2016

Public Enforcement Compensation and Private Rights

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Article

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INTRODUCTION

On July 18, 2012, the newly created United States Consumer Financial Protection Bureau (CFPB) settled its first enforcement action.[1] The CFPB alleged that Capital One Bank targeted subprime credit card holders with solicitations for credit monitoring services, falsely stated these services were free, and misrepresented the benefits.[2] The settlement required the bank to provide account credits to card holders for the full cost of the services plus amounts incurred for interest and bank fees, resulting in estimated total consumer refunds of $140 million.[3] The settlement also required the bank to comply with a plan to reform its marketing practices and pay a $25 million penalty.[4] The agency followed its action against Capital One with a series of similar cases involving "add-on" charges by credit card issuers,[5] which are part of over $11.2 billion in re-

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1. Press Release, CFPB, CFPB Probe into Capital One Credit Card Marketing Results in $140 Million Consumer Refund (July 18, 2012), http://www.consumerfinance.gov/newsroom/cfpb-capital-one-probe.

2. Stipulation and Consent Order, *In re* Capital One Bank (USA) N.A., CFPB No. 2012-CFPB-0001, at 3–8 (July 18, 2012) [hereinafter Capital One Consent Order].

3. *Id.* at 13–20; Press Release, CFPB, s*upra* note 1.

4. Capital One Consent Order, *supra* note 2, at 8–13, 21–23 (discussing compliance requirements), 20–21 (discussing civil penalty).

5. Press Release, CFPB, Prepared Remarks of CFPB Director Richard Cordray on the Bank of America Enforcement Action Press Call (Apr. 9, 2014),

funds or other relief to 25.5 million consumers through CFPB enforcement actions during its first years of existence.[6]

A nascent scholarly view is emerging that recipients of public enforcement compensation should be given the procedural protections afforded to class members in class action cases.[7] For the CFPB action against Capital One, this would have meant submitting the settlement agreement to judicial review, sending notices to credit card holders whose accounts were charged by the bank, and providing these consumers with an opportunity to accept or opt out of the refund, rather than the CFPB simply arranging for automatic account credits. Over the last fifteen years, state attorneys general have brought several similar enforcement actions alleging deception in charges added to credit card or other consumer accounts.[8] As part of this new scholarship critiquing public compensation, a 2012 article in the *Harvard Law Review* by Margaret Lemos suggests that consumer payments like those that occurred in these state enforcement cases raise constitutional Due Process concerns.[9]

The new scholarship on public enforcement compensation is wrong in analysis and prescription. This Article presents an alternative framework for understanding the relationship between public compensation and the private rights of recipients

http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-on-the-bank-of-america-enforcement-action-press-call (announcing settlement with $727 million in consumer refunds and noting the case was CFPB's fifth enforcement action related to credit card add-on products).

6. CFPB, CONSUMER FINANCIAL PROTECTION BUREAU: BY THE NUMBERS (Oct. 2015), http://cdn.thinkprogress.org/wp-content/uploads/2015/11/10165106/2015-10-26-CFPB-By-the-Numbers.pdf.

7. *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 491–92 (2012); Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 1999–2002 (2012); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 504–07 (2011); *see also* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 45 (2014) (discussing "substitute suits" that provide monetary relief). This Article uses the term "public enforcement compensation," or "public compensation" for ease of reference, to mean an order or agreement resulting from a public civil enforcement action that creates an obligation by the defendant to compensate a numerous group of people.

8. *See* Prentiss Cox, *The Invisible Hand of Preacquired Account Marketing*, 47 HARV. J. ON LEGIS. 425, 439–40 (2010) (describing enforcement actions by state attorneys general); *see also* State *ex rel.* Miller v. Vertrue, Inc., 834 N.W.2d 12, 33 (Iowa 2013) (awarding approximately $36 million in restitution to Iowa consumers for charges to their credit cards and bank accounts).

9. Lemos, *supra* note 7, at 531–42.

of that compensation. Public compensation is defined by two realities: first, government enforcers obtain public compensation under different forms of statutory authority in various regulatory fields; second, it is a discretionary remedy in public civil law enforcement. Because public compensation occurs under various statutory authorities in a multitude of enforcement areas, the relationship between public compensation and private rights has to be understood contextually. Calls for sweeping procedural reforms make little sense without attention to these differing legal and enforcement environments. Because public compensation is a discretionary remedial option, it presents no substantially different issues regarding conflicts between public enforcement and private rights than the myriad other choices made by public officials in selecting and prosecuting targets within their authority.

The billions of dollars in public compensation already distributed to consumers in the short life of the CFPB parallels billions in public compensation obtained by the Federal Trade Commission (FTC), the Securities and Exchange Commission (SEC), state attorneys general, and other government entities active in civil law enforcement. Payment to consumers, investors, and employees has been part of government civil law enforcement for decades, but the frequency and dollar amounts of these cases have risen sharply.[10] As class actions recede under judicial and legislative pressure,[11] the burgeoning scholarship on public compensation lays the groundwork for limits on this remedy.

This Article offers four contributions to the emerging scholarship on public compensation. First, it maps the existing law and practice in public compensation cases, which has occurred only in bits and pieces in prior work. Knowledge of the legal authority granted by—and constraints imposed by—varying statutory schemes is a critical and usually overlooked starting point for understanding public compensation.

Second, the Article identifies an error in the prior scholarship on the central issue of the preclusive effect of public compensation on subsequent private claims for monetary relief. Lemos is wrong in asserting that the "prevailing view" of courts

10. *See infra* note 200.

11. *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 658–60 (2012) (concluding that "[c]lass actions are on the ropes," resulting in an "enforcement gap").

is that public compensation results in preclusion of later private claims for monetary relief.[12] Accordingly, concerns about constitutional deprivations arising from public compensation are misplaced. Her erroneous assertion about preclusion rests on a failure to differentiate the various statutory schemes under which government enforcers obtain public compensation. It also reflects a mistaken premise that public compensation is a government form of class action litigation.

The notion that public compensation and class actions are functional equivalents is employed in the new scholarship to argue that the imposition of class action procedures in public compensation would better protect the interests of the relief recipients. The third contribution of this Article is to explore and reject the usefulness of this analogy for understanding and structuring public compensation. This analogy has roots in largely unsuccessful arguments by enforcement defendants in a variety of contexts.[13] Indeed, corporate defendants have cited the new scholarship in recent challenges to government enforcement actions seeking public compensation.[14] The decision by a government enforcer to pursue public compensation does not diminish the public nature of the enforcement action and does not convert public officials into representatives of private interests. Public and private enforcement can overlap in purpose and consequence, but a focus on similarities distracts from the fundamentally distinct nature of public versus private enforcement.

Fourth, the Article identifies two categories of public compensation cases which can result in a practical, meaningful loss of private rights. The Article presents proposals for law reform to better align public purpose and private rights in these two types of cases.

The Article proceeds roughly in alignment with these four contributions. Part I is an overview of the government enforcement entities that obtain public compensation in four discrete areas of market regulation and the varying statutory schemes that provide authority for this remedy. Part II summarizes the scholarship arguing that public compensation should operate under stricter procedural constraints because it achieves the same result as a class action and purportedly raises similar problems of accountability and consent, yet lacks the rigorous

12. For Lemos's assertion, see Lemos, *supra* note 7, at 500.
13. *See infra* Part IV.B.3.
14. *See infra* note 225.

procedural protections governing class actions. Part III demonstrates that public compensation is not preclusive of later private claims and examines how the mistaken premises in the existing scholarship appear to have influenced the error in the Lemos article. Part IV broadens the discussion to look at the distortions in understanding public compensation caused by scholarly reliance on the analogy between public compensation and class action cases. Part V narrows the discussion to focus on practical conflicts that occur between public compensation and private rights, and means of avoiding these conflicts.[15]

I. THE LAW AND PRACTICE OF PUBLIC COMPENSATION

This Part explicates the types of government enforcement actions that result in public compensation and the legal authority for this remedy.

A. REGULATORY AREAS OF PUBLIC COMPENSATION

Government enforcers regularly obtaining public compensation can be categorized by the markets or conduct over which the entity has regulatory authority. Public compensation tends to follow distinct patterns in the following four areas: consumer protection, antitrust, securities, and employment.[16] A brief survey of each of these areas follows.

1. Consumer Protection

The longest-standing routine use of public compensation is found in consumer protection cases brought by the FTC and state attorneys general.[17] These entities bring actions in a

15. "Private rights" in this Article refers to the rights of recipients, including potential recipients, of public compensation, and not the rights of enforcement defendants, which would open an entirely different set of issues.

16. The United States Department of Justice (DOJ) has enforcement authority in each of the four regulatory areas. It has authority to pursue public compensation in civil law enforcement for employees under various employment discrimination laws, 42 U.S.C. § 2000e-5(f) (2012); Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 461–78 (2007), for tenants and homeowners subject to discrimination under the Fair Housing Act, 42 U.S.C. § 3614(d)(1)(B) (2012), and for consumer financial protection of active duty military members under the Servicemembers' Civil Relief Act, 50 U.S.C. app. § 597 (2012). The DOJ also plays a critical role in antitrust enforcement, although it lacks authority to pursue public compensation in such cases. Patricia A. Conners, *Current Trends and Issues in State Antitrust Enforcement*, 16 LOY. CONSUMER L. REV. 37, 55 (2003).

17. *See* Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 432 (1997) (noting that the FTC has

broad array of industries employing their authority to pursue violations of unfair and deceptive acts and practices (UDAP) laws.[18] In 2013, the FTC obtained $297 million in public compensation in its UDAP cases.[19] The FTC and state attorneys general have used their UDAP authority to challenge fraudulent practices in entire market segments, but they also bring a variety of modest-sized cases against individual companies.[20]

While the FTC and state attorneys general have broad marketplace purview, a segment of federal and state regulators seek public compensation for deceptive practices and other law violations involving consumer financial products. Federal banking regulators that regularly obtain public compensation are the CFPB, the Office of Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC).[21] Banking regulators order public compensation incident to their supervision examinations or seek it in enforcement actions resulting from investigations of suspected problems. In 2012, for example, the FDIC alleged an affiliate of Bancorp Bank was illegally "charging student account holders multiple nonsufficient fund

made "widespread use" of public compensation since the 1980s); John W. Wade & Robert D. Kamenshine, *Restitution for Defrauded Consumers: Making the Remedy Effective Through Suit by Governmental Agency*, 37 GEO. WASH. L. REV. 1031, 1057–65 (1969) (describing the early use of public compensation by the FTC and state attorneys general).

18. JONATHON SHELDON ET AL., NAT'L CONSUMER LAW CTR., FEDERAL DECEPTION LAW § 1.5 (2d ed. 2016); *see* Lesley Fair, *Federal Trade Commission Advertising Enforcement*, FTC 6–10 (Mar. 1, 2008), https://www.ftc.gov/sites/default/files/attachments/training-materials/enforcement.pdf (collecting cases in which the FTC has obtained monetary remedies for consumers).

19. FTC, STATS AND DATA 2013 (Jan.–Dec. 2013), http://www.ftc.gov/system/files/attachments/stats-data-2013/statsdata2013.pdf.

20. State attorneys general, for example, used UDAP law to lead public enforcement efforts against subprime mortgage lenders both before and after the mortgage market collapse that led to the financial crisis. *See* Mark Totten, *The Enforcers & the Great Recession*, 36 CARDOZO L. REV. 1611 (2015). An example of a routine UDAP enforcement resulting in public compensation is a joint case brought by the FTC and the Florida Attorney General in which owners of timeshare interests in real estate received $16.9 million in restitution of fees paid to a company falsely claiming to have buyers ready to purchase their timeshare interests. Judgment and Final Order, FTC v. Info. Mgmt. Forum, Inc., No. 6:12-cv-00986-JA-KRS, at 8 (M.D. Fla. Aug. 30, 2013).

21. The OCC and FDIC are "prudential" banking regulators charged primarily with ensuring the safety and soundness of their regulated financial institutions. Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2018, 2043 (2014); *see also* Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 331 (describing overlapping UDAP authority of FTC, state regulators and federal banking regulators).

(NSF) fees from a single merchant transaction" and other conduct related to NSF fees, including taking funds typically used to cover tuition expenses to pay the improper NSF charges.[22] The FDIC obtained a Consent Order with extensive requirements for operational changes, a civil penalty of $172,000 for Bankcorp Bank and $110,000 for its affiliate, and restitution estimated at $11 million, which was provided by the bank directly to account holders as credits for the full amount of the overcharges.[23] State financial regulators also obtain public compensation for consumers in the banking, insurance, and real estate sectors.[24]

2. Antitrust

The FTC obtains public compensation in civil antitrust cases, although it historically has been more cautious in seeking public compensation in antitrust cases than in UDAP cases.[25] State attorneys general play a substantial role in public compensation in antitrust, with authority under both federal and state law to seek relief for consumers.[26] States commonly bring antitrust enforcement actions cooperatively in a single

22. Press Release, FDIC, FDIC Announces Settlements with Higher One, Inc., New Haven, Connecticut, and the Bancorp Bank, Wilmington, Delaware for Unfair and Deceptive Practices (Aug. 8, 2012), https://www.fdic.gov/news/news/press/2012/pr12092.html.

23. *Id.*

24. States have parallel authority to federal regulators in banking and primary authority over insurance and real estate transactions. *See, e.g.*, *Review of the National Bank Preemption Rules: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 108th Cong. 132–40 (2004) (statement of Gavin M. Gee, Director of Finance, State of Idaho, on behalf of the Conference of State Bank Supervisors) (describing the dual banking system and listing examples of restitution in enforcement actions by numerous state banking commissioners); Theodore Allegaert, Comment, *Derivative Actions by Policyholders on Behalf of Mutual Insurance Companies*, 63 U. CHI. L. REV. 1063, 1069–70 (1996) (noting that "[s]tates regulate insurance more than almost any other industry, due in part to a near total absence of federal insurance regulation" and "[f]ines and restitution" are common remedies obtained by state insurance commissioners).

25. D. Bruce Hoffman, *To Certify or Not: A Modest Proposal for Evaluating the "Superiority" of a Class Action in the Presence of Government Enforcement*, 18 GEO. J. LEGAL ETHICS 1383, 1387 (2005). In 2003, the FTC issued a policy statement limiting the circumstances under which it would seek public compensation, but the FTC withdrew the policy in 2012 because it created "an overly restrictive view of the Commission's options for equitable remedies." Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47,070 (Aug. 7, 2012).

26. *See infra* Part I.B.4.

action known as a "multistate" case.[27] State antitrust enforcement raises unique issues in public compensation.[28]

In re Lorazepam & Clorazepate Antitrust Litigation,[29] a suit jointly filed by the FTC and ten state attorneys general against a drug manufacturer, provides an apt example of public compensation in the antitrust context. The FTC and the states alleged that four manufacturers conspired to monopolize the market for generic anti-anxiety medications, allegedly raising the price nineteen-fold.[30] The settlement of the suit resulted in over $71 million in public compensation, with more than 244,000 claims filed by consumers who were expected to obtain full compensation for overpayment on the price of these medications.[31]

3. Securities

Investors receive public compensation from the enforcement actions of the SEC. The SEC obtains disgorgement of illegal gains and can, in its discretion, seek distribution of these funds to investors.[32] The SEC also can use civil penalties to provide investor restitution through the "Fair Funds" program created by Congress in the wake of corporate accounting scandals.[33] The Commodity Futures Trading Commission (CFTC) and state securities regulators also distribute public compensation to investors.[34]

27. Conners, *supra* note 16, at 37 (describing the development and organization of multistate antitrust cases); Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1021 (2001) (describing multistate antitrust attorney general enforcement actions).

28. *See infra* Part I.B.4.

29. 205 F.R.D. 369 (D.D.C. 2002).

30. *Id.* at 373; Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 226–27 (2003) (describing the suits against the drug manufacturer, including allegation of price rise from antitrust conduct, and settlement arrangements).

31. *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. at 376, 377 n.14.

32. Verity Winship, *Public Agencies and Investor Compensation: Examples from the SEC and CFTC*, 61 ADMIN. L. REV. 137, 145–46 (2009).

33. *Id.* at 138; *see* Fair Funds for Investors, 15 U.S.C. § 7246(a) (2012).

34. *The Role of State Securities Regulators in Protecting Investors: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 108th Cong. 10–11 (2004) (statement of Joseph P. Borg, Director, Alabama Securities Commission; Chairman, Enforcement Section of the North American Securities Administrators Association, Inc.) (citing survey of state securities regulators finding over $660 million in "restitution, rescission and disgorgement" in 2002 and 2003). The CFTC usually arranges for investor compensation in a role akin to

An exhaustive 2014 study of SEC public compensation cases from 2002 to 2013 found that SEC ordered more than $14 billion in public compensation.[35] The study also found that public compensation focused on different types of securities law violations than private securities class action cases.[36] Partly due to statutory reforms that limit private securities class actions, public compensation constitutes the only form of monetary relief for investors in more than half of cases in which the SEC obtains such relief.[37]

4. Employment

Employees receive public compensation from the Equal Employment Opportunities Commission (EEOC).[38] EEOC public compensation is obtained through "pattern and practice" cases that challenge systemic employment discrimination practices.[39] The EEOC can also seek relief for individual employees in addition to the aggregate relief of concern here.[40] An example of an EEOC public compensation case is a 2009 settlement following litigation against Outback Steakhouse for employment conditions that limited the promotion of women to senior management positions.[41] The settlement resulted in a $19 million fund that identified two categories of women who had the opportunity to file a claim and obtain relief as determined by a

arbitrator rather than through public compensation, Winship, *supra* note 32, at 147–52, but it also obtains public compensation in certain enforcement actions. *See, e.g.*, U.S. Commodity Futures Trading Comm'n v. Hunter Wise Commodities, LLC, No. 12-81311-cv, 2014 WL 4050008, at *2–3 (S.D. Fla. May 16, 2014) (awarding over $52 million in restitution to be distributed at the discretion of the court-appointed monitor); Commodity Futures Trading Comm'n v. Milton, No. 10-80738-cv, 2013 WL 2158428, at *6 (S.D. Fla. May 17, 2013) (awarding "restitution to all defrauded customers").

35. Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 332–33 (2015).

36. *See id.* at 391 ("[SEC] distributions . . . dwarf class action recoveries except in accounting fraud cases.").

37. *Id.* at 369–71.

38. Angela D. Morrison, Duke-*ing Out Pattern or Practice After* Wal-Mart*: The EEOC as Fist*, 63 AM. U. L. REV. 87, 120–24 (2013).

39. *See id.* at 93.

40. *See id.* at 121. *See generally* Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1136–38 (2015) (explaining the difference between cases on behalf of an aggrieved individual and EEOC systemic discrimination cases).

41. Consent Decree, EEOC v. Outback Steakhouse of Fla., No. 06-cv-01935-CMA-KLM, 2009 WL 5177751 (D. Colo. Dec. 22, 2009).

neutral or the EEOC.[42] The settlement also included agreements by Outback to reform its employment promotion procedures.[43]

B. LEGAL AUTHORITY FOR PUBLIC COMPENSATION

Public compensation almost always is based on statutory authority. This statutory authority, in turn, sometimes reflects specific circumstances and history of the regulatory area in which the government enforcer acts. Understanding public compensation requires attention to these varying statutory schemes and enforcement environments. Government enforcers rely on one of three types of legal authority to obtain public compensation: (1) statutory injunctive authority; (2) express statutory authority; or (3) *parens patriae* authority. The following three subparts explain each type of legal authority, all of which grant broad powers to, and occasionally impose restraints on, government enforcers seeking public compensation. The fourth subpart looks at the unique character of public compensation in state antitrust enforcement.

1. Statutory Injunctive Authority

The foundational case for public compensation is *Porter v. Warner Holding Co.*, decided by the U.S. Supreme Court in 1946.[44] The defendant in *Porter* was a landlord found to have charged hundreds of tenants rent in excess of wartime price controls.[45] The Office of Price Administration (OPA) brought an enforcement action to stop the overcharges and require restitution payments to the tenants.[46] Lacking specific authority for such relief, the Administrator relied on a statute authorizing the court to grant an injunction "or other order" upon proof of a violation of the law.[47] The district court order, affirmed by the Eighth Circuit, granted the Administrator an injunction against further excessive rent but determined that the Administrator lacked authority to obtain restitution for the tenants under this statute.[48]

42. *Id.* at *34–47.
43. *Id.* at *12–34.
44. 328 U.S. 395 (1946).
45. *Id.* at 396–97.
46. *Id.* at 396.
47. *Id.* at 397.
48. *Id.*

The Supreme Court reversed and held that "an order for recovery and restitution of illegal rents" was a proper equitable remedy within the meaning of the price control statute and also within the equitable power of the court to shape remedies as necessary to enforce compliance with the statute.[49] The Court distinguished the equitable remedy of restitution from the legal right of tenants to sue for damages under the same statute.[50] The Administrator's request for restitution in equity invoked "broader and more flexible" powers of the court because it was in the public interest, and thus "within the highest tradition of a court of equity."[51]

Statutory authorization for injunctive relief, as used by the Administrator in *Porter*, has been called a "statutory injunction."[52] The rationale of *Porter* linking public compensation to the broad equitable powers of the court remains vital in public compensation almost seven decades later. Many government enforcers continue to use statutory injunctive authority for public compensation, and the FTC and the CFTC primarily rely on this authority.[53] It is often used by federal agencies who sporadically seek public compensation. HUD, for example, used this authority to obtain an award of over $8 million for hundreds of land purchasers for violations of the Interstate Land Sales Full Disclosure Act.[54] State attorneys general commonly rely on statutory injunctive authority for public compensation when state law does not provide express authority.[55]

49. *Id.* at 398–99.

50. *Id.* at 401–02.

51. *Id.* at 398, 401–02.

52. *See* 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 CALIF. L. REV. 524 (1982).

53. *See* Commodity Futures Trading Comm'n v. Wilshire Inv. Mgmt. Corp., 531 F.3d 1339, 1344 (11th Cir. 2008) (finding CFTC statute similar to the statute interpreted in *Porter* and collecting cases allowing CFTC to use statutory injunctive authority for restitution or disgorgement); Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1184–95 (1992).

54. U.S. Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc., 64 F.3d 920, 924 (4th Cir. 1995).

55. *See* CAROLYN CARTER & JONATHON SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 13.5.4.1 (8th ed. 2012) (stating that the "overwhelming majority of courts find it within their equitable power to grant restitution as relief even when this is not provided for in the UDAP statute"); *see also* State *ex rel.* McGraw v. Imperial Mktg., 506 S.E.2d 799, 811–12 (W. Va. 1998).

2. Express Statutory Authority

Most government enforcers active in seeking public compensation at both the federal and state level rely on express statutory authority, in part or in whole.[56] State attorneys general typically use express statutory authority for UDAP enforcement,[57] and state financial regulators also distribute public compensation under statutory schemes.[58] Some states also expressly authorize local government enforcement entities to obtain public compensation.[59]

The statutes expressly authorizing public compensation often contain only a word or phrase providing for the entity to obtain or the court to order "restitution," "recovery" or "restoration" of money or property, or disgorgement. The authorization to obtain the identified remedies can appear in isolation or can be lumped into a list of options, including reference to general judicial equitable authority as the context for the granted power. For example, the Illinois Attorney General has authorization to obtain "restitution" for UDAP violations,[60] while New Jersey authorizes a court order "of rescission, restitution or disgorgement or any other order within the court's power" for violations of state securities law.[61] The newest entrant to public compensation, the recently created CFPB, obtains public compensation under authority in the Dodd-Frank Act that lists a gamut of concepts, including most terms that can be found in statutes expressly authorizing public compensation: "(A) rescission or reformation of contracts; (B) refund of moneys or return of real property; (C) restitution; (D) disgorgement or compensa-

56. *See* 42 U.S.C. § 2000e-5 (2012) (EEOC); 12 U.S.C. § 5565 (2012) (CFPB); 12 U.S.C. § 1818(b)(6) (2012) (FDIC and OCC). The SEC and the FTC combine statutory injunctive and express statutory authority, as described in this subpart.

57. CARTER & SHELDON, *supra* note 55, § 13.5.4.1, app. A (collecting statutes); DEE PRIDGEN & RICHARD ALDERMAN, CONSUMER PROTECTION AND THE LAW § 7:13, apps. 3A, 7A (2012) (collecting statutes); Albert Norman Shelden & Stephen Gardner, *A Truncated Overview of State Consumer Protection Laws*, C485 A.L.I.-A.B.A. 375, 386–87 (1994).

58. *See, e.g.*, CONN. GEN. STAT. § 38a-817 (2015) (Connecticut insurance commissioner authority); MO. REV. STAT. § 409.6-603 (2015) (Missouri securities commissioner authority); N.H. REV. STAT. ANN. § 383:10-d (2016) (New Hampshire insurance commissioner authority).

59. *See, e.g.*, CAL. BUS. & PROF. CODE § 17204 (West 2016) (authorizing suits for unfair practices by district attorneys and certain city attorneys).

60. 815 ILL. COMP. STAT. 505/7 (2016).

61. N.J. STAT. ANN. § 49:3-69 (West 2015).

tion for unjust enrichment; (E) payment of damages or other monetary relief."[62]

Public compensation under statutory injunctive authority and most of the terms used in statutes expressly authorizing public compensation are forms of equitable relief and typically reviewed on appeal for abuse of discretion.[63] Consistent with the public compensation rationale in *Porter*, the broad dictates of equity are found to allow more flexible methods of proof to obtain an award of public compensation compared to private class actions.[64] A few government enforcers, however, are authorized to obtain damages.[65]

Statutory injunctive authority and express statutory authority often overlap. The FTC has both types of authority, and uses them alternatively depending on the type of case and enforcement objectives.[66] The public compensation power of the SEC provides an example of express statutory authority evolving out of prior reliance on statutory injunctive authority. The

62. 12 U.S.C. § 5565(g)(2) (2012).

63. *See, e.g.*, SEC v. Contorinis, 743 F.3d 296, 301 (2d Cir. 2014); FTC v. Wash. Data Res., Inc., 704 F.3d 1323, 1325 (11th Cir. 2013).

64. *See* SEC v. Razmilovic, 738 F.3d 14, 31 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1564 (2014) ("[T]he court need not determine the amount of such [unjust] gains with exactitude."); FTC v. Verity Int'l, Ltd., 443 F.3d 48, 69 (2d Cir. 2006) (restitution is based on "reasonably approximated" unjust gains of defendants); Christopher J. Willis & Stefanie H. Jackman, What Is an Attorney General's Burden of Proof? (Mar. 8, 2010) (UDAP Litigation Against Financial Institutions conference paper), http://media.straffordpub.com/products/udap-litigation-against-financial-institutions-merging-theories-and-the-foreclosure-documentation-crisis-2010-11-30/reference-material.pdf (categorizing states by strictness of proof required for UDAP public compensation and observing that "the vast majority" of states allow for relaxed proof standards for restitution); *infra* note 78 and accompanying text (flexible proof allowed in state antitrust actions under Clayton Act). *But see* Donald R. Livingston, EEOC Pattern or Practice Litigation (Mar. 23–27, 2010) (ABA National Conference on EEO Law conference paper) (collecting cases showing a split among courts as to precision of proof in EEOC pattern and practice cases).

65. *See, e.g.*, 12 U.S.C. § 5565(a)(2) (2012) (authorizing damages in CFPB enforcement actions). The DOJ obtains injunctive relief and "such other relief as the court deems appropriate, including monetary damages to persons aggrieved" in enforcing the Fair Housing Act, 42 U.S.C. § 3614(d)(1)(B) (2012), and Servicemembers' Civil Relief Act, 50 U.S.C. app. § 597 (2012).

66. *See* 15 U.S.C. §§ 53(b), 57b(b) (2012); PRIDGEN & ALDERMAN, *supra* note 57, § 7:13 (explaining that an agency may base an action on either the express or the implied authority of the applicable statute); Ward, *supra* note 53 (tracing the history of two sources of authority); *see also Washington Data Res.*, 704 F.3d at 1326 (explaining the two sources of authority FTC uses to obtain public compensation and affirming an award under statutory injunctive power).

SEC began to seek disgorgement of illegal profits under its statutory injunctive powers in the 1970s, although it only later distributed these funds to investors.[67] In 1990, Congress recognized the agency's use of public compensation and authorized it to promulgate rules for the distribution of these funds.[68] Congress then created the Federal Account for Investor Restitution (FAIR) Funds authority,[69] which permits distribution to investors of civil penalties levied by the SEC against the defendant, along with disgorged funds from the same enforcement action.[70]

Some statutory schemes authorize multiple government enforcers to obtain public compensation. For instance, state attorneys general have power parallel with federal agencies to enforce numerous federal consumer protection laws and obtain public compensation, although states infrequently use most of this federal authority.[71]

Very few of these statutes impose procedural requirements on the use of public compensation authority. The most prominent are in the Clayton Act's authorization for state recovery of antitrust damages.[72] In addition, the SEC has adopted rules prescribing some procedures to guide its public compensation. SEC staff are required to develop a public plan for the distribution, which must include the proposed process for notice to and claims by investors, and provide a right for investors to comment on the plan.[73] A few state attorneys general are permitted to seek public compensation through class certification in UDAP and antitrust cases.[74] The EEOC and some state attor-

67. Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317, 320–22 (2008).

68. *Id.* at 323–24.

69. 15 U.S.C. § 7246(a) (2012).

70. Black, *supra* note 67, at 323–27 (tracing history of SEC "Fair Funds" authority).

71. Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 80 (2011) (finding 104 cases raising 120 claims under 16 federal statutes authorizing state enforcement, but with 2 telemarketing statutes accounting for 91 of the 120 claims, with sparse use of all the remaining federal authority).

72. *See infra* Part I.B.4.

73. 17 C.F.R. §§ 201.1101–.1106 (2014). Investors do not have the right to intervene in the SEC proceeding. *Id.* § 201.1106.

74. *See* MICH. COMP. LAWS § 445.910 (2012) (permitted to proceed by class); Hawaii *ex rel.* Louie v. HSBC Bank Nev., N.A., 761 F.3d 1027, 1039–40 (9th Cir. 2014) (noting that there is conflicting statutory authority as to whether the state attorney general is required to bring UDAP and antitrust actions under class action authority); *In re* Lorazepam & Clorazepate Anti-

neys general must follow pre-complaint restrictions on suit that require notice to and engagement with the employer prior to suit, but public compensation distribution procedures are on a case-by-case basis.[75]

3. *Parens Patriae* Authority

Commentators have focused a great deal of attention on the third type of legal authority used in public compensation cases—*parens patriae*—even though this doctrine in its traditional form is used sparingly as authority for public compensation. Scholars and courts agree that the *parens* doctrine is "murky."[76] *Parens* allows a state to bring suit when it has "quasi-sovereign" interests in the enforcement of its civil or criminal laws. A key limitation on a *parens* action is that the state suit cannot represent solely private interests. As the Supreme Court stated in the seminal modern case explicating the *parens* doctrine, *Snapp & Son, Inc. v. Puerto Rico*, the state's quasi-sovereign interests cannot be "private interests pursued by the State as a nominal party."[77]

Much of the focus on *parens* authority arose from the highly publicized litigation against the tobacco industry by state attorneys general in the 1990s, and later cases brought against other controversial industries, including gun and lead paint manufacturers.[78] None of these cases, however, involved public compensation. Rather, the states sought to enjoin conduct and

trust Litig., 205 F.R.D. 369, 387–88 (D.D.C. 2002) (finding that eight states properly sought antitrust indirect purchaser relief through class action rules); Celebrezze v. Hughes, 479 N.E.2d 886, 889 (Ohio 1985) (noting that the attorney general may bring a class action but is not required to do so to obtain restitution). *But see* Farmers Grp., Inc. v. Lubin, 222 S.W.3d 417, 425 (Tex. 2007) (holding that a state attorney general cannot maintain a class action in the absence of a class representative).

75. CARTER & SHELDON, *supra* note 55, § 13.4.1 (state attorneys general); Morrison, *supra* note 38, at 124–31 (EEOC).

76. Jack Ratliff, Parens Patriae*: An Overview*, 74 TUL. L. REV. 1847, 1850 (2000) (quoting *In re* Gault, 387 U.S. 1, 16 (1967)). For an exhaustive history of the *parens* doctrine, see Jay Himes, State *Parens Patriae* Authority (2004) (prepared for Institute for Law & Economic Policy Symposium on Protecting the Public).

77. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 602 (1982).

78. Edward Brunet, *Improving Class Action Efficiency by Expanded Use of* Parens Patriae *Suits and Intervention*, 74 TUL. L. REV. 1919, 1921 (2000) (state attorneys general can use flexible proof in seeking damages under federal Clayton Act).

obtain recompense for the state treasuries rather than compensation for purchasers or victims of the products.[79]

State attorneys general actively use *parens* authority for public compensation mostly in a statutorily authorized form of the doctrine in one aspect of their antitrust enforcement, which presents unique issues discussed in the following subpart. Some of the federal consumer protection statutes authorizing parallel state enforcement also refer to *parens* authority.[80] It is not clear that a statute including the term "*parens*" in authorizing public compensation restricts the authority of the government enforcer compared to other forms of express statutory authority.[81]

Government enforcers rarely rely on common law *parens* doctrine for public compensation.[82] Federal agencies generally have been found to lack authority to employ *parens* to imply a right of action or remedy.[83] No empirical research has established how often state attorneys general use common law *parens* authority for public compensation, but there is little reason for most state attorneys general to invoke this doctrine given their statutory authority, and it appears to be an infre-

79. 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); William H. Pryor, Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1901–03 (2000).

80. *Compare* Home Ownership and Equity Protection Act, 15 U.S.C. § 1640(e) (2012) (explaining that enforcement actions for violations "may also be brought by the appropriate State attorney general"), *with* Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, 15 U.S.C. § 7706(f)(a) (2012) ("[T]he attorney general, official, or agency of the State, as parens patriae, may bring a civil action on behalf of the residents of the State . . . ."). State statutes authorizing public compensation outside of antitrust occasionally incorporate a *parens* reference.

81. In a suit by state attorneys general against Apple, Inc. for antitrust violations in the sale of electronic books, a court recently rejected an argument that Due Process requires the states to proceed under class action rules. *In re* Elec. Books Antitrust Litig., 14 F. Supp. 3d 525, 535–37 (S.D.N.Y. 2014). The court noted that *parens* authority in this statutory context was different than common law *parens*, and also held that any questions of prudential standing by the states under the *parens* doctrine were unavailable when Congress statutorily authorized the *parens* action. *Id.*

82. The term "common law *parens*" is used here to mean a non-statutory use of the *parens* doctrine. It should be noted, however, that the *parens* doctrine has roots in both common law and equity. *See generally* Himes, *supra* note 76.

83. Davis, *supra* note 7, at 24.

quent occurrence.[84] Even when state attorneys general use the common law *parens* doctrine for public compensation, it can be intertwined with statutory authority.[85]

4. The Special Case of State Antitrust Enforcement

State attorney general antitrust enforcement differs from other areas of public compensation in its origin and its procedural regime. State antitrust and unfair competition laws generally track federal antitrust laws.[86] Local bid-rigging conduct and mergers of local health care providers are typical subjects of local market antitrust enforcement under state law.[87] But state attorneys general also have an important place in national antitrust enforcement. They are the only governmental entities with the ability to seek damages, including treble damages, for antitrust violations under both federal and state law.[88]

The federal statutory authority arose out of failed attempts by the states to use their common law *parens* authority to obtain damages in national antitrust cases. In 1972, the U.S. Supreme Court held in *Hawaii v. Standard Oil Co.* that states could sue for injunctive relief to restrain antitrust violations using *parens* authority, but that state quasi-sovereign interests did not authorize states to seek damages for state citizens for the same antitrust violations.[89] In 1976, Congress responded by amending the Clayton Act, one of two primary federal antitrust laws, to authorize state attorneys general to "bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State . . . to secure monetary

84. Ratliff, *supra* note 76, at 1865 (observing "sparse" use of *parens* in consumer protection area).

85. The Minnesota Attorney General, for example, has relied on common law *parens* in seeking public compensation, but Minnesota courts have mixed citations to *parens* authority with cases basing public compensation on statutory injunctive relief. State *ex rel.* Humphrey v. Alpine Air Prods., Inc., 490 N.W.2d 888, 896 (Minn. Ct. App. 1992), *aff'd*, 500 N.W.2d 788 (Minn. 1993). The primary enforcement statute used by the Minnesota Attorney General later was amended to recognize the existence of public compensation as a remedy and to provide ancillary authority for its administration. MINN. STAT. § 8.31 subdiv. 2(c) (2014) (providing that undistributed public compensation can be paid to the public treasury); *id.* at subdiv. 3(c) (authorizing appointment of administrator for public compensation).

86. AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS (SEVENTH) 633–34 (2012).

87. Conners, *supra* note 16, at 43–46, 51–52.

88. Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 682–84 (2003).

89. 405 U.S. 251 (1972).

relief."[90] Unlike federal enforcement agencies, states can obtain treble damages for antitrust violations under this authority.[91] Congress added this statutory *parens* authority substantially because of a concern that injured consumers were unable to obtain compensation either through federal agency actions or private class actions given adverse decisional law complicating class certification when individual consumer injury is small and injured consumers difficult to identify.[92] In recognition of this diffuse injury problem, Congress allowed the states to obtain consumer recovery using loosened standards of proof for damages.[93]

Congress also established procedures for state enforcement under the Clayton Act that are similar to a class action but more flexible. The Clayton Act requires notice by state attorneys general to potential consumer recipients—at least by publication or directly to consumers as needed "according to the circumstances of the case" if the court determines that notice "solely by publication would deny due process of law."[94] Consumers have the right to opt out of inclusion in the state attorney general action, but uniquely in the area of public compensation, the Clayton Act provides for statutory preclusion of claims when the consumer does not exercise opt-out rights.[95] Settlement requires judicial review and further notice prior to effectuation of statutory preclusion.[96]

The less rigorous requirements for proving damages and the more flexible notice and review procedures represent a legislative choice to establish an alternative public scheme to private class actions for certain antitrust violations.[97] The focus on

90. 15 U.S.C. § 15c (2012).

91. *Id.* § 15c(a)(2).

92. New York *ex rel.* Vacco v. Reebok Int'l Ltd., 96 F.3d 44, 46 (2d Cir. 1996) ("Congress empowered state attorneys general to investigate and prosecute antitrust abuses on behalf of consumers stymied by Rule 23's certification and notification hurdles."); 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).

93. Farmer, *supra* note 92, at 381–82.

94. 15 U.S.C. § 15c(b)(1).

95. *Id.* § 15c(b)(2)–(3).

96. *Id.* § 15c(c); *see* Farmer, *supra* note 92, at 383–85 (describing procedures for state enforcement under the Clayton Act and observing that the "notice and claim preclusion provisions of the statute are as creative as the section on estimation of damages").

97. *See* Farmer, *supra* note 92, at 381, 383; First, *supra* note 27, at 1005–13.

compensation as a defining characteristic of state antitrust enforcement suits under the Clayton Act, and the preclusive effect and procedural requirements in the Act give this type of action a different character than other public enforcement actions. As a result, some aspects of the relationship between public compensation and private rights present differently in state antitrust enforcement compared to other forms of public compensation—a point that recurs in this Article.[98]

5. Summary of Public Compensation Legal Authority

Almost all public compensation is based on some form of statutory authority. The following chart shows the authority used by various government enforcers to obtain public compensation. The larger oval represents a form of legal authority based wholly or partly in statute.

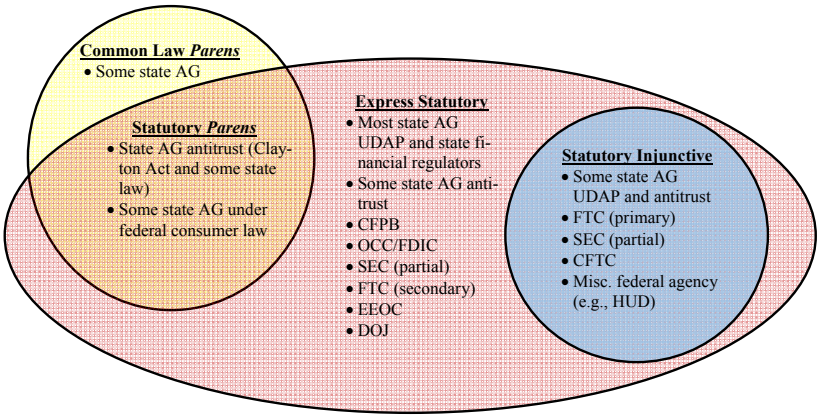

Figure 1: Overview of public compensation authority.

98. Antitrust enforcement is further complicated by the fact that federal law allows for damages only to "direct purchasers" from the antitrust violator. State law, however, allows for damages to "indirect purchasers," such as buyers of a breakfast cereal who paid slightly higher prices for the product because suppliers of an input into the product engaged in price collusion that raised the prices of those inputs to cereal manufacturers. Waller, *supra* note 30, at 218–19. The state law authority for public compensation with indirect purchaser suits varies, with sixteen states providing express statutory authority, fourteen states providing for a statutory grant of *parens* authority similar to the Clayton Act, thirteen states relying on some combination of judicial interpretation of statutory and common law authority, and eight states using a class action mechanism. *In re* Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 369, 386–88 (D.D.C. 2002).

II. THE CRITIQUE OF PUBLIC COMPENSATION

In 1969, John Wade and Robert Kamenshine published an article analyzing whether and when public compensation should be awarded.[99] Wade and Kamenshine generally lauded the potential for public compensation and urged, along with U.S. Senator Warren Magnuson, that "[t]his method would vindicate not only the interests of those already defrauded, but hopefully would also deter unscrupulous businessmen from pursuing new schemes."[100] After decades of scholarly silence, most recent commentators reach a less favorable evaluation. This Part begins with the observation of recent scholarship that public compensation cases "mimic" class action cases and that the two types of cases raise similar concerns as to adequate representation of and consent by recipients. The second subpart examines one particular branch of scholarship for which the relationship between private rights and public compensation is central—the assertion that public compensation precludes the rights of compensated individuals to bring a later private action.

A. SIMILARITIES IN THE SCHOLARLY CRITIQUE

The commonality in most of the recent scholarly critiques of public compensation is three observations. First, these scholars note the similarities between public compensation and monetary recovery in class action cases. Both types of actions return money to groups of people, leading to observations that public compensation "mimics," "mirrors,"[101] or "bears a striking resemblance"[102] to class action cases. Not only do these actions superficially look the same, but according to these scholars public compensation cases "perform the same job"[103] or "serve the

99. Wade & Kamenshine, *supra* note 17, at 1031. Student commentators of the period opined on the authority of specific government entities to obtain such relief. *See, e.g.*, Note, *Ancillary Relief in SEC Injunction Suits for Violation of Rule 10b-5*, 79 HARV. L. REV. 656 (1966); Allan Jergesen, Note, *New York City's Alternative to the Consumer Class Action: The Government as Robin Hood*, 9 HARV. J. ON LEGIS. 301, 307 (1972); *Restitution in Food and Drug Enforcement*, 4 STAN. L. REV. 519 (1952).

100. Wade & Kamenshine, *supra* note 17, at 1050.

101. *See* Zimmerman, *supra* note 7, at 519; *see also* Max Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2113, 2153 (2015) (observing that agency actions obtaining restitution "mirror class actions in both their goals and their overall structure").

102. Lemos, *supra* note 7, at 487.

103. *See* Zimmerman, *supra* note 7, at 506 ("[A]gencies should adopt rules from representative litigation, like those that govern class action settlements,

same aggregative function as private damages class actions."[104] Public compensation has been labeled an "agency class action"[105] or "'executive branch' class action,"[106] and the government enforcer has been called "public class counsel."[107]

Second, these scholars describe the lesser procedural requirements for public compensation compared to class actions.[108] Class actions require notice to class members, allow for objections by class members to settlement terms, permit class members to opt out of the litigation and provide for judicial review of a settlement.[109] In contrast, these scholars correctly note that public compensation often occurs without most or all of these procedural rights,[110] and that when these procedures apply to public compensation they usually are less rigorous.[111]

The third observation is that government enforcers neither adequately represent the interests of the recipients of relief nor have procedures to involve recipients in the distribution of relief. According to these critiques, public officials and compensation recipients have multiple conflicting interests, such as the government's interest in receiving funds,[112] the "political ambitions" of an elected official[113] and influence of campaign finance donors,[114] reputational concerns of the agency,[115] capture of a

when agencies, in effect, perform the same job.").

104. *See* Lemos, *supra* note 7, at 510.

105. Sant'Ambrogio & Zimmerman, *supra* note 7, at 1992.

106. Adam S. Zimmerman, *The Corrective Justice State*, 5 J. TORT L. 189, 191 (2012).

107. *See generally* Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV. 1103 (2008).

108. *See* Zimmerman, *supra* note 7, at 520 ("[M]ost agency settlements afford only the most minimal level of process.").

109. FED. R. CIV. P. 23(c)(2), 23(d)(1)(B), 23(e)(1) (notice to class members); *id.* at 23(e)(5) (right of class members to object to settlement); *id.* at 23(e) (judicial review and approval of settlement required).

110. *See* Lemos, *supra* note 7, at 499–511; Zimmerman, *supra* note 7, at 553–71 (considering three potential reforms of multidistrict coordination, negotiated rulemaking, and judicial hard look review).

111. *See* Sant'Ambrogio & Zimmerman, *supra* note 7, at 2016–34.

112. *See* Lemos, *supra* note 7, at 513; *see also* Davis, *supra* note 7.

113. *See* Adam S. Zimmerman, *Mass Settlement Rivalries*, 82 U. CIN. L. REV. 381, 392 (2013) (noting conflicts between different victims "may pale in comparison" to conflicts with "[p]olitically ambitious attorneys general"); *see also* Davis, *supra* note 7, at 46.

114. *See* Lemos, *supra* note 7, at 515 (arguing that corporate donors who do not want injured citizens to receive maximum recoveries donate to attorney general election campaign funds).

115. *See* Zimmerman, *supra* note 7, at 551 (suggesting agencies sometimes settle matters to resolve embarrassing missteps); *see also* Davis, *supra* note 7,

regulatory agency by the interests of the regulated entity,[116] the use of private counsel on contract with their own financial interests,[117] and an interest in the jobs of those working for the defendant.[118] These critics also conclude that government enforcers provide insufficient notice of and opportunity to participate in public compensation cases and fail to involve potential recipients in the size or shape of public compensation.[119]

These observations beget a conclusion—that the lesser procedural protections in public compensation are not justified by the differences in compensation outcomes between public enforcement and private aggregate litigation. Class action procedures are designed to protect the interests of the class members. Notice and rights to object or opt out exist to reflect, as much as possible in private aggregate litigation, the consent of the class members to participation in the litigation.[120] Judicial review of class actions exists, in part, to ensure that the class counsel and the representative plaintiff adequately represent the interests of class members.[121] The critics argue that applying class action procedures to public compensation would help resolve the observed conflicts of interest of public officials with the recipients of compensation and the lack of participation rights for recipients.[122]

B. CONCERN THAT PUBLIC COMPENSATION VIOLATES DUE PROCESS PROTECTIONS

Scholarly critics argue that a lack of procedural requirements for public compensation results in inadequate or unfair

at 46 (contending that political ambitions may skew enforcement priorities).

116. *See* Zimmerman, *supra* note 7, at 551–53.

117. *See* Davis, *supra* note 7, at 46; Lemos, *supra* note 7, at 515–16 (contending that private counsel have personal incentives to maximize the recovery for the class because the attorneys' fees increase as the clients' recovery grows).

118. *See* Lemos, *supra* note 7, at 513–14 (noting that a large recovery for the consumers of the *parens patriae* group may put the defendant out of business).

119. *See id.* at 519–20; Zimmerman, *supra* note 7, at 546–49.

120. 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1786 (3d ed. 2005).

121. John Coffee famously described the agency cost problems that arise in class action litigation because class members cannot, or lack incentives to, control class counsel conduct. Morris Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 REV. LITIG. 757, 763–74 (2012) (describing Coffee's critique).

122. Davis, *supra* note 7, at 41; Lemos, *supra* note 7, at 548.

distributions to recipients of public compensation.[123] The article by Lemos compels particular attention because it argues that the purported problems with public compensation rise to the level of possible constitutional deprivations.

Lemos examines state attorneys general enforcement and asserts that public compensation in these state cases precludes later assertion of private claims for monetary relief.[124] She contends that "[a]lthough the case law on the preclusive effect of public aggregate litigation is surprisingly sparse, the prevailing view is that the judgment in a state case is binding 'on every person whom the state represents . . . .'"[125] Consistent with the assumption that public compensation is the functional equivalent of class action relief, Lemos asserts that state attorneys general represent the recipients of public compensation and thus that public compensation precludes a later private claim for monetary relief.[126] Lemos argues that conflicts of interest are "more stark"[127] and the prospects for client monitoring "are even darker"[128] in state public compensation cases compared to class action cases.

Putting together these assertions, Lemos concludes that public compensation raises constitutional Due Process concerns because state attorneys general do not adequately represent

123. *See* Sant'Ambrogio & Zimmerman, *supra* note 7, at 2007; Zimmerman, *supra* note 7, at 500; Zimmerman, *supra* note 106, at 219. Another branch of scholarship on public compensation is limited to investor recovery in securities cases. This scholarship does not strictly follow the pattern described above and is largely concerned with coordination of public and private actions. Verity Winship argues that SEC public compensation should focus on cases in which private actions are not feasible. Winship, *supra* note 107, at 1141–45. The Velikonja study establishes that this is largely the approach taken by the SEC and its public compensation is appropriately adequate in amount. Velikonja, *supra* note 35, at 338; *see also* Black, *supra* note 67 (arguing that the SEC generally should refrain from seeking public compensation to efficiently use resources and not hinder private actions); Zimmerman, *supra* note 7, at 556–63 (focusing largely on SEC cases in discussing coordination of public compensation and private enforcement). For a particularly thoughtful examination of the relationship of public and private enforcement, see David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913 (2014).

124. Lemos, *supra* note 7, at 500.

125. *Id.* Lemos similarly states: "Case law on *parens patriae* preclusion is remarkably thin, but the consensus view seems to be that public suits preclude all private actions raising the same claims." *Id.* at 531.

126. Lemos, *supra* note 7, at 535.

127. *Id.* at 530.

128. *Id.* at 519.

the interests of public compensation recipients.[129] Lemos proposes that states remedy these purported constitutional concerns by either adopting laws providing that preclusion does not result from public compensation, or creating procedures similar to a class action when state attorneys general seek public compensation.[130] Other scholars also have raised concerns about public compensation precluding later private claims for monetary relief without adequate representation of compensation recipients.[131]

III. PRECLUSION, PUBLIC COMPENSATION, AND FALSE ALARM

The starting point for understanding the relationship between public compensation and private rights is determining whether public compensation precludes later assertion of private rights for monetary relief. The case law is reasonably clear that public compensation generally does not result in preclu-

129. *Id.* at 531–42.

130. *Id.* at 542–48.

131. Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1924 (2015) ("Precluding private suits in the wake of a *parens patriae* action can be particularly problematic since those suits have not been subjected to Rule 23's adequacy requirement and attorneys general may prioritize political agendas and quick resolution over private claimants' interests."). Seth Davis analyzes the broader question of government use of an implied right of action in the absence of express statutory authority. Davis identifies four types of such implied actions, including the category of "substitute suits," which includes actions seeking public compensation. Davis, *supra* note 7, at 22–24. Davis asserts that these suits preclude later private claims and observes that this result is at odds with the procedural protections in class actions. Thus, these suits "may wrest control of private rights from an individual beneficiary without the procedures that protect a beneficiary's right to her day in court." *Id.* at 41 ("[W]hile the Federal Rules of Civil Procedure prescribe mechanisms to ensure adequate representation in class actions, no such mechanisms apply to substitute suits."). Davis makes substantially similar observations and conclusions as the new scholarship about the equivalence of public and private purpose and the inadequacy of representation by state attorneys general in "substitute suits" because of conflicting interests with the recipients of public relief. *Id.* at 42. Davis presumes in his analysis that public enforcement actions preclude both injunctive remedies and public compensation. *Id.* He later considers and rejects the option of limiting preclusion of private claims to injunctive relief as a means of addressing the problem. *Id.*; *see also* Verity Winship, *Policing Compensatory Relief in Agency Settlements*, 82 U. CIN. L. REV. 551 (2013) (arguing that public compensation should be avoided when individuals are precluded from bringing claims). Winship observes, however, that preclusion does not apply to private actions following SEC enforcement. *Id.* at 556.

sion of private claims for monetary relief.[132] Accordingly, concerns about Due Process protections for recipients are misplaced. The first subpart looks at judicial decisions and litigation practice bearing on the preclusive effect of public compensation on subsequently asserted private claims, an analysis not systematically undertaken in the prior scholarship. The Lemos article gets this basic proposition wrong. The second subpart examines the reasons underlying this error, which leads to a broader discussion of how and when public compensation should occur.

A. GENERAL RULE OF NON-PRECLUSION

As Edward Cooper succinctly states, "[t]he central proposition that a party is bound (by a prior result) is balanced by the rule that ordinarily nonparties are not bound."[133] Because an enforcement action is public in nature and brought by the government, public compensation cannot preclude a later action by a private beneficiary of that relief unless an exception to this principle applies. Existing case law and litigation practice is sufficiently clear to conclude that public compensation generally does not preclude later private suits for monetary relief.

1. Case Law on Preclusion of Subsequent Private Actions

In *General Telephone Co. v. EEOC*, the U.S. Supreme Court reached the conclusion that public compensation obtained by the EEOC does not "bind" the recipients of that compensation in later private suits.[134] The EEOC accused General Telephone Company of gender discrimination by restricting maternity leave and access to jobs and promotions for a large group of women in four western states, and it sought injunctive relief and backpay as remedies in its enforcement action.[135] General Telephone argued that the EEOC should be required to use class action procedures to obtain public compensation in the form of backpay.[136] The Court rejected this argument, noting that an EEOC enforcement action did not act as a "proxy"

132. *See infra* Part III.A.

133. 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4448 (2d ed. 1987). The limited boundaries of nonparty preclusion was emphasized in the U.S. Supreme Court's rejection of the "theory of virtual representation." Taylor v. Sturgell, 553 U.S. 880, 904 (2008).

134. 446 U.S. 318, 333 (1980).

135. *Id.* at 319–21.

136. *Id.* at 321.

for the employees for whom it sought relief.[137] Rather, the EEOC sought to "vindicate the public interest in preventing employment discrimination," even when seeking public compensation.[138]

The Court then directly addressed the preclusion issue. It observed that General Telephone's objective in seeking the use of the class procedures was to obtain the preclusive effect of a class.[139] The Court treated the matter as one of statutory interpretation.[140] It found that mandating preclusion would conflict with the intent of Congress in prohibiting gender discrimination and providing wide discretion for trial courts to exercise equitable powers to achieve this result, especially given "the possible differences between the public and private interests involved."[141] The Court observed that a trial court could order that individuals be required to choose to release claims as a condition of receiving public compensation if appropriate in a given case, stating that the "Title VII remedy is an equitable one; a court of equity should adjust the relief accordingly."[142] EEOC public compensation, therefore, has been found not preclusive of later private claims.[143]

Three years prior to the decision in *General Telephone*, the California Supreme Court had reached an identical result in an action brought by the California Attorney General. In *People v. Pacific Land Research*, the defendants created and sold subdivided real estate parcels without proper notice to the California Real Estate Commissioner and by use of unfair and deceptive practices.[144] The California Attorney General brought an action under express statutory authority and sought the familiar troika of remedies—injunctive relief, civil penalties, and restitution.[145] Defendants argued that the state should comply with class action procedures when seeking restitution for a group of

137. *Id.* at 326.
138. *Id.*
139. *Id.* at 332.
140. *Id.* at 330.
141. *Id.* at 333.
142. *Id.*
143. Circuit court decisions in the wake of *General Telephone* have made this result clear. 18A WRIGHT ET AL., *supra* note 133, § 4458.1 n.9 (collecting cases in which preclusion was denied); *see also* EEOC v. Nw. Airlines, Inc., 216 F. Supp. 2d 935, 938–39 (D. Minn. 2002) (extending *General Telephone* holding to EEOC enforcement under the Americans with Disabilities Act).
144. 569 P.2d 125, 127 (Cal. 1977).
145. *Id.* at 127–28.

purchasers, that this relief should be preceded by notice to the purchaser group, and that the result as to restitution in the public action should be binding on the purchasers.[146]

In rejecting this argument, the California Supreme Court noted that its decision might result in an advantage to the land purchasers because they could benefit from the state action without relinquishing rights to a later private action, but that "[t]hese consequences flow not from any inherent unfairness in the procedures but because the People's action is fundamentally for the benefit of the public even though founded upon the same violations of law which form the basis of the (private) claim for restitution."[147] Relying on *Pacific Land Research*, a California appellate court later held that public compensation resulting from a public enforcement action for deception in sale of a job training program did not bar later claims for monetary relief by private plaintiffs.[148]

There are two exceptions to the general rule that public compensation is not preclusive of subsequent private actions for damages.[149] First, the Clayton Act provides for preclusive effect in the special circumstance of state antitrust enforcement of

146. *Id.* at 128–32.

147. *Id.* at 130.

148. Payne v. Nat'l Collection Sys., Inc., 111 Cal. Rptr. 2d. 260, 266 (Ct. App. 2001).

149. Although not technically preclusion, "required release" public compensation, in which the government enforcer enters into a settlement or a court orders that a recipient must execute a release of private claims to obtain public compensation, results in preclusion for those who accept public compensation. *See infra* Part V.B. The use of an opt-in public compensation procedure is consistent with no preclusive effect absent the opt-in process, and courts have refused to find a release of claims by consumers who do not opt-in to public compensation. Riddle v. Cerro Wire & Cable Grp., Inc., 902 F.2d 918, 922 (11th Cir. 1990) (holding that the employee who refused compensation under EEOC consent decree that required her to release claims to obtain compensation was not precluded from bringing private action for monetary relief); State v. Peppertree Resort Villas, Inc., 651 N.W.2d 345 (Wis. Ct. App. 2002) (holding that the land purchasers who refused public compensation accompanied by release were not precluded). Also, preclusion can apply when the EEOC seeks victim-specific relief rather than public compensation, but even in these cases courts have split as to the preclusive effect of EEOC enforcement. *Compare* Riddle v. Cerro Wire & Cable Grp., Inc., 902 F.2d 918, 922 (11th Cir. 1990) (holding no preclusion even though "the EEOC's suit against Cerro was based solely on Riddle's charge of discrimination; it did not involve a class of employees or an allegation of pattern and practice discrimination"), *with* Adams v. Proctor & Gamble Mfg. Co., 697 F.2d 582 (4th Cir. 1983) (en banc) (reversing appellate panel and finding no private right of action when EEOC reached consent decree as to named employees).

federal law.[150] Second, a small number of enforcement cases by state attorneys general proceed as class actions, with the result that preclusion applies in this circumstance.[151] In one state, Alaska, courts have held that public compensation under state law must be obtained by the application of a form of class action rules, including notice and opt-out rights, and resulting in preclusive effect on later private claims.[152] In both of these exceptional circumstances, government enforcers must comply with stricter procedural protections to obtain public compensation.

2. Litigation Practice Reflects Non-Preclusion

That subsequent private actions for monetary relief generally are not precluded following public compensation is consistent with observed litigation practice. Two common types of cases are in conflict with the assertion that public compensation has a preclusive impact—"coattail" class actions, and class certification review subsequent to public compensation.[153]

150. *See supra* Part I.B.4.

151. *See supra* note 74.

152. State v. First Nat'l Bank of Anchorage, 660 P.2d 406, 416 (Alaska 1982). The court found that an award of public compensation generally requires that the Alaska Attorney General follow procedures analogous to Rule 23. *Id.* at 416–17. The court also imposes preclusive effect on later private claims for monetary relief, but held that use of an opt-in procedure would be sufficient in that case. *Id.* at 417. The court's decision appears to be an isolated result, even from the case law in other states extant at the time. As its only authority for the decision, the Alaska court cited an early decision interpreting New Jersey law providing for public compensation, Kugler v. Romain, 279 A.2d 640, 649 (N.J. 1971), in which the New Jersey Supreme Court noted in passing that public compensation is "in the nature of a class action." *Id.* at 416. In *People v. Pacific Land Research Co.*, which had been decided before the *First National Bank of Anchorage* decision, the California Supreme Court also cited this quote from *Kugler* and observed that "the matter was settled the following year" by New Jersey courts holding that its Attorney General was not required to use class action procedures. 569 P.2d 125, 131 n.10 (Cal. 1977).

153. Of course, individuals cannot obtain a double recovery through a later private suit. The later private suit can only recover the difference between the consumer's loss and the amount of public compensation received by the consumer. Gen. Tel. Co. v. EEOC, 446 U.S. 318, 333 (1980) ("It also goes without saying that the courts can and should preclude double recovery by an individual."); SEC v. Risman, 7 F. App'x 30, 31 (2d Cir. 2001) ("In administering the disgorgement fund, the SEC will be under obligation to ensure that payments to victims are not made in a manner that would duplicate compensation."); *see also* 15 U.S.C. § 15c(a) (2012) (excluding recovery by a state for a Clayton Act antitrust claim if it "duplicates amounts which have been awarded for the same injury").

"Coattail" class actions are private class actions using the information revealed or result obtained in public enforcement cases to seek private relief.[154] These class actions seek damages following cases where public compensation was sought or awarded, which is a result at odds with preclusion of a later private action when public compensation was awarded.[155] An exhaustive study of SEC public compensation cases from 2002 through 2013 found that in 46.8% (108 of 231) of these cases a parallel class action also obtained a monetary settlement.[156] When parallel SEC and private actions obtained compensation for investors, the private actions recovered over $39 billion, which accounted for 59% of total investor recovery.[157] The same situation occurs in other regulatory areas.[158] In discussing preclusion of coattail class actions by public enforcement, Howard Erichson observes that "[r]estricting private claims would generally require legislative action, so such restrictions cannot simply be offered by a negotiating government lawyer."[159]

A related circumstance inconsistent with preclusion is when courts determine whether to certify a class action seeking monetary relief given the existence of public compensation. The typical putative class seeks certification under Rule 23(b)(3), which requires a court finding that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[160] Class action defendants have argued that class certification is improper following public compensation because the class action mechanism is not superior to individual claims given prior public compensation. Courts have both denied and certified class actions in response to these arguments.[161] These class certification motions would make no sense if courts regularly precluded subsequent private claims. In fact,

154. Erichson, *supra* note 79, at 5; *see* Velikonja, *supra* note 35, at 368.

155. Erichson, *supra* note 79, at 6.

156. Velikonja, *supra* note 35, at 369.

157. *Id.* at 342–47; *see also* Winship, *supra* note 131, at 556 ("[S]ettlement for monetary relief in an SEC action generally does not preclude other actions by injured investors.").

158. *See, e.g.*, *In re* First Databank Antitrust Litig., 209 F. Supp. 2d 96 (D.D.C. 2002) (illustrating a case in which a class obtained additional relief following FTC antitrust enforcement action).

159. Erichson, *supra* note 79, at 30. Erichson recounts the attempt by some state attorneys general to have Congress pass legislation to preclude private claims against tobacco manufacturers. *Id.*

160. FED. R. CIV. P. 23(b)(3); 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.46[2][c] (Matthew Bender ed., 3d ed. 1999).

161. *See infra* Part V.A.

courts in these cases have specifically noted the lack of preclusion of private claims in deciding these motions.[162]

3. Public Relief Preclusion Following Public Enforcement

Private rights can be extinguished following an enforcement action without regard to public compensation, but only as to the public relief sought in the subsequent private action, not as to private damages claims. The exact line between public and private relief is not precise, but the ends of the continuum are clear enough. Courts generally do not allow private actions to proceed if the relief sought changes the terms of an injunction or required conduct to remedy a public resource or problem resulting from the enforcement action. Courts allow a later private action seeking monetary relief, with the sometimes exception of punitive damages.

Satsky v. Paramount Communications, Inc. offers a clear example of this result in applying common law preclusion to private claims following a public enforcement action.[163] The *Satsky* plaintiffs were property owners near a mine that had long discharged toxic waste.[164] The mine was subject to environmental cleanup under a consent decree following litigation in which the State of Colorado asserted liability of the mine owner under the federal Comprehensive Environmental Response, Compensation, and Liability Act.[165] The plaintiffs sought multiple types of relief, including various types of damages and an injunction.[166] The defendant mine owner argued that the government consent decree precluded later private claims.[167] The Tenth Circuit Court of Appeals held that preclusion doctrines barred claims "based on injuries to the natural resources held by the State of Colorado" but permitted claims for "purely private interests," and remanded to the district court to distinguish among the many remedies sought by the plaintiffs.[168]

162. *See, e.g.*, Kamm v. Cal. City Dev. Co., 509 F.2d 205, 212 (9th Cir. 1975) (stating that one factor in denying class certification was that "[n]o member of the class is barred from initiating a suit on his own behalf").

163. 7 F.3d 1464 (10th Cir. 1993).

164. *Id.* at 1465.

165. *Id.* at 1467.

166. *Id.*

167. *Id.*

168. *Id.* at 1470. The court held that neither the *parens* doctrine nor federal environmental law allowed the state to assert purely private interests. The State of Colorado appeared amicus curiae in support of the plaintiff's position

Numerous commentators have noted that public enforcement actions have a differing preclusive effect based on the type of relief sought in the later private suit.[169] There are gray areas, of course. Courts have, for instance, allowed private parties to litigate claims for injunctive relief in the face of a consent decree obtained by a federal antitrust enforcer,[170] yet precluded punitive damages claims brought by private parties following a government action.

This latter situation is illustrated well by private actions brought in the wake of the 1990s settlement of lawsuits by state attorneys general against tobacco companies. The settlement between state attorneys general and the tobacco companies released state claims for civil penalties and punitive damages.[171] In the private actions that followed, courts reached differing results as to preclusion of punitive damages claims depending on whether the court characterized the purpose of punitive damages under state law as deterrence for the public good or to compensate private injury.[172] Even the courts that

that it did not represent plaintiffs' private interests in the prior public enforcement litigation. *See also* Alderwoods Grp., Inc. v. Garcia, 119 So. 3d 497, 503–04 n.6 (Fla. Dist. Ct. App.), *review dismissed*, 131 So. 3d 787 (Fla. 2013) (holding that plaintiffs barred from seeking injunctive relief against cemetery following public action for licensing violations that obtained injunctive relief and operational changes, but "plaintiffs are not barred from seeking damages").

169. RESTATEMENT (SECOND) OF JUDGMENTS § 41 illus. 6–7 (AM. LAW INST. 1982) (stating that a taxpayer suit to challenge restrictions on the statutorily permissible operations of a charity would be precluded by a prior state attorney general action, but a suit by an employee for "relief for himself" can proceed in the face of a prior government suit resulting in injunctive relief to restrain illegal employment practices); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 cmt. B(1)(b) (AM. LAW INST. 2010) (concluding that in *parens* cases, "governmental action on a general interest cannot preclude a private-damages action brought to obtain compensation for a loss"); 18A WRIGHT ET AL., *supra* note 133, § 4458.1 ("In most circumstances . . . it should be presumed that public enforcement actions are not intended to foreclose traditional common-law claims or private remedies expressly created by statute.").

170. In *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), the Court refused to allow intervention under a prior iteration of Federal Rule of Civil Procedure 42 by a group of smaller publishers in a federal antitrust enforcement action against larger publishers because the smaller publishers could pursue injunctive relief in the face of a consent decree in the government action. The Court stated that it is "fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation." *Id.* at 689.

171. *See* Erichson, *supra* note 79, at 9–16 (explaining how state action against the tobacco industry paved the way for private action).

172. Elizabeth Chamblee Burch, *Adequately Representing Groups,* 81

found punitive damages claims precluded as public relief made it clear that state attorneys general acting under common law *parens* authority could not release private claims for compensation due to injuries from smoking. As the Georgia Supreme Court stated, for purposes of preclusion in a private suit following a state *parens* action, "the State and its citizens can be privies . . . only with regard to public claims; they cannot be privies with regard to private claims."[173]

B. THE FALSE SCHOLARLY ALARM

The above law and practice cannot be squared with the assertion in the Lemos article that—as a result of the "prevailing view"[174] of courts that private claims are precluded following public compensation in state attorneys general cases without appropriate procedural protections—new and onerous procedural requirements for public compensation are the constitutional "price of preclusion."[175] The scope of inquiry in the Lemos article, and similarly defined here, is a public action "that seeks to remedy or prevent unlawful activity by obtaining some form of direct financial relief for injured citizens."[176] The concern over preclusion resulting from these actions, therefore, must focus on situations in which an injured private plaintiff was barred from litigating a claim for financial relief as a result of a public enforcement action. Such cases, surprisingly, are absent in the article.[177] Because no judicial decision holds that preclusion of

FORDHAM L. REV. 3043, 3075–78 (2013) (describing varying results as to preclusion of punitive damages claims in coattail class actions following state attorneys general actions against tobacco companies).

173. Brown & Williamson Tobacco Corp. v. Gault, 627 S.E.2d 549 (2006); *see also* Curtis v. Altria Grp., Inc., 813 N.W.2d 891, 904 (Minn. 2012). *Curtis* turns the preclusion analysis upside down by holding that the state attorney general tobacco actions which obtained public relief other than public compensation results in preclusion of a later suit seeking private damages under state UDAP laws. This result flows from the broad "public benefit" restriction imposed by Minnesota courts, which eliminated private rights of action under Minnesota UDAP law following any public enforcement. *Id.* at 899 ("We have previously concluded that the right of a private litigant to bring a lawsuit under subdivision 3a is limited by the authority given the State AG." (citing Ly v. Nystrom, 615 N.W.2d 302, 313 (Minn. 2000))).

174. Lemos, *supra* note 7, at 500.

175. *Id.* at 548.

176. *Id.* at 492.

177. The cases cited in the article generally did not involve the award of public compensation and clearly did not hold that public compensation is preclusive of later private claims for monetary relief absent statutory directive to that effect. Lemos references a mid-level Illinois state appellate decision,

private monetary relief claims follows public compensation from a state attorney general action without procedural protections similar to a class action, the Lemos article is plainly wrong about the prevailing view of courts, especially when that assertion is directly contrary to substantial case law and practice patterns.[178]

This error highlights the problem with conceiving of public compensation as an abstract practice disconnected from the law and context of public enforcement. The first subpart below describes the error as a consequence of failing to distinguish between varying legal authority for public compensation. The second subpart introduces the inapposite use of adequate representation as a gauge for structuring public compensation without properly placing this remedy in the broader context of public enforcement; an idea that is then developed more fully in Part IV.

Bonovich v. Convenient Food Mart, Inc., 310 N.E.2d 710 (Ill. App. Ct. 1974), which held that a private antitrust suit should be dismissed following a decision at trial for defendants in a parallel action brought by the Illinois Attorney General. To the extent this decision has relevance to the issues here, later Illinois state court decisions explicitly reject its reasoning. Jackson v. Callan Publ'g, Inc., 826 N.E.2d 413 (Ill. App. Ct. 2005) (rejecting *Bonovich* as good law and reversing dismissal of a private class action of police officers seeking equitable relief in the form of a constructive trust); People *ex rel.* Fahner v. Climatemp, Inc., 428 N.E.2d 1096, 1100 (Ill. App. Ct. 1981) ("[W]e believe that the *Bonovich* court's definition of 'same parties' is overly broad."). The decision also predates the federal statutory scheme for state attorney general antitrust public compensation under federal law adopted in 1976. *See supra* Part I.B.4.

178. This Article does not take the position that it is fully settled law that public compensation can never result in preclusion of later private claims in any circumstances. Perhaps the best argument that a circumstance exists for finding public enforcement precludes later private claims for monetary relief would be to focus on a state attorney general enforcement action using only common law *parens* authority and seeking only damages. Even in this scenario, preclusion seems unlikely because a fundamental *parens* principle is the separation of the interests of the state and the interests of the citizens; the state must represent "quasi-sovereign" interests, not private interests. *Parens* "does not involve the States stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves." Snapp & Son v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982). Although this question is an all but untraveled side road as to current practice, it might have theoretical interest, especially given prominent scholars encouraging state attorneys general to bring such cases to fill the enforcement gap caused by judicial limits on class actions. *See* Gilles & Friedman, *supra* note 11. This theoretical potential for preclusion, however, is wholly different than the factual assertion by Lemos about the prevailing view of courts. That assertion is simply wrong.

1. Differences in Authority Explain Preclusion Outcomes

A careful look at the cited support for Lemos's assertion about preclusion suggests that it can be explained substantially by a failure to understand that public compensation has different contours under different statutory schemes. The article directly supports its contention about the prevailing view of courts by quoting a law review article discussing solely state attorneys general antitrust suits brought under the Clayton Act.[179] As we have seen, preclusion of private claims following state attorney general enforcement under the Clayton Act is based in statute and has a unique origin and structure, including a requirement of using procedures that comport with Due Process, so preclusion in this specific context cannot be generalized to other areas of public compensation.[180]

The Lemos article also glosses over the different types of legal authority under which state attorneys general pursue public compensation.[181] Although her article acknowledges that most state attorneys general enforcement actions proceed under statutory authority,[182] it emphasizes the special concerns that arise in state use of common law *parens* authority. A focus on common law *parens* doctrine limits the relevance of the critique to the broader topic of public compensation because this remedy almost always has a statutory basis, in state attorneys general cases and other public enforcement actions.[183] Yet even

179. Lemos partially quotes Farmer as part of her formulation of the critical supposition underlying her argument: "Although the case law on the preclusive effect of public aggregate litigation is surprisingly sparse, the prevailing view is that the judgment in a state case is binding 'on every person whom the state represents . . . .'" Lemos, *supra* note 7, at 500 (citing Farmer, *supra* note 92, at 384). Farmer, however, was writing solely about the state attorney general statutory *parens* authority in the Clayton Act. Indeed, the entire sentence from which Lemos extracts a clause refers specifically to the notice and opt-out rights in the Clayton Act: "Because *parens patriae* group members are presumed to have had notice of the action and an opportunity to opt out of the litigation, a judgment is conclusive on every person whom the state represents as *parens patriae*." Farmer, *supra* note 92, at 384 (citations omitted). Farmer also observes that the Clayton Act procedural requirements "protect the consumers' constitutional right to be heard." *Id.* (citation omitted).

180. *See supra* Part I.B.4; *see also In re* Elec. Books Antitrust Litig., 14 F. Supp. 3d 525, 536 (S.D.N.Y. 2014) (finding that Due Process does not necessitate use of class action rules in state antitrust action under the Clayton Act).

181. Lemos also sees no reason to differentiate between restitution and damages. Lemos, *supra* note 7, at 498 ("[T]he differences between restitution and other monetary damages are immaterial for present purposes . . . .").

182. Lemos, *supra* note 7, at 497–98.

183. *See supra* Part I.B.

with such a narrow emphasis, the article does not identify any case in which state attorneys general used common law *parens* authority to obtain public compensation.[184]

Instead, the article cites cases, including *Satsky*, that hold private parties are precluded only from seeking injunctive relief.[185] Those cases are consistent with the absence of prelusion as to public compensation. In fact, several of the judicial decisions cited in the Lemos article explicitly hold that private damages claims are not precluded following a public enforcement action.[186]

2. Private Interests in Public Enforcement

The Lemos article cites some of the relevant case law about preclusion in discussing purported Due Process concerns about adequate representation, rather than using these cases to shed light on the predicate question of whether and when private claims are precluded following public compensation. The article jumps to constitutional concerns with this explanation:

> Such suits blur the lines between public and private, raising difficult questions about their effect on subsequent private litigation. The difficulty stems from the fact that the state clearly *does* purport to represent private interests when it seeks damages or restitution on behalf of injured citizens. The operative question for preclusion

184. Lemos states that "[d]octrinal puzzles aside, states do use *parens patriae* actions to obtain damages and other monetary remedies for their citizens," *supra* note 7, at 497, but cites as support only law review articles discussing industry-wide cases against tobacco, guns, and lead paint manufacturers, which are not public compensation cases. *See supra* notes 78–79 and accompanying text.

185. Lemos, *supra* note 7, at 500 n.55. Lemos also explicates the suits following the Exxon Valdez oil spill, the public enforcement actions of which were unrelated to public compensation. *Id.* at 533–36. Lemos also cites the earlier discussed coattail tobacco class actions. *Id.* at 528.

186. *See* Brown & Williamson Tobacco Corp. v. Gault, 627 S.E.2d 549, 552 (Ga. 2006) ("[P]laintiffs' claim for compensatory damages is of a private, individual nature, [but] it cannot be said that plaintiffs and the State are in privity with respect to such claims."); Fabiano v. Philip Morris Inc., 862 N.Y.S.2d 487 (N.Y. App. Div. 2008) ("[I]t is undoubtedly true that plaintiffs' private claims seeking compensation for personal injury could not have been prosecuted by the Attorney General 'within the *parens patriae* umbrella,' the claim asserted by them for punitive damages is not similarly disqualified, for punitive damages claims are quintessentially and exclusively public in their ultimate orientation and purpose." (citations omitted)); *see also* Satsky v. Paramount Commc'ns, Inc., 7 F.3d 1464 (10th Cir. 1993); *supra* notes 163–68 and accompanying text. In *United States v. Olin Corp.*, 606 F. Supp. 1301 (N.D. Ala. 1985), the court severed plaintiffs' claim for damages from their claim for injunctive relief and the finding of preclusion was "directed solely against the severed injunctive claim." *Id.* at 1304.

> purposes is thus not whether the state "understood [itself] to be acting in a representative capacity"—plainly it did. Instead, the validity of preclusion turns on whether the state representation was constitutionally "adequate."[187]

The statement that state attorneys general "plainly" intend to represent private interests in seeking public compensation is unsupported in the article and probably often inaccurate. But more importantly, the intent of government enforcers is beside the point for purposes of determining preclusion. The legal authority for public compensation gives government enforcers the right to seek benefit for private individuals within the context of public enforcement designed to achieve broader public benefits.[188] Whether or not the government enforcer conceives of itself as representing the interests of a group of recipients when seeking public compensation, it can only seek what it has authority to obtain in a public enforcement action, not all the relief that any individual in the group is entitled to seek in a private action.

It is consistent with preclusion law, therefore, for a government enforcer to take the position that it intends to represent the private interests of consumers, investors or employees in seeking public compensation in a public enforcement action *and* that any public compensation it obtains is not preclusive of a later suit for additional recovery by those individuals. The FTC took exactly this stance in opposing intervention by a putative class in a UDAP enforcement action against a seller of Bitcoin "mining" equipment.[189]

The focus on adequacy of representation as an abstract principle in the new scholarly critiques reflects the importance ascribed in those critiques to the observation that public compensation looks like a class action case. If public compensation is a mimic of a private class action, then it may seem a straight line to the conclusion that government enforcers must represent the private interests of the relief recipients using the same

187. Lemos, *supra* note 7, at 535 (footnotes omitted).

188. *See infra* Part IV.A.

189. The FTC argued that it adequately protected the interests of the class members because "[w]hile all enforcement actions serve a general public interest in deterring violations of the FTC Act and thereby protecting consumers, this action also serves the narrower goal of attempting to make the specific victims of those violations whole." Brief of Plaintiff-Appellee at 26, Alexander v. FTC, No. 14-3286 (8th Cir. Jan. 16, 2015). The FTC also argued that the class members would not be barred from receiving relief as a result of the FTC public compensation relief, noting that concerns about preclusion were an "especially weak link" in the putative class counsel's argument. *Id.* at 15.

procedures required of class counsel. But the premise that seeking public compensation converts public enforcement into the equivalent of a private action is incorrect, as explained in the following Part.

IV. FAILURE OF THE CLASS ACTION ANALOGY

The claim that state attorneys general violate Due Process by obtaining public compensation obviously fails when private monetary claims are not precluded by public compensation, or when public compensation has adequate procedural protections in the infrequent cases where it results in preclusion. This leaves the less forceful but important argument that public compensation would be more accountable and transparent if it followed class action procedures. The underlying critique and suggested reform rest almost entirely on the analogy between public compensation and class action cases. This analogy fails because government enforcers obtain public compensation as part of their discretion in bringing and shaping public enforcement actions, which means accountability for public compensation should be measured by the goals and structure of exercise of this discretion by government enforcers rather than norms of class action law.

This Part proceeds as follows: The first subpart explores the discretionary authority of government enforcers in seeking and structuring remedies. The second subpart argues that legislative decisions to grant enforcers discretionary authority in seeking enforcement remedies means government enforcers tasked with public objectives are not accountable to the private interests of individual recipients of relief. Government enforcers face a variety of pressures to resolve conflicting interests in enforcement actions, and the decision to seek public compensation as a remedy is no more, and may be less, subject to conflicts with various private interests in the enforcement action than the conflicts that arise from other enforcement decisions. The second subpart also places the class action analogy in the context of other largely unsuccessful arguments by enforcement defendants that public compensation should be treated as a form of government class action. The third subpart outlines practical reasons that class action procedures are an ill fit for determining the award and structure of public compensation.

A. ENFORCER DISCRETION IN SEEKING AND IMPLEMENTING REMEDIES

Government enforcers exercise substantial discretion in determining when to seek public compensation and how it is structured. They can compromise the amount of or distribution scheme for public compensation in favor of other enforcement remedies as a matter of policy or as applied in specific case negotiations.

1. Remedial Options in Public Enforcement

Government enforcers seek three types of relief for violations of civil law—injunctions (or administrative orders restraining future conduct), civil penalties, and public compensation. They commonly seek and obtain all three types of relief in the same enforcement action. The distribution of remedies varies by the objectives, resources, and legal constraints of the parties to the action.

Deterrence is the core goal of civil law enforcement.[190] Injunctions, or similar forms of administrative orders, are central to public enforcement because they are aimed at directly deterring future misconduct by proscribing or requiring future conduct. Injunctive relief occurs in most public enforcement actions.[191] Civil enforcement actions also deter through the assessment of civil penalties. The potential size of such penalties can vary tremendously depending on the amount and calculation of number of violations set forth in the authorizing

190. Velikonja, *supra* note 35, at 359 ("The primary purpose of the SEC's enforcement activity is deterrence."); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 952 (noting that government agencies "seek to deter by fines, injunctions, and orders for disgorgement and restitution"). *But see* Minzner, *supra* note 101, at 2129–31 (arguing that enforcement agencies can use retributive theories of punishment).

191. Hoffman, *supra* note 25, at 1386 ("In the usual case, at least at the federal level, the government will have obtained or will be seeking prospective relief and perhaps civil or criminal penalties."); *see also* Brief for Center for Responsible Lending & AARP et al. as Amici Curiae Supporting Respondents, Nevada v. Bank of Am. Corp., 672 F.3d 661, 670 (9th Cir. 2012) (cataloging injunctive relief routinely obtained in state attorneys general consumer protection actions). In contrast, class action cases focus on monetary recovery. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 824 (2010) (finding 89% of class action settlements included cash relief and 23% of cases included injunctive or declaratory relief).

statute, the severity of the violations, the willfulness of the conduct, and other factors.[192]

Public compensation is part of but complicates the deterrence rationale of public enforcement. Public compensation obviously provides relief to people adversely affected by the violator's conduct.[193] Courts, however, also stress the deterrence rationale for public compensation because it forces law violators to forego gains and takes away unfair market advantage.[194] Underscoring the deterrence rationale of public compensation is the fluidity between civil penalty and public compensation recovery in some contexts. Penalties collected in enforcement actions usually are paid to the general fund of the government,[195] but some enforcers are authorized to use penalty funds for public compensation.[196] Conversely, money collected for pub-

192. Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435 (1979) (describing the varying requirements of 348 federal statutes authorizing civil penalties); Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 358 (2013) (describing complex CFPB civil penalty authority); Shelden & Gardner, *supra* note 57, at 388 (state attorneys general civil penalty authority); *see also* Minzner, *supra* note 101, at 2127–31 (describing the choices facing government enforcers in seeking an amount of penalties).

193. A similar intersection of compensatory and deterrence functions exists in private enforcement, but the balance weights toward compensation. Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1310 (2008).

194. *See, e.g.*, Eddleman v. U.S. Dep't of Labor, 923 F.2d 782, 791 (10th Cir. 1991) ("DOL's pursuit of debarment and liquidation of back-pay claims was primarily to prevent unfair competition in the market by companies who pay substandard wages."); State v. Master Distribs., 615 P.2d 116, 124–25 (Idaho 1980) ("Only a substantial likelihood that defendants . . . will be subject to restitutionary orders will deter many with a mind to engage in sharp practices.").

195. Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 864 (2014) ("The default rule under both state and federal law is that the proceeds of public enforcement belong to the public fisc . . . ."). Some government enforcers are authorized to retain penalty or cost recoveries to fund enforcement or other agency activity. *Id.* at 864–76.

196. Winship, *supra* note 107, at 1118–24 (describing SEC "Fair Funds" authority). The CFPB has a Civil Penalty Fund which, unlike SEC Fair Funds, allows CFPB assessed penalties to be distributed in later cases when the agency is unable to collect ordered public compensation from the enforcement defendant. 12 U.S.C. § 5497(d)(1) (2012); 12 C.F.R. § 1075 (2012). State attorneys general have successfully argued that civil penalties for UDAP violations can be used to augment public compensation. CashCall, Inc. v. Morrisey, No. 12-1274, 2014 WL 2404300, at *19 (W. Va. May 30, 2014).

lic compensation often is directed to a public treasury or *cy pres* awards if it is not practical to distribute.[197]

2. Discretion in Seeking Remedies

Government enforcers exercise discretion over the balance of remedies to seek in enforcement actions. The highest-level choice is the balance between the rigor of injunctive prescriptions to restrain future conduct versus some form of monetary payment. If a company has ceased operations, an enforcement action may be focused solely on obtaining a monetary recovery from corporate officials. When the primary goal is to change the conduct of a company or industry, an injunction likely will be the priority. In many cases, the balance between injunctive and monetary relief will evolve over the course of the enforcement action.

Whether to seek civil penalties, public compensation or both as monetary relief for violations also is a discretionary matter, and different government enforcers have different policies as to balance of remedies.[198] The U.S. Food and Drug Administration (FDA) has a practice of eschewing public compensation.[199] Agency views of the relative importance of public compensation shift over time, and the current trend is decidedly in favor of more public compensation.[200] The SEC, for example, "long disclaimed any role as an instrument for private individuals to recover money," but by 2005 had decided to seek the return of money to investors "whenever possible."[201]

197. 15 U.S.C. § 15e(2) (2012) (stating that state antitrust enforcement recovery for harm to consumers can "be deemed a civil penalty by the court and deposited with the State as general revenues"); 17 C.F.R. § 201.1102(b) (2012) (allowing SEC disgorgement to be deposited into U.S. Treasury); Farmer, *supra* note 92, at 391–400 (noting *cy pres* awards are common in state antitrust cases).

198. Enforcement defendants also will have varying preferences as to monetary relief. For instance, they may prefer payment to consumers because it is tax deductible, unlike a civil penalty.

199. Zimmerman, *supra* note 7, at 536–39 (observing that the FDA obtains disgorgement or restitution in enforcement actions but has a practice of distributing the money to the U.S. Treasury rather than victims of the illegal conduct).

200. *Id.* at 529 (stating "SEC-based compensation has increased dramatically" after 2002); *id.* at 534 (stating "FTC-based compensation to victims has increased tremendously" since the 1970s).

201. Winship, *supra* note 107, at 1110. The FTC view of public compensation in antitrust enforcement similarly has evolved. *See supra* note 66 and accompanying text.

In a series of enforcement actions against mortgage servicing companies, state attorneys general used their authority to seek penalties to obtain a multi-billion dollar public compensation program for loan modifications.[202]

Regardless of the general disposition of the government enforcer toward public compensation, the mix of remedies obtained in an enforcement action remains a case-by-case decision in public enforcement. Banking regulators, for instance, have settled cases involving illegal practices in account overdraft charges by imposing only a civil penalty,[203] by administrative order concerning regulatory compliance,[204] or by an order with all forms of relief—civil penalty, public compensation, and an order requiring operational changes.[205]

3. Discretion in Structuring Public Compensation

The broad discretion of government enforcers usually extends to distribution mechanisms and procedures for public compensation. In most circumstances, no regulatory scheme requires specific procedures for public compensation, and thus the procedures are shaped by the court or agency, or more typically through settlement on a case-by-case basis.

Unlike class actions, notice to consumers typically occurs after the plan for public compensation is determined. Consumers do not have a right to object to the terms of the distribution.

A key difference in public compensation procedures is whether the compensation requires the consumer to file a claim, and if so, the type of claims process. Some public compensation cases involve a distribution of the relief without any requirement for consumer involvement. The recipients and amount of public compensation per person is determined based on the business records of the enforcement defendant. The government enforcer either requires the defendant to provide the compensation,[206] or the enforcement defendant is given credit

202. Totten, *supra* note 20, at 1639–47.

203. *In re* Greenbank Greeneville, FDIC-10-802K (Sept. 2, 2011) (order to pay), https://www.fdic.gov/bank/individual/enforcement/2011-09-40.pdf.

204. *Appeal of Violation of Federal Trade Commission Act and Material Supervisory Determinations (First Quarter 2012)*, OCC, http://www.occ.treas.gov/topics/dispute-resolution/bank-appeals/summaries/appeal-violations-trade-q1-2012.html (last visited Apr. 17, 2016).

205. Press Release, OCC, OCC, Woodforest National Bank Enter Agreement To Reimburse Consumers (Oct. 8, 2010), http://www.occ.gov/news-issuances/news-releases/2010/nr-occ-2010-122.html.

206. *See, e.g.*, Press Release, CFPB, CFPB Orders American Express To

for refunds or actions to recompense consumers based on criteria identified in a settlement agreement,[207] or the government enforcer receives a fixed amount for public compensation and has broad discretion to distribute the money.[208] Public compensation occasionally requires no distribution because it is relief that benefits individuals but does not require the payment of money, such as when a defendant foregoes the right to collect an alleged debt.[209]

Claim forms are used in cases where the customer must opt-in to receive the offered relief. Some claims require only that the consumer file a form to receive the offered relief, while other claim forms require the consumer to certify that she meets an eligibility requirement, or to submit proof of eligibility for the relief.[210] An important distinction in claims procedure in

Pay $59.5 Million for Illegal Credit Card Practices (Dec. 23, 2013), http://www.consumerfinance.gov/newsroom/cfpb-orders-american-express-to-pay-59-5-million-for-illegal-credit-card-practices (announcing settlement of joint enforcement action with OCC and FDIC and describing refund procedure as follows: "If the consumers are still American Express customers, they will receive a credit to their accounts. If they are no longer an American Express credit card holder, they will receive checks in the mail. Consumers are not required to take any action to receive their credit or check."); *see also* Velikonja, *supra* note 35, at 392 ("Where the defendant is solvent and trustworthy and the victims identifiable without a notice and claims process, the SEC has ordered the defendant . . . to compensate its victims directly—eliminating the need to create a distribution fund.").

207. *See, e.g.*, *National Mortgage Settlement Summary*, NAT'L CONF. ST. LEGISLATURES (Sept. 4, 2013), http://www.ncsl.org/research/financial-services-and-commerce/national-mortgage-settlement-summary.aspx (describing $17 billion of relief for certain types of actions, such as mortgage modifications, for which the mortgage servicer "will receive credit for completing these consumer relief activities").

208. *See, e.g.*, Final Order, FTC v. Info. Mgmt. Forum, Civ No. 6:12-cv-986-Orl-31 KRS, at 8 (M.D. Fla. Aug. 30, 2013) (indicating that over $16.9 million was to be dispersed under FTC's direction); U.S. Commodity Futures Trading Comm'n v. Trimble, No. 11-CV-PAB-KMT, 2013 WL 317576, at *10–11 (D. Colo. Jan. 28, 2013) (awarding more than $878,000 in restitution to investors to be distributed at discretion of court-appointed monitor).

209. The CFPB, for example, obtained a settlement with the Zenith Education Group in February 2015 to reduce student loan principal balances by 40% for Corinthian College graduates. Press Release, CFPB, CFPB Secures $480 Million in Debt Relief for Current and Former Corinthian Students (Feb. 3, 2015), http://www.consumerfinance.gov/newsroom/cfpb-secures-480-million-in-debt-relief-for-current-and-former-corinthian-students.

210. *Compare* Consent Order, *In re* Ace Cash Express, Inc., 2014-CFPB-0008, at 17–18 (July 8, 2014) (appointing a third-party administrator to create and distribute claims forms for public compensation to payday loan borrowers with no proof requirements), *with* Consumer Prot. Div. Office of Atty. Gen. v. Consumer Pub. Co., 501 A.2d 48, 74 (Md. 1985) (requiring consumers to file a claim form stating "that they relied on the false impressions created by the

public compensation arises with regard to whether acceptance of the relief is made contingent on the consumer executing a release of private claims against the enforcement defendant, which occurs in some cases.[211]

Unlike class actions, judicial review is not always required in public compensation cases. Settlements in administrative actions generally are not subject to judicial review, but courts sometimes review enforcement actions filed in a judicial forum, even if a settlement is reached.[212] State attorneys general frequently settle cases prior to filing a lawsuit through use of an assurance of voluntary compliance, which is a statutory authorization for such settlements and can require judicial approval.[213]

B. BROAD REMEDIAL DISCRETION UNDER STATUTORY AUTHORITY DISTINGUISHES PUBLIC COMPENSATION FROM CLASS ACTION REMEDIES

Public and private enforcement of civil law overlap in purpose and consequence. Both types of enforcement deter, and both compensate people who suffer loss. That public and private enforcement share attributes, however, should not obscure fundamental differences. Government enforcers have a different job than class action attorneys, and accountability has a different meaning for public compensation than it does for monetary recovery in private actions.

1. Differing Origins of Public Enforcement Authority and Class Action Certification

Public enforcement rests on legislative designation of government entities to exercise broad discretion in enforcing specific statutory schemes. These statutory schemes do not charge government enforcers with obligations to represent private interests.[214] This point becomes apparent in civil public enforce-

advertising" at issue).

211. *See infra* Part V.B.

212. Winship, *supra* note 131, at 559 ("Courts have often evaluated whether SEC settlements and distributions are fair, reasonable, and adequate.").

213. *See, e.g.*, MO. REV. STAT. § 407.030 (2015) (requiring assurance subject to get approval of the court). State attorneys general also commonly jointly file a complaint and proposed consent judgment, which requires court review and approval. *See, e.g.*, Consent Judgment, Washington v. Household Int'l, Inc., No. 02-2-35630-3 (Wash. Super. Ct. Dec. 13, 2002) (including the complaint of the Washington Attorney General).

214. Again, state antitrust enforcement actions, under the Clayton Act, are

ment litigation when the government calls consumers, investors, or employees as witnesses who can testify about the alleged illegal conduct, or the enforcement defendant deposes these individuals. The government enforcer does not represent these individuals in the same way as would the individuals' private counsel, so the defendant is free to obtain testimony about conversations these individuals have with government attorneys or investigators, as no attorney-client privilege applies. The fact that government enforcers do not represent the recipients of public compensation renders unnecessary an inquiry into the adequacy of the purported representation as a constitutional matter.[215]

Government enforcers have authority to define enforcement priorities when implementing statutory schemes. Flexibility in selecting and implementing enforcement remedies is part of the broad discretion invested by Congress and state legislatures in government enforcers. Part of this discretionary authority involves considering whether to seek public compensation or not, structure it in one way or another, and balancing it against other remedies. Statutes authorizing public compensation do not provide for private rights in the pursuit of that compensation.

In contrast, the class action is a procedural mechanism that rests on the grievances and claims of the class members. Class members do not pick the representative of their private interests in class actions. Accordingly, class actions are certified under civil procedure aggregation rules that invest authority in class counsel and class representatives only if they adequately represent the interests of the class. Notice, opt-out and judicial review requirements for class actions flow, in part, from the need for some formal method of apprising class counsel fealty to this principle.

The underlying rationale for public compensation authority granted in public enforcement, therefore, wholly differs from the rationale for granting class counsel and class representatives the authority to prosecute a class action. The less rigorous procedures for public compensation compared to a class action

exceptions because the state is expressly authorized to represent private interests of its citizens and required to comply with procedures designed to afford Due Process protections of those private interests. *See supra* Part I.B.4.

215. Courts and government enforcers can and do structure public compensation so as to require the recipient to release claims as a condition of obtaining the compensation, which raises issues of adequacy of representation as a practical matter. *See supra* note 149 and accompanying text; *infra* Part V.B.

make sense because public compensation is pursued or foregone by decision of the government enforcer. A state attorney general, for example, can decide to settle an enforcement action with a $50 million penalty and an injunction, even if the government's complaint sought public compensation as a remedy and prior settlement discussions included a demand by the state attorney general for $25 million each in penalties and public compensation. Counsel and class representatives for a class action certified based on alleged monetary damages suffered by the class cannot operate similarly in unilaterally deciding to forego any monetary relief for the class in favor of a payment to the government or reform of sales practices, absent unusual circumstances.

Contrast this broad discretion to seek and shape relief, with the criticism that public compensation occurs without effective participation or control by the recipients, against the stricter requirements for notice and objection rights provided in class action cases. These notice and objection rights exist because class actions assert the collective claims of class members and the class case results in preclusion of those claims. Government enforcers who decide to seek public compensation have no obligations to obtain a certain amount of compensation, structure the compensation in a particular manner, or involve the recipients of relief in any way. Some enforcement actions resulting in public compensation involve close collaboration between the government enforcer and recipients of relief or advocates for those recipients. Recipients in other public compensation cases discover the existence of the enforcement action when they receive an account credit or a claim form or through discovering media stories. From the perspective of legislatively granted authority, there is no difference in the legitimacy of public compensation in these two situations.

2. Public Compensation Is Part of the Broader Exercise of Discretion in Civil Law Enforcement

The scholarly critics mostly ignore this difference in the origin of the authority for public enforcement versus private aggregate actions. Instead, they offer a functional critique. They contend that choosing to seek monetary relief for a group of people effectively puts government enforcers in the same position as class counsel, and thus government enforcers have the same problems of accountability to and consent from the recipients of relief. So "like class counsel," they are prone to accept

inadequate, "quick and easy" settlements, among other problems.[216]

This argument narrows the scope of the inquiry without justification. There is no difference between the issues of accountability and consent in public compensation and the same concerns with other enforcement decisions made by government enforcers. The critics appear to be picking a fight with the use of one government enforcement remedy, but their position really attacks a legislative choice to grant broad discretion to government enforcers.

Take the argument of the critics that packs the most force—that government enforcers have conflicts of interests with the potential recipients of public compensation. For sure, government enforcers have multiple interests to consider in any enforcement action, and some of these interests will sometimes conflict with some or all compensation recipients. This observation, however, applies to the full range of enforcement discretion entrusted to the government enforcer, not just public compensation. The key for our inquiry is to sort out the conflict of interest concerns unique to public compensation that would justify imposing new procedural requirements only on this aspect of public enforcement.

Government enforcers decide which problems within their purview deserve attention, which cases in those areas to investigate as an enforcement concern, and which cases investigated will be pursued as an enforcement action. Once a specific case achieves regulatory attention worthy of enforcement, the government enforcer faces a new set of decisions, which usually includes the scope of conduct to investigate, the investigative methods, the best forum for the action, what violations of law to allege, and whom to target (e.g., whether to include corporate officials as defendants). Then comes the issue of what relief to seek as to which targets of the action, with the familiar allocation between injunctive relief, penalties, and restitution.

The critique of public compensation starts after all these decisions have been made, when the government enforcer has begun to prosecute an enforcement action and determined to seek consumer, investor, or employee relief as one remedy. The focus of the critique is on how much compensation was obtained in the action and to whom it was distributed. These questions

216. Lemos, *supra* note 7, at 491; *see* Zimmerman, *supra* note 7, at 551 (indicating that "agencies may seek quick settlements to resolve embarrassing missteps in regulatory policy").

do not raise any patent concerns about conflicts of interest and accountability that are absent from the other welter of decisions in the enforcement action. If an individual, advocacy organization, or company lobbies a government enforcer to initiate, or refrain from initiating, an enforcement action against a particular company or against an industry, one can point to the conflicting interests of the government enforcer as motivating its decision, to bring an action or demure.[217] The same critique about conflicting interests can be leveled if a government enforcer decides to sue Company X and not its competitors, or seeks only injunctive relief and not monetary relief.

Consider examples from the list of specific conflicts of interest that animate the critics. If a regulator becomes captive of the interests of the regulated entities, the decision to bring an action or not, or the strength of injunctive relief constraining future conduct, or total monetary value of the case including penalties would seem to be more affected by this conflict than how public compensation is distributed. In the wake of the multi-billion dollar settlement between the DOJ and J.P. Morgan Chase involving the sale of mortgage securities, a public interest group sued the DOJ for failure to seek judicial review and reveal information about the settlement, but the focus of the suit was on the overall relief and penalties assessed rather than the public compensation.[218] The same is true of a state attorney general suing for UDAP violations but mostly concerned about the loss of jobs of an in-state defendant employer resulting from the enforcement action. The attorney general could forgo the lawsuit, compromise on the details of injunctive relief, or abstain from seeking penalties just as easily as she could fail

217. For instance, a "short seller" investor anticipating a drop in the stock price of Herbalife recently lobbied the FTC and state attorneys general to bring a UDAP action against the company. Michael Schmidt et al., *After Big Bet, Hedge Fund Pulls the Levers of Power*, N.Y. TIMES (Mar. 9, 2014), http://www.nytimes.com/2014/03/10/business/staking-1-billion-that-herbalife-will-fail-then-ackman-lobbying-to-bring-it-down.html.

218. Ben Protess, *Lawsuit Challenges Government's $13 Billion Deal with JPMorgan*, N.Y. TIMES (Feb. 10, 2014), http://dealbook.nytimes.com/2014/02/10/justice-department-sued-over-13-billion-jpmorgan-pact; *see also* Lisa Gilbert & Brett Naylor, *Bank Settlements Need To Reveal More Information*, N.Y. TIMES (Aug. 27, 2014), http://www.nytimes.com/roomfordebate/2014/08/27/holding-bankers-accountable/bank-settlements-need-to-reveal-more-information (arguing that the settlement did not reveal the underlying allegations and thus it was not possible to determine if the DOJ should have pursued criminal prosecutions).

to aggressively pursue public compensation or structure compensation in a certain form.

Public compensation arguably raises fewer issues of public accountability than other discretionary enforcement decisions, even those choices limited only to remedies. An individual or class can seek relief from inadequate public compensation where such suits are feasible.[219] No alternate private relief is available for the person disappointed in the injunctive relief from the enforcement action or the amount of civil penalty paid to the government.[220] We have seen that homeowners can seek damages for harm caused by a polluter, for example, but they have no recourse to challenge a remediation plan resulting from a public enforcement action.[221] The fact that decisions of the government enforcer are subject to comparison with later private actions may give pause to elected or appointed officials who want to settle cheaply or distribute the money in service of unsavory motives. The same is true when courts review the adequacy of public compensation in determining whether to certify a class action. These situations present the possibility that the government enforcer's decision on public compensation will be publicly scrutinized and publicly criticized in the subsequent private case, a result not likely as to injunctive relief because a private action challenging the injunction would be precluded.

In short, arguments for procedural reform of public compensation, based on a litany of perceived conflicts of interest or problems of "client monitoring and control,"[222] are arguments against the unavoidable and routine exercise of discretion in government civil law enforcement. One could protest the breadth of discretion afforded to public officials in civil law enforcement, as have advocates for corporate enforcement defendants.[223] But urging class action procedures only as to public compensation misconstrues the purpose and operation of public enforcement.

219. *See supra* Part III.A.

220. *See supra* Part III.A.3.

221. *See supra* notes 168–70 and accompanying text.

222. Lemos, *supra* note 7, at 518–22.

223. *See* U.S. CHAMBER INST. LEGAL REFORM, UNPRINCIPLED PROSECUTION: ABUSE OF POWER AND PROFITEERING IN THE NEW "LITIGATION SWARM" 3 (2014) ("Exercises of significant government authority should be subject to checks and balances. Yet enforcement officials have virtually unrestricted discretion in deciding whether to initiate investigations and institute lawsuits, and in setting the price of settlement.").

3. Judicial Recognition of the Importance of Enforcement Discretion in Rejecting the Class Action Analogy

The differences in authority and function of public and private enforcement explain case law that overwhelmingly rejects application of the class action analogy to public compensation in a variety of contexts. Enforcement defendants repeatedly have attempted to define public compensation as a public form of a private class action suit to force limits on its use as a remedy. In largely rejecting these arguments, courts articulate the importance of government enforcer discretion in shaping public enforcement under authority in statutory schemes. The decisions—of the U.S. Supreme Court in *General Telephone* and the California Supreme Court in *Pacific Land Research*—that government enforcers need not use preclusive class action procedures when seeking public compensation are such cases,[224] and the rejection of the class action analogy has occurred in other contexts.

The Lemos article was cited repeatedly in the briefs of business defendants and industry amici, including in *Mississippi ex rel. Hood v. AU Optronics Corp.*, a 2014 U.S. Supreme Court case holding that a state enforcement action is not converted into a "mass action" under the Class Action Fairness Act (CAFA) when the state seeks public compensation as a remedy.[225] Enforcement defendants had argued in a series of circuit cases that state enforcement action became a "disguised class action" when the state sought public compensation, thus mak-

224. *See supra* Part III.A.1.

225. 134 S. Ct. 736 (2014). The Lemos article was also cited in the following briefs: Brief for Respondents at 58 n.6, *Mississippi*, 134 S. Ct. 736 (No. 12-1036), 2013 WL 4769415; Brief for Pharmaceutical Research & Manufacturers of America & American Bankers Association as Amici Curiae Supporting Respondents at 7 n.3, *Mississippi*, 134 S. Ct. 736 (No. 12-1036), 2013 WL 4875113; Brief of DRI—The Voice of the Defense Bar as Amicus Curiae Supporting Respondents at 10–11, *Mississippi*, 134 S. Ct. 736 (No. 12-1036), 2013 WL 4829338; *see also* Petition for Writ of Certiorari at 27–33, AU Optronics Corp. v. South Carolina, 134 S. Ct. 999 (2014) (No. 12-911), 2013 WL 287738 (citing Lemos multiple times). The Lemos article was cited in numerous industry amici briefs in support of certiorari to the U.S. Supreme Court in *State v. Exxon Mobil Corp.*, 126 A.3d 266 (N.H. 2015), including for the proposition that the prevailing view of courts is that public compensation results in preclusion of later private claims. *See* Brief of the Chamber of Commerce of the United States of America & Pharmaceutical Research & Manufacturers of America as Amici Curiae Supporting Petitioners at 9, *Exxon*, 126 A.3d 266 (No. 15-933), 2016 WL 704923; Brief International Association of Defense Counsel as Amicus Curiae Supporting Petitioners at 11, *Exxon*, 126 A.3d 266 (No. 15-933), 2016 WL 738178.

ing state enforcement actions removable under CAFA.[226] Three of four circuits rejected this argument prior to the Supreme Court similarly resolving the issue. The Ninth Circuit held that "Nevada's sovereign interest in protecting its citizens and economy from deceptive mortgage practices is not diminished merely because it has tacked on a claim for restitution."[227] Prior to the enactment of CAFA, enforcement defendants removed cases by state attorneys general seeking public compensation to federal court by asserting that the potential recipients of relief were the real parties in interest and thus diversity jurisdiction authorized removal. Courts remanded these actions to state court because public compensation was one remedy sought in an enforcement case with a broader public purpose.[228]

226. LG Display Co. v. Madigan, 665 F.3d 768, 770 (7th Cir. 2011) (stating that defendants characterized state attorney general suits as a "disguised class action"). CAFA allows for removal to federal court of "mass actions," which CAFA defines as "monetary relief claims of 100 or more persons . . . proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i) (2012). Four federal circuits—the Second, Fourth, Seventh and Ninth—rejected the argument that public compensation cases were mass actions removable to federal court under CAFA based on a review of the whole complaint. Purdue Pharma L.P. v. Kentucky, 704 F.3d 208, 219 (2d Cir. 2013); AU Optronics v. South Carolina, 699 F.3d 385, 394 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 999 (2014); Nevada v. Bank of Am. Corp., 672 F.3d 661, 670 (9th Cir. 2012); *LG Display*, 665 F.3d at 773–74. The Fifth Circuit held that a state public enforcement action could be reviewed for each specific claim and type of relief for CAFA purposes, and an action seeking public compensation was removable under CAFA. Mississippi *ex rel.* Hood v. AU Optronics Corp., 701 F.3d 796 (5th Cir. 2012), *rev'd*, 134 S. Ct. 736 (2014). The Court reversed the Fifth Circuit without directly engaging the circuit split regarding the "whole complaint" versus "claim specific" approach. *See Mississippi*, 134 S. Ct. at 746; Georgene Vairo, *Is the Class Action Really Dead? Is That Good or Bad for Class Members?*, 64 EMORY L.J. 477, 521–29 (2014) (describing the CAFA litigation in state attorney general cases).

227. *Nevada*, 672 F.3d at 671.

228. New York v. Gen. Motors Corp., 547 F. Supp. 703, 706–07 (S.D.N.Y. 1982) ("This conclusion is not altered by the State's decision to seek restitutionary relief and damages on behalf of those who allegedly have been defrauded by GM. Recovery of damages for aggrieved consumers is but one aspect of the case."); *accord* Missouri *ex rel.* Webster v. Best Buy Co., 715 F. Supp. 1455, 1457 (E.D. Mo. 1989); Illinois *ex rel.* Scott v. Hunt Int'l Res. Corp., 481 F. Supp. 71, 73 (N.D. Ill. 1979) (rejecting defendant's argument that "the 'private' relief of restitution and damages on behalf of a class of land purchasers is separate and independent from the claim for 'public' relief in the form of an injunction and civil penalties sought by the Attorney General"); *see also* People *ex rel.* Hartigan v. Lann, 587 N.E.2d 521, 523–25 (Ill. App. Ct. 1992) (rejecting the argument that the Illinois Attorney General must represent individual consumers for purposes of discovery requests because consumers were real parties in interest).

New York state courts rejected an argument by former AIG officials that federal securities law governing private class action suits applies to state enforcement action because the New York Attorney General was acting as "a de facto representative" of stockholders in bringing an enforcement action seeking public compensation.[229] The court emphasized the distinction between public and private actions in describing why the Attorney General was not representing the stockholders:

> [A]fter years of joint federal and state investigation, the Attorney General exercised the discretion of his office to bring this enforcement action . . . to protect the citizens of this State and the integrity of the securities marketplace in New York, to enjoin allegedly fraudulent practices, and to direct restitution and damages to deter future similar misconduct.[230]

For similar reasons, federal courts have held that public compensation in state UDAP enforcement cases is to "effectuate public policy" rather than "adjudicate private rights," and thus seeking public compensation falls within the police and regulatory exceptions in bankruptcy.[231] In finding that public compensation is "fundamentally law enforcement," the Ninth Circuit concluded that the character of an enforcement action "is not affected by the choice of restitution as a remedy."[232]

229. People *ex rel.* Cuomo v. Greenberg, 946 N.Y.S.2d 1, 6 (App. Div. 2012). A parallel class later settled and the Attorney General agreed on appeal to the highest state court that public compensation in the form of damages was not possible in the face of the class settlement and in light of prior New York precedent. People *ex rel.* Cuomo v. Greenberg, 994 N.E.2d 838, 840–41 (N.Y. 2013).

230. *Cuomo*, 946 N.Y.S.2d at 6. The Washington Supreme Court also upheld the constitutionality of the express statutory authority of its Attorney General for public compensation over an objection that "obtaining money or property restoration by the Attorney General for private parties who were complaining witnesses would be in effect having the Attorney General directly representing those persons." State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 510 P.2d 233, 241 (Wash. 1973).

231. City of San Francisco v. PG & E Corp., 433 F.3d 1115, 1124 (9th Cir. 2006) (holding that there was no right of removal because the police and regulatory exemption applies to a claim by California state and local authorities for restitution from a bankrupt utility); *In re* First All. Mortg. Co., 263 B.R. 99, 109–15 (B.A.P. 9th Cir. 2001) (finding an automatic stay to be inapplicable to a claim by Massachusetts Attorney General seeking restitution for subprime mortgage borrowers); *In re* Luskin's, Inc., 213 B.R. 107, 108 (D. Md. 1997) (finding an automatic stay inapplicable to a claim by Maryland Attorney General seeking restitution for deceptive advertising by a retailer). In *In re First Alliance Mortgage Co.*, the Ninth Circuit Bankruptcy Appellate Panel discussed an earlier, contrary decision and found that it was not supportable based on later case law development. 263 B.R. at 111–12. This Panel also noted cases reaching a contrary result when restitution was victim-specific rather than public compensation. *Id.* at 112–13.

232. *City of San Francisco*, 433 F.3d at 1126.

Some government enforcers, notably the EEOC, regularly obtain victim-specific relief rather than public compensation for a numerous group. In victim-specific suits, the EEOC seeks relief for one employee or a small number of identified individuals.[233] These suits draw government enforcers as close as possible to representing private interests. Yet even in this situation, courts usually draw the line between public enforcement and private interests.

The U.S. Supreme Court rendered such a decision when the EEOC sued Waffle House, Inc. for violations of the Americans with Disabilities Act as to a single employee.[234] The Court rejected an attempt by Waffle House to compel the EEOC to arbitrate its claim under the conditions of a pre-dispute arbitration clause in the contract between the employee and the company.[235] The Court articulated the importance of understanding the requested EEOC relief as part of its exercise of discretion under a public enforcement scheme:

> [W]henever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief. To hold otherwise would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not even contemplate the EEOC's statutory function.[236]

State courts have similarly refused to enforce arbitration clauses in enforcement actions brought by state attorneys general and state regulators for the same reasons.[237] These deci-

233. Morrison, *supra* note 38, at 121 (indicating the EEOC may bring a pattern and practice case, or it "may also bring suit based on an aggrieved individual or individuals' charge of discrimination"). Victim-specific compensation occurs in a variety of other types of enforcement actions, including enforcers that typically obtain public compensation. *See, e.g.*, State *ex rel.* Celebrezze v. Eastside Nissan, Inc., No. 87CV-10-6460, 1987 WL 421777, at *3 (Ohio Ct. Com. Pl. Oct. 13, 1987) (detailing the UDAP enforcement action by Ohio Attorney General resulting in payments to three identified car buyers). Other enforcers are smaller regulatory entities like occupational licensing entities. *See* Bitter v. Comm'n for Lawyer Discipline, No. 02-12-00197-CV, 2014 WL 1999315 (Tex. App. May 15, 2014) (providing restitution to specific victims of attorney misconduct).

234. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

235. *Id.* at 293–95.

236. *Id.* at 296.

237. Rent-A-Ctr., Inc. v. Iowa Civil Rights Comm'n, 843 N.W.2d 727, 740–41 (Iowa 2014) (refusing to compel arbitration in civil rights employment enforcement action and noting similar state appellate court holdings in New York and Massachusetts); State *ex rel.* Hatch v. Cross Country Bank, Inc., 703

sions flip on its head the assertion by critics that public compensation is essentially a government form of class action. Rather, statutory schemes permitting government enforcers to seek public compensation at their discretion without requiring use of class action procedures reflect a legislative decision that public compensation should not be governed by norms underlying class action suits. Analogizing or equating class action monetary recovery and public compensation creates misunderstanding as to the reasons that courts, legislators, and government enforcers act as they have in structuring public compensation in civil law enforcement.

C. CLASS ACTION PROCEDURES ARE AN ILL FIT FOR PUBLIC COMPENSATION IN VARYING ENFORCEMENT ENVIRONMENTS

The argument to this point has been that the use of flexible, less onerous procedures for public compensation neither raises constitutional concerns nor results in problems of accountability and consent that have any meaning in the context of public enforcement. But what about applying class action procedures for practical policy reasons? Perhaps rigorous procedural requirements for public compensation would make it fairer and more responsive to the needs of recipients. But any theoretical appeal of this idea quickly dissolves when considering the ill fit and negative consequences of imposing more onerous procedures on public compensation as it occurs under varying statutory schemes and in varying enforcement environments. One can imagine a case for imposing class action procedures in a specifically identified enforcement context. A broad-brush comparison of class actions and public compensation, however, does little to identify when such procedures are warranted, if ever. Although not an exhaustive list, this subpart looks at the following four variations in public compensation that undermine a call for broad imposition of costly procedures: differing proof requirements, differing importance of

N.W.2d 562, 574–75 (Minn. Ct. App. 2005) (refusing to compel arbitration in a case brought by state attorney general under common law *parens* and statutory injunctive authority for tort violations in debt collection); People *ex rel.* Cuomo v. Coventry First LLC, 915 N.E.2d 616, 619 (N.Y. 2009) (indicating that arbitration agreements between insurance entities did not require New York Attorney General to arbitrate claims against insurer); Taylor v. Ernst & Young LLP, 958 N.E.2d 1203, 1211 (Ohio 2011) (refusing to compel arbitration by the state superintendent of insurance in his "public-protection role"). *But see* Ropp v. 1717 Capital Mgmt. Co., No. CIV.A. 02-1701-KAJ, 2004 WL 93945, at *2 (D. Del. Jan. 14, 2004) (stating that an arbitration clause is enforceable when state securities commissioner seeks victim-specific relief).

non-monetary factors in compensation, the fact that many public compensation schemes make recipients whole, and the adverse impact on recipients of public compensation that will follow added procedural costs.

First, unlike private class actions, calculation of public compensation often is not based on the loss of the consumer, investor, or employee, so there is less or no reason to impose procedures designed to ensure the consent of the recipient. Government enforcers usually seek restitution or disgorgement or another form of equitable relief. Private actions typically seek damages. The proof required, the measure of loss or recovery, and the definition of success can differ in public compensation and private actions. Many enforcement actions, including most FTC, SEC, and CFTC cases, are based on a restitution or disgorgement theory that measures public compensation by the illegal gain to the defendant rather than an estimate of loss to the consumer or investor.[238] And the amount of public compensation can be derived in an imprecise manner fitting a deterrence rationale, but not appropriate for proof in a damages case.[239]

In some cases, the source of funds for public compensation is wholly removed from the distribution of funds. The CFPB authorizing statute establishes a Civil Penalty Fund that allows the agency to use money obtained in a prior enforcement action to fund public compensation in a later enforcement action.[240] Other government enforcers have authority to deploy civil penalty recoveries for public compensation, even though such penalties are derived from different considerations than consumer loss.[241] These sorts of public compensation recoveries are alien to a private action for damages or other monetary relief, and thus the justification for imposing private class action procedures has no application in such actions.

238. FTC v. Verity Int'l, Ltd., 443 F.3d 48, 67 (2d Cir. 2006) (explaining that in FTC cases, "appropriate measure for restitution is the benefit unjustly received by the defendants"); Commodity Futures Trading Comm'n v. Am. Metals Exch. Corp., 991 F.2d 71, 78 (3d Cir. 1993) (following an approach regarding compensation similar to the CFTC cases). The Pennsylvania State Securities Regulator's authority to obtain restitution and disgorgement is a sharp example of this distinction. However, it can seek damages only when "enforcement of the rights of such persons by private civil action, whether by class action or otherwise, would be so burdensome or expensive as to be impractical." 70 PA. STAT. AND CONS. STAT. ANN. § 1-509 (West 2014).

239. *See supra* note 64.

240. *See supra* note 196.

241. *See, e.g.*, *supra* note 196.

Second, government enforcers have discretion to consider numerous factors other than the amount or distribution scheme for recovery. For example, timeliness of relief can be one of the primary factors in shaping public compensation. The state attorney general enforcement actions during the foreclosure crisis occurred in a situation where the quantity of relief to distressed borrowers needed to be balanced against the need for relief while homeowners were still in possession of their homes. Class action procedures would attenuate the process and prevent swifter public enforcement remedies when necessary.

Third, a substantial amount of public compensation fully compensates the recipients of the relief. Even though securities regulators have been heavily criticized for inadequate distributions, the study of SEC actions by Urska Velikonja identified over fifty cases, almost twenty-five percent of the total cases evaluated, in which SEC public compensation made claimants whole or appeared to do so, or provided "very close" to full compensation of loss.[242] Empirical study is needed in other areas to determine exactly what percentage of public compensation achieves full compensation, but anecdotal evidence is easy to find in almost all relevant regulatory areas. The seminal *Porter* case involved full compensation for the tenants who overpaid rent, and many of the consumer cases previously described fully returned the amount expended by all consumers who were charged for a good or service.[243] Wholly compensating an entire group alleviates any concerns about the adequacy or fairness of the distribution.

Fourth, public compensation is less costly in its current form. Class action notice, objection, and review procedures would add expense and impose case supervision burdens. These costs could be substantial relative to the amount of recovery in small-dollar actions, which occur in many consumer finance cases. Whether in response to these costs or to the administrative burdens of implementing procedures, government enforc-

242. Velikonja, *supra* note 35, at 363–64.

243. *See, e.g.*, CFPB, *supra* note 6 (reporting that credit card add-on cases by CFPB returned full cost of product); *see also In re* Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 369, 402–03 (D.D.C. 2002) (providing full relief to more than 244,000 buyers of medication); State *ex rel.* Humphrey v. Alpine Air Prods., Inc., 490 N.W.2d 888, 896 (Minn. Ct. App. 1992) (upholding award of full cost of air purifying units as restitution); State *ex rel.* McGraw v. Imperial Mktg., 506 S.E.2d 799, 811 (W. Va. 1998) (granting full refund without requiring return of product with "ambiguous" value); *infra* note 247 (listing cases with full relief).

ers have the discretion to simply forego public compensation in favor of civil penalties, and likely would make this substitution in many small-dollar cases. Any substitution of penalties for public compensation will be at the expense of private interests in compensation when a class action is not feasible and the small-dollar loss makes individual cases impractical.[244]

Public enforcement actions operate on different premises and with different legal authority than class actions. Not surprisingly, importing class procedures into a public enforcement context would needlessly impose costs and discourage government enforcer use of a valuable tool.

V. WHEN PUBLIC COMPENSATION CONFLICTS WITH PRIVATE RIGHTS

The analogy between public compensation and class actions neither explains how legislatures and courts have structured public compensation, nor illuminates consequential conflicts between private rights and public compensation, nor supports the recommendation that class procedures should apply when enforcers seek public compensation. This Part turns the problem around by identifying categories of cases where public compensation conflicts with later assertion of private rights and asks whether these conflicts have adverse real-world impacts on the assertion of private rights. Finding some of these conflicts to be of consequence and avoidable, this Part suggests targeted law reform proposals to restore a proper balance with public enforcement objectives when appropriate.

Government enforcers and courts limit private rights following public compensation, legally or as a practical matter, in two circumstances.[245] We have already seen the first set of cas-

244. A complete analysis of the costs and disadvantages of class action procedures for public enforcement is not possible here, but it is doubtful whether such procedures would be appropriate and effective in public compensation even if there were reasons for constraining the current practice of public compensation. As Deborah Hensler suggests in reviewing the proposal by Lemos for stricter judicial review of public compensation, "[t]he theoretically attractive procedural solution, authorizing judges to conduct a case-by-case inquiry into an elected official's ability to represent faithfully the interest of class members is fraught with dangers, both practical and political." Deborah R. Hensler, *Goldilocks and the Class Action*, 126 HARV. L. REV. F. 56, 59 (2012).

245. This Part does not address situations where private rights are limited by legislative choice to make public enforcement the exclusive or preemptive means of enforcement. Some statutory rights are restricted to public enforcement. For example, state UDAP laws almost universally contain a private right of action, CARTER & SHELDON, *supra* note 55, § 12.2.1, but federal UDAP

es—where courts refuse to certify a class action because a class would not be a superior adjudicative mechanism in light of the public compensation. The second category of cases is public enforcement settlements predicated on a release of claims by the recipient of public compensation.

A. JUDICIAL DENIAL OF CLASS CERTIFICATION

The existence of a government enforcement action can result in a court refusing to certify a class action as a "superior" method of adjudication due to public compensation, although such cases are not frequent.[246] In theory and operation, judicial denials of class certification based on a completed government enforcement action do not typically present a conflict between

laws enforced by the FTC and the CFPB provide exclusively for public enforcement. SHELDON ET AL., *supra* note 18, § 3.8 (stating there is no private right of action under CFPB UDAAP authority); Dee Pridgen, *Wrecking Ball Disguised as Law Reform: ALEC's Model Act on Private Enforcement of Consumer Protection Statutes*, 39 N.Y.U REV. L. & SOC. CHANGE 279, 282 (2015) ("The FTC Act itself has never featured a private right of action."). Other statutes authorize public enforcement of the entire statutory scheme and provide only for private enforcement of specified types of violations. *See, e.g.*, 7 FEDERAL PROCEDURE, LAWYERS EDITION § 15:67 (Mar. 2016) (identifying which requirements of Real Estate Settlement and Procedures Act have a private right of action). A few statutory schemes include both public and private enforcement rights, but provide that private enforcement cannot occur when the government enforcer acts. An EEOC action under the Age Discrimination in Employment Act (ADEA) "terminate(s)" an individual's private right of action. 29 U.S.C.A. § 626(c)(1) (2012). *See generally* David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013) (discussing various forms of public oversight or displacement of private rights of action). Nor does this Part examine situations in which practical conflicts occur between parallel public and private actions, such as when a defunct defendant has limited resources to allocate between the two actions, which is a problem of appropriate use of discretion by the government enforcer to efficiently coordinate parallel actions.

246. Steven Malech & Seth Huttner, *What Is Superiority? The Role of Completed, Pending, and Anticipated Government Activity in Certifying a Class Action*, 9 ANTITRUST SOURCE 1, 1 (2010) (noting "surprisingly few cases" adjudicating superiority of a government action to a class action and describing only a handful of such cases involving public compensation); Steven B. Malech & Robert E. Koosa, *Government Action and the Superiority Requirement: A Potential Bar to Private Class Action Lawsuits*, 18 GEO. J. LEGAL ETHICS 1419 (2005) (explaining that only "approximately forty" class certification denials occurred from the early 1970s through the mid-2000s as a result of a court finding any form of government action the superior method of adjudication). Not all courts take the position that public compensation is relevant to the superiority determination. *See* Amalgamated Workers Union v. Hess Oil Virgin Islands Corp., 478 F.2d 540, 543 (3d Cir. 1973) (holding that Rule 23 "was not intended to weigh the superiority of a class action against possible administrative relief" by state labor commissioners).

public compensation and private rights, but class certification denial is improper when the government action is not completed and when the rationale for denying certification is based on enhancing the bargaining leverage of the government enforcer.

1. Class Certification Review Appropriately Harmonizes Private Rights and Completed Public Compensation

Denying class certification after public compensation is complete, or after the terms of public compensation are determined, impairs private rights only when one of two conditions exist: (1) individuals in the putative class were excluded from receiving public compensation, or (2) recipients of public compensation received less than full compensation and a class action could effectively remedy this failure. Courts have appropriately denied class certification following completed public compensation when neither of these conditions existed because there was no obtainable relief remaining for the class members. For instance, a state court denied class certification where a state securities regulator settled litigation by requiring the new owner of a group of cemeteries to assume all contractual obligations breached by the prior owner, including "honor all preneed contracts, and advance over $14,800,000 to trusts" to ensure performance of contracts.[247] Conversely, courts have certified a class where the public compensation was not comprehensive and complete, allowing the class to obtain additional relief for their injuries.[248] These outcomes effectively harmonize public compensation and private rights.

A few courts have denied class certification following completed public compensation that did not provide exhaustive re-

247. Farno v. Ansure Mortuaries, LLC, 953 N.E.2d 1253, 1268 (Ind. App. 2011); *see also* Wechsler v. Se. Properties, Inc., 63 F.R.D. 13, 16–17 (S.D.N.Y. 1972), *aff'd*, 506 F.2d 631 (2d Cir. 1974) (discussing the state Attorney General settlement provided relief to investors in putative class that would "make them whole"); Brown v. Blue Cross & Blue Shield of Mich., Inc., 167 F.R.D. 40, 46 (E.D. Mich. 1996) (stating that public compensation obtained by state Attorney General and insurance commissioner "covers all members of the proposed class . . . and provides full co-pay relief on all but de minimis claims").

248. *See, e.g.*, *In re* Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig., 270 F.R.D. 521, 533 (N.D. Cal. 2010) (certifying a class after a state regulator settlement with public compensation because the insureds "may be entitled to other relief through this class action"); Gouldd v. Lowrance, No. 07-97-0401-CV, 1998 WL 526489 at *7 (Tex. Ct. App. 1998) (certifying class alleging illegal pyramid scheme following enforcement action because the Texas Attorney General settlement "merely requires Equinox to renotify a certain portion of its Texas distributors . . . about its refund policy").

lief. These cases constitute a situation, albeit uncommon, where public compensation meaningfully impinges on private rights. The question is what sort of procedure best protects private rights against the alleged conflicts of interest between the government enforcer and the putative class. Compare an imagined scheme of class action procedures in public compensation cases, as advocated by scholars critical of public compensation, with the current procedure of deciding this matter on a class certification motion.

Judicial review of each public compensation settlement akin to class action procedure would mean a hearing at which the opposing parties in the enforcement action maintain a shared interest in obtaining judicial review of a negotiated restitution plan. The adequacy of the public compensation program would be evaluated as part of an uncontested motion for which both parties have strong incentives to contend that the settlement is adequate. It is unclear how such a costly review would help consumers with a viable class claim obtain appropriate relief if the settlement could have better protected their interests. Use of this procedure likely would increase the chance of certification denial in a subsequent class action because the existence of notice and review procedures would be an argument in favor of finding public compensation superior to private aggregate litigation.

In contrast, in a class certification motion, counsel for the putative class surely will point out any private interests that were not adequately represented in the design of the public compensation. If the government enforcer has conflicts of interest or its restitution program reflects bias by public officials, it is difficult to imagine a better and more motivated advocate than putative class counsel for discovering and articulating those concerns in the certification stage of the proceeding. For example, in one of the cases denying class certification due to the existence of public compensation, the court considered whether reputational concerns of state officials "may place public attorneys in a situation analogous to private counsel who hope to win large fee awards," which is one of the conflicts of interest of concern to scholarly critics.[249] A class certification motion would seem to be an ideal forum for effectuating the

249. Brown v. Blue Cross & Blue Shield, Inc., 167 F.R.D. 40, 45 (E.D. Mich. 1996) (quoting Oswald v. Gen. Motors Corp., 549 F.2d 1106, 1125 (7th Cir. 1979)).

"hard look" judicial review sought by the critics of public compensation to remedy concerns of representational adequacy.

In two particular circumstances, however, judicial reasoning for denial of class certification should be reconsidered. First, when the public enforcement action is pending rather than completed, class certification should not be denied on this basis, except when the public action involves state antitrust enforcement under the Clayton Act. Second, courts should not consider whether certifying a class action would interfere with the bargaining position of a government enforcer.

2. Pending Public Enforcement and Class Certification

Some courts have cited a pending rather than completed public enforcement action as a basis for denying class certification.[250] Several of these cases involve state antitrust enforcement under the Clayton Act. Courts in these antitrust cases have appropriately deferred to the state enforcement action because the statutory scheme under the Clayton Act puts state enforcer damage claims in direct conflict with the class, and Congress clearly intended for the government action to take precedence.[251]

In cases other than state antitrust actions, courts should not deny class certification solely due to a pending parallel government action. The same reasons that lead courts to reject efforts to hamper government enforcement by equating public compensation with class action relief should apply in reverse when considering whether to certify a class in the face of a pending government action. Government enforcers have discretion to not seek or to bargain away the size of public compensation in service of other enforcement objectives, so there should be no presumption that the outcome of the public action will constitute adequate relief for a putative class.[252] One option available to courts in this situation is to stay the determination

250. Malech & Huttner, *supra* note 246, at 7–10.

251. Farmer, *supra* note 92, at 387–89 (collecting and describing cases).

252. Courts also have cited the potential for public compensation from a public action not yet filed at the time of the class certification motion, although this reasoning has not been used as a primary justification for denying class certification. Malech & Huttner, *supra* note 246, at 9–10 (collecting cases and concluding that "no case has yet held that an anticipated or potential suit should be a dispositive factor in precluding certification"). Courts should not take this approach because the rationale for not deferring to pending government actions applies with even more force to anticipated but not extant government enforcement.

of class certification until the completion of the public case, thus allowing comparison of the actual public compensation with the claims of the putative class.[253] Or similarly, courts can certify the class and hear a decertification motion if the public enforcement action resolves with public compensation.[254]

3. Denying Class Certification in Deference to Public Enforcement

Courts also deny certification when allowing the class to proceed would impair the bargaining position of government enforcers seeking to settle an enforcement action. In *Thornton v. State Farm Mutual Auto Insurance Co.*,[255] plaintiffs sought certification of a class of Ohio residents who did not file a claim with State Farm under a multistate attorneys general settlement. In finding that the class was not a superior method of adjudication, the federal district court observed:

> [I]f courts consistently allow parallel or subsequent class actions in spite of state action, the state's ability to obtain the best settlement for its residents may be impacted, since the accused may not wish to settle with the state only to have the state settlement operate as a floor on liability or otherwise be used against it.[256]

Enforcement defendants may well be more likely to settle with government enforcers for public compensation if that relief prevents certification of a coattail class action, but that is not a valid reason to deny certification. If government enforcers do not represent private interests, they should not gain bargaining leverage at the expense of a putative class action by bargaining away the interests of the class. This same rationale applies to

253. Belfiore v. Procter & Gamble Co., 311 F.R.D. 29, 39 (E.D.N.Y. Oct. 5, 2015). The federal district court also took this approach in *Wechsler v. Southeastern Properties, Inc.*, 63 F.R.D. 13, 13 (S.D.N.Y. 1972).

254. Bryan v. Amrep Corp., 429 F. Supp. 313, 318–19 (S.D.N.Y. 1977) ("The possibility that the FTC may at some future time secure refunds for the class is not an adequate reason to deny a class determination in this case, which seeks present and independent relief. If the FTC proceeding should ever assure the rights of the parties, defendants may apply for a stay of this action or for other appropriate relief.").

255. No. 1:06-cv-00018, 2006 WL 3359482 (N.D. Ohio Nov. 17, 2006); *see also* Kamm v. Cal. City Dev. Co., 509 F.2d 205, 212 (9th Cir. 1975) (discussing whether a class would "possibly to some extent negate the work on the state level" is a factor in determining superiority); *In re* Beacon Assocs. Litig., 2012 WL 1569827, at *12 (S.D.N.Y. May 3, 2012) (discussing cases in which "it is not simply the existence of the parallel government action but the threat that certification of the Rule 23(b)(3) class poses to the success or enforcement of the government action that led courts to deny certification").

256. *Thornton*, 2006 WL 3359482, at *3.

the other situation in which public compensation conflicts with private rights, which is opt-in public compensation.

B. OPT-IN PUBLIC COMPENSATION THROUGH REQUIRED RELEASE SETTLEMENTS

Government enforcers sometimes settle cases by making public compensation contingent on the recipient releasing claims against the enforcement defendant.[257] A release requirement converts public compensation into an opt-in class, as exists in some mass employment claims,[258] with the government enforcer in the position of class counsel. This circumstance calls into question the separation of public and private enforcement because the government enforcer requires the potential recipient of relief to make a choice between public relief and a private right to sue. Forcing this choice breaches the line between public enforcement and private rights and thus makes appropriate an inquiry into the adequacy of the government as representative of the recipients of public compensation.[259] This subpart argues that such settlements should be discouraged and suggests reforms to public compensation to achieve this result.

1. Required Releases and Private Rights

Unlike the unfounded apprehension over public compensation precluding later assertion of private rights, required release settlements necessitate an affirmative decision by the recipient to accept an offered bargain at the price of the release. The predicate question, therefore, is whether a voluntary relin-

257. This subpart concerns only cases in which a determined amount of money or other relief is conditioned on a release. Some enforcement cases settle by an agreement to allow claimants an opportunity to present their individual cases for consideration by a neutral or the government enforcer, which does not present the same concerns as conditioning a share of group relief.

258. 29 U.S.C. § 216 (2012) (providing opt-in procedure in certain wage underpayment cases).

259. In some cases, the national mortgage settlement between state attorneys general and the five largest mortgage servicing banks being a significant example, the government enforcer will expressly state that private claims are not within the scope of the release as a precaution against later arguments that public compensation has preclusive effect. Wells Fargo, which was one of the settling banks in the national mortgage settlement, nonetheless argued that the South Carolina Attorney General's participation in the settlement had preclusive effect on a later assertion of a private claim by a South Carolina homeowner. The district court dismissed the argument as "disingenuous." Harlin v. Wells Fargo Bank NA, No. 3:13-cv-02719 (D.S.C. June 16, 2014).

quishment of rights by recipients of public compensation raises any concern about the relationship between public compensation and private rights. Indeed, Lemos argues that required release settlements are one means of affording the procedural protections she deems required by Due Process.[260]

A voluntary and affirmative exchange of a release for compensation does not obviate questions about the representational adequacy of government enforcers for three reasons. First, the release option arrives with the government enforcer's implicit encouragement to accept. The credibility of public sanction of the offer gives urgency to ensuring that the relief is adequate compared to the consequence of a release of claims. In fact, some evidence exists that participation rates in public settlements can be substantially higher than in class action cases requiring filed claims.[261]

Second, there is an asymmetry between the total loss of rights resulting from a required release settlement and the opportunity for public cure of inadequate relief resulting from a class action settlement. A release accompanying public compensation extinguishes the claim of the person executing the release, and also may make it more difficult to certify a class only of people not executing the release.[262] Government enforcers, however, have options for curing inadequate class settlements. Courts generally find no preclusive effect for public compensation sought subsequent to a final judgment in a private action,[263] so in most cases government enforcers can simply

260. Lemos, *supra* note 7, at 547.

261. Class actions often have participation of less than five percent, even in opt-out cases where the potential recipient's claims will be released regardless of participation in the class settlement. Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV. 747, 751–54 (1988). In contrast, public compensation settlements often have much higher participation rates. *See, e.g.*, *Thornton*, 2006 WL 3359482, at *1 (approximately thirty-nine percent acceptance rate).

262. *See, e.g.*, *Thornton*, 2006 WL 3359482 (refusing to certify a class even though more than half of the class did not opt-in to public compensation).

263. EEOC v. Pemco Aeroplex, Inc., 383 F.3d 1280, 1293 (11th Cir. 2004) (reversing district court holding that EEOC precluded in seeking monetary relief in racial discrimination pattern and practice case involving over 200 employees by prior private suit joining thirty-six private plaintiffs and stating "it is so unusual to find privity between a governmental agency and private plaintiffs because governmental agencies have statutory duties, responsibilities, and interests that are far broader than the discrete interests of a private party"); Herman v. S.C. Nat'l Bank, 140 F.3d 1413 (11th Cir. 1998) (holding that Secretary of Labor could pursue ERISA action seeking equitable relief

proceed in the face of a prior class result. Even when a prior private judgment is considered preclusive, government enforcers have the threat of civil penalties and other remedies as leverage to obtain public compensation in settlements. A recent $60-million settlement in a case brought by DOJ and FDIC against Sallie Mae and affiliated entities for alleged violations of laws protecting active duty military personnel with student loan debt, for example, provided that public compensation was owed to service members even if the enforcement defendants had earlier obtained a release of claims by the service member.[264] Because public enforcement can cure inadequate relief in private enforcement, but private enforcement cannot resolve inadequate public compensation in required release settlements, the adequacy of government enforcer representation in such settlements is a relevant concern.

Third, government enforcers sometimes are not well positioned to protect the rights of individual recipients who may have losses substantial enough to make an individual claim or defense feasible, yet who waive the right to that claim by accepting public compensation. The extent of harm may not have been apparent to the recipient at the time he signs the release, either because the amount of the loss is not apparent or the loss has not occurred.

A 2005 $40-million settlement between forty-nine state attorneys general and State Farm offers an example of this problem.[265] Almost all states require that an automobile title carry a

including restitution despite court-approved class action settlement); Commodity Futures Trading Comm'n v. Commercial Hedge Servs., Inc., 422 F. Supp. 2d 1057, 1061 (D. Neb. 2006) (rejecting preclusion of CFTC claim for restitution where investors had executed releases in private settlements because public compensation serves "distinct deterrence functions"). *Compare* FTC v. AMREP Corp., 705 F. Supp. 119, 123 (S.D.N.Y. 1988) (finding that a prior class action precludes FTC from seeking restitution but not other relief), *with* FTC v. QT, Inc., 448 F. Supp. 2d 908, 970 (N.D. Ill. 2006) *amended on reconsideration in part*, 472 F. Supp. 2d 990 (N.D. Ill. 2007), *aff'd*, 512 F.3d 858 (7th Cir. 2008) (allowing FTC to seek restitution despite adverse trial result in prior class action and holding that FTC and class members are not in privity). *But see* People *ex rel.* Spitzer v. Applied Card Sys., Inc., 894 N.E.2d 1, 11–15 (N.Y. 2008) (holding the New York Attorney General was precluded from seeking restitution but not disgorgement following class action settlement).

264. Consent Order, United States v. Sallie Mae, Inc., No. 1:14-cv-00600-LPS, ¶ 29 (D. Del. May 13, 2014).

265. Press Release, Iowa Attorney Gen., States Reach Agreement with State Farm Insurance that Will Result in $40 Million to Consumers (Jan. 10, 2005), http://www.iowaattorneygeneral.gov/newsroom/states-reach-agreement-with-state-farm-insurance-that-will-result-in-40-million-to-consumers.

"salvage" brand after it has been in an accident that results in loss of a high percentage of the value of the vehicle. The case involved State Farm's failure to obtain branded titles when purchasing and then reselling salvage vehicles following accidents involving their insureds. The settlement paid about $800 to $1850 per purchaser of an improperly titled car, but the car owners were required to sign an unqualified release of claims against the insurer.[266] Public attorneys experienced in pursuing public law enforcement claims may have little or no experience representing auto buyers in salvage title cases, and thus might not be cognizant of all the implications of the release. It is reasonable to assume that driving a salvaged vehicle with undetected structural defects increases the chance of serious injury. So a consumer may have taken $1500 in compensation from the state attorneys general settlement in 2005 only to be seriously injured or killed in an accident in 2006 caused by structural defects in the vehicle for which a claim against State Farm may have been feasible but possibly released.

2. Required Releases Rarely Needed in Public Compensation

There often is no compelling need for government enforcers to enter into required release settlements to ensure that consumers, investors or employees receive relief. Public compensation that offers full relief should prevent certification of a later class action. In cases where a class action is not feasible for other reasons, there should be no value for the defendant in the release other than absolving it of individual claims of substantial amounts, which is a problem with releases the government enforcer should seek to avoid. And when a class action is feasible but the public action cannot be settled for full relief, the government enforcer's discretion among various remedial options makes it unnecessary to bargain away private rights in the form of a release. It can more aggressively pursue injunctive restrictions and civil penalties, thus leaving compensation to a private action.

The obvious reason for the government enforcer to enter this type of settlement is the bargaining leverage provided because the release has value for the enforcement defendant. Government enforcers can use that leverage in two ways: to obtain better injunctive terms or civil penalties, or to improve the amount or terms of public compensation. The former presents a

266. *Id.*; *see also* Assurance of Discontinuance, *In re* State Farm Automobile Insurance Company, No. 0532CZ (Mich. Cir. Ct. Jan. 10, 2005).

direct conflict between public compensation and private rights, and trading purely public relief for a release of private rights is hard to justify.

The latter circumstance—when the government enforcer agrees to a required release as a means of improving the amount or terms of relief to the group receiving the compensation—raises difficult questions. This situation has consequence when class feasibility is uncertain, or the government enforcer determines a class action will not obtain relief as substantial as would occur through public compensation. The difficulty is that these decisions result in the release of private claims, so the government enforcer cannot rely on a coattail class action if the public compensation is deemed insufficient or if an individual has an unusual, high-value claim. The next subpart looks at law reform options for targeted changes to ameliorate concerns with required release settlements while preserving their use when consistent with private rights.

3. Limiting Required Release Settlements

This subpart proposes a broad reform and a narrow reform for required release settlements. The broad reform is to impose judicial review and public notice with all required release settlements. This reform is aimed at ensuring public compensation is adequate for the relinquishment of rights. The narrow reform is for government enforcers and courts to carefully review and restrict the scope of releases, which is aimed at preventing individual recipients with high-value claims from suffering unknown or unintended consequences.

Judicial Review and Notice. Some enforcement actions face review by a court; others do not.[267] All required release settlements should be subject to meaningful judicial review because they present the potential for loss of private rights. Judicial review should be preceded by some form of public notice of the proposed terms of the settlement and an opportunity to object. The notice need not be onerous because the likely audience for the notice is made up of attorneys with an interest in the matter as a possible class action. A posting of proposed settlement terms at a known website would be sufficient.

These procedural reforms would induce appropriate restraint by government enforcers. Nothing requires a government enforcer to enter required release settlements. Faced with

267. *See supra* notes 212–13 and accompanying text.

the prospect of public notice followed by judicial review, government enforcers would have a disincentive to use this form of settlement unless it were essential to the creation of a deal, and then only if the deal would withstand scrutiny. The degree of scrutiny likely would be related to the value of the lost private claims.

Limiting Release Scope. Courts should give especially careful consideration to the scope of releases when reviewing these settlements. At minimum, required release settlements should contain limits on the amount or circumstances of the release to address the problem of individuals with unusual, substantial claims. Circumstance restrictions could have been effective in the State Farm case, with a release limited to claims related to diminished vehicle value as a result of violating title branding law. The exclusion of claims for personal injury or wrongful death would have ameliorated the potential for the settlement to result in the release of claims with extraordinary value for isolated individuals.

The 2002 settlement between fifty state attorneys general and Household International provides an example, good and bad, of an attempt to restrict a release. The settlement included $484 million in public compensation in the form of cash payments to homeowners who the attorneys general alleged were deceived by Household in the origination of subprime mortgages.[268] The payments averaged about $1500 per homeowner, but to obtain that payment the homeowner had to sign a release of all claims against Household, with one exception—homeowners could raise otherwise released claims as a defense in foreclosure.[269] The importance of this release exception became apparent when foreclosure rates soared in the years after the settlement. But the settlement did result in the release of powerful claims other than in foreclosure that were possessed by many Household borrowers. One particularly important claim was an action to rescind the loan under the Home Ownership and Equity Protection Act, which would allow for the return of up to three years of loan payments to the borrower.[270]

268. Consent Judgment, Washington v. Household Int'l, Inc., No. 02-2-35630-3, ¶ 4 (Wash. Super. Ct. Dec. 13, 2002).

269. *Id.* ¶ 32.

270. 15 U.S.C. § 1635 (2012).

CONCLUSION

Public compensation is poorly understood by scholars, despite the size of recoveries and its increasing prominence. This Article describes the statutory schemes authorizing public compensation in different regulatory fields and demonstrates why the existing law of preclusion appropriately resolves questions about the constitutionality of public compensation as it is currently practiced. This Article also situates public compensation within the context of its use as a discretionary remedy in public enforcement so as to dispel the power of the superficially appealing analogy between public compensation and class actions, and instead focuses discussion of the friction between public compensation and private rights on two narrow categories of cases where the conflict actually occurs.

Government enforcers and courts can do a better job of aligning public enforcement with private rights when public compensation is conditioned on a release of claims and in some cases where courts consider public compensation as a factor in class certification. Courts and policy-makers, however, should give scant notice to scholarship proposing sweeping procedural reform. The new scholarly critics offer a wholly abstract critique of public compensation that has little connection to how government enforcers exercise discretion in civil law enforcement. Stripped of its proper context, public compensation appears as a cartoon version of a class action lawsuit that may deprive recipients of their rights.

This Article is replete with examples of public compensation providing relief for large numbers of consumers, investors, and employees—often full compensation. To name a few: payments to over-charged payday loan borrowers; refunds to purchasers of medications who paid an inflated price due to antitrust violations; students credited for improper bank fees; payments to female employees denied promotional opportunities; protecting the contract interests of people who prepaid for cemetery services; account credits to subprime credit card holders charged for "add-on" services; and even the long-past example of tenants receiving money back from a landlord charging rent in excess of World War II price limits. Placing new and unhelpful procedural obstacles in the way of this type of relief would be a disservice to the people who benefit from public enforcement of laws designed to protect them.