v. Gordon, 819 F.3d 1179, 1195 (9th Cir. 2016) (restitution, citing primarily SEC and FTC disgorgement cases); Consumer Fin. Prot. Bureau v. Mortg. Law Grp., LLP, 420 F. Supp. 3d 848, 853 (W.D. Wis. 2019) (restitution, citing SEC and FTC disgorgement cases, and other CFPB cases). *See also* Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc., No. 15-CV-02106-RS, 2017 WL 3948396, at *12 (N.D. Cal. Sept. 8, 2017) (restitution denied; primarily citing FTC public restitution case); Consumer Fin.

based on express statutory authority, in practice it seeks relief that is not clearly governed by either a theory of disgorgement or public restitution.

2. State Enforcers

Most state attorneys general have express statutory authority for public compensation.[135] Unlike federal public compensation law, state law is dominated by measuring relief in terms of consumer loss.[136] Although state public enforcement cases occasionally refer to disgorgement or cite to *Porter*, some state courts have rejected the use of disgorgement when not expressly authorized by statute or when state law provides for restitution or another express remedy.[137]

A common form of state statute providing for public restitution awards to the state attorney general is for a court order 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.[138] Other state statutes refer specifically to an award of restitution.[139] Some states include a requirement that the consumer loss be "ascertainable."[140] Colorado allows for public restitution orders "to completely compensate or restore to the original position of any person injured" by a violation.[141] 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 drives state court interpretations of the requisites for this relief. 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 statutory authority.

State enforcers also can rely on federal law to obtain public compensation. Twenty-four federal statutes authorize state attorneys general, and sometimes state financial regulators, to enforce federal consumer protection laws.[142] Many of these statutes provide express authority for public compensation for violations.[143]

Prot. Bureau v. CashCall, Inc., No. CV1507522JFWRAOX, 2018 WL 485963, at *14 (C.D. Cal. Jan. 19, 2018) (same).

[135] NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 13.5.4.1, Appx A.

[136] *Id.* at § 13.5.4.1 (concluding that "[t]he purpose of restitution is to restore the victim, not the offender, to the status quo" in state attorneys general enforcement of UDAP laws). People v. Sarpas, 172 Cal. Rptr. 3d 25, 44 (App. Ct. 2014).

[137] *See* State ex rel. Horne v. Autozone, Inc., 275 P.3d 1278 (Ariz. 2012); State ex rel. Miller v. Santa Rosa Sales & Mktg., Inc., 475 N.W.2d 210 (Iowa 1991). Even when authorizing public compensation under general equitable authority, states typically refer to it as restitution. NCLC UDAP 13.5.4.1 n360 (collecting cases).

[138] N.J. Stat. § 56:8-8. *See, e.g.*, Ariz. Rev. Stat. § 44-1528; Iowa Code § 714.16; Wash. Rev. Code § 19.86.080.

[139] *See, e.g.*, CT AG General Statutes § 42–110m(a); 815 Ill. Comp. Stat. Ann. 505/7; Md. Code Ann., Com. Law § 13-403.

[140] *See, e.g.*, Tenn. Code § 47-18-108; Me. Rev. Stat. tit. 5, § 209.

[141] COLO. REV. STAT. § 6-1-110.

[142] 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).

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

III. PUBLIC COMPENSATION DOCTRINE

Public compensation effectively has its own unrecognized legal doctrine rooted in the rationales of public enforcement. We have seen that courts and Congress (or state legislatures) have sketched the outlines of such a 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.

Subpart A states the scope of our proposed doctrine and notes public enforcement remedies outside of our concern here. Subpart B 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. Subparts C and D elaborate the parts of the doctrine specific to disgorgement and restitution, respectively. In subpart E, we provide examples of how the doctrine would be applied. This subpart 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 a civil market protection law, and (3) involving a substantial number of people awarded compensation. We describe each of these criteria below.[144]

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.[145] We focus our discussion here on the award of money to people because the overwhelming majority of public compensation is 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

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

[145] Seema Kakade, *Remedial Payments in Agency Enforcement*, 44 HARV. ENVTL. L. REV. 117 (2020); *see also* State ex rel. Guste v. Orkin Exterminating Co., Inc., 528 So. 2d 198 (La. Ct. App. 4th Cir. 1988) (ordering seller to honor long-term contracts).

brought by state attorneys general in the 1990s alleging UDAP and antitrust violations that resulted in payments to the states.[146]

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.[147] Criminal prosecutions can result in restitution awards that are not within the scope of our article.[148]

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 results in return of money to individual complainants.[149] State attorneys general bring enforcement actions that obtain compensation for a single individual or a small group of people with identifiable dollar amounts of loss, as does the EEOC.[150] State governments also operate professional malpractice compensation funds, or issue awards in such cases, to specific individuals harmed by such misconduct.[151] Return of money to specific individuals or small groups in these circumstances do 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 exist 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—they present common problems of the proof required for causation and determining the proper amount of public compensation. Courts have developed a consensus position to address these problems. 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 meets this requisite, the burden shifts to the law violator to prove the amount was not a reasonable approximation.

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[146] 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); PRIDGEN & ALDERMAN, *supra* note 56 at § 7:13 (describing public enforcement actions against pharmaceutical companies and nursing home alleging UDAP violations resulting in payments to government).

[147] Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 1996 (2012).

[148] CHARLES DOYLE, CONG. RESEARCH SERV., RL34138, RESTITUTION IN FEDERAL CRIMINAL CASES (2019).

[149] Angela Littwin, *Why Process Complaints? Then and Now*, 87 TEMP. L. REV. 895 (2015)

[150] Cox, et al., *supra* note 5 at 39 (as to state attorneys general); Morrison, *supra* note 31 at 121.

[151] *See, e.g.*, *Wisconsin's Injured Patients and Families Compensation Fund*, Insurance J. (2017).

1. Disgorgement

This reasonable approximation framework was first articulated by the D.C. Circuit in *S.E.C. v. First City Fin. Corp.* in 1989.[152] The defendants in *First City* violated federal securities law by failing to timely disclose their purchase of more than 5% 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 after discovery of the takeover attempt.

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," but 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." 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. The D.C. Circuit saw the problem as one of decision-making in a context of "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." 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…

The court emphasized that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty."[153]

The reasonable approximation framework enunciated in *First City* has developed into a consensus position for establishing the amount of disgorgement in SEC cases.[154] It has been adopted for SEC enforcement by courts in nine circuits and has not been rejected by any

[152] 890 F.2d 1215 (D.C. Cir. 1989).
[153] *Id.* at 1232
[154] Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1, 11 (2013) ("the 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.").

circuit.[155] The Second Circuit has stated this framework relieves the SEC of the burden of establishing its approximation "with exactitude."[156] In adopting reasonable approximation, the Third Circuit also held that the burden-shifting element of this framework applied to a law violator's claim of intervening causes, holding 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," but rather is an issue that will normally be the defendant's burden."[157]

Circuit courts also have broadly adopted, and without split, the use of reasonable approximation with burden-shifting in FTC cases seeking disgorgement.[158] Reasonable approximation has been used by courts determining public compensation in enforcement actions brought by all of the other federal public enforcers regularly obtaining this relief, including the CFPB, HUD and CFTC.[159] Courts have cited across market protection schemes in using reasonable approximation to measure disgorgement.[160]

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 Int'l*, the defendant deceptively sold heat detectors.[161] The court rejected defendant's argument that restitution should be limited to consumers who proved that they relied on the deceptive statements. As did the D.C. Circuit in *First City*, the court began by distinguishing private fraud action based on their higher proof burdens and lack of public purpose that animated FTC public compensation, noting that requiring such proof would thwart effective civil law enforcement. It held that "[a] presumption of actual reliance arises once the Commission has proved that the

[155] Seven circuit court of appeals have adopted this framework. SEC v. Happ, 392 F.3d 12 (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, L.L.C. v. Heartbrand Beef, Inc., 885 F.3d 794, 805 (5th Cir. 2018); SEC v. Platforms Wireless Int'l Corp., 617 F.3d 1072 (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. United States SEC v. Kilpatrick, No. 12-12109, 2014 U.S. Dist. LEXIS 104307 (E.D. Mich. July 31, 2014); United States SEC v. Quan, No. 11-723 ADM/JSM, 2014 U.S. Dist. LEXIS 131618 (D. Minn. Sep. 19, 2014).

[156] SEC v. Razmilovic, 738 F.3d 14, 31 (2d Cir. 2013), as amended (Nov. 26, 2013).
[157] *Teo*, 746 F.3d at 105–06 (3d Cir. 2014).
[158] F.T.C. v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 15 (1st Cir. 2010); F.T.C. v. BlueHippo Funding, LLC, 762 F.3d 238 (2d Cir. 2014); F.T.C. v. Febre, 128 F.3d 530, 535 (7th Cir. 1997); F.T.C. v. Kuykendall, 371 F.3d 745 (10th Cir. 2004); *see also* F.T.C. 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.").
[159] Consumer Fin. Prot. Bureau v. Gordon, 819 F.3d 1179, 1195 (9th Cir. 2016); U.S. Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Virginia, 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."); U.S. Commodity Futures Trading Comm'n v. Am. Bullion Exch. Abex, Corp., No. SACV101876DOCRNBX, 2014 WL 12603558, at *9 (C.D. Cal. Sept. 16, 2014); *see also* Commodity Futures Trading Comm'n v. Am. Metals Exch. Corp., 991 F.2d 71, 78 (3d Cir. 1993) (permitting "reasonable approximation" of violator gain on remand).
[160] *See, e.g.*, F.T.C. v. Febre, 128 F.3d 530, 535 (7th Cir. 1997) (citing SEC, HUD and CFTC cases).
[161] F.T.C. v. Figgie Int'l, Inc., 994 F.2d 595, 605 (9th Cir. 1993).

defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product."[162] The Ninth Circuit then adopted the 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 Section 19," and holding that "[b]ecause Figgie has presented no evidence to rebut the presumption of reliance, injury to consumers has been established."[163]

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.[164] 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 "GE, whose deceptive practices caused damages to so many consumers, can now hardly complain that petitioner has not quantified actual damages with exactitude."[165] 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.[166] As with disgorgement, fundamental differences between public compensation and private relief underlie these relaxed proof standards.[167]

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, and courts routinely reject this argument.[168] To hold otherwise would make public compensation impossible to award in most cases.

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[162] *Id*. at 605 (quoting FTC v. Kitco of Nevada, Inc., 612 F.Supp. 1282 (D. Minn. 1985).
[163] *Id*. at 605-606.
[164] State v. Bob Chambers Ford, Inc., 522 A.2d 362, 366 (Me. 1987) ("fair 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. Centers, Inc., 603 S.W.3d 1, 30 (Tenn. Ct. App. 2019), appeal denied (Apr. 16, 2020) (rejecting that attorney general must show "mathematically precise computation of reasonably identifiable alleged direct losses incurred by consumers").
[165] People ex rel. Spitzer v. Gen. Elec. Co., 302 A.D.2d 314, 317, 756 N.Y.S.2d 520, 525 (20).
[166] *Infra* Part III.D.1.
[167] 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* State v. Bob Chambers Ford, Inc., 522 A.2d 362, 367 (Me. 1987) ("[t]he 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).
[168] Commodity Futures Trading Comm'n v. McDonnell, 332 F. Supp. 3d 641, 726 (E.D.N.Y. 2018); U.S. Commodity Futures Trading Comm'n v. Hunter Wise Commodities, LLC, 21 F. Supp. 3d 1317, 1352 (S.D. Fla. 2014); State v. Minnesota Sch. Of Bus., Inc., 935 N.W.2d 124, 135-138 (Minn. 2019); State ex rel. Kidwell v. Master Distributors, Inc., 101 Idaho 447, 456, 615 P.2d 116, 125 (1980); State v. Ralph Williams' N. W. Chrysler Plymouth, Inc., 87 Wash. 2d 298, 321, 553 P.2d 423, 439 (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, 520 (Colo. Ct. Appeals 2014) (rejecting public compensation to 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).

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 the deterrence of conduct of 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 the 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 was properly disclosed.

Subpart 1 details widely-held principles for measuring the amount of a disgorgement award that are consistent with the Court's holdings in *Liu*. Subpart 2 looks at areas of discord in the law, or where *Liu* shifts or clarifies the law.

1. Agreed Principles for Measuring the Amount of Disgorgement

Several principles for measuring violator gain are clear. Courts do not require tracing of the precise money improperly gained by the defendant.[169] Similarly, it is well-settled that the lack of clear records from a law violator are not needed to establish the amount of improper gain.[170] These results flow partly from the burden-shifting process in the reasonable approximation framework. Courts typically permit revenue to 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.[171] This is true whether or not revenue is used as a proxy for profit or the enforcer introduces direct evidence of the amount of profit. If the law violator returns money to the people subject to the violation it cannot have profited in that amount. If known to the enforcer, these amounts should be excluded at the initial stage of enforcer approximation of gain.[172]

Money paid by the consumer but not received by the law violator also can be excluded when determining disgorgement. In *F.T.C. v. Verity Int'l, Ltd*, the Second Circuit distinguished between two similar schemes for collecting money billed to phone carriers as international calls.[173] In one scheme, the phone service companies took a share of the revenue paid by the

[169] SEC v. Faulkner, No. 3:16-CV-1735-D, 2021 WL 75551, at *5 (N.D. Tex. Jan. 8, 2021) (citing FTC and SEC case law rejecting tracing requirement).
[170] F.T.C. v. Bronson Partners, LLC, 654 F.3d 359, 374 (2d Cir. 2011) ("it 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).
[171] *See, e.g.*, Fed. Trade Comm'n v. Primary Grp., Inc., 713 F. App'x 805 (11th Cir. 2017); SEC v. Tropikgadget FZE, 146 F. Supp. 3d 270 (D. Mass. 2015).
[172] Verity Winship, *Disgorgement in Insider Trading Cases: FY 2005- FY 2015*, 71 SMU L. REV. 999, 1004 (2018).
[173] F.T.C. v. Verity Int'l, Ltd., 443 F.3d 48, 67-68 (2d Cir. 2006).

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. 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. Reshaping and Unsettling of the Law by *Liu*

The Court's decision in *Liu* resolves at least one area of discord in the law, and unsettles the law 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 *F.T.C. 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 in disgorgement, based solely on consumer loss.[174] Defendants had argued that no disgorgement was proper because there was "conflicting testimony whether documents existed which would allow the calculation of profits." 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.[175] The consumer loss measure of disgorgement has been used in other FTC section 13 cases, but has been rejected by some courts.[176] Measuring disgorgement by loss also has occurred in securities public enforcement case law.[177]

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 in decades of the most carefully reasoned decisions. Accordingly, it is unlikely to be disturbed by the NDAA 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),

[174] F.T.C. v. Febre, 128 F.3d 530, 536 (7th Cir. 1997).
[175] *Id*. at 536. The court in *Febre* 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.
[176] F.T.C. 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.");
F.T.C. 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). *Compare* F.T.C. v. Verity Int'l, Ltd., 443 F.3d 48, 67 (2d Cir. 2006) (holding it was error to measure disgorgement by consumer loss); F.T.C. v. Washington Data Res., Inc., 704 F.3d 1323, 1326 (11th Cir. 2013) ("a damages award based on consumer losses would be improper" when FTC sought disgorgement.).
[177] *See, e.g.*, SEC: SEC v. Lorin, 76 F.3d 458 (2d Cir. 1996). CFTC: U.S. Commodity Futures Trading Comm'n 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); U.S. Commodity Futures Trading Comm'n v. Crombie, 914 F.3d 1208, 1216 (9th Cir. 2019) (proper to award disgorgement based on consumer loss).

rather than the amount of profit (net revenue minus expenses)."[178] *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 the court 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."[179] As with the deduction of expenses, the Court's opinion opens the opportunity for years of litigation to find the contours of this limit. For example, one of the questioned cases, *S.E.C. v. Whittemore*, was a D.C. Circuit opinion in a "pump and dump" stock price scheme.[180] One of the defendants, Cahill, held jointly and severally liable for the disgorgement award argued doing so was improper because the SEC failed to establish both his collaboration with the primary defendants and his 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 warranted...and Cahill failed to do so."[181] 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.[182]

3. To Whom a Disgorgement Award Should be Distributed.

Because it is a remedy based on depriving gain, not compensating loss, questions of distributing disgorged money should not demand precision. Distribution of the ill-acquired gain for any public benefit are in the broad discretion of the court, unless the statutory authority of the enforcer specifically restricts distribution in some way.[183] In disgorgement, courts care less 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 recovery in a private suit.

Consistent with this purpose, 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

[178] F.T.C. v. Washington Data Res., Inc., 704 F.3d 1323, 1327 (11th Cir. 2013) (citing FTC cases from the First, Second and Seventh Circuits holding the same).
[179] *Liu*, at 1936.
[180] SEC v. Whittemore, 659 F.3d 1, 10-13 (D.C. Cir. 2011).
[181] *Id*. at 11.
[182] *Compare* SEC v. Colello, 139 F.3d 674, 676 (9th Cir. 1998) (finding relief defendant liabile and holding that equity permits joint liability for "one who has received the proceeds after the wrong"), *with* Fed. Trade Comm'n v. LeadClick Media, LLC, 838 F.3d 158, 176-178 (2d Cir. 2016) (no liability where alleged relief defendant had legitimate claim to funds).
[183] 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.") (citations omitted).

consumers at the sole discretion of the agency.[184] Any distribution of the money that reasonably relates to the reason for disgorgement would be proper because this distribution is a method of ensuring the implementation of 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.

Placing the money in a public treasury also is reasonably related to a public purpose for disgorgement.[185] As previously noted, the holding in *Liu* prohibiting the SEC from disgorging funds to the U. S. Treasury was based on particular language in the SEC statutory injunction provision.[186] Even after *Liu*, it seems likely the long-approved SEC practice of disbursing to the Treasury money left-over in a disgorgement fund from inability to locate recipients would survive.[187]

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 with 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.[188]

Conversely, the shift in focus from ill-gotten gain to consumer loss complicates determining the amount and distribution of the award compared 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. Subparts 1 and 2 identify the issues in a public restitution theory of public compensation, with particular attention to its application in situations when the loss is less readily discerned because of partial benefit to consumers from the transaction, variation in conduct of the violator, variation in the experience of consumers. Subpart 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 attorney general cases did not ask much from a legal doctrine of public restitution. Uniformly selling goods and services of no value should result in an order to provide full restitution to all consumers under any reasonable legal standard. The work of the public compensation doctrine, by contrast, arises in situations that complicate this narrative.

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[184] Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, *supra* note 8 at 343 (2015) (except in "rare cases," the SEC "creates and oversees a distribution fund …(that) includes developing a plan to administer and distribute the funds and overseeing the distribution."); Cox, et al., *supra* note 5 at 73 (83% of FTC public compensation awards in 2014 distributed in the discretion of the agency).
[185] SEC v. Fischbach Corp., 133 F.3d 170 (2d Cir. 1997).
[186] *Supra* Part II.C.3.
[187] *See, e.g.*, SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985); F.T.C. v. Febre, 128 F.3d 530, 537 (7th Cir. 1997).
[188] *Infra* Part V.B.2.

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*, and the Seventh Circuit rejected the argument that a full refund is improper when a product has more than *de minimis* value to consumers.[189] 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.[190]

Other courts have held similarly.[191]

In *Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., 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. 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.[192] 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.[193]

A federal district court decision in a request by the FTC for public restitution under section 19 is 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 conduct. 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."[194] The consumer

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[189] F.T.C. v. Figgie Int'l, Inc., 994 F.2d 595, 606 (9th Cir. 1993).
[190] *Id*.
[191] F.T.C. v. IAB Mktg. Assocs., LP, 746 F.3d 1228, 1235 (11th Cir. 2014) (citing Figgie and holding that possible "residual value" not a defense to asset freeze because fraud tainted buying decision); People ex rel. Spitzer v. Applied Card Sys., Inc., 41 A.D.3d 4, 9, 834 N.Y.S.2d 558, 563 (2007), aff'd, 11 N.Y.3d 105, 894 N.E.2d 1 (2008) (citing *Figgie* and upholding restitution despite consumers receiving some value from credit card); State v. Cottman Transmissions Sys., Inc., 86 Md. App. 714, 736, 587 A.2d 1190, 1201 (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…. to hold otherwise would make the restitution procedure meaningless in every case where something is provided, through deceptive practices, to those being deceived.").
[192] Consumer Fin. Prot. Bureau v. Nationwide Biweekly Administration, Inc., No. 15-CV-02106-RS, 2017 WL 3948396, at *11 (N.D. Cal. Sept. 8, 2017).
[193] *See, e.g.*, Consumer Prot. Div. v. Morgan, 387 Md. 125, 874 A.2d 919 (2005); State of Colorado v. Center for Excellence in Higher Education, et. al., No. 14-CV-34530 (Denver Cty Dis. Ct. August 21, 2020) (denying award of public restitution because some students obtained value from the for-profit college degree).
[194] F.T.C. v. AMREP Corp., 705 F. Supp. 119, 128 (S.D.N.Y. 1988).

experience also 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."

State attorneys general are more likely to seek, and state courts are more likely to award, public restitution that includes a claim procedure, sometimes requiring consumers to state some form of reliance as a condition of receiving an award, or the appointment of a special master to adjudicate individual consumer disputes as part of the restitution process.[195] The public restitution in *Figgie* relied on a claim procedure that required consumers return the heat detectors to obtain a refund.[196]

Like disgorgement, determining the amount of public restitution is almost always held to be a discretionary determination of the trial court.[197] This provides the court with an opportunity to construct public restitution awards that fit the particular conditions of each case. In the following subparts, we discuss the need for a common set of principles to guide a pragmatic solution in difficult cases and 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 with 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 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 borrower is sold a loan that contains an illegal fee, it should be refunded 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 farther, 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

[195] *See, e.g.*, State v. Minnesota Sch. of Bus., Inc., 935 N.W.2d 124, 138–39 (Minn. 2019); State ex rel. Webster v. Areaco Inv. Co., 756 S.W.2d 633, 637 (Mo. Ct. App. 1988); Consumer Prot. Div. Office of Atty. Gen. v. Consumer Pub. Co., 501 A.2d 48, 74 (1985). *See* Cox, et al., *supra* note 5 at 76 (22% of state attorney general enforcement actions in 2014 involved a claims procedure)

[196] F.T.C. v. Figgie Int'l, Inc., 994 F.2d 595, 606 (9th Cir. 1993).

[197] *See, e.g.*, F.T.C. v. Commerce Planet, Inc., 815 F.3d 593 (9th Cir. 2016). Carter & Sheldon, *supra* note 100 NCLC UDAP (observing that state "[c]ourts have displayed significant flexibility in making restitution awards.")

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 restation 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. 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. 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.[198] 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.

(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 to determine 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.[199] 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." The Maine Supreme Court affirmed the $125 value as a reasonable approximation given the evidence presented as to cost of the service to customers.[200] 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.

[198] FED. R. CIV. P. 26(b) 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) (observing that Rule 26(b)(1) "anticipates a suitably pragmatic approach to resolving discovery disputes.").
[199] State v. Bob Chambers Ford, Inc., 522 A.2d 362 (Me. 1987).
[200] *Id.* at 366.

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." Relative loss amount matters in both terms of the overall and per capita award amount. A total consumer loss of $1 million argues in favor of a detailed examination of consumer loss when there are 30 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. They 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 the impact on their rights of claiming relief. Claims procedures also can complicate the long and consistently stated desire for a public restitution process not encumbered by the same concerns as apply in private actions and authorizing broad, but efficient, remedial relief. Nonetheless, courts should weigh the costs and benefits of such a mechanism 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. A claims process would less likely be proper in a case involving small dollar losses because the cost of the procedure would almost always exceed any value in 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.[201] Any recovery in a private action that has resolved obviously would be excluded in public restitution in the public enforcement case. When a parallel private action is pending, it may be appropriate to consider the possibility of relief in this action in 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.

[201] Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, *supra* note 8, at 368 (a parallel private class action existed in 65% of SEC cases with Fair Fund awards); CFPB Arbitration Fact Sheet, *supra* note 44 at 17.

(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.[202] 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 business operation due to lack of compliance resources and with no evident intent.

Using violation severity as a factor in shaping the amount or distribution of a public restitution award is not the same as suggesting the issuance of the award should depend on the egregiousness of the violator's conduct. In one of the few cases rejecting entirely a request for public compensation, a district court did so on the grounds that the CFPB had failed to establish "that Defendants acted in bad faith, resorted to trickery or deception."[203] 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.[204] But nothing prevents egregiousness of the violation from being considered as one factor in determining an appropriate amount of public restitution.

E. Examples

This subpart provides four examples of how courts could determine awards using the principles of public compensation identified in this part. For each example, we 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.*

It would make no difference in this simple case whether the enforcer used a disgorgement or public restitution theory in seeking public compensation. The difference between the amount

[202] *See* Steve Tripoli & Elizabeth Renuart, *Dreams Foreclosed: The Rampant Theft of Americans' Homes Through Equity-Stripping Foreclosure "Rescue" Scams*, NATIONAL CONSUMER LAW CENTER (2005), https://www.nclc.org/images/pdf/foreclosure_mortgage/scam/report-foreclosure-rescue-scams-2005.pdf.
[203] Consumer Fin. Prot. Bureau v. CashCall, Inc., No. CV1507522JFWRAOX, 2018 WL 485963, at *13 (C.D. Cal. Jan. 19, 2018).
[204] Scienter is not a consideration in liability for UDAP violations. People by Abrams v. Am. Motor Club, Inc., 179 A.D.2d 277 (N.Y. App. Div. 1992); *see also* Commodity Futures Trading Comm'n v. Amerman, 645 F. App'x 938, 944 (11th Cir. 2016) (rejecting argument that scienter is required for public compensation even though it is not required for liability, and stating that defendant "cites no legal authority, and we have found none.").

paid to the workers and the amount that should have been paid under the minimum wage law is ill-gotten gain to the sports team, and the same amount is the loss to the workers. The calculation is easy to make as a reasonable approximation under either form of relief. The proportionality test has no role because reasonable approximation is not rebuttable once the determination is made that the workers were employees under the state wage law and thus minimum wage requirements applied. This type of ready substitution between the two types of public compensation is common in easy cases, such as the sale of worthless stock or useless products.

Example #2. *A drug company makes misleading statements to physicians about possible negative side effects of a competing prescription pharmaceutical, and 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. And it would be difficult to identify specific drug users given that drug fulfillment would typically happen through yet another channel and because of the confidentiality concerns involved in prescription drugs.*

An enforcer would clearly want to use disgorgement 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 reduced to 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 a difficult lift 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 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 a factor. 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 use an estimate of the ill-gotten gain to increase the requested amount of civil penalties.

Example #3. *A seller of discount buying club memberships sold through telemarketers 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 and contact information for former guests. The seller agrees to pay the hotel 10% of all revenue it collects for telemarketing sales of these memberships. The seller pays a third-party telemarketing service to conduct the solicitations. The enforcer sues the hotel and the seller. It alleges that the telemarketing solicitations were deceptive about the membership benefits and deceptive about charging the full annual cost of $100 for the membership 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).[205] *The enforcer introduces evidence from a survey sample showing that at least 90% and up to 98% of the former hotel guests charged for the memberships had no awareness that their credit card had been charged $100/year for the membership. The seller and hotel do not present any evidence rebutting this fact. The court issues an injunction against both defendants.*

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. It is reasonable for the enforcer to estimate that if more than 90% of the customers were not aware they were paying for the product, that essentially all of this revenue is an ill-gotten gain. *Liu*, however, may change this outcome. The hotel received only 10% of the revenue, and thus as an initial matter is likely to be held liable only for the profits it received.[206] Joint and several liability 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.

Obtaining a disgorgement award of the full amount of the charge against the seller also would encounter some uncertainty under *Liu*, which allows for the deduction of "legitimate expenses," but excepts expenses "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 in this way.

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.[207]

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 and obtaining 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% of homeowners subject to only one order and 10% of homeowners paying for 5 or more orders; (2) corporate level employees testified that "about half" of the work change orders were based on legitimate problems with the house, and the other half were bogus, although "that percentage varied tremendously by which crew was working the*

[205] Telemarketing Sales Rule, 16 C.F.R. pt. 310.
[206] *Liu*, at 1945 (approvingly citing cases limiting recovery for ill-gotten gains to revenue actually received by the defendant).
[207] 16 C.F.R. pt. 310.3(b).

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.

Disgorgement would be a more efficient means of obtaining public compensation in this circumstance. Applying a public restitution measure also would work, and the proportionality test for public restitution would offer a more effective means of distributing public compensation in a manner that tracks consumer loss.

For disgorgement, an enforcer could make a reasonable approximation of the ill-gotten gain here by estimating the total homeowner payments for bogus work orders at $36 million (24,000 orders * 50% 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. *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 as the unnecessary payments made by homeowners. The need to more closely relate public restitution to consumer loss, however, complicates the situation. A substantial number of consumers, perhaps about 15,000 (30,000 homeowners with one work change order * 50% bogus), may have had no loss. Conversely, about 1,000 homeowners paid for 5 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 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 the information from the 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 properly 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.

IV. PUBLIC ENFORCEMENT DEFINES PUBLIC COMPENSATION

The law of public compensation had a consistent arc for decades. John Wade & Robert Kamenshine writing in 1969 recognized that public compensation in market protection civil law enforcement should rely upon relaxed standards of proof.[208] 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.[209] Even commentators opposing this consensus recognize the liberal framework courts have employed in deciding public compensation. In arguing for more 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," leading him to ask: "[w]hy do federal agencies win revenue disgorgement and other remedies based on uniquely favorable measures?"[210]

In Subpart 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 subpart describes how recent decisions of federal courts, mostly within the last year, have begun to undermine the consensus doctrine by more closely aligning pubic compensation with the law governing private claims. Then, in Subpart B, we set out the characteristics of public enforcement that underlie why courts have afforded "uniquely favorable" treatment in public compensation 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

[208] 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, 1057 (1969).
[209] Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, *supra* note 8 at 336; *see also* Winship, *supra* note 172 at 1011; Velikonja, *Public Enforcement After Kokesh: Evidence from SEC Actions*, *supra* note 78 at 402 (2019). Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1076 (2016); Cox, et al., *supra* note 5 at 55.
[210] Roach, *supra* note 57, at 4. 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.".

label" or "whatever the name."[211] 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.

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,[212] and a 19th century case regarding a partnership accounting.[213] Justice Thomas argued in dissent in *Liu*, although from an entirely different perspective than presented here, that equitable concepts like accounting have "a well-accepted definition," unlike the use of disgorgement as a term to describe public compensation.[214]

Recent decisions upending the law governing FTC rights to relief present differently than *Liu*. A 2019 decision of the Seventh Circuit, *FTC v. Credit Bureau Ctr., LLC*., overturned decades of precedent holding that section 13 of the FTC Act authorized the FTC to obtain disgorgement.[215] In *FTC v. AMG Capital Mgmt., LLC*, the Ninth Circuit rejected the reasoning of the Seventh Circuit based on prior Ninth Circuit precedent, although a special concurrence by the judge writing the opinion expressed sympathy with the Seventh Circuit's view on the matter.[216] The Supreme Court initially accepted certiorari of both cases, but later vacated its decision to review *Credit Bureau*, and now is deciding only *AMG*.[217] Recently, the Third Circuit joined this attack on FTC authority by holding in an antitrust case that section 13 did not authorize the FTC to obtain disgorgement.[218]

The Seventh Circuit decision in *Credit Bureau* is most instructive. The critical commonality between *Liu* and *Credit Bureau* is reliance on the law of equity in resolving private claims with no regard for constructing remedies consistent with the rationale of public enforcement. It frames the problem solely as a question of "modern implied-remedies jurisprudence."[219] It concludes that the FTC Act section 13 injunctive provision language, read together with the section 19 express authority for restitution, provide no implied authority for the FTC to obtain disgorgement. Except the court never uses the word disgorgement to describe this relief.[220] It describes the relief sought by the FTC as restitution and, more importantly, it treats decades of

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[211] *Id*.
[212] Mertens v. Hewitt Assocs., 508 U.S. 248, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993).
[213] Ambler v. Whipple, 87 U.S. 546, 547, 22 L. Ed. 403 (1874)
[214] *Liu*, at 1951 (Thomas, J, dissenting).
[215] Fed. Trade Comm'n v. Credit Bureau Ctr. LLC, 937 F.3d 764 (7th Cir. 2019).
[216] AMG Capital Mgmt. LLC v. Fed. Trad Comm'n, 141 S. Ct. 194 (2020).
[217] FTC v. Credit Bureau Center, LLC, 937 F.3d 764, 777 (7th Cir. 2019), cert. granted, 141 S. Ct. 194, 207 L. Ed. 2d 1118 (2020), vacated sub nom. FTC v. Credit Bureau Ctr., No. 19-825, 2020 WL 6551765 (U.S. Nov. 9, 2020).
[218] Fed. Trade Comm'n v. AbbVie Inc., 976 F.3d 327 (3d Cir. 2020). The FTC relies on the same statutes—sections 13 and 19 of the FTC Act—in UDAP and antitrust enforcement actions; *see also*
Stein, *supra* note 36 at (describing the development of FTC policy on disgorgement in antitrust cases and a 2019 Third Circuit case presaging *AbbieVie*).
[219] *Credit Bureau Center*, at 779.
[220] The opinion makes two references to "restitution and disgorgement" in parentheticals summarizing holdings in cases between private litigants. *Credit Bureau Center*, at 772, 782.

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 identifies the Supreme Court's decision in ***Meghrig v. KFC W., Inc.*** as the main pillar of its reasoning.[221] *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 under the Resource Conservation and Recovery Act (RCRA). In refusing to recognize such a private right to equitable relief, the Court distinguished between the remedial scheme for public enforcement by the EPA under RCRA and other statutes, and the private right to relief. It noted that under RCRA the private right of action was circumscribed by federal enforcement, and that "no citizen suit can proceed if either the EPA or the State has commenced, and is diligently prosecuting, a separate enforcement action."[222] 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 process, we agree with the Meghrigs that a private party cannot recover the cost of a *past* cleanup effort under RCRA.[223]

Indeed, the majority opinion in *Credit Bureau* approvingly quotes from a portion of *Meghrig* distinguishing *Porter* in which the Court twice observes it is adjudicating a case involving a private dispute.[224] The court in *Credit Bureau* refers to a "spectrum" a cases of which implied equitable remedies were denied or granted, but contrasts only two cases with private litigants denied equitable relief with two cases brought by the FDA allowing disgorgement as public compensation, and in both of the FDA cases the courts noted the importance of the public enforcement context in their decisions.[225] The court in *Credit Bureau* then cites the only federal case in which federal courts denied disgorgement as an equitable remedy to an enforcer—the

[221] Meghrig v. KFC W., Inc., 516 U.S. 479 (1996).
[222] *Id*. at 486.
[223] *Id*. at 488. Notably, the Third Circuit decision in *Price* 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." United States v. Price, 688 F.2d 204, 211-212 (3d Cir. 1982).
[224] *Price* 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" and that "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute.").
[225] *Id*. at 782-783. 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"); *Lane-Labs-USA Inc.* at 225 (citing to FTC, SEC, CFTC and ICC cases permitting public compensation); United States v. Rx Depot, Inc., 438 F.3d 1052, 1057 (10th Cir. 2006) ("*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," and citing *Porter* for support).

DOJ seeking disgorgement for RICO violations. Not mentioned in any of this discussion are the dozens of consistent decisions over decades allowing disgorgement under a broad range of public enforcement statutes based on the need to create deterrence from public enforcement.[226] After reaching its conclusion that the FTC lacks disgorgement authority, the court in *Credit Bureau* addresses and dismisses 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."[227]

Liu and the seventh Circuit's *Credit Bureau* decision are part of a very recent trend of courts using private law concepts to restrict the ability of enforcement agencies to obtain public compensation. 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.[228] 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. 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."[229] And, in a post-trial order, the 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."[230] 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 come after a decade of scholarship debating the statutory foundation of the public compensation authorities of the SEC, FTC, and the FDA.[231] In affirming the SEC's disgorgement power in *Liu*, the Supreme Court put to rest the notion that public compensation cannot be based on public enforcer statutory authority, while inviting years of litigation by enforcement defendants to narrow the reach of that authority. The Supreme Court's pending decision in *FTC v. AMG*, which focuses on construction of the FTC

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[226] *Price* at 783 (citing United States v. Philip Morris USA, Inc., 396 F.3d 1190 (D.C. Cir. 2005)).
[227] *Price* at 784.
[228] U.S. Commodity Futures Trading Comm'n v. S. Tr. Metals, Inc., 894 F.3d 1313, 1328-1333 (11th Cir. 2018).
[229] *Id.* at 1330
[230] Consumer Fin. Protec. Bureau v. CashCall, Inc., 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 the Trump Administration appointees, the Bureau voluntarily withdrew their appeal. Consumer Fin. Protec. Bureau v. CashCall, Inc., 18-55407, 2019 WL 5390028, at *1 (9th Cir. Oct. 21, 2019).
[231] The writing in this area reflects a mix of practitioners, heavily weighted toward the defense bar, and legal scholars. SEC: *Compare* Ryan, *supra* note 154, at 11; *with* Gabaldon, *supra* note 6, at 1612; Donna M. Nagy, *The Statutory Authority for Court-Ordered Disgorgement in Sec Enforcement Actions*, 71 SMU L. REV. 895, 901 (2018). 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 (1992); Beales & Muris, *supra* note 95, at 21 (questioning the legitimacy of. FTC disgorgement); *with* Vladeck, *supra* note 95. FDA: 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 n.4 (2004) (citing numerous articles in the same journal on the issue of FDA disgorgement authority).

Act remedy provisions, could strip the FTC of the public compensation authority on which it has primarily relied for almost forty years.[232] That would 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 separate judicial action seeking public restitution with an additional proof.[233] This result would widen an already noticeable gap in enforcement authority between the lesser remedies afforded the FTC, which has more limited civil penalty powers, and the authority of other enforcers.[234] And the Court's ruling could signal an ominous future for the public compensation authority of the FDA and other market protection civil enforcement agencies, which likely would 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 little purchase outside of public compensation.[235] 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," and other courts have held the same.[236] In this subpart, we examine 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.

1. Statutorily Authorized Position of Public Enforcers

The first sentence of Article II in the U.S. Constitution of the vests "executive power" in the President who in turn appoints the various minsters, officers, and heads of the departments of

[232] F.T.C. v. H. N. Singer, Inc., 668 F.2d 1107, 1112-1113 (9th Cir. 1982). Beales & Muris, *supra* note 95, at 23 (noting *Singer* was first case determining FTC disgorgement authority).
[233] *See supra* part x.
[234] Recognizing the potential disruption to their law enforcement program from the AMG appeal, the FTC has already testified before Congressional about the potential need to remedy this situation following the Seventh Circuit's decision in *Credit Bureau*. Press Release, Fed. Trade Comm'n, 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).
[235] *Cf* Melvin A Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 597-99 (2006) (arguing a disgorgement interest should be available in private breach of contract cases, but noting its conspicuous rarity in caselaw).
[236] F.T.C. v. Bronson Partners, LLC, 654 F.3d 359, 372 (2d Cir. 2011). *Accord* F.T.C. v. LoanPointe, LLC, 525 F. App'x 696, 698 (10th Cir. 2013) (citing *Bronson*); S.E.C. v. Cavanagh, 445 F.3d 105, 117 (2d Cir. 2006) ("'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."); State v. Macko, No. HHDCV126031858S, 2016 WL 4268383, at *11 (Conn. Super. Ct. Aug. 1, 2016) (citing *Bronson*).

government with the advice and consent of the Senate.[237] The Constitution does not expressly define executive power. But, the founders envisioned an energetic executive branch of government 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.[238]

Or, as James Madison wrote, "the natural province of the executive magistrate is to execute laws."[239]

While a full scholarly treatment of the limits of this executive power "might well take thirty years and 7,000 pages,"[240] the Constitution clearly tasks the executive branch to "take care that the laws be faithfully executed."[241] 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.[242] 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."[243] 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 public-private central bank in order to balance the competing interests of private banks and populist fear of their economic power.[244] In 1914 Congress adopted the Federal Trade Commission Act creating a five member commission charged with stopping "unfair" competition.[245] In the Great Depression, New Deal legislation strengthened the authorities of these agencies and forged the Securities and Exchange

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[237] U.S. CONST., Art II.
[238] THE FEDERALIST No. 70 (Alexander Hamilton).
[239] 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, 663 (1994).
[240] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).
[241] U.S. CONST., Art II.
[242] JEREMY D. BAILEY, THOMAS JEFFERSON AND EXECUTIVE POWER 10 (2007).
[243] LOUIS FISHER, THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER at 4 (2014).
[244] PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE at 6, 21-23 (2017).
[245] Federal Trade Commission Act, 38 Stat. 717 (1914) (codified at 15 U.S.C. §§ 41–58); PETER C. WARD, FEDERAL TRADE COMMISSION: LAW, PRACTICE AND PROCEDURE, § 1:2 (2020).

Commission and the Federal Deposit Insurance Corporation in their mold. Congress created the Food and Drug Administration, the Department of Housing and Urban Development, the National Credit Union Administration, and the Commodities Futures Trading Commission, 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 with these administrative agencies as integral structures of the law. For the enabling legislation creating each of these aspects of executive power, a public enforcer is a central feature of the legal regime. Administrative agencies recruit and train a professional civil service 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. 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.[246] 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 impunity would be repugnant to" that duty.[247] The "uniquely favorable" position of public enforcement agencies seeking public compensation is based on the constitutional duty of the executive branch to implement law.[248]

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. The pursuit of compensation for harm primarily drives private claims. Courts and scholars widely agree on these points.[249] Yet there is no shortage of judicial opinions and scholarly literature to muddy the picture; that point out the deterring effect of private actions

[246] U.S. S.E.C. v. Quan, 817 F.3d 583, 594 (8th Cir. 2016).
[247] *Letter to Alexander Hamilton* (Sept. 7, 1792), *in* 32 WRITINGS OF GEORGE WASHINGTON 144 (John C. Fitzpatrick ed., 1939). *Cf* Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POLICY 63, 69 (2015) (arguing selective non-enforcement violates the "take care" clause of Article II).
[248] *Cf* Roach, *supra* note 57, at 4.
[249] *See, e.g.*, Kokesh v. S.E.C. 137 S. Ct. 1635, 1643 (2017) ("the primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains."); Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, *supra* note 8, 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*, 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").

and the compensatory effect of public enforcement.[250] Public compensation combines violator deterrence and 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. As the Court held in *Porter:* "Future compliance may be more definitely assured if one is compelled to restore one's illegal gains."[251] The SEC has stated since the 1970s that its disgorgement remedy primarily is based on deterrence, and courts repeatedly affirm that deterrence justifies disgorgement in SEC cases.[252] Similarly, courts have held that deterrence is the purpose of disgorgement in FTC cases[253] and in state attorneys general cases.[254] Courts also have cited deterrence as the basis for restitution awards based on consumer loss.[255]

Deterrence as a rationale for public compensation 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: "because 'the primary purpose of disgorgement orders is to deter violations of the [ ] laws by depriving violators of

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[250] *See* Bradley J. Bondi, *Dangerous Liaisons: Collective Scienter in SEC Enforcement Actions*, 6 NYU J. OF L. & BUS. 2 (2009); Jared N. Jennings, Simi Kedia & Shivaram Rajgopal, *The Deterrent Effects of SEC Enforcement and Class Action Litigation*, HARV. L. SCHOOL FORUM ON CORPORATE GOV. (2011).

[251] Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946).

[252] U.S. SEC. & EXCH. COMM'N, REPORT PURSUANT TO SECTION 308(C) OF THE SARBANES-OXLEY ACT OF 2002, at 20, available at https://www.sec.gov/news/studies/sox308creport.pdf ("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 6 at 1637-1639 ("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, *Public Enforcement After Kokesh: Evidence from SEC Actions*, *supra* note 78 at 402 (observing that "the Court held [in *Kokesh*] disgorgement is imposed to deter violations"). *See, e.g.,* S.E.C. 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* Gabaldon, *supra* note 6 at 105 (collecting cases in which courts hold that SEC disgorgement is based on a deterrence rationale).

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

[254] State ex rel. Kidwell v. Master Distributors, Inc., 101 Idaho 447, 455–56, 615 P.2d 116, 124–25 (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 (Ct. App. 1983) ("the 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").

[255] State v. Masters Distributors, Inc., 615 P.2d 116, 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."); State ex rel. Kidwell v. Master Distributors, Inc., 615 P.2d 116, 124–25 (1980) ("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."). *See* PRIDGEN & ALDERMAN, *supra* note 56.

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.[256]

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."[257] Gabison concludes that "[s]ince private and public actors value deterrence differently, they approach enforcement different."[258]

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.[259] 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.[260] Yet these UDAP laws mostly require proof of injury or damage as an element of the claim.[261] 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.[262] 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 was 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% of cases.[263] 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.

3. Public Compensation as a Discretionary Money Remedy

[256] F.T.C. v. Bronson Partners, LLC, 654 F.3d 359, 373 (2d Cir. 2011) (citation omitted).
[257] Garry A. Gabison, *Public Enforcement of Private Rights*, 18 FLA. COASTAL L. REV. 207, 215–16 (2017).
[258] *Id*. at 217-218.
[259] Exceptions are mostly fedl csr credit laws that allow for statutory damages…even then, Spokeo Article III injury concerns
[260] NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (10th ed. 2020), § 12.2.1, updated at www.nclc.org/library.
[261] *Id*. at § 11.4.2.1.1.
[262] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY (2015)
[263] Cox, et al., *supra* note 5 at 90.

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. This substitution of one form of money relief for another again 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.[264] 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.[265] 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.[266]

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 obviously is paid to people affected by the violation.[267] With SEC Fair Funds, civil penalties can be converted into public compensation in the same enforcement action.[268] Congress authorized the CFPB to use civil penalties in a way that muddies even more 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 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.[269]

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[264] United States v. Reader's Digest Ass'n, 662 F.2d 955, 967 (3d Cir.1981), *cert denied*, 455 U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (1982); State v. Mandatory Poster Agency, Inc., 199 Wash. App. 506, 526, 398 P.3d 1271, 1281 (2017) (citing Reader's Digest); 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).

[265] Press Release, Statement of the Securities and Exchange Comm'n Concerning Financial Penalties (Apr. 2006)(https://www.sec.gov/news/press/2006-4.htm) ("corporate 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.").

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

[267] *Civil Penalty Fund*, CONSUMER PROT. FIN. BUREAU, https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/civil-penalty-fund/.

[268] *Supra* Part II.C.4.

[269] Craig Cowie, *Putting Money Back Into Consumers' Pockets: An Empirical Study of the CFPB's Civil Penalty Fund* (2020), __ U. ILL. L. REV. (forthcoming 2021), available at https://ssrn.com/abstract=3537984.

Substitution of money remedies again distinguishes public enforcement from private actions. In cases without some form of statutory penalty, 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, whereas 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 demonstrates is illustrative. In *CFPB v. Omni Military Loans* the Bureau sued the 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 dollars 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 Central District of California's *CashCall* post-trial order.[270] 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. But 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*.[271]

By imposing upon itself a higher burden for seeking public compensation, the CFBP 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 from awarding public compensation has caused an ironic glut in its CPF.[272] 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 provide an incentive to 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

[270] MAJORITY STAFF OF THE COMM. ON FIN. SERVS., 116TH CONG., SETTLING FOR NOTHING: HOW KRANINGER'S CFPB LEAVES CONSUMERS HIGH AND DRY (2019).
[271] 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/).
[272] *See* Kate Berry, *What Will Incoming CFPB Chief do with $570 Million Consumer Aid Fund?*, AM. BANKER (Jan. 25, 2021); 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).

enforcement actions to be used for public compensation in creating Fair Funds and the CPF.[273] The uniquely favorable posture of enforcement agencies in seeking public compensation is in part 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. Despite this, a body of relatively recent scholarship argues that public compensation essentially constitutes public enforcers acting as class action counsel.[274] Some 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 caselaw, the blurring between class actions and public compensation did leak into the Seventh Circuit's *Credit Bureau* decision. In particular, the Seventh Circuit cites the Supreme Court's decision *Wal-Mart Stores, Inc. v. Dukes* as support for its holding.[275]

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."[276] 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.[277] And in contrast to *Wal-Mart*, public compensation to the FTC or other enforcers does not "present the problem of internal conflict within a class."[278] As Chief Judge Woods recognized, disgorgement as a form of public compensation is supported by the unique position of public enforcers as civil law enforcement, and find supports in the fact that "this understanding of disgorgement permeates the case law of our sister circuits" in SEC enforcement actions.[279] The dissent repeatedly

[273] 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.

[274] Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500 (2011) (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) (state attorneys general suits seeking public compensation are "public aggregate litigation" that "bears 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, *Fair Funds and the SEC's Compensation of Injured Investors*, *supra* note 59, 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) (in state attorneys general multistate actions "the analogy to the class action compounds, and a second 'class action' of a sort emerges.").

[275] *Credit Bureau* at 772. See *infra* notes 50-51 and accompanying text for discussion of Walmart's restrictive views of Rule 23's commonality requirement in class certification.

[276] *Credit Bureau* at 791-792 (Wood, J, dissenting).

[277] *See, e.g.*, U.S. S.E.C. 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.").

[278] *Credit Bureau* at 791-792 (Wood, J, dissenting).

[279] *Id.* at 793 (Wood dissent).

criticizes the majority for relying on cases involving private litigants, observing that a line of cases concerns "implied private rights of action—a problem we surely do not have here."[280]

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.[281] 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. 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 owed" it is even less analogous to *a group* of private plaintiffs suing for money they are owed.[282] 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.[283] "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.[284]

Or, as Chief Judge Woods said specifically of the FTC, "[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."[285] 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."[286] 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 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. Subpart A makes the case for uniform authority. Subpart B examines the concepts underlying our proposed legislative reform.

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[280] *Id*. at 789 (Wood dissent).
[281] *See* Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1291 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.").
[282] U.S. S.E.C. v. Quan, 817 F.3d 583, 594 (8th Cir. 2016).
[283] *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.").
[284] *Quan*, 817 F.3d at 594.
[285] *Id*. at 793 (Wood dissent).
[286] *Id.*

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 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; available only in other cases and not the action for which the penalties were collected. The FTC's public compensation authority may be reshaped by the *AMG* decision, but regardless of that decision the FTC will retain public restitution authority and civil penalty authority hobbled by restrictions imposed on no other enforcer.[287] Agencies less frequently obtaining public compensation, such as the FDA or HUD, rely on implied statutory equitable that will no doubt be challenged in light of the recent judicial movement to restrict public enforcer use of this remedy.

Taking a step back to observe the broad sweep of public compensation across enforcers raises 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 a decision against the FTC in *AMG* would mean homeowners subject to a foreclosure scam likely would receive no public compensation. Why are investors treated differently, in fact better, than consumers in these situations? Why does an agency with UDAP authority over consumer finance violations have broader public compensation authority than agencies with UDAP authority over other types of market place protections? 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.[288] 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.

[287] *Cf* Chopra & Levine, *supra* note 64, 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)).

[288] *See* Beales & Muris, *supra* note 95, at 6 (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) (history of SEC remedial authority).

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 compensation as a common problem across market protection schemes. Given the broad similarities in purpose and function among market protection enforcers, the burden should be on those opposing authority for certain enforcers 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.[289] Congress created SEC Fair Funds authority in the Sarbanes-Oxley Act 2002 and expanded CFTC public compensation authority in the DFA in 2010.[290] 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.[291] Absent from this history of evolving public compensation statutory authority is any Congressional action to retrench public compensation powers previously granted. 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.[292]

The urgency of this model legislation project is heightened by the recent retreat from public enforcement rationales in cases determining public compensation. As we described earlier, federal courts have sharply restricted access to the courts for private claims. A constriction of public compensation brings us closer to a consequence-free violation of market protection laws, or at least a judicial system that has neutered its own authority to provide any recompense to people affected by those violations.

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 shaping the proposed legislation.

1. Clarify Alternative Availability of Both Forms of Public Compensation.

[289] *Id*.
[290] *See supra* Part II.C.4.
[291] *See supra* notes 267-269.
[292] State ex rel. Horne v. AutoZone, Inc., 275 P.3d 1278, 1283 (Ariz. 2012) (distinguishes the validity of disgorgement FTC authority because it is in a separate section of the statute); 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); 1992 Iowa Legis. Serv. 1062 (West) (S.F. 2276).

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 is 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 express the implied. 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 CFTC express authority contained in the DFA.[293] 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.[294] 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 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.

2. Preserve What Works

The proposed legislation replicates the judicial consensus embodied in the 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

[293] We omit the reference to "proximate cause" for public restitution, which led the Eleventh Circuit to impose common law tort proof standards. *Supra* note 82.
[294] FTC v. Figgie Intern, Inc., 994 F.2d 595, 605 (9th Cir. 1993).

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 they are unable to distribute into a fund that would operate as does the CFPB civil penalty fund, permitting fulfilment of public compensation awards in other cases involving insolvent defendants. The empirical scholarship validates the effectiveness of this type of funds.[295] 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*.[296]

Finally, the legislation makes explicit that public compensation is solely for public enforcement, which is consistent with the decades of case 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.

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." It expressly states that "public compensation is not subject to the traditional limits imposed on judicial authority in equity." 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

[295] Cowie, *supra* note 269. 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.

[296] The proposed legislation include a savings clause for existing public compensation authority to make clear that it is designed to provide supplemental statutory authority available to use in 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.

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? The alternative money remedy in public enforcement is for the enforcer to seek an actual civil penalty. And in the case of the SEC and CFPB, to then repurpose that money to public compensation, either in the same case (SEC Fair Funds) or in other cases (CFPB 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.

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. Constitutions 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 law would create uniform authority across public enforcers, and would 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.

Appendix: Model Federal Legislation

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

SECTION 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 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 facia 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 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 victims 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.