PUTTING MONEY BACK INTO CONSUMERS' POCKETS: AN EMPIRICAL STUDY OF THE CFPB'S CIVIL PENALTY FUND

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One of the Consumer Financial Protection Bureau's ("CFPB") primary goals is to protect consumers. Protecting consumers necessarily means ensuring that companies and individuals stop violating the consumer laws. But stopping illegal conduct in the future does not help the consumers who have already been harmed. In many of the cases prosecuted by the CFPB, the defendants illegally took money out of the pockets of consumers: they charged fees that were expressly illegal; they charged consumers more than the consumers owed or more than the defendants had disclosed; and they deceived consumers about what the consumers were buying or how much it would cost. Remediating this harm—giving back money actually taken from consumers through the defendants' illegal conduct—is an essential part of protecting consumers, and through the end of its 2019 fiscal year, the CFPB often required the defendants to pay consumers directly for the harm identified by the CFPB.

In approximately 13% of the cases in which some relief was ordered, however, the defendants did not have the financial wherewithal to remediate consumers fully: they were bankrupt; they were banned from their respective industries or ordered to cease operations altogether; and in some cases, the principals were jailed. If consumers had to rely on these defendants for relief, they likely would be, quite simply, out of luck. Through the use of a previously unstudied mechanism, the Civil Penalty Fund, however, the CFPB is providing relief to all of them—hundreds of thousands of consumers across twenty-seven cases. Congress created the Fund in the Dodd-Frank Act and required that all civil money penalties collected by the CFPB be placed into the Fund. Further, Congress required that the CFPB use the

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Fund in the first instance to provide monetary relief to consumers who otherwise would not receive compensation for harm caused by the defendants in CFPB enforcement actions.

And the defendants in these twenty-seven cases caused hundreds of thousands of consumers substantial amounts of monetary harm. Despite the fact that these companies had limited resources, they caused a total of $671.2 million in uncompensated harm with an average of over $24.9 million per case and a median of $10 million per case. Through the end of the CFPB's 2019 fiscal year, the CFPB had used the Fund to send more than 905,000 checks, with an overall average of $494. In 70% of the cases, the average check sent was $1,000 or more, and more than 177,000 checks were sent in cases where the average check sent was at least $1,000.

This Article expands on the growing body of scholarly literature regarding public enforcement of consumer laws. Although that scholarship has addressed the effectiveness and propriety of public enforcement, even raising concerns about judgment-proof defendants, there is virtually no substantive mention of the Civil Penalty Fund or its operations despite the magnitude of monetary relief it provides to consumers. This Article is the first empirical analysis of the Fund's operation and the assessment and collection of civil money penalties that are used by the Fund to remediate consumers.

After explaining the Fund's operation, the Article finds that the Fund is an efficient way to provide significant monetary relief to consumers who otherwise would not receive any compensation for their losses from defendants' unlawful conduct, including through private litigation. The Fund also is putting money back into consumers' pockets. In all but one of the cases, the defendants either charged fees expressly prohibited by law, took amounts that were not disclosed or owed, deceived consumers about the cost or material aspects of the services that they were purchasing, or some combination thereof. The Article finds that the structure of the Fund creates positive incentives for regulators to bring important cases.

As is noted in the literature, states and other regulators also bring enforcement actions against similar defendants—those who cause consumers monetary harm but cannot pay it back. Based on the evidence regarding the Civil Penalty Fund's operation, this Article therefore recommends that states adopt similar consumer restitution funds. The Article details several issues that legislatures should consider in implementing their own funds and ends by providing draft language for creating and implementing such a fund.

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I. INTRODUCTION

Through March 31, 2019, defendants in 162 cases brought by the Consumer Financial Protection Bureau ("CFPB") were ordered to pay civil money penalties.[1] In 135 of those cases, the CFPB determined that after the defendants complied with the orders there would be no remaining compensable, uncompensated harm.[2] In the remaining twenty-seven cases, however, the CFPB determined that the defendants had caused consumers more than $671 million in harm that the defendants could not repay and that the consumers were not reasonably expected to recover from any other sources.[3] But the CFPB could, and did, provide relief to those harmed consumers when the defendants could not. Using a little-studied mechanism, the Civil Penalty Fund (the "Fund"), the CFPB was able to use penalties paid by defendants in all of the CFPB's enforcement actions to compensate consumers for all $671 million of that harm.[4] As of December 2019, the CFPB

1. Craig Cowie, Consumer Financial Protection Bureau Decisions and Calculations (Sept. 3, 2020) (on file with author). *See generally* CFPB, FINANCIAL REPORT OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION: FISCAL YEAR 2019, at 18–29 (2019), https://files.consumerfinance.gov/f/documents/bcfp_annual-financial-report_fy-2019.pdf [https://perma.cc/P98S-59GG].

2. *See* discussion *infra* Section IV.A.2 below for a discussion regarding the definition of compensable, uncompensated harm. For additional details on the types and amounts of relief provided in CFPB enforcement actions, see, for example, Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1078 fig.2 & 1081 tbl.2 (2016) (discussing consumer relief through 2015); Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 70 fig.6 & tbl.5., 71 fig.7 & tbl.6, 75 tbl.9, 76 tbl.10 (2018) (discussing CFPB actions in 2014). In some cases, the defendants have provided redress, and in others, the CFPB determined that there was no compensable harm. *Compare* Bank of America, N.A., CFPB No. 2014-CFPB-0004, 21–25 (Apr. 9, 2014) (ordering payment of redress estimated at more than $700 million), *and CFPB Orders Bank of America to Pay $727 Million in Consumer Relief for Illegal Credit Card Practices*, CFPB, https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-bank-of-america-to-pay-727-million-in-consumer-relief-for-illegal-credit-card-practices/ [https://perma.cc/J44F-JWUQ], *with* Lighthouse Title, Inc., CFPB 2014-CFPB-0015, 7–15 (Sept. 30, 2014) (ordering injunctive relief and penalties but not payment of redress). *See also* CFPB, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU: FISCAL YEAR 2017, at 40–41 (2017), https://files.consumerfinance.gov/f/documents/cfpb_financial-report_fy17.pdf [https://perma.cc/4THJ-Z3D7] [hereinafter "2016 FINANCIAL REPORT"].

3. *See infra* Table 9.

4. Given the length of time between resolution of a case and the CFPB's release of information regarding any payments from the Fund, unless stated otherwise, this Article examines cases resolved through March 31, 2019. *See*, *e.g.*, *Civil Penalty Fund*, CFPB, https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/civil-penalty-fund/ (last visited May 13, 2021) [https://perma.cc/UUH8-32BY].

reported that checks totaling more than $447 million had been sent to consumers harmed in twenty of those cases.[5]

Defendants in these twenty-seven cases generally did not have the financial resources to pay consumers for the harm the defendants had caused: they were bankrupt; they were banned from their respective industries or ordered to cease operations altogether; and in some cases, the principals were jailed.[6] Yet, these defendants had caused a substantial amount of harm, an average of over $24.9 million per case and a median of $10 million per case.[7] Through March 31, 2019, the CFPB had used the Fund to send more than 905,000 checks, with an overall average of $494.[8] In 70% of the cases, the average check sent was $1,000 or more; and more than 177,000 checks were sent in cases where the average check sent was at least $1,000.[9]

As just one example, in the Student Loan Processing case, defendants ran an illegal student debt-relief scheme; they charged borrowers unlawful fees and deceived the borrowers about the costs of defendants' services and defendants' affiliations with the government.[10] Based on sworn statements regarding the defendants' financial conditions, the stipulated judgment required defendants to cease their operations and pay $326,001 in redress and penalties, leaving an additional $7.9 million in unremediated consumer harm.[11] The CFPB used the Fund to give these consumers back the money that the defendants had taken illegally, sending 4,800 checks averaging $1,650 to harmed consumers.[12]

Despite the significant amount of harm remediated by the Fund, there has been virtually no mention of this mechanism in the scholarly literature.[13] This

5. All of these cases resolved before September 30, 2018, the end of the CFPB's 2018 fiscal year, and as of February 2020, the CFPB had not published data on how much in relief it had sent to consumers for the remaining seven cases. *See infra* Table 3.

6. *See* discussion *infra* Section IV.C.2; *see, e.g.*, *Payments to Harmed Consumers*, CFPB, https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/ (last visited May 13, 2021) [https://perma.cc/35DL-2XLN].

7. *See* Cowie, *supra* note 1.

8. *See infra* Table 3.

9. *See infra* Tables 2 & 6.

10. Complaint at 4–12, CFPB v. IrvineWebWorks, Inc., No. 8:14-cv-01967 (C.D. Cal. Dec. 11, 2014).

11. Stipulated Final Judgment and Order at 6–8 & 10, CFPB v. IrvineWebWorks, Inc., No. 8:14-cv-01967 (C.D. Cal. Mar. 15, 2016). In addition, the order required defendants to set aside funds necessary to wind down their operations, and if any of those funds remained after the cessation, the defendants had to pay those funds as a penalty as well. *Id.* at 11.

12. Cowie, *supra* note 1.

13. Others have discussed the relief provided by the CFPB or the penalties imposed, but without discussing the use of the Civil Penalty Fund. *See, e.g.*, CHRISTOPHER L. PETERSON, CONSUMER FED'N AMERICA, DORMANT: THE CONSUMER FINANCIAL PROTECTION BUREAU'S LAW ENFORCEMENT PROGRAM IN DECLINE 2–3 (2019), https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Decline.pdf [https://perma.cc/RQ9G-CJPF] (discussing decreases in the number of overall cases and restitution awarded, but mentioning only one penalty imposed by the Bureau); Cox et al., *supra* note 2, at 80 (discussing relief provided in CFPB enforcement actions in 2014); Peterson, *supra* note 2, at 1078 fig. 2 (analyzing consumer relief provided through CFPB enforcement actions from 2012 through 2015); Donald C. Lampe & Ryan J. Richardson, *The Consumer Financial Protection Bureau at Five: A Survey of the Bureau's Activities*, 21 N.C. BANKING INST. 85, 123–24 (2017) (mentioning the range of civil money penalties assessed in the CFPB's first five years and noting the penalties assessed in a few cases); Kelly Thompson Cochran, *The CFPB at Five Years: Beyond the Numbers*, 21 N.C.

Article is the first empirical analysis of the CFPB's use of the Fund and concludes that it is an efficient mechanism for providing real monetary relief to harmed consumers. Ninety-five percent of the amount allocated from the Fund has been allocated for remediating consumer harm, and only 1% has been set aside for administrative costs.[14] As a result, the Article recommends that states adopt similar consumer restitution funds.

The Article proceeds in four parts. Part II lays out the basic history of the Fund and explains its operation. Part III summarizes the results of an empirical analysis of the CFPB's use of the Fund, including assessing the amounts allocated and actually distributed to consumers, as well as the success of those distributions. Part IV explores the benefits and costs of the Fund's operation, finding that the Fund is providing consumers with significant relief—generally by returning money that defendants had taken unlawfully—and that, absent the Fund, these consumers likely would receive little to no relief from other sources. Part IV concludes that the CFPB has operated the Fund with minimal overhead costs. Finally, Part V argues that states with a variety of different enforcement strategies could operate similar funds successfully and that the existence of a fund creates incentives to bring important cases while undermining or eliminating possible undesirable incentives.

II. IN RESPONSE TO THE FINANCIAL CRISIS, CONGRESS CREATED A CIVIL PENALTY FUND THAT ALLOWED THE CFPB TO PROVIDE COMPENSATION TO HARMED CONSUMERS EVEN IF THE DEFENDANTS WHO HARMED THEM COULD NOT

A. Congress Created the CFPB to Ensure Consistent Enforcement of Consumer Laws

Congress passed the Dodd-Frank Act[15] as "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008" and to fix "the failure of the federal banking and other regulators to address significant consumer protection issues."[16] The Dodd-Frank Act, and in particular Title X of the Act (the Consumer Financial Protection Act of 2010),[17] created the Bureau of Consumer Financial Protection,[18] more commonly known

BANKING INST. 55, 59 (2017) (noting that the CFPB had assessed "more than half a billion dollars" in civil money penalties, including a $100 million CMP against Wells Fargo).

14. The remainder has been allocated for consumer education and financial literacy programs. *Civil Penalty Fund*, *supra* note 4.

15. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank].

16. S. REP. NO. 111-176, at 2, 9 (2010).

17. Dodd-Frank, *supra* note 15, § 1001.

18. 12 U.S.C. § 5491(a).

as the Consumer Financial Protection Bureau[19] or the CFPB.[20] Congress charged the CFPB with regulating the "offering and provision of consumer financial products or services under the Federal consumer financial laws"[21] and protecting consumers from unfair, deceptive, or abusive practices.[22] Congress gave the CFPB numerous powers to effectuate its charge and objectives, including, *inter alia*, the power to issue regulations[23] and to supervise specified financial institutions.[24]

One of the CFPB's "primary functions . . . [is] taking appropriate enforcement action to address violations of Federal consumer financial law."[25] In so doing, the CFPB can seek a wide variety of remedies, including monetary relief, injunctive relief, and civil money penalties.[26] In particular, Congress expressly authorized the CFPB to seek relief that would provide money directly to consumers harmed by the defendants[27] in any given case.[28] Recognizing that not every defendant would be able to remediate consumers for the harm he, she, or it caused, however, Congress also mandated the creation of a Civil Penalty Fund.[29]

19. *See, e.g.*, Dodd-Frank, *supra* note 15, § 336(a)(1)–(3), § 1091, § 1100G(a) (referring to the "Consumer Financial Protection Bureau").

20. *See, e.g.*, S. REP. NO. 111-176, 1 at 11 (2010) ("This legislation creates the Bureau of Consumer Financial Protection (CFPB), a new, streamlined independent consumer entity housed within the Federal Reserve System.").

21. 12 U.S.C. § 5491(a).

22. *Id.* § 5511(b)(2).

23. *Id.* §§ 5513(b), 5531(b).

24. *Id.* § 5511(c)(4). *See generally* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 343–62 (2013) (discussing CFPB's authorities); Peterson, *supra* note 2, at 1064–73 (explaining the same).

25. 12 U.S.C. §§ 5511(c)(4), 5481(14) (defining federal consumer financial law). The CFPB may file actions in federal court, 12 U.S.C. § 5564(a), (f), or file an administrative adjudication proceeding before its Office of Administrative Adjudication, § 5563(a). *See generally* 12 C.F.R. § 1081 (2019) (Rules of Practice for Adjudication Proceedings).

26. 12 U.S.C. § 5565(a)(2). The CFPB can seek the same relief in either federal court or an administrative adjudication proceeding. § 5565(a)(1).

27. When the CFPB files an action against a person in federal court, that person is referred to as a defendant; when the CFPB files an action against a person in an adjudication proceeding, that person is referred to as a respondent. This Article refers to both groups as "defendants," as that is the term used in the Civil Penalty Fund Rule. 12 C.F.R. § 1075.101 (2013) (defining "Bureau enforcement actions" as "any judicial or administrative action or proceeding" and "defendant" as "a party in a Bureau enforcement action that is found or alleged to have committed a violation").

28. 12 U.S.C. § 5565(a)(2)(B) ("refund of moneys or return of real property"), (a)(2)(C) ("restitution"), (a)(2)(E) ("payment of damages or other monetary relief"); *cf.* § 5565(a)(2)(A) ("rescission or reformation of contracts").

29. 12 U.S.C. § 5497(d)(1) ("There is established in the Federal Reserve a separate fund, to be known as the 'Consumer Financial Civil Penalty Fund' (referred to in this section as the 'Civil Penalty Fund').").

B. The Civil Penalty Fund Uses Penalties Imposed for Violations of Consumer Laws To Compensate Consumers Harmed by Those Violations Who Otherwise Would Not Receive Redress

Penalties for unlawful conduct are an important enforcement tool, both to punish wrongdoers for violating the law and to deter others from violating the laws in similar ways. Numerous government enforcers have the power to impose civil money penalties for violations of the law.[30] In most cases, these penalties are paid into a general fund or are used by the enforcer to fund its own operations.[31]

In creating the CFPB, Congress also authorized the imposition of penalties, providing that "[a]ny person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty."[32] Congress established different limits based on the defendant's actions and mandated consideration of a number of factors in imposing any penalty, including the defendant's financial resources and good faith, the gravity of the violations, the severity of harm to the consumer, and the history of prior violations.[33] The CFPB has used its authority to penalize wrongdoers, including, for example, imposing a $20 million penalty on Bank of America for illegal conduct that caused more than $725 million in harm to 1.9 million consumers,[34] imposing a $100 million penalty on Equifax for harming 147 million people,[35] and—after having prosecuted Wells Fargo three previous times for consumer law violations—imposing a $1 billion penalty in a fourth case, although Wells Fargo received credit for the $500 million penalty the Office of the Comptroller of the Currency imposed for related conduct.[36]

Rather than paying penalties like these to the U.S. Treasury, however, Congress mandated that all penalties collected by the CFPB must go into the Civil

30. *See, e.g.*, N.Y. GEN. BUS. LAW § 350-d (McKinney 2019) (allowing civil penalties for violations of specified consumer laws); MONT. CODE ANN. § 30-14-142 (2019) (same); DEL. CODE ANN. tit. 6, § 2522(b) (West 2019) (same); ARIZ. REV. STAT. ANN. § 44-1531(A) (2019) (same); 15 U.S.C. § 45(m)(1) (allowing the Federal Trade Commission to seek civil penalties for violations of consumer laws in specified circumstances).

31. *See, e.g.*, DEL. CODE ANN. tit. 6, § 2527 (West 2019) (mandating payment of penalties into a fund for payment of operational expenses related to enforcing consumer laws); MONT. CODE ANN. § 30-14-143 (2019) (requiring payment of penalties into either the general fund or a special revenue account for defraying certain expenses).

32. 12 U.S.C. § 5565(c)(1).

33. *Id.* § 5565(c)(2), (3) (setting different maximum penalties when the defendant recklessly or knowingly violates Federal consumer financial law).

34. Press Release, Consumer Finance Protection Bureau, CFPB Orders Bank of America to Pay $727 Million in Consumer Relief for Illegal Credit Card Practices (Apr. 09, 2014), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-bank-of-america-to-pay-727-million-in-consumer-relief-for-illegal-credit-card-practices/ [https://perma.cc/J44F-JWUQ].

35. Stipulated Order for Permanent Injunction and Monetary Judgment at 3, 49, 60, CFPB v. Equifax, Inc., No. 1:19-cv-3300-TWT (N.D. Ga. July 23, 2019) (imposing a $100 million penalty and $425 million judgment for unlawfully failing to take basic steps to protect the data of 147 million consumers whose information was exposed in a data breach).

36. Consent Order at 5–6, 10, 23–24, Wells Fargo Bank, N.A., CFPB No. 2018-BCFP-0001 (Apr. 20, 2018) (finding that Wells Fargo charged consumers for mortgage interest-rate-lock extensions when it should not have and illegally forced consumers to pay for auto insurance they did not need or request).

Penalty Fund[37] to be used in the first instance to pay people harmed by the defendants in CFPB enforcement actions.[38] Only if victims cannot be found or payments are not practicable, may the CFPB use the Fund for "the purpose of consumer education and financial literacy programs."[39]

The CFPB has used the vast majority of its payments from the Fund to provide monetary relief to consumers who were harmed by defendants that did not have the resources to pay back those consumers for the harm the defendants caused.[40] Through November 2019,[41] the CFPB has allocated more than $671 million from the Fund to remediate consumers harmed by the defendants in CFPB enforcement actions, and $28.8 million for consumer education and financial literacy programs.[42]

Both the Dodd-Frank Act[43] and the Civil Penalty Fund Rule[44] impose certain conditions on the use of the Fund. First, as is noted above, the CFPB must use available funds to provide relief to consumers first, and only if that is not practicable may the CFPB use the funds for educational purposes.[45] Second, consumers are only eligible to receive payments from the Fund if a final order[46]

37. 12 U.S.C. § 5497(d)(1) ("If the Bureau obtains a civil penalty against any person in any judicial or administrative action under Federal consumer financial laws, the Bureau *shall* deposit into the Civil Penalty Fund, the amount of the penalty *collected*." (emphasis added)). If the CFPB or a court imposes a penalty, but the defendant does not pay it, no money from that penalty will go into the Fund (although consumers harmed by that defendant can receive payments from the Fund if the other requirements are met).

38. *Id.* § 5497(d)(2) ("Amounts in the Civil Penalty Fund shall be available to the Bureau, without fiscal year limitation, for payments to the victims of activities for which civil penalties have been imposed under the Federal consumer financial laws.").

39. *Id.* ("To the extent that such victims cannot be located or such payments are otherwise not practicable, the Bureau may use such funds for the purpose of consumer education and financial literacy programs."); 12 C.F.R. § 1075.107(a) (2013) (allowing allocation for educational purposes only if funds "remain after the Fund Administrator allocates funds as described in §1075.106(a)"); § 1075.106(a) (requiring that if there are sufficient funds in the Fund, "the Fund Administrator *will* allocate to *each class of victims* the amount necessary to compensate *fully* the uncompensated harm . . . [to] *all victims in that class* to whom it is practicable to make payments . . . ." (emphasis added)). Because §1075.107(a) allows allocation for educational purposes only if funds remain after the allocation of funds under § 1075.106(a), which requires complete remediation of all harm to all eligible victims, funds may be allocated for educational purposes only after there is no remaining compensable, uncompensated harm. *See also* 12 C.F.R. § 1075.106(d)(2) (preventing the Fund Administrator from allocating funds for educational purposes that she did not allocate to eligible victims with compensable, uncompensated harm through the use of her discretion under section 1075.106(d)(1)). If there are not sufficient funds necessary to compensate fully all uncompensated harm, the allocation occurs pursuant to section 1075.106(b), and section 1075.107(a) does not apply.

40. *See* discussion *infra* Section IV.C. In many cases, the defendants could pay some amount, but could not cover all of the harm they caused. *Infra* Section IV.C. In one case (*Amerisave*), the defendant paid more in redress and penalties than the harm it caused, and the CFPB used the Fund to remediate some of the harm caused. *See* discussion *infra* notes 195, 197.

41. The CFPB allocates funds in May and November each year.

42. Cowie, *supra* note 1.

43. 12 U.S.C. § 5497(d)(2).

44. On May 7, 2013, the CFPB issued a final rule to implement Section 1017(d)(2) of the Dodd-Frank Act, 12 U.S.C. § 5497(d)(2), that made the Fund created in Section 1017(d)(1) available to remediate victims when certain conditions are met. Consumer Financial Civil Penalty Fund, 78 Fed. Reg. 26,489 (May 7, 2013) (codified at 12 C.F.R. Pt. 1075) [hereinafter Civil Penalty Fund Rule].

45. 12 U.S.C. § 5497(d)(2); 12 C.F.R. Pt. 1075 (2013).

46. 12 C.F.R. § 1075.101 (2013) (defining "Final order"); § 1075.103 (requiring penalty be imposed by a "final order").

imposes (1) a penalty on the defendant (2) in a Bureau enforcement action (3) for a violation that harmed the consumer.[47] Third, as will be explained in more detail, eligible consumers may receive payments only for compensable, uncompensated harm, as those terms are defined in the Civil Penalty Fund Rule.[48]

Every six months, the CFPB determines whether consumers in its enforcement actions[49] have any compensable, uncompensated harm.[50] If they do, the CFPB must allocate any available money from the Fund to remediate that harm.[51] If there are not sufficient funds to remediate all of the harm, which has happened only twice,[52] it allocates money to consumers harmed by conduct in the most recent orders first.[53] In allocating funds, the CFPB may exercise discretion in determining that payments are impracticable or in apportioning funds among eligible consumers where there are not sufficient funds to remediate all harm.[54]

47. 12 C.F.R. § 1075.103 (2013); 12 U.S.C. § 5497(d)(2). Bureau enforcement action is defined to include both actions in federal court and administrative adjudication proceedings. 12 C.F.R. § 1075.101.

48. *See infra* Section IV.A.2.

49. Only cases in which civil money penalties are imposed are reviewed. *See* 12 C.F.R. § 1075.103 (requiring that consumers eligible for payments from the Fund be harmed by a violation for which a penalty was imposed).

50. 12 C.F.R. § 1075.105(b)(1)(i). The periods must be consecutive, with each new period starting the day after the prior period ended. *Id.* Pursuant to the schedule set by the CFPB, a period starts on the first day of the fiscal year (October 1) and the first day of the third quarter of the fiscal year (April 1). *Civil Penalty Fund Allocation Schedule*, CFPB, https://www.consumerfinance.gov/about-us/payments-harmed-consumers/civil-penalty-fund/allocation-schedule/ [https://perma.cc/9LH2-TXBY]. The first period started July 21, 2011 and ended March 31, 2013. CFPB, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 25 (2013) [hereinafter 2013 FINANCIAL REPORT]; *see also* 12 C.F.R. § 1075.105(b)(1)(ii) (allowing the first period to be longer or shorter than six months); § 1075.105(b)(1)(iii) (providing that the first period must start on July 21, 2011). The administrator must allocate the funds for a given period within sixty days after the end of the period. 12 C.F.R. § 1075.105(b)(2).

51. 12 C.F.R. § 1075.105(b)(2) ("The fund administrator *will* allocate available funds in the Civil Penalty Fund in accordance with §§1075.106 and 1075.107." (emphasis added)).

52. 2016 FINANCIAL REPORT, *supra* note 2, at 37; CFPB, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 26 (2018) [hereinafter 2018 FINANCIAL REPORT].

53. 12 C.F.R. § 1075.106(b)(1) ("If funds remain after allocating to each class of victims from that six-month period the amount necessary to compensate fully the uncompensated harm . . . of all victims in that class to whom it is practicable to make payments, the Fund Administrator next will allocate funds to classes of victims from the preceding six-month period, and so forth until no funds remain."). Harmed consumers who are members of a class of victims are from the six-month period in which they first had uncompensated harm as defined by the rule. §1075.106(b)(2). Generally speaking, the harm from the violations becomes "uncompensated harm" for purposes of the rule once it becomes clear that a class will not be compensated. *Id.*

54. 12 C.F.R. § 1075.106(c). The Civil Penalty Fund Rule refers to the practicability of making payments in a number of provisions. Generally, the rule gives the fund administrator considerable discretion to determine whether payments are "practicable." *See* 12 C.F.R. § 1075.109(a)(6) (providing that payments to an individual are impracticable when the "Fund Administrator determines that other circumstances make it unreasonable to make a payment to the victim."); § 1075.109(b)(3) (providing that payments to a class are impracticable if the fund administrator makes the same determination about payments to the class). But the rule identifies a number of situations where payments will be deemed impracticable. § 1075.109(a)(1)–(5) (deeming payments to individuals impracticable, *inter alia*, when the payments are not redeemed in a reasonable time, the victim cannot be located, the payment is too small given the cost of locating the victim and making the payment, the payment is so small that redemption is unlikely, and the victim fails to provide information required by the distribution plan); § 1075.109(b)(1)–(2) (deeming payments to a class impracticable when the aggregate amount is too small given the costs of locating the victims and making the payments or when payments to individuals in the class are impracticable); *cf.* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 342 (2015) (noting that one of the two key factors the SEC considers in

After funds have been allocated, the CFPB hires a vendor to send checks to consumers.[55] Any amounts that are not cashed by consumers are returned to the Fund.[56] The CFPB uses the Fund itself to pay for this entire process by "setting aside" funds for administrative expenses.[57]

III. AN EMPIRICAL ASSESSMENT OF THE CFPB'S IMPLEMENTATION OF THE CIVIL PENALTY FUND DEMONSTRATES THAT THE FUND PROVIDES SUBSTANTIAL MONETARY RELIEF TO HARMED CONSUMERS

A. Methodology

In compiling the data cited herein regarding the CFPB's use of the Civil Penalty Fund, the author reviewed every enforcement action listed on the CFPB's website,[58] listed on the CFPB's Office of Administrative Adjudication's docket,[59] or mentioned in the CFPB's financial reports.[60] When necessary, additional documents related to these cases were pulled from the federal court dockets or the CFPB's Office of Administrative Adjudication's docket. The author also reviewed all of the CFPB's quarterly and annual financial reports and its memoranda on distributions from the Fund. For cases in which the Fund was used to compensate consumers and case documents did not indicate the financial or operating status of the defendants, the author reviewed the defendants' and various Secretary of State websites to determine whether the defendants continued to operate. For each case, the author coded more than 140 variables related to the case, including the amount of relief and penalties ordered, the types of harm caused, the amount collected, and any amounts allocated or distributed from the Fund to consumers harmed by the defendants in that case. Given the

determining whether to distribute money from a fair fund to harmed investors is whether the amount available to pay each investor justifies the cost of the distribution).

55. *See* 12 C.F.R. § 1075.108 (allowing designation of a payments administrator). Through February 2020, the CFPB has reported using Epiq Systems, Inc., eleven times, Rust Consulting seven, and Analytics Solutions twice. The FTC also has used all three vendors, as well as others, to distribute refunds to harmed consumers. Cowie, *supra* note 1; *Recent FTC Cases Resulting in Refunds*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/cases-proceedings/refunds [https://perma.cc/4EEZ-HVM8].

56. *See* 12 C.F.R. § 1075.108(e), 1075.109(a)(5).

57. Consumer Financial Civil Penalty Fund, 78 Fed. Reg. 26,489, 26,496 (May 7, 2013); 12 C.F.R. § 1075.105(c)(3).

58. *See Enforcement Actions,* CFPB, https://www.consumerfinance.gov/policy-compliance/enforcement/actions/ [https://perma.cc/N24P-QEZ6]. The CFPB states that it will post court documents on its website when it takes enforcement action. *Id. But see* discussion *infra* note 60.

59. *Docket of the Office of Administrative Adjudication*, CFPB, https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/ (last visited Jan. 12, 2021) [https://perma.cc/6ASV-D9W2].

60. *Financial Reports*, CFPB, https://www.consumerfinance.gov/about-us/budget-strategy/financial-reports/ [https://perma.cc/APT4-Z4YU]. Only one case mentioned in the reports did not have a webpage on the Bureau's Enforcement Actions page. *See Republic Mortgage Ins. Co.*, CFPB No. 1:13-cv-24146-JAL (Nov. 19, 2013); Peterson, *supra* note 2, at 1063.The author also cross-referenced the results of these searches against other analyses of CFPB enforcement actions and CFPB press releases to verify that there were no additional actions. *See* Peterson, *supra* note 2.

length of time between resolution of a case and the CFPB's release of information regarding any payments from the Fund, unless stated otherwise, this Article examines cases resolved through March 31, 2019 for which allocation data was available by February 2020.

B. The CFPB Has Allocated Hundreds of Millions of Dollars from the Fund to Harmed Consumers

Through the end of the second quarter of the CFPB's 2019 fiscal year,[61] the CFPB had allocated more than $671 million to compensate victims in twenty-seven cases. This amount was sufficient to compensate all of the consumers' compensable, uncompensated harm, as those terms are defined in the Civil Penalty Fund Rule,[62] in each of the twenty-seven cases.

The defendants in each of these cases caused a significant amount of unremediated harm, even as narrowly defined by the Civil Penalty Fund Rule. The average allocation per case was $24.9 million with a median of $10 million.[63] As is clear from the table and graph below, just over 70% of the allocations are between $1 million and $25 million with a cluster of allocations (seven) between $1 million and $5 million.[64] Further, there were six cases over $25 million, with two of those being over $100 million (and a third case was $94.8 million).[65] Only two of the cases had allocations below $1 million, and each of those was almost $500,000.[66]

61. Although the allocation itself occurred on May 29, 2019, the allocation covered all cases that became final, within the meaning of the Civil Penalty Fund Rule by the end of the second quarter of the 2019 fiscal year, Mar. 31, 2019. ELIZABETH REILLY, CFPB, CFO UPDATE FOR THE THIRD QUARTER OF FISCAL YEAR 2019 8–9 (2019), https://files.consumerfinance.gov/f/documents/cfpb_cfo-update_report_fy-2019_q3.pdf [https://perma.cc/JDJ7-7CSE] [hereinafter Q3 2019 CFO REPORT].

62. Civil Penalty Fund Rule, *supra* note 44, at 26489; 12 C.F.R. § 1075.104(b)–(c).

63. *See* Cowie, supra note 1.

64. *See infra* Graph 1.

65. *See infra* Table 1.

66. *See infra* Table 1.

GRAPH 1

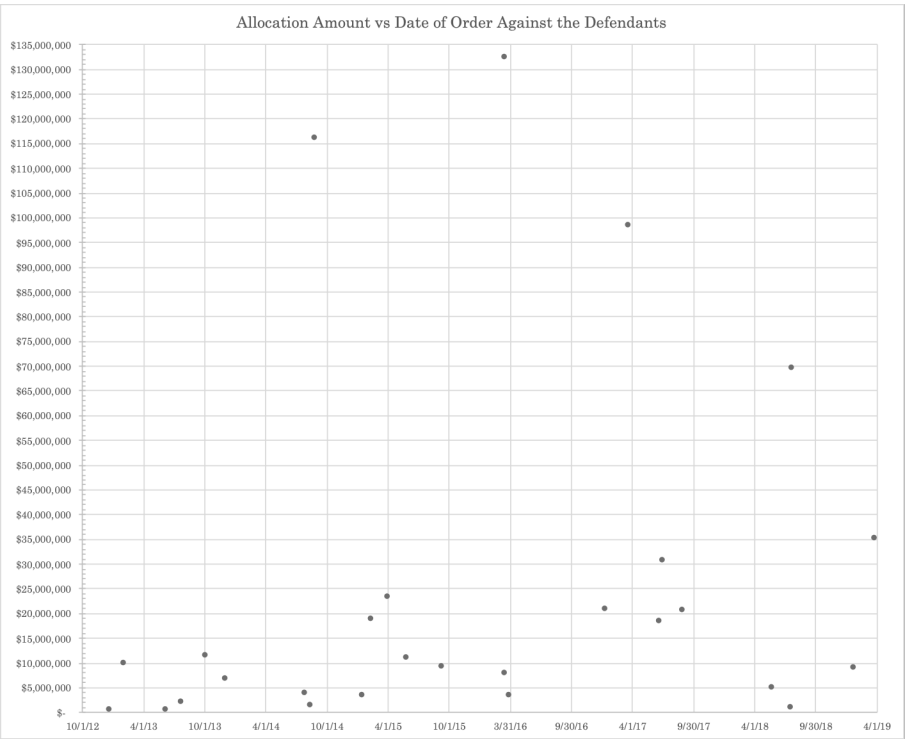

Allocation Amount vs Date of Order Against the Defendants
$135,000,000
$130,000,000
$125,000,000
$120,000,000
$115,000,000
$110,000,000
$105,000,000
$100,000,000
$95,000,000
$90,000,000
$85,000,000
$80,000,000
$75,000,000
$70,000,000
$65,000,000
$60,000,000
$55,000,000
$50,000,000
$45,000,000
$40,000,000
$35,000,000
$30,000,000
$25,000,000
$20,000,000
$15,000,000
$10,000,000
$5,000,000
$-
10/1/12
4/1/13
10/1/13
4/1/14
10/1/14
4/1/15
10/1/15
3/31/16
9/30/16
4/1/17
9/30/17
4/1/18
9/30/18
4/1/19

TABLE 1

Amount Allocated	Number of Cases
$100mm or more	2
$50mm to $100mm	2
$25mm to $50mm	2
$20mm to $25mm	3
$15mm to $20mm	2
$10mm to $15mm	3
$5mm to $10mm	4
$1mm to $5mm	7
<$1mm	2
Total	**27**

Based on the three allocations completed as of May 29, 2019, the CFPB's practices with respect to allocation do not appear to have changed significantly under a new administration.[67] Given that the tenth allocation occurred just days after Director Cordray's resignation,[68] this Article compares the first ten allocations with the three allocations under Director Kraninger or Acting Director Mulvaney. Because there have been only five cases[69] with compensable, uncompensated harm in the eleventh through thirteenth allocations, comparing the means and medians is of somewhat limited utility. Nonetheless, the average allocation in periods eleven through thirteen is $24 million,[70] which is fairly close to the

67. *See* 2018 FINANCIAL REPORT, *supra* note 52, at 28. As is noted *supra* in note 61, the allocation for all cases with final orders as of March 31, 2019, occurred on May 29, 2019.

68. Richard Cordray resigned effective November 24, 2017, and President Trump appointed Mick Mulvaney as acting director that same day. Kevin McCoy, *Richard Cordray Resigns as Director of Consumer Financial Protection Bureau*, USA TODAY (Nov. 24, 2017, 4:48 PM), https://www.usatoday.com/story/money/2017/11/24/richard-cordray-resigns-director-consumer-financial-protection-bureau/893489001/ [https://perma.cc/4ZSH-T8YT]. Mulvaney's appointment was effective the next day, November 25, 2017. Alan S. Kaplinsky, *How Long Can Mick Mulvaney Serve as CFPB Acting Director?*, CONSUMER FIN. MONITOR (Feb. 27, 2018), https://www.consumerfinancemonitor.com/2018/02/27/how-long-can-mick-mulvaney-serve-as-cfpb-acting-director/ [https://perma.cc/JFZ2-TWKQ]. The tenth allocation happened on November 29, 2017, which is roughly the same amount of time after the close of the fiscal year as all other allocations governing the latter half of a fiscal year. 2018 FINANCIAL REPORT, *supra* note 52, at 25. President Trump later nominated Kathleen Kraninger as the director, and she became director effective December 11, 2018, after the Senate confirmed her. Alan S. Kaplinsky, *Kathy Kraninger's First Day as Director of the BCFP*, CONSUMER FINANCE MONITOR (Dec. 11, 2018), https://www.consumerfinancemonitor.com/2018/12/11/kathy-kraningers-first-day-as-director-of-the-bcfp/ [https://perma.cc/K7DG-4DHQ].

69. In addition, there were two cases that received a second allocation in period eleven. 2018 FINANCIAL REPORT, *supra* note 52, at 29. The second allocations were roughly half the first allocations, which occurred in period ten. *Id.*

70. This average is to assess whether there has been a change in the determination of the total harm, as reflected by the allocation. Because two of the allocations in period eleven were only partial allocations to complete the allocation amounts determined in period ten, they are excluded from the average for period eleven and are included in the average for period ten. *See id.* If they were included in period eleven, the average for periods eleven through thirteen would be $19.3 million, and the average for periods one through ten would be $24.4 million.

average of $25.1 million for periods one through ten.[71] In addition, it is worth noting that of those five allocations, one was the CFPB's fourth largest allocation, $69.6 million, and another was $35.2 million.[72] Further, the number of cases that received allocations in a given period does not seem to have changed significantly. The average and median number of allocations per period overall are two, and those numbers are the same for periods one through ten and periods eleven through thirteen.[73]

C. The CFPB Has Distributed More than $400 Million to Consumers Through the Civil Penalty Fund

Of the twenty-seven cases for which it has allocated funds, the CFPB has published final data on its distributions of those funds for fifteen cases and initial data on another five.[74] In the twenty cases for which there is data,[75] the CFPB has distributed more than 905,000 checks totaling almost $447.5 million[76] to

71. Cowie, *supra* note 1.

72. Q3 2019 CFO REPORT, *supra* note 61, at 6–9.

73. Because some cases had multiple final orders in different periods (*i.e.*, orders resolving the claims against different sets of defendants), each of which could allow allocations, for purposes of calculating the average number of cases with allocations in each period, this Article considered the allocation for a given case to have happened in the period in which the first order became final when there were multiple final orders. There were no cases with compensable harm in period eleven, and there also were no cases in period eight because the two cases with final orders with compensable harm in period eight had final orders in prior periods. *See* 2018 FINANCIAL REPORT, *supra* note 52, at 28; CFPB, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU: FISCAL YEAR 2017 35 (2017), https://files.consumerfinance.gov/f/documents/cfpb_financial-report_fy17.pdf [https://perma.cc/4THJ-Z3D7] [hereinafter "2017 FINANCIAL REPORT"].

74. One of these five has been completed, but the CFPB had not published the final distribution data as of the writing of this Article.

75. For purposes of analyzing the amounts distributed, this Article combines the final data and the initial data on the distributions. The CFPB publishes data on its distributions from the Civil Penalty Fund only in its annual fiscal year reports. Historically, there has been very little change between the CFPB's initial reporting and its final reporting on distributions. There have been twelve instances for which the CFPB has reported both initial and final data on distributions. In eleven of those twelve, no additional money was distributed between the reports, and in the twelfth, the additional funds distributed represented only a 7.89% increase over the initial report. Similarly, in seven of the twelve cases, no additional checks were sent between the initial and final reports, and only forty-two additional checks were sent in total in the remaining five cases, which represented an increase of only 0.01%.

76. In most cases the amount distributed is very close to the amount allocated. In fourteen of the twenty cases (70%), the amount distributed was at least 95% of the amount allocated, and in a fifteenth case the amount distributed was 94% of the amount allocated. In four of the cases, however, the amount distributed was at least $1 million less than the amount allocated, and all told, the CFPB allocated $480.2 million to consumers harmed in the twenty cases, and sent checks to consumers totaling 93% of that amount, or $447.5 million, meaning that $32.8 million was allocated but not distributed. In at least some cases, this difference is the result of overestimating the harm during the allocation process. *See* 2017 FINANCIAL REPORT, *supra* note 73, at 35 n.8 (noting that the initial harm in the Morgan Drexen matter was overstated by $500,000). In others, it may be that the CFPB could not identify harmed consumers with enough specificity to provide reimbursement. *See* 2018 Financial Report, *supra* note 52, at 30 (noting that $15 million was unallocated from the Morgan Drexen matter "upon further assessment of available victim data and funding needs"). The $17.6 million difference in the Morgan Drexen matter alone accounted more than half of the total difference between the amounts initially allocated and the amounts ultimately distributed.

consumers harmed by the unlawful actions of the defendants in CFPB enforcement actions.[77]

As the average check amounts[78] in the tables below demonstrate, payments from the Fund are not insubstantial.[79] They represent significant losses for consumers. The mean of the average check amounts for all of the cases is $2,329 and the median is $1,322.[80] In other words, in more than half of the cases, the average check amount was $1,322 or greater.[81] Just over two thirds of the cases (fourteen of twenty or 70%) have average check amounts of $1,000 or more, and more than 177,000 checks[82]—totaling $391.8 million—were sent to consumers harmed in these cases.

There is considerable variation among the average check amounts in each case. Slightly more than half of the cases (twelve of twenty or 60%) have average check amounts between $1,000 and $5,000 (inclusive), with the averages in a cluster of cases (eight of the twenty or 40%) falling between $1,000 and $2,000 (inclusive).[83] Only six cases had averages below $1,000, and they respectively had averages of $891, $391, $210, $93, $41, and $27.[84] Thus, even the cases with

77. The figures in this section include only the amounts distributed through the Civil Penalty Fund. In a number of cases, the CFPB also provided Bureau-administered redress to the same consumers. Although the money is going to the same consumers, it is coming from different sources, and likely in separate checks, in the two instances. In some cases, a defendant pays some amount of redress to the CFPB as well as paying a civil money penalty. In those cases, the amounts paid as redress are sent to consumers as Bureau-administered redress, and any remaining compensable, uncompensated harm is paid through the Civil Penalty Fund. *See, e.g.*, 2017 FINANCIAL REPORT, *supra* note 73, at 41, 44 (reporting that approximately $3 million was distributed from the Civil Penalty Fund to consumers harmed in the 3D Resorts-Bluegrass matter and approximately $100,000 in Bureau-administered redress). *Compare* 2017 FINANCIAL REPORT, *supra* note 73, at 43–44 nn.13–14, 16 (noting cases in which a single class of victims was compensated through both the Civil Penalty Fund and Bureau-administered redress) *with* 2017 FINANCIAL REPORT, *supra* note 73, at 44 n.15 (noting a case in which there were two classes of harmed consumers, one of which was compensated through the Civil Penalty Fund and another that was compensated through Bureau-administered redress).

78. By dividing the amount distributed by the number of checks sent, one can derive an average check amount for a given case or for all of the cases combined. To the extent that the CFPB sent multiple checks to some individuals (*e.g.*, to replace the original checks sent to those individuals or to send additional monies to a given individual) and has included those additional checks in its reports of the total number of checks sent, the average check amount herein will be a conservative estimate of the average amount actually sent to consumers. Any check reissues will artificially lower the average amount actually sent. For example, if two consumers each received $100 from the fund, but one consumer needed the check to be reissued, there would be 3 checks sent, resulting in an average of $67 rather than the true average of $100. *See* discussion *infra* Section III.C. and notes 90–91.

79. *See infra* Table 2.

80. *See* Cowie, *supra* note 1.

81. If one divides the overall amount distributed by the total number of checks sent, the average check amount overall is $494. This average, however, masks both the fact that almost 75% of the cases have averages higher than this amount and the fact that 80% of the checks sent were sent in cases with average check amounts below this amount.

82. The CFPB publishes only the number of checks sent, not the number of consumers who received or cashed the checks. The CFPB appears to have sent multiple checks to at least some individual consumers. *See* discussion *supra* note 78*; see also* discussion *infra* Section III.C. and notes 90–91.

83. *See infra* Table 2.

84. The smallest average ($27) was in Amerisave Mortg. Corp., CFPB No. 2014-CFPB-0010 (Aug. 12, 2014). The Amerisave matter is unusual. Amerisave paid approximately $20.9 million to the CFPB as part of its consent order with the CFPB, roughly $14.9 million in redress and another $6 million in civil money penalties. *Id*. at 27, 29; 2016 FINANCIAL REPORT, *supra* note 2, at 37–38, 46, 50. The CFPB sent harmed consumers 50,061

smaller averages still had average amounts that likely would be significant to consumers.[85]

TABLE 2: AVERAGE CHECK AMOUNTS BY CASE

Average Check Amount		Number of Cases		Average Check Amount		Number of Cases
Greater than or Equal to	Less Than			Greater than or Equal to	Less Than	
$10,000		1		$9,000	$10,000	0
$1,000	$10,000	13		$8,000	$9,000	0
$100	$1,000	3		$7,000	$8,000	1
$75	$100	1		$6,000	$7,000	0
$50	$75	0		$5,000	$6,000	0
$25	$50	2		$4,000	$5,000	1
$0	$25	0		$3,000	$4,000	1
				$2,000	$3,000	2
				$1,000	$2,000	8
	Total	**20**			**Total**	**13**

Furthermore, as the tables below demonstrate, the vast majority (88%) of money distributed from the Fund has gone to consumers harmed in cases where the average check amount is at least $1,000.[86] If one considers the checks sent in cases where the average check amount was at least $100, the number of checks sent increases to almost 292,000,[87] and those checks total almost $418 million, accounting for 93% of the total amount distributed.[88]

The below tables group the checks sent in each case based on the average check amount for that case. Each row represents a range of average check amount values. For each range, the table shows how many checks were sent in the cases with average check amounts within the range and the total value of those checks. For each range, the table also shows the percentage of the total number of checks sent and the percentage of the total value of all checks sent that were sent in cases where the average check amount fell within the specified range.

checks totaling $1,366,268 from the Fund, and sent another 96,780 checks averaging $150 to pay the redress to consumers. It is the only case in which funds were allocated from the Civil Penalty Fund and the defendants paid more to the CFPB in total than the amount of harm they caused to consumers. Indeed, it is the only case in which the Fund was used wherein the amounts actually paid by the defendants to the CFPB exceeded the amount of compensable, uncompensated harm. *See also* discussion *infra* notes 195, 197, 217.

85. *See* discussion *infra* Section III.D (noting that even the two cases with the lowest averages still had rates of cashing of 63% and the others had higher rates); Section IV.B (noting comparisons with consumer returns in other types of actions).

86. *See infra* Table 3.

87. 291,928 to be exact. *See infra* Table 6.

88. *See infra* Table 3.

TABLE 3: CHECKS MAILED IN CASES WITH AVERAGE CHECK AMOUNTS IN SPECIFIED RANGES

Range of the Average Check Amounts		Number of Checks Sent in Each Range	Percentage of the Total Number of Checks Sent Represented by Checks Sent in Each Range	Total Value of All Checks Sent In Each Range	Percentage of Total Amount Sent Represented by Checks Sent in Each Range
Greater than or Equal to	Less Than				
$10,000		239	0%	$2,983,646	1%
$5,000	$10,000	1,331	0%	$10,599,805	2%
$1,000	$5,000	175,495	19%	$378,258,621	85%
$100	$1,000	114,863	13%	$26,136,444	6%
$75	$100	99,338	11%	$9,243,731	2%
$50	$75	-	-	-	-
$25	$50	513,806	57%	$20,268,714	5%
$0	$25	-	-	-	-
	Total	**905,072**		**$447,490,961**	

TABLE 4

Range of the Average Check Amounts		Number of Cases in Each Range	Number of Checks Sent in Each Range	Percentage of the Total Number of Checks Sent Represented by Checks Sent in Each Range	Total Value of All Checks Sent In Each Range	Percentage of Total Amount Sent Represented by Checks Sent in Each Range
Greater than or Equal to	Less Than					
$4,000	$5,000	1	20,485	2%	$90,212,602	20%
$3,000	$4,000	1	5,394	1%	$18,331,734	4%
$2,000	$3,000	2	4,320	0%	$11,385,587	3%
$1,000	$2,000	8	145,296	16%	$258,328,698	58%
	Total	**12**	**175,495**	**19%**	**$378,258,621**	**85%**

Because the CFPB does not publish information on the number of consumers who have received checks or the amounts that any individual consumers received, it is not possible to state exactly how many consumers received distributions from the Civil Penalty Fund. Given that the CFPB already has sent more than 905,000 checks to consumers, however, the number of consumers receiving checks seems likely to be in the hundreds of thousands.[89] It appears that at least in some cases, the CFPB has re-sent checks to given individuals. There were three cases in which additional checks were sent after the initial report on the

89. *See supra* Table 3.

distributions, but the amount distributed did not increase.[90] In addition, numerous CFPB memos on the distributions refer to re-issuing checks, suggesting that at least some checks were reissued.[91] Even if every consumer received two checks, which seems extremely unlikely, it would mean more than 450,000 consumers received checks.

Nonetheless, what can be shown from the data is that the CFPB distributed most of the money (85%) in the 175,495 checks totaling $378.3 million that were sent to consumers harmed in cases where the average check amount was between $1,000 and $5,000 and that 145,296 of those checks, totaling $258.3 million, were sent to consumers harmed in the cluster of cases where the average check amount was between $1,000 and $2,000.[92]

Relatively few checks (just over 1,500) were sent in the two cases where the average check amount was greater than $5,000, and those two cases had unusual characteristics that caused large amounts of harm per consumer.[93] Only 239 checks were sent in the 3D Resorts-Bluegrass matter—a matter involving the sale of real property and violations of the Interstate Land Sales Full Disclosure Act[94]—where the average check amount was more than $12,000.[95] The Bureau also sent 1,331 checks in the Hoffman Law Group matter, where the average check amount was $7,964. In that case, the court found that the defendants charged very high, unlawful initial fees (typically $6,000) as well as other unlawful fees.[96]

In addition, a relatively small portion (5%) of the total amount distributed was sent to consumers harmed in the two cases with the lowest averages, $41 in Union Workers Credit Service[97] and $27 in Amerisave.[98] Although the CFPB sent $20.3 million to the consumers in these two cases, it also sent more than 510,000 checks, resulting in relatively low average check amounts in each case. Most of these checks (463,745) were sent in the Union Workers Credit Service

90. *Compare* 2016 FINANCIAL REPORT, *supra* note 2, at 46–47 (initial report on distributions for (Gordon and National Corrective Group), *and* 2017 FINANCIAL REPORT, *supra* note 73, at 40 (initial report on distribution for Hoffman Law Group), *with* 2017 FINANCIAL REPORT, *supra* note 73, at 41 (final report on distribution for National Corrective Group), *and* 2018 FINANCIAL REPORT, *supra* note 52, at 29–30 (final report on distributions for Gordon and Hoffman Law Group).

91. *See, e.g.*, CFPB, *In the Matter of* Student Aid Institute, Inc—*File No. 2016-CFPB-0008*, https://files.consumerfinance.gov/f/documents/cfpb_Student-Aid-Institute.pdf (last visited May 13, 2021) [https://perma.cc/E93F-2F3M] ("This matter is now closed. Payments and check reissue requests are no longer being honored.").

92. *See supra* Table 4.

93. *See supra* Table 3.

94. 15 U.S.C. §§ 1701–1720.

95. 3D Resorts-Bluegrass, LLC, CFPB No. 2013-CFPB-0002, 3–6, 11 (Dec. 3, 2013) (finding that defendants materially misrepresented the value of property sold as part of a resort); *see also* discussion *infra* note 125.

96. Default Judgment and Order as to Corporate Defendants at 6, CFPB v. Harper, No. 9:14-cv-80931 (S.D. Fla. May 28, 2015) [hereinafter *Hoffman Law Group* matter].

97. *See generally* Stipulated Final Judgment, CFPB v. Union Workers Credit Servs., No. 3:14-cv-04410 (N.D. Tex. Feb. 10, 2015).

98. *See generally* Amerisave Mortg. Corp., CFPB No. 2014-CFPB-0010 (Aug. 12, 2014).

case.[99] That case was a relatively straightforward fraud where the defendants allegedly lied to consumers by falsely telling them they would receive a general-purpose credit card (similar to a MasterCard or Visa) if they paid a membership fee (either $37 or $95), but the defendants took the relatively small membership fee from hundreds of thousands of consumers.[100] As is discussed below, the Amerisave matter also was unusual in that the defendants caused much more harm than the $1.4 million paid from the Civil Penalty Fund, but the defendants paid for most of the remediation of harm through Bureau-administered redress.[101]

Because the CFPB sent so many checks in these two cases with relatively low average amounts, these checks pull the overall average check amount—determined simply by dividing the total amount distributed by the total number of checks sent—down to $494. If the checks sent in these two cases are excluded from the totals, the overall average increases to $1,092—in the range with the cluster of eight cases that accounted for 58% of the total amount distributed.

D. Consumers Have Cashed 87% of the Amounts Distributed and That Percentage Is Likely To Increase

The CFPB's distributions are very effective at getting money back into consumers' pockets to compensate them for money taken illegally by defendants. The published data[102] indicate that consumers actually cash an extremely high percentage of the funds distributed. In just over half of the cases, consumers cashed 90% or more of the funds distributed, and overall, consumers cashed 87%—$192.4 million—of the $220.7 million distributed in these fifteen cases.[103] And the two lowest cashing rates are still 63%.[104]

99. CFPB, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU – FISCAL YEAR 2016, at 46 (2016), https://files.consumerfinance.gov/f/documents/112016_cfpb_Final_Financial_Report_FY_2016.pdf [https://perma.cc/9V7B-47LK].

100. Complaint at 3, *Union Workers Credit Servs., Inc.*, No. 3:14-cv-04410.

101. *See* discussion *infra* notes 195, 197; *see also* discussion *supra* notes 84, 85.

102. Although the CFPB has completed sixteen distributions, it has published data on the percentage of funds distributed that were cashed (the "rate of cashing") only for fifteen of the cases as of the writing of this Article. *See generally* 2018 FINANCIAL REPORT, *supra* note 52.

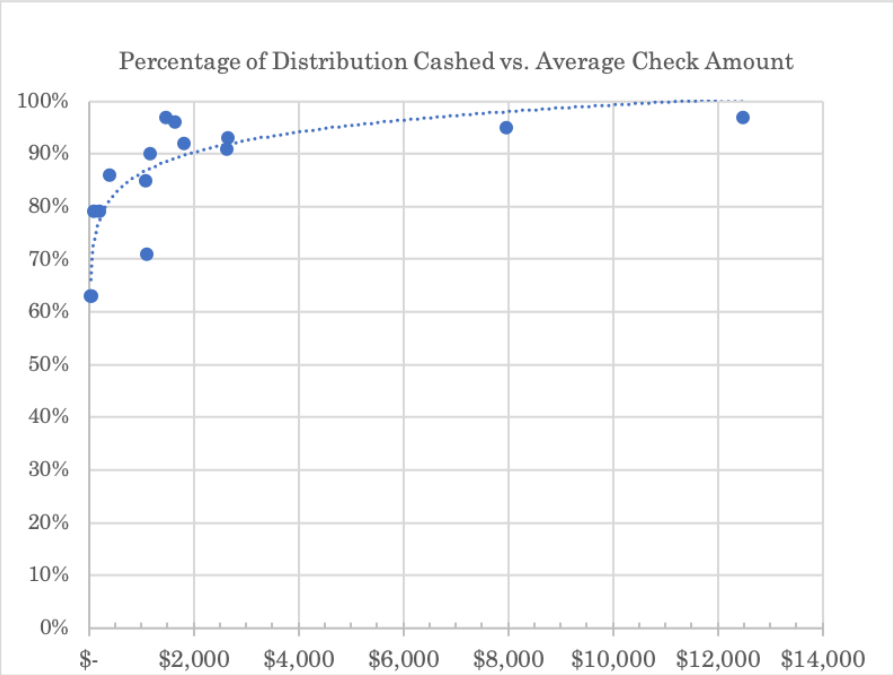
103. *See infra* Tables 5, 9.

104. *See infra* Table 5, Graph 2.

TABLE 5

Matter Name	Average Check Amount	Percentage of Distribution Cashed
3D Resorts-Bluegrass, LLC	$ 12,483.87	97%
Hoffman Law Group	$ 7,963.79	95%
National Legal Help Center	$ 2,657.40	93%
Gordon	$ 2,632.50	91%
Global Client Solutions, LLC	$ 1,804.81	92%
IrvineWebWorks Inc.	$ 1,650.73	96%
American Debt Settlement Solutions	$ 1,472.70	97%
Meracord LLC	$ 1,166.44	90%
Colfax Capital Corp.	$ 1,104.38	71%
Student Aid Institute, Inc.	$ 1,073.39	85%
Payday Loan Debt Solution, Inc.	$ 390.57	86%
National Corrective Group, Inc.	$ 209.59	79%
Student Financial Aid Services	$ 93.05	79%
Union Workers Credit Services, Inc.	$ 40.76	63%
Amerisave Mortgage Corp.	$ 27.29	63%

GRAPH 2



Furthermore, as the tables above demonstrate, the rate of cashing tends to increase as the average check amount increases.[105] Therefore, the overall rate of

105. *See supra* Table 5. The FTC also has noted a statistically relevant relationship between check cashing rates and median check amounts. FTC, CONSUMERS AND CLASS ACTIONS: A RETROSPECTIVE AND ANALYSIS OF

cashing is likely to increase for two reasons. First, of the five remaining cases where the distributions are complete but the rates of cashing have not been published, four have average check amounts above $1,000—which have typically had rates of cashing at 90% or higher[106]—and the fifth has an average check amount of $891.[107] Second, in those remaining five cases, the CFPB sent $226.7 million in checks to consumers, more than the total distributed in the fifteen published cases.[108] Assuming that those cases have rates of cashing comparable to the rates of published cases with similar average check amounts, one would expect the overall rate of cashing to rise to 90% or higher once the data on those five cases is published.

IV. THE FUND EFFICIENTLY PROVIDES SIGNIFICANT REDRESS TO CONSUMERS WHO LOST MONEY AND OTHERWISE WOULD RECEIVE LITTLE TO NO RELIEF

A. The CFPB Uses the Fund To Repay Consumers Money That Defendants Took From Them Unlawfully

1. The Fund Is Used To Return Unlawful Fees to Consumers

The CFPB has used the Fund primarily to return fees that defendants took from consumers illegally. These fees break down into roughly two categories: (1) fees that were by themselves unlawful or (2) fees for goods or services where the defendants deceived the consumers as to either the cost or the goods and services that would be provided. All but one of the cases where the CFPB allocated funds to consumers fell into one of these two categories.[109] In most cases, the defendants both collected unlawful fees *and* deceived consumers about the cost or the services that would be provided.[110]

SETTLEMENT CAMPAIGNS 12 (2019), https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf [https://perma.cc/X46E-Z6JM] [hereinafter "2019 FTC CLASS ACTION REPORT"].

106. *See supra* Table 5. Eight of the ten cases with average check amounts above $1,000 had a cashing rate of 90% or higher. The two exceptions are Colfax Capital, in which the rate was only 71%, and Student Aid Institute, with 85%. The four remaining cases with average check amounts above $1,000 have average check amounts of $4,403.84, $3,398.54, $1,945.04, and $1,171.02.

107. *See* Cowie, *supra* note 1.

108. Of the five cases for which cashing rates had not been published as of the writing of this Article, the four cases where the average check amount is above $1,000 represented $224.3 million of the $226.7 million in outstanding checks.

109. The lone case that did not fall into one of these two categories also involved deceptive conduct: the defendants sent letters on government letterhead, threatened consumers that they would be sent to jail unless they paid their debts, and falsely stated that consumers had to enroll in defendants' classes in order to avoid prosecution. Complaint at 6, 9–13, 17–20, 22–23, CFPB v. Nat'l Corrective Grp., No. 15-cv-00899-RDB (D. Md. Mar. 30, 2015). These statements and threats were deceptive under both Dodd-Frank, 12 U.S.C. § 5536(a)(1)(B), and the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692e, 1692e(3)–(5), 1692e(9)–(10). *See id.* at 17–20, 22–23.

110. Defendants in nineteen of the twenty-seven cases allocated (seventy percent) did both. *See infra* text accompanying notes 120–25.

In more than 80% of the cases, the defendants took unlawful fees.[111] Most of these cases involved defendants taking fees that were unlawful because the defendants had not yet provided the services as required by law.[112] So-called advance fees are illegal in a number of contexts, including, *inter alia*, debt-relief and credit-repair services sold through telemarketing.[113] Collecting these fees before providing the services is illegal because these companies often promised results, collected fees, and then failed to deliver the services or achieve the promised results.[114] Seventy percent of the cases that received allocations (nineteen of the twenty-seven) involved unlawful advance fees, primarily in debt-relief cases.[115] Another three cases (11% of the total cases that have received allocations) involved defendants charging consumers more than either the defendants had disclosed or more than the consumers owed.[116]

In these cases, by law, defendants simply were not allowed to collect these fees.[117] Returning the money to consumers directly corrects the harms caused by the defendants' unlawful acts. Some might argue that these consumers are receiving windfalls because they received some services. This argument, however, misses the mark. Based on a history of scams in the provision of these types of services, the law requires these defendants to perform the services before they can charge consumers, and the services had to have provided benefit to the consumers.[118] If the defendants ultimately did provide the services such that they

111. *See* Cowie, *supra* note 1.

112. *E.g.*, 16 C.F.R. § 310.4(a)(2), (a)(5)(i) (2020) (prohibiting advance fees for debt-relief and credit-repair services sold through telemarketing).

113. § 310.4(a)(4).

114. Telemarketing Sales Rule, 75 Fed. Reg. 48,458, 48,463 (Aug. 10, 2010) (codified at 16 C.F.R. pt. 310) (discussing concerns with debt-relief services); Telemarketing Sales Rule, 60 Fed. Reg. 43,842, 43,853–54 (Aug. 23, 1995) (codified at 16 C.F.R. pt. 310) (discussing concerns with credit-repair services).

115. Fourteen of the nineteen cases involved unlawful advance fees for debt-relief services, in violation of either the Telemarketing Sales Rule (TSR), 16 C.F.R. pt. 310, or Regulation O, 12 C.F.R. pt. 1015, which was formally known as the Mortgage Assistance Relief Services Rule ("MARS Rule") and formerly codified at 16 C.F.R. pt. 322. Nine of those fourteen cases involved defendants taking advance fees for debt-relief services in violation of the TSR, 16 C.F.R. § 310.4(a)(5)(i). The other five cases involved defendants who violated Regulation O, 12 C.F.R. § 1015.5(a), by taking advance fees for debt-relief services in the context of providing mortgage relief assistance services. Three of the nineteen cases involved defendants collecting advance fees for credit-repair services in violation of the TSR, 16 C.F.R. § 310.4(a)(2). Two of the nineteen cases involved defendants substantially assisting others in the collection of unlawful advance fees in violation of the TSR, 16 C.F.R. § 310.3(b). The nineteenth case involved a defendant charging fees prior to providing a good-faith estimate in violation of Regulation Z, 12 C.F.R. § 1026.19(a)(1)(ii), and Regulation X, 12 C.F.R. § 1024.7(a)(4). All told thirteen of the nineteen cases involved unlawful advance fees in violation of the TSR. One case involved unlawful advance fees for both credit-repair and debt-relief services.

116. These cases primarily involved violations of the Truth in Lending Act, 15 U.S.C. §§ 1601(1)–114, and/or its implementing regulation, Regulation Z, 12 C.F.R. pt. 1026. In one case, the defendants violated 15 U.S.C. §§ 1631(b), 1638(a)(3), and 12 C.F.R. §§ 1026.17(c)(1), 1026.18(d). In another, the defendants violated 15 U.S.C. §§ 1631(a), 1638(b), 12 C.F.R. §§ 1026.17(a)–(b), 1026.18, as well as the prohibitions on deceptive acts or practices in Dodd-Frank, 12 U.S.C. §§ 5531(a), (c)(1), (d)(2)(A), and 5536(a)(1)(B). And in the last, the defendants violated 12 C.F.R. §§ 1026.6(b)(2) and 1026.14.

117. *E.g.*, 16 C.F.R. § 310.4(a)(2), (a)(5)(i).

118. *See, e.g.*, § 310.4(a)(2) (prohibiting sellers from requesting or receiving payment for credit-repair services until, *inter alia*, they have provided consumers with documentation "that the promised results have been achieved"); § 310(a)(5)(i) (prohibiting sellers from requesting or receiving payment for "any debt relief service

would be entitled to collect fees, the consumers might have no—or de minimis—compensable harm from the unlawfully early collection. Absent proof that the defendants ultimately complied with the law's requirements, however, the consumers owed nothing. Giving the consumers their money back is a substantial step toward putting the consumers back in the position the law intended.[119]

Eighty-five percent of the cases (twenty-three of twenty-seven) that have received allocations involved defendants deceiving consumers as to either the cost of the services or the types of services that would be provided.[120] In these cases, the CFPB often pleaded deception under both the Dodd-Frank Act[121] as well as another consumer law statute.[122] In eleven cases, the defendants deceived the consumers as to the cost of the services;[123] in seventeen, as to the services that would be provided,[124] and in five, as to both.[125]

In both types of cases, defendants deceived consumers to get them to agree to purchase the goods or services. The correct remedy for what is, in essence, fraudulent inducement is to return the consumers' money.[126] Even assuming that consumers received goods or services with some value, "the central issue here is whether the seller's misrepresentations tainted the customer's purchasing decisions."[127] In rejecting the defendant's argument that redress for such deception should be reduced by the value of the goods received, the Ninth Circuit used the example of a consumer who was sold rhinestones that were marketed as diamonds.[128] "We would not limit their recovery to the difference between what they paid and a fair price for rhinestones. The seller's misrepresentations tainted the customers' purchasing decisions."[129] Thus, the "fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or

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until and unless . . . [t]he seller or telemarketer has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt pursuant to a . . . valid contractual agreement executed by the customer").

119. Simply refunding the fees does not, of course, compensate consumers for lost time, the time value of the money, and other harms.

120. *See* Cowie, supra note 1.

121. *See* 12 U.S.C. § 5536(a)(1)(B).

122. *E.g.*, Complaint for Permanent Injunction and Other Relief at 14–19, CFPB v. Com. Credit Consultants, No. 2:17-cv-4720 (C.D. Cal. June 27, 2017) (alleging deception under the CFPA, 12 U.S.C. § 5536, and under the Telemarketing Sales Rule, 16 C.F.R. §§ 310.3(a)(1)(iii), (a)(2)(i), (a)(2)(iii)).

123. *E.g.*, Complaint for Injunctive Relief and Damages at 9–13, CFPB v. Student Fin. Aid Serv., Inc., No. 2:15-at-00821 (E.D. Cal. July 23, 2015) (alleging that defendant misrepresented the total cost of its services and failed to disclose truthfully a negative option feature of its services).

124. *E.g.*, Complaint at 3, CFPB v. Union Workers Credit Servs., Inc., No. 3:14-cv-4410 (N.D. Tex. Dec. 17, 2014) (alleging that defendant falsely stated that consumers would get a general-use credit card—similar to a Visa or MasterCard—if they purchased a membership).

125. *E.g.*, Notice of Charges Seeking Rescission, Restitution, Civil Money Penalties, and Other Legal and Equitable Relief at 10–23, *In re* 3D Resorts-Bluegrass, LLC, CFPB No. 2013-CFPB-0002 (June 14, 2013) (alleging that defendant misrepresented the infrastructure and services that would be provided with the properties for sale as well as the cost of some services).

126. *See, e.g.*, McGregor v. Chierico, 206 F.3d 1378, 1388-89 (11th Cir. 2000) (affirming consumer redress equivalent to the amount of gross sales because defendant had fraudulently induced customers "to accept and pay for unordered" goods).

127. *Id.* at 1388.

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

129. *Id.*

to refunds for each [item] that is not useful to them."[130] A more limited remedy would strip away the consumers' ability to make their own purchasing decisions and would force them into purchases that they would not have made but for defendants' unlawful conduct. Thus, the default position in deception cases such as these should be that the consumers get back all of the money they paid as a result of the deception.

Moreover, in all but four of the cost-deception cases, the defendants also collected unlawful advance fees, deceived consumers about the services to be provided, or both.[131] In 45% of the cost-deception cases, the defendants also charged unlawful advance fees.[132] To the extent that all of the monies defendants illegally took from consumers were unlawful advance fees, consumers should get all of those fees back, regardless of any services that may have been provided. In 45%[133] of the cost-deception cases, the defendants also deceived consumers as to the goods or services that would be provided. Again, setting aside the deception as to the cost, the deception as to what would be provided vitiates the consumers' purchasing decisions, and the consumers should receive all of their money back.

In the remaining four cases, the CFPB has taken a conservative approach to defining harm.[134] When consumers contracted for, and received, something of significant value from the defendants (for example, a loan or real property), the CFPB defined the harm as only undisclosed charges paid above the value of the goods actually received and the charges the consumers agreed to pay for those goods.[135] In two of these cases, *Triton Management* and *Colfax Capital*, the defendants charged more for loans than they had disclosed to consumers, and the CFPB gave consumers back any amounts they paid beyond the principal and agreed-upon charges.[136] In the third case, *Student Financial Aid Services*, the defendants, *inter alia*, deceived consumers about the existence of recurring fees, and the CFPB used the fund to return only fees paid for periods in which the

130. *Id.*; *see e.g.*, Default Judgment and Order as to Corporate Defendants at 12–13, CFPB v. Harper, No. 9:14-cv-80931 (S.D. Fla. May 28, 2015) (holding defendants liable for the entire amount spent by consumers because of the "fraud in the selling").

131. Cowie, *supra* note 1.

132. Cowie, *supra* note 1.

133. Although there is some overlap between these two groups, the fact that they both happen to account for 45% of the cost deception cases is a coincidence.

134. *See e.g.*, Consent Order at 14, *In re* Colfax Capital Corp., CFPB No. 2014-CFPB-0009 (July 29, 2014) (ordering equitable monetary relief in the amount of finance charges consumers paid above the amounts of finance charges disclosed by defendants).

135. *See, e.g.*, *id.*

136. Consent Order at 12, *In re* Triton Mgmt. Grp., Inc., CFPB No. 2018-BCFP-0005 (July 19, 2018) (ordering equitable monetary relief in the amount of consumer payments that exceed the finance charges disclosed by defendants); *In re Triton Management Group, Inc.*, File No. 2018-BCFP-0005 CFPB, https://files.consumerfinance.gov/f/documents/cfpb_triton-management-group.pdf (last visited May 13, 2021) [https://perma.cc/8QPT-5XK2] (stating that defendants failed to disclose finance charges and that defendants must return unlawful fees to consumers); Consent Order, *supra* note 134, at 14 (ordering equitable monetary relief in the amount of finance charges consumers paid above the amounts of finance charges disclosed by defendants).

defendants provided no services to the consumers.[137] In the fourth case, *Moseley*, the CFPB had not published information as of the writing of this Article on the harm that will be remediated, but some consumers never authorized defendants' loans, and those consumers should receive all of the finance charges they paid back while those consumers who agreed to loans but were deceived as to the total cost should receive only the finance charges they paid above the amounts that they reasonably expected to pay.[138]

2. *The Structure of the Fund Helps Ensure That Only Actual Harm Is Compensated*

The Civil Penalty Fund Rule (the "Rule")[139] narrowly defines[140] the "harm" that may be remediated through the Fund in a way that reasonably prevents consumers from receiving windfalls. The Fund's framework leaves little space for gaming the system: an adjudicative authority either expressly orders redress for the consumers' harm in an amount certain or defines the amount of that harm in some way, or the harm is limited to actual out-of-pocket losses caused by the defendants' unlawful conduct.[141] Both methods provide certainty as to the existence of the harm that might be remediated through the Fund. Further, however the harm is defined, a consumer may only receive compensation from the Fund if the CFPB determines that the consumer is not reasonably expected to receive compensation from another source.[142] As is discussed in detail *infra* in Section IV.C, in most cases in which the Fund has been used, it is ex-

137. Stipulated Final Judgment and Order at 2, CFPB v. Student Fin. Aid Servs., Inc., No. 2:15-cv-01581 (Sept. 11, 2015) (defining affected consumers as those who purchased certain services and were charged in a given year during which they did not use defendant's services).

138. Stipulated Final Judgment and Order as to Defendants Richard F. Moseley, Sr., at 4, CFPB v. Moseley, No. 4:14-cv-00789 (W.D. Mo. Aug. 10, 2018) (defining affected consumers as those affected by the violations detailed in counts I through IV of the complaint); Complaint for Permanent Injunction and Other Relief at 18–21, CFPB v. Moseley, No. 4:14-cv-00789 (W.D. Mo. Sept. 8, 2014) (alleging that defendants deceived consumers into believing that they authorized loans when they had not and therefore were obligated to pay the corresponding finance charges, deceived consumers as to the total finance charges for the loans, unfairly debited consumers' bank accounts without authorization, and failed to disclose accurately the cost of the loans).

139. Civil Penalty Fund Rule, *supra* note 44; 12 C.F.R. pt. 1075 (2020).

140. Under the rule, the amount of harm is set by an order (or the method for calculating the harm is set by an order), or the CFPB compensates only out-of-pocket losses. 12 C.F.R. § 1075.104(c). Non-monetary harm (*e.g.*, stress or time spent handling the results of a violation) are not out-of-pocket losses.

141. 12 C.F.R. § 1075.104(b)–(c).

142. *Id.* § 1075.104(b).

tremely unlikely that consumers could receive relief from private litigation following the CFPB enforcement action.[143] Thus, the requirements of the Civil Penalty Fund Rule make it reasonably unlikely that any consumers will receive windfalls from the Fund.[144]

The Rule limits payments to situations in which three criteria are met: the consumers must be eligible victims; they must have compensable harm; and some amount of that harm must be uncompensated. First, consumers are eligible victims—who therefore may receive payments from the fund—only if they have been harmed by a violation for which a final order[145] in a Bureau enforcement action[146] imposes a civil penalty.[147] Thus, if a final order does not require a defendant[148] to pay a civil money penalty, the consumers harmed by that defendant cannot receive payments from the fund regardless of the amount of harm they have suffered.

Second, the consumers' harm must be "compensable" under the rule.[149] The rule establishes a hierarchical framework for determining whether there is compensable harm.[150] Court orders regarding the amount of harm control.[151] If an order does not specify the amount of the harm, each consumer's compensable harm is his or her out-of-pocket losses from the violation for which the penalty was imposed if those losses are practicable to determine.[152]

143. Although it does not appear to have happened frequently with the CFPB, when federal agencies bring enforcement actions while there is ongoing private litigation, they often have coordinated with the private actions in the provision of relief, thereby ensuring that there are no double recoveries. *See, e.g.*, Stipulated Order for Permanent Injunction and Monetary Judgment at 35–41, CFPB v. Equifax, Inc., No. 1:19-cv-3300 (N.D. Ga. July 23, 2019); Velikonja, *supra* note 54, at 387–88 (noting that where there are overlapping actions, the SEC "usually coordinates the distribution of collected funds with parallel proceedings," for example in cases with parallel class actions or criminal proceedings); Stipulated Final Judgment and Order for Injunctive and Other Equitable Relief at 8–14, FTC v. Airborne Health, Inc., No. 08-05300 (Aug. 13, 2008) (entering judgment against defendants for $30 million but coordinating the provision of relief to consumers with a private class action).

144. Indeed, if anything, this conservative approach often will undercompensate consumers by excluding harm that is hard to quantify (*e.g.*, the value of lost time, the time-value of money, the costs of significant emotional distress).

145. 12 C.F.R. § 1075.101 (defining "Final order" as "a consent order or settlement issued by a court or by the Bureau, or an appealable order issued by a court or by the Bureau as to which the time for filing an appeal has expired and no appeals are pending").

146. *Id.* (defining "Bureau enforcement action" to include both administrative actions or proceedings as well as actions in court wherein the Bureau has "obtained relief with respect to a violation").

147. § 1075.103.

148. The Civil Penalty Fund Rule defines "defendant" to include parties "found or alleged to have committed a violation" in both court and administrative adjudications). 12 C.F.R. § 1075.101.

149. § 1075.104(a)–(c) (2020) (providing that the fund will be used to compensate eligible victims' uncompensated harm, that "uncompensated harm" is equal to a victim's compensable harm minus any payments reasonably expected or received, and defining the framework for determining "compensable" harm).

150. *See* § 1075.104(c). This includes orders denying redress, setting an amount of harm for an entire class, or establishing a method for calculating the harm. *Id.* If the order suspends or waives part of the redress ordered, it does not alter or reduce the amount of compensable harm. § 1075.104(c)(1).

151. § 1075.104(c)(2)(i).

152. § 1075.104(c)(2)(iii). Although the CFPB does not release much data on how it calculates the harm in a given case (beyond what is in the relevant orders), the CFPB generally appears to be determining harm by looking at the defendants' and other related entities' records of consumers' payments, rather than by creating a claims process where consumers would submit supporting documents. It has used claims processes in a few

Third, the fund only makes payments for the *uncompensated* harm of eligible consumers.[153] Uncompensated harm is defined as compensable harm minus any compensation the consumer has received for that harm or is reasonably expected to receive for that harm.[154] The rule lays out several instances in which the consumer will have received other compensation for the harm: previous payments from the Civil Penalty Fund to the same class of victims; redress ordered in a Bureau enforcement action that has not been suspended, waived, or determined to be uncollectible; and any other redress that the Bureau knows has either been paid or has been paid to an intermediary for distribution to victims and that compensates the consumer for the same harm.[155] If it is unduly burdensome, given the amounts at stake, to determine either the amount of redress that is, or will be, paid by another entity or the extent to which that redress compensates consumers for the same harm, the Bureau may exclude that redress from the compensation that the victim is expected to receive.[156]

B. Consumers Likely Find Payments from the Fund to Be Significant

The CFPB's payments from the Fund likely are significant to average consumers. For context, the Federal Reserve Board surveyed approximately 12,000 individuals in 2019.[157] Nearly 37% of people surveyed stated that they would have difficulty covering a $400 unexpected expense.[158] Further, "[n]early 3 in 10 adults were either unable to pay their monthly bills or were one modest financial setback away from failing to pay monthly bills in full."[159] Overall, 25% of adults had family incomes that were less than $25,000, and 37% had family incomes of less than $40,000.[160] Those family incomes translate into average monthly incomes of $2,083 or less and $3,333 or less.

As is discussed in detail in Section III.C above, the CFPB has sent hundreds of thousands of checks to consumers where the average check amounts were approximately $100 or more.[161] Indeed, more than 177,000 checks were sent to consumers in cases where the average check amount was more than $1,000.[162] If one includes checks in cases where the average check amount is more than

cases, though. *See, e.g.*, Stipulated Order for Permanent Injunction and Monetary Judgment at 35–41, CFPB v. Equifax Inc., No. 1:19-cv-3300-TWT, (N.D. Ga. July 23, 2019).

153. 12 C.F.R. § 1075.104(a)–(b).

154. § 1075.104(b).

155. § 1075.104(b)(2); *cf.* Velikonja, *supra* note 54, at 364–65 (noting that the SEC takes into account related actions when determining how much to pay investors from fair funds and refuses to pay more than necessary to compensate investors for "the full extent of their losses").

156. § 1075.104(b)(2).

157. BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2019, at 1 n.1 (2020), https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf [https://perma.cc/V68D-8HD2]; *see also id.* at 57–59 (describing the survey methodology).

158. *Id.* at 21.

159. *Id.*

160. *Id.* at 11.

161. *See supra* Section III.C and accompanying text.

162. *See supra* Section III.C and accompanying notes; *see also infra* Table 7.

$100, that number increases to more than 291,000, and if one includes the single case with an average check amount of $93.05, the number of checks sent increases to just over 391,000.[163]

TABLE 6

Average Check Amount Is Greater Than:[164]	**Number of Checks Sent to Consumers**[165]
$1,000	177,065
$100	291,928
$90	391,266

These average check amounts—involving checks totaling $427.2 million for these eighteen cases—are significant by any measure.[166] Moreover, as noted above, many cases involved unlawful fees for debt-relief or credit-repair services.[167] Purchase of these services suggests that the consumers in question already were in some financial distress, making the return of these funds even more significant.

Furthermore, the above groupings mask the fact that thousands of consumers are receiving checks with even higher average amounts. In cases in which the average check amount was between $1,000 and $5,000, the CFPB sent more than 170,000 checks, and the average check amount for those cases was more than $2,000.[168] Another approximately 115,000 checks were sent in cases where the average check amount was more than $200, and another almost 100,000 checks were sent in a case with an average check amount of $93.[169]

163. The average check amount is $93.05 in the one case with an average check amount above $75, but below $100. *See supra* Table 3; *see also infra* Table 6. The CFPB sent 99,338 checks in that case.

164. Because each row indicates the number of checks sent in cases where the average check amount is greater than a specified amount, the number of checks in any given row includes all of the checks in the higher rows as well.

165. As is discussed in *supra* Section III.C, the CFPB does not publish data on the number of consumers who received or cashed checks.

166. Cowie, *supra* note 1.

167. *See supra* Section IV.A.1.

168. *See infra* Table 7.

169. *See infra* Table 7.

TABLE 7

Range of the Average Check Amounts		Number of Checks Sent to Consumers in Cases in this Range	Average Check Amount for Cases in this Range[170]
Greater than or Equal to	Less Than		
$5,000		1,570	$8,652
$1,000	$5,000	175,495	$2,155
$100	$1,000	114,863	$228
$90	$100	99,338	$93

Even the average check amount in the two cases with the lowest average check amounts[171] is still significant. The CFPB sent more than 500,000 checks[172] with an average check amount of $39 in these two cases.[173] The fact that 63% of the more than $20 million distributed by the CFPB in these two cases was cashed by consumers is some indication that consumers felt that the amounts they were receiving were significant, at least significant enough to go through the effort to cash the checks.[174]

In addition, the average check amounts paid from the Civil Penalty Fund compare very favorably to amounts paid to consumers for relief in similar situations. Over four years, 2016-2019, the Federal Trade Commission ("FTC") distributed checks to 9.9 million consumers averaging $101.[175] By comparison, the overall average check amount from the Civil Penalty Fund is $494.[176] Similarly,

170. This average is a weighted average for all of the cases with average check amounts in each range. The average for each range is calculated by summing the total amounts distributed in all of the cases in a given range and dividing that figure by the sum of all of the checks sent in all of the cases in that range. For example, if four checks were sent in a case with an average check amount of $100 and two checks were sent in a case with an average check amount of $500, the average check amount in that range would be ((100*4)+(500*2))/(4+2) = 1,400/6 = $233. This weighted average is more informative than simply averaging the averages from the two cases, which would be (100+500)/2 = $300. Unless stated otherwise, all of the averages in this section are calculated using a weighted average.

171. $41 and $27 respectively.

172. 513,806 to be exact. *See supra* Table 3.

173. Cowie, *supra* note 1; *see also supra* Table 3.

174. The question here is not whether consumers felt that this amount adequately compensated them for their harm. It is impossible to infer their attitudes from this data. Rather, the question is whether they felt that this amount was significant to them given their budget and other demands on their time. Assuming that the benefit from cashing a check outweighs the costs of doing so, one would assume that an economically rational person would cash the check. A person could decline to cash either because the amount was relatively insignificant in the context of the person's budget or because the costs of cashing the check (in time and fees) outweighed the value of the check. For some consumers, especially poorer or unbanked consumers, the transaction costs to cash the check could be higher than $41 or $27. The data here shows that despite the relatively low average check amounts recipients of 63% of these distributions elected to cash the checks. Cowie, *supra* note 1; *see also supra* Table 5.

175. FTC Refunds to Consumers: Calendar Year: 2016 to 2019, TABLEAU PUB., https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_15797958402020/RefundsbyDate [https://perma.cc/R7HP-HYSS] (Jan. 5, 2021). This comparison is not perfect. The FTC refunds consumers' money by using money the FTC collected from the defendants in the same case, and thus, these amounts may not reflect the total harm. Also, the types of cases enforced by the FTC and the CFPB are not identical; therefore the FTC may provide refunds in cases that involve violations that the CFPB could not prosecute.

176. Cowie, *supra* note 1.

for 2017 and 2018, most of the money distributed in the FTC's initial distributions went to consumers in cases where the average refund[177] was between $100 and $1,000.[178] That range represented 66% of the total initial distributions, and the average refund to all consumers from cases in that range was $401.[179] By contrast, 84% of the money distributed through the Civil Penalty Fund was sent to consumers harmed in cases where the average check amount ranged between $1,000 and $5,000, with the average check amount in that range being $2,155.[180] As with the Civil Penalty Fund, the FTC also sent most consumers (86% of the total) refunds in cases where the average refund was less than $50. Only 57% of the Civil Penalty Fund checks, however, were sent in cases where the average check amount was less than $50, and the funds distributed to those consumers represented only 5% of the total funds distributed from the Civil Penalty Fund, while 30% of the refunds provided by the FTC were in cases from this range.[181] In addition, almost 15% of the FTC's refunds were in cases whether the average refund was less than $25.[182]

Cox, Widman, and Totten examined 128 state enforcement cases in which consumers received compensation.[183] These cases primarily provided relief to consumers that were identified specifically in the orders, and typically involved relatively few consumers (more than half involved less than ten consumers).[184] In the forty-two cases in which consumers in a given case received the same amounts, the average payment was $3,010 and the median $1,000.[185] In the eighty-six cases in which consumers received different amounts, the average high and low payments were $6,030 and $648 respectively, and the median high and low payments were $2,431 and $250 respectively.[186] These numbers are not directly comparable to the average check amounts from CFPB distributions, as they do not include the mean or median for each case, but the CFPB issued thousands of checks in cases where the average check amounts were comparable.

177. In the 2017 FTC REFUND REPORT, the FTC reported the average refund for each case. FTC, OFFICE OF CLAIMS AND REFUNDS ANNUAL REPORT 2017, at 3–4 (2017), https://www.ftc.gov/system/files/documents/reports/bureau-consumer-protection-office-claims-refunds-annual-report-2017-consumer-refunds-effected-july/redressreportformattedforweb122117.pdf [https://perma.cc/3Z5A-8DG5]. In the 2018 FTC REFUND REPORT, the FTC reported only the median refunds for each case, but the average could be calculated by dividing the figures provided for the amount mailed for each case and for the number of consumers, which mirrors the calculation of the average in the 2017 FTC REFUND REPORT. *Id.*; OFF. CLAIMS AND REFUNDS, FTC, 2018 FTC ANNUAL REPORT ON REFUNDS TO CONSUMERS 2018, at 3–4 (2018), https://www.ftc.gov/system/files/documents/reports/2018-annual-report-refunds-consumers/annual_redress_report_2018.pdf [https://perma.cc/VA65-ZVR4].

178. *See supra* note 177 and accompanying text.

179. *See supra* note 177 and accompanying text.

180. *See supra* Tables 3 & 7.

181. *See supra* Table 3.

182. Cowie, *supra* note 1.

183. Cox, *supra* note 2, at 78.

184. *Id.* (noting that the average number of consumers receiving relief was 125 and the median was eight from 141 cases, although they could identify the amount of the payment only in 128 cases).

185. *Id.*

186. *Id.*

As another example, the CFPB's use of the Civil Penalty Fund compares favorably to the relief consumers have received in class actions.[187] The FTC conducted a study of relief provided to consumers through class actions.[188] That study found that the average compensation was $79 and the median compensation was $69, with one-quarter of the cases having a median of $22 and one-quarter a median of $200 or more.[189] The CFPB analyzed settlements in more than 200[190] class-action cases involving consumer financial products or services and found that consumers received approximately $32.[191]

Both the FTC, the states, and class actions are limited in an important way that the CFPB is not; they can only provide consumers with relief from the money available from the defendants that specifically harmed them. When those defendants do not have sufficient resources, consumers cannot receive full relief. These situations are comparable to Bureau-administered relief, which also relies solely on money collected from the defendants who caused the specific harm. The Civil Penalty Fund squarely addresses this problem.

187. An analysis of the benefits and costs of private enforcement of consumer laws through class actions is beyond the scope of this paper; however, it is worth noting that there undoubtedly is a significant amount of unlawful conduct that is neither prosecuted by government regulators nor enforced through private actions (either individual or class actions). In addition, in those instances in which a case is filed, most of the time there is either a government enforcement action or a private action, but not both. CFPB, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT §1028(A) §§ 1.3, 1.4.8, at 8, 17–18 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/Y9CA-C2RJ] (noting that in its survey of 1,150 cases filed by enforcers, it was not able to find a related private class action in 88% of the cases, and that in its survey of 114 private class actions, it was not able to find a related government action 66% of the time). Thus, the point of this section is not to say that these other types of cases do not reach appropriate resolutions, especially in the typical case where the alternative is no recovery at all for the consumers, but rather that the typical checks sent from the Civil Penalty Fund are providing significant monetary relief to consumers.

188. 2019 FTC CLASS ACTION REPORT, *supra* note 105. As with the FTC comparison, the class action data set included cases that the CFPB could not prosecute. *See id.* at 19 fig.3 (noting that data set included cases involving product malfunction and anticompetitive conduct).

189. *Id.* at 21 tbl.2, 23 n.41.

190. The CFPB analyzed 419 cases in total, but not every case had sufficient detail to allow an analysis of the relief consumers received. CFPB ARBITRATION STUDY, *supra* note 187, § 8.1, at 3 n.4.

191. *Id.* at 27; Arbitration Agreements, 82 Fed. Reg. 33,210, 33,234 n.335 (July 19, 2017) (disapproved under the Congressional Review Act on Nov. 1, 2017, PL 115-74, and removed from the code of federal regulations on Nov. 22, 2017). Arbitration Agreements, 82 Fed. Reg. 55,500, 55,500 (Nov. 22, 2017)) (noting that although the two datasets in the CFPB Arbitration Study were not congruent, the CFPB "believes that this $32-per-class-member recovery figure is a reasonable estimate"). The CFPB noted one multi-district litigation involving 18 settlements that provided $1 billion in monetary relief to 29 million consumers, which averages to $34 per consumer. CFPB ARBITRATION STUDY, *supra* note 187, § 8, at 39–40.

C. Absent the Existence of the Fund, These Consumers Likely Would Receive Little or No Relief

A revolutionary aspect of the CFPB's Civil Penalty Fund is that it can provide relief to consumers when the defendants who harmed those consumers do not have enough money to make the consumers whole.[192] It does so by using the penalties paid by all defendants for violating consumer laws to provide relief to consumers harmed by those defendants who do not have sufficient assets to provide relief themselves. Absent the relief provided through the Civil Penalty Fund, the consumers in these cases likely would have received little or no relief.

1. In Most Cases in Which the Fund Is Used, the CFPB, Rather than the Defendants, Has Remediated the Vast Majority of the Consumers' Harm

The defendants in the twenty-seven cases for which the CFPB has allocated funds from the Civil Penalty Fund[193] caused $706.2 million[194] in harm to consumers—under the narrow definition of compensable, uncompensated harm in the Civil Penalty Rule. But these defendants paid only $46 million of that harm,[195] or roughly seven cents for each dollar of harm they caused. Absent payments from the Fund, the consumers in these cases most likely would receive no compensation for 93% of their harm, resulting in more than $660.2 million[196] in compensable but uncompensated harm.

Even these figures understate the amount of unremediated harm consumers would have in a typical case if the Fund did not exist. As an initial matter, just

192. *See, e.g.*, Brief for the CFPB as Amici Curiae supporting Respondents, Linton v. Consumer Prot. Div., 225 A.3d 456 (Ct. App. Md. Nov. 6, 2019) (No. 2019-33) ("[T]he Fund is used principally to compensate consumers who were harmed by violations of Federal consumer financial law and who were not fully compensated through the relevant [CFPB] enforcement action, often because the defendants lacked sufficient financial resources to fully remediate the harm they caused.").

193. This analysis includes the cases resolved by March 31, 2019. *See* discussion *supra* Section III.A.

194. This amount includes $35 million in Bureau-administered redress paid to consumers and $671.2 million allocated from the Fund for payment to consumers. Defendants in a given case may be ordered to pay redress to the CFPB, rather than paying redress directly to the consumers they harmed. When this happens, the CFPB uses the funds to provide Bureau-administered redress to the consumers harmed by those specific defendants. These payments are separate from payments from the Fund. None of the defendants in these 27 cases paid redress directly to consumers, although thirteen paid redress to the CFPB in addition to paying civil money penalties. The amount of Bureau-administered redress understates the actual amount of harm to consumers because in three of the cases, the defendants have paid redress to the Bureau—and therefore their payments are included in the $46 million that the defendants paid—but the CFPB had not published any data on its distribution of those monies as of the writing of this Article—and therefore those payments are *not* included in the $35 million figure for Bureau-administered redress (and thus are not included in the total harm). When that redress is known and included in the total harm, the percentage of harm remediated by defendants will decrease and the amount of unremediated harm will increase.

195. This figure includes both amounts paid as redress and as penalties. The defendant in only one of these twenty-seven cases, Amerisave Mortgage Corp., CFPB No. 2014-CFPB-0010 (Aug. 12, 2014), paid more to the Bureau than the harm it caused. This figure and the subsequent percentages do not include the amount Amerisave paid beyond the harm it caused, as doing so artificially decreases the unremediated harm in the remaining cases.

196. This analysis conservatively assumes that all of the money paid by defendants to the CFPB (including both money paid for redress and civil money penalties) would have been paid directly to consumers with no decreases due to administrative costs.

one case accounts for roughly 35% of the total paid by defendants in all twenty-seven cases.[197]

Additionally, in half of the cases, the defendants paid less than 1% of the harm they caused.[198] In six of those cases, the defendants paid $5 or less while causing an *average* of $9.8 million in harm.[199] The consumers in these six cases would receive, effectively, no compensation for their harm without the Fund—resulting in a total of $59 million in *unremediated* harm. In another seven cases, the defendants paid more than $5 but less than 1% of the harm they caused,[200] resulting in a total of $243.5 million in *unremediated* harm if the Fund were not used. All told, in these thirteen cases, the defendants paid less than 0.3% of the harm they caused, leaving a total of $302.5 million in harm to be covered by the Fund.

197. Amerisave Mortgage Corp., CFPB No. 2014-CFPB-0010 (Aug. 12, 2014). Amerisave is an unusual case in many respects. First, it is the only case in which the Fund was used where the defendants paid more to consumers than the CFPB did. Second, the defendants in that case are the only defendants who paid more in redress and penalties than the amount of harm they caused (as calculated by the Civil Penalty Fund Rule). The Amerisave defendants paid $14.9 million to the CFPB for redress and another $6 million in civil money penalties (roughly $20.9 million combined). *Id.* However, they caused $15.9 million in harm to consumers. Finally, the average check amount in the distribution for this case was the lowest of all the cases. *See supra* Table 5. By contrast, the average check amount for the Bureau-administered redress in Amerisave was $150. It is not clear from the publicly available information why the CFPB allocated funds to the Amerisave matter rather than simply ordering Amerisave to remediate consumers fully. Amerisave clearly had enough money to remediate consumers completely itself. It paid $14.9 million in redress, and paid a civil money penalty that was higher than the amount allocated from the Fund—the only instance in which that occurred. One possible explanation is that the CFPB either underestimated the amount of harm when it structured the consent order or discovered additional harm after the order had issued. The fact that the average check amount from the Bureau-administered redress was so much higher than the average check paid from the Fund ($150 versus $27 respectively) suggests that the CFPB found some additional harm after the settlement. Either way, because the amount of additional harm was lower than the penalty paid, the defendants ultimately did cover the entire amount of harm themselves.

198. Harm is defined as the amount allocated from the Civil Penalty Fund plus any amounts paid to consumers as Bureau-administered redress. For these cases, those two amounts equal consumers' compensable harm as that term is defined in the Civil Penalty Fund Rule. This analysis and the analyses that follow are derived from twenty-six of the twenty-seven cases. The analyses exclude Triton Mgmt. Grp., Inc., CFPB No. 2018-BCFP-0005 (July 19, 2018). In that case, the defendants paid redress to the CFPB, but the CFPB had not yet reported on how much it distributed in Bureau-administered redress to the consumers harmed in those cases. Although the amount of redress paid by defendants to the CFPB is usually very close to the amount in Bureau-administered redress ultimately paid by the CFPB to consumers, there have been differences, and in this case, a difference could be significant. Assuming that the Bureau-administered redress roughly equaled the amount of redress Triton Management paid to the CFPB, Triton Management will have paid approximately 1/3 of the more than $1.5 million in harm it caused. Two other cases where the defendants had paid redress but the CFPB had not yet reported on the amounts of Bureau-administered redress were included. In one, CFPB v. Moseley, No. 4:14-cv-00789-SRB (W.D. Mo. Aug. 10, 2018), the CFPB received seized assets (ordered as redress to be paid to the CFPB) after it already had allocated funds to the harmed consumers. Therefore, the seized amounts should not increase the harm remediated. In the other, Bureau Cons. Fin. Prot. v. Howard, No. 8:17-cv-00161-JLS (C.D. Cal. Mar. 27, 2019), the amount of redress paid by the defendants was de minimis compared with the amount of harm caused ($50,000 in redress paid versus over $35 million in harm), such that it will not have a significant impact on the analyses.

199. *See infra* Table 8.

200. *See infra* Table 8.

In almost 70% of the cases, the defendants paid less than 5% of the harm they caused.[201] In addition to the cases from the prior paragraph, there were another five cases in which the defendants paid less than 5% (but more than 1%) of the harm they caused.[202] Absent the use of the Fund, the consumers in these five cases would have had an additional $47.7 million in unremediated harm. The defendants in these five cases collectively paid only 4% of the harm they caused.

In seven of the remaining cases, the defendants paid more than 5% of the harm they caused,[203] but the Fund still provided vastly more relief to consumers harmed in those cases than the defendants could have. Collectively, the defendants in these seven cases caused $336.2 million in harm, but the CFPB reimbursed consumers for more than 92% of that harm, while the defendants collectively paid less than 8%.[204] In total, using the Fund, the CFPB allocated $309.5 million to consumers in relief beyond the amounts paid by the defendants in those six cases, an average of almost $44.2 million covered by the Fund per case.

TABLE 8

Harm Covered by Defendants in Each Case	Number of Cases	Total Unremediated Harm[205]	Average Unremediated Harm Per Case
Less than $5	6	$59,000,000	$9,800,000
Between $5 and 1%	7	$243,500,000	$34,800,000
Between 1% and 5%	5	$47,700,000	$9,500,000
More than 5%	7	$309,500,000	$44,200,000
100%	1	$0	$0
Total[206]	**26**	**$659,700,000**	

Thus, the defendants in most cases paid amounts that remediated little to none of the harm they caused. Although, on average, the defendants in these cases paid less than 7% of the harm they caused, the median amount of harm covered by defendants in individual cases was less than 1%. Indeed, almost 70% of defendants paid less than 5% of the harm they caused, and half paid less than 1%. Just under one-quarter paid less than $5, effectively zero.

2. *In Most Cases, the Defendants Had Limited Financial Resources or Were Out of Business, and Consumers Likely Could Not Receive Compensation From Any Other Source*

In resolving enforcement actions, enforcers always should strive to require defendants to remediate harmed consumers fully. In determining whether to settle a given case and the specific terms on which to settle, however, enforcers

201. *See infra* Table 8.
202. *See infra* Table 8.
203. *See infra* Table 8.
204. The percentages in these seven cases were 5, 6, 7, 8, 12, 19, and 36% respectively.
205. Figures for both the totals and the averages are rounded to the nearest $100,000. *See* Table 4 n.4.
206. If Triton Management were included, the total unremediated harm likely would be approximately $660.7 million for all twenty-seven cases. *See* discussion *supra* notes 136, 198.

must balance a multitude of competing factors: What are the defendants' financial resources? How many of those resources will be depleted by ongoing litigation costs? Even if the enforcer ultimately wins, how many of those resources will be recoverable by the enforcer? How much additional delay in providing relief to consumers will be caused by continuing litigation? How much harm will that delay cause? How much new harm will the defendants' illegal practices cause—both to new and existing consumers—while the litigation is ongoing? How much harm will other market actors cause through similar actions before the resolution becomes public? What are the risks of ultimately losing the litigation? In fact, the CFPB is required by statute to consider "the size of financial resources" of the defendants in determining the amount of any civil money penalty.[207] While ordering defendants to remediate all harmed consumers fully is obviously the ideal, and one the CFPB has achieved much of the time,[208] in practice, that result is not always feasible.

In most of the cases (eighteen of twenty-seven) where funds were allocated from the Civil Penalty Fund, the information available in the relevant orders suggests that the defendants did not have sufficient resources to remediate the hundreds of millions of dollars in harm they caused consumers.[209] In eleven of the twenty-seven cases, the orders either expressly determined that the defendants had an inability to pay or set the amounts ordered to be paid based on the defendants' sworn representations regarding their limited financial resources.[210] In another five cases, the defendants either were in bankruptcy or were ordered to cease operations completely.[211] In another two cases, the defendants defaulted.[212]

The defendants' statuses in the remaining nine cases are not as clear from the orders. Based on reviewing the defendants' websites as well as state-government websites in states where the defendants were incorporated or operating, the artificial-person defendants in five of the nine cases appear to be no longer operating.[213] In addition, the defendants in each of these cases were enjoined from participating in the relevant industry as a whole, rather than a simple injunction

207. 12 U.S.C. § 5565(c)(3)(A).

208. In 83% of the cases resolved prior to April 1, 2019, and where a civil money penalty was imposed, the CFPB determined that there was no remaining compensable, uncompensated harm, and therefore, no funds needed to be allocated from the Civil Penalty Fund. Again, it is important to recognize that remediating all harm, as that term is defined in the Civil Penalty Fund Rule, does not necessarily mean that consumers will not have other harm (*e.g.*, stress, lost wages or opportunity costs from time spent responding to the unlawful conduct, etc.).

209. *See, e.g.*, CFPB v. Michael Harper, No. 9:14-cv-80931 (S.D. Fla. May 5, 2015).

210. *See, e.g.*, *id.* In one of these cases, an individual defendant also was sentenced to 120 months in jail and ordered to forfeit $49 million. Stipulated Final Judgment and Order as to Defendants Richard F. Moseley, Sr., et al., at 3, CFPB v. Moseley, No. 4:14-cv-00789 (W.D. Mo. Aug. 10, 2018).

211. Cowie, supra note 1.

212. *Id.*

213. Cowie, *supra* note 1. Based on this data, it is not possible to determine when the companies ceased operating; thus it is possible that one or more of them continued to operate for a time after the resolution of the CFPB enforcement action.

against violating the law or collecting unlawful fees.[214] As a result, those defendants lost access to a major—if not their sole—source of revenue.

Thus, in twenty-three of the twenty-seven cases (85%), the available information strongly suggests a lack of resources sufficient to remediate consumers fully. Collectively the defendants in these cases paid $22.8 million but caused $544.8 million in harm.[215] Even if they could have paid significantly more than they did—which appears unlikely given their resources and operating statuses—it seems unlikely that they could have made up the almost $522 million[216] in remaining harm that will be remediated by the use of the Civil Penalty Fund.[217]

In addition, it is unlikely that the consumers harmed in these cases could recover their damage from another source. First, the CFPB itself must determine that the consumers are not reasonably expected to receive compensation before it allocates any amount from the Fund.[218] Second, given the demonstrated lack of resources from most of these defendants, it seems extremely unlikely that any individual, or even a class of individuals, could find private attorneys to bring an action against these defendants after the resolution of the CFPB's enforcement action, especially if the order required the defendants to pay significant amounts to the CFPB and to cease operations, as many orders do. Third, although the average check amounts are significant to individual harmed consumers, in most cases they do not seem high enough to justify an individual action even if the

214. In four cases, the defendants were permanently enjoined, and in the fifth the ban was for five years. Stipulated Final Judgment and Order at 4, CFPB v. Prime Mktg. Holdings, LLC, No. 2:16-cv-07111 (C.D. Cal. Aug. 31, 2017) (permanently restraining defendant from, *inter alia*, "selling, assisting in the sale of, or administering Credit Repair Services" or receiving remuneration from another's sale of such services); Stipulated Final Judgment and Order at 4, CFPB v. Commercial Credit Consultants, No. 2:17-cv-4720 (C.D. Cal. June 30, 2017) (ordering a five-year ban on providing "Credit Repair Services"); Stipulated Final Judgment at 3, CFPB v. Union Workers Credit Servs., Inc., No. 3:14-cv-4410 (N.D. Tex. Feb. 10, 2015) (permanently restraining defendant from offering or profiting from the offering of credit); Stipulated Final Judgment and Order for Permanent Injunction, Civil Money Penalties, and Other Relief at 5, CFPB v. College Educ. Servs. LLC, No. 8:14-cv-3078 (M.D. Fla. Jan. 15, 2015) (permanently restraining offering, or profiting from the offering of, "Debt-Relief Service"); Stipulated Final Judgment and Consent Order at 4, CFPB v. Meracord LLC, No. 3:13-cv-05871 (W.D. Wash. Oct. 3, 2013), 2013 WL 5477618 (permanently enjoining defendants from providing payment-processing services for providers of a "Debt Relief Service or a Mortgage Assistance Relief Service").

215. Cowie, *supra* note 1.

216. *Id.* If one considers only the eighteen cases where the orders made clear the status of the defendants, the defendants' payments would have left $462.8 million in unremediated harm.

217. *Amerisave* is one of the remaining four cases, and those defendants actually paid more than the full amount of harm they caused. *See* discussion *supra* notes 195, 197. In the remaining three cases it is not clear from the publicly available information why those companies were not required to remediate consumers fully. In one of those cases, *CFPB v. Global Client Sols., LLC*, No. 2:14-cv-6643 (C.D. Cal. Aug. 27, 2014), the defendants allegedly provided unlawful substantial assistance because they processed payments that allowed other parties to collect unlawful advance fees. Complaint at 3–6, CFPB v. Global Client Sols., LLC, No. 2:14-CV-6643 (C.D. Cal. Aug. 25, 2014). Those other parties were not defendants in the case, and the defendants in Global Client Solutions collectively paid a substantial amount, just over $7 million, CFPB, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU: FISCAL YEAR 2014 27, 37 (2014), https://files.consumerfinance.gov/f/201411_cfpb_report_fiscal-year-2014.pdf [https://perma.cc/SC6E-EGC5]; 2016 FINANCIAL REPORT, *supra* note 2, at 44 n.15, 48, everything they were ordered to pay. Stipulated Final Judgment and Consent Order at 14, 16, CFPB v. Global Client Sols., LLC, No. 2:14-cv-6643 (C.D. Cal. Aug. 27, 2014).

218. 12 C.F.R. § 1075.104(b) (2020).

defendants had remaining resources.[219] "[P]arties generally do not state overall claim amounts in complaints,"[220] but studies on arbitration and small claims court suggest that individuals typically do not arbitrate claims for these amounts[221] or use small-claims courts for these types of claims.[222] Thus, private actions following on CFPB enforcement actions against defendants with limited resources like these seem unlikely.[223]

Furthermore, empirical data indicate that private suits often are not filed covering the same conduct prosecuted in government enforcement litigation. For example, the CFPB's arbitration study surveyed 1,150 cases filed by enforcers, and did not find a related private class action in 88% of the cases.[224] Similarly, in its survey of 114 private class actions, it was not able to find a related government action 66% of the time.[225] An analysis of the SEC's use of fair funds to provide compensation to harmed investors also determined that in 78.8% of the 217 fair-fund cases, there was no related action providing relief to the investors.[226]

Defendants in enforcement actions in which the CFPB used the Fund typically caused far more harm than they could remediate themselves.[227] Perhaps unsurprisingly, their business practices resulted in limited assets, bankruptcy, or even jail, leaving consumers with no realistic recourse. Thus, for all the reasons

219. *See, e.g.*, Cox, *supra* note 2, at 78.

220. CFPB ARBITRATION STUDY, *supra* note 187, § 6, at 3.

221. *See* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 76–77, 80 & n.176, 91–92 & n.294, 117 (2015) (discussing an Ernst & Young study of 226 arbitrations filed by consumers against lenders where the median amount was more than $15,000 and reviewing 4,839 arbitrations filed by consumers—in disputes not limited to financial services—and finding an average claim of $143,962 and a median of $10,000, but when more than 1,000 AT&T Mobility matters are removed—each of which claimed $10,000—the average increases to over $183,000 and the median to $15,000; all told, only 184, or less than 4%, of these cases involved claims less than $1,000); CFPB ARBITRATION STUDY, *supra* note 187, § 5, at 9–10, 23–24 (noting that in a survey of 1,847 arbitrations related to consumer financial services, affirmative claims by consumers averaged approximately $27,000 with a median of $11,500 and noting that only approximately twenty-five per year were $1,000 or under).

222. Relatively little empirical data exists on the use of small-claims courts. CFPB ARBITRATION STUDY, *supra* note 187, § 7, at 4. The available studies suggest that consumers do not use small claims court for claims like these, although the average claims amounts could be in the range of relief often provided by the Fund. *See* Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 487 tbl.G, 489 (1990) (finding that of 1,799 claims filed in small claims court only 4% were filed by individuals against businesses other than landlords and that most claims filed by individuals sounded in tort); Bruce Zucker & Monica Her, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 USF L. REV. 315, 341–42 tbl.4 (2003) (finding that the average claim brought by an individual, regardless of type of claim or defendant, in small claims court was $2,219 with a median of $1,351). Requiring consumers to file thousands of cases in small claims court, however, would be vastly more inefficient on a variety of axes than using a civil penalty fund to provide consumers relief for harm caused by conduct found to be unlawful.

223. *Cf.* Velikonja, *supra* note 54, at 369 (noting that fair-fund cases filed where there were no related private actions included cases where the likely recovery made any private actions not "cost effective," where the defendants were "judgment-proof," or the fair fund had fully compensated the harmed investors).

224. *See* CFPB ARBITRATION STUDY, *supra* note 187, § 1, at 17; *see also* discussion *supra* note 187.

225. CFPB ARBITRATION STUDY, *supra* note 187, § 1, at 17–18.

226. Velikonja, *supra* note 54, at 388. In cases where government and private actions both provided relief, the provision of relief often is coordinated. *See* discussion *supra* note 143.

227. *See* discussion *infra* Section IV.C.

discussed above, the consumers harmed by these defendants likely would receive no relief for the vast majority, if not all, of their harm absent the existence and use of the Civil Penalty Fund.

D. The Civil Penalty Fund Efficiently Remediates a Tremendous Amount of Consumer Harm with Minimal Administrative Overhead

The Civil Penalty Fund primarily pays for itself,[228] and it is a very efficient way to distribute funds to harmed consumers. The CFPB does not publish detailed information about the operating expenses for the fund. Through November 2019,[229] however, the amount set aside for operational costs represents less than 1% of the amounts allocated from the Fund, and 1.3% of the amounts already distributed from the Fund, a very good ratio of overhead to relief delivered.[230] This ratio also compares favorably with the FTC's rate of 2.1% for the administrative expenses over four years of providing refunds to consumers.[231] Further, 95% of the allocations have been to consumers to remediate harm caused by defendants.[232] Even assuming that none of the money set aside for administrative expenses went to start-up costs, the Bureau has distributed at least $74 for each dollar set aside, and allocated $111.[233] Again, ignoring any set-up costs, the Bureau set aside $6.71 for every check sent although the average check amount across all of the distributions was $494,[234] meaning the amount set aside per check is 1% of the cost of distributing the average check amount. Importantly, setting aside amounts for administrative expenses has not prevented the Fund from providing full relief to all consumers with compensable harm.

The amount set aside through February 2020 has covered the costs of setting up the fund, completing 16 distributions, starting another 4, and determining uncompensated harm and allocating monies to cover those harms in seven additional cases.[235] As of November 2019—using penalties paid by defendants and respondents for their unlawful conduct—the $6.1 million set aside[236] allowed the

228. *See generally* 2016 FINANCIAL REPORT, *supra* note 2, at 29–33.

229. As of February 2020, the CFPB had not published data regarding any set asides since the March 2019 allocation.

230. *See generally* 2016 FINANCIAL REPORT, *supra* note 2, at 29–41.

231. FEDERAL TRADE COMMISSION, *FTC Refunds to Customers* (Jan. 5, 2021), https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_15797958402020/RefundsbyDate [https://perma.cc/R7HP-HYSS].

232. In addition to the administrative set-asides, the remaining difference, $28.8 million, was allocated for consumer education and financial literacy programs. *See id.*; 12 C.F.R. § 1075.107 (2020); 2016 FINANCIAL REPORT, *supra* note 2, at 30 (allocating $13.4 million for such purposes in 2013–15 and $15.4 million in 2016).

233. Given the delays in reporting information regarding distributions, this number may understate the actual figure if the CFPB had not published data on all distributions made. As of February 2020, the CFPB had finished at least one distribution, but had published only initial data on that distribution.

234. *See* Cowie, *supra* note 1.

235. The CFPB may use some of its full-time employees' time in the operation of the Fund without "paying" for that time from the funds set aside for operational costs of the Fund. Yet, even if that is true, it seems likely that the costs of the distributions, which are done by third-party vendors, dwarf any such costs.

236. The Bureau set aside $6,073,322 through March 31, 2019 from the fund to cover administrative expenses. Cowie, *supra* note 1.

CFPB to complete a remarkable amount of work, remediating $447.5 million in consumer harm (by sending over 905,000 checks to consumers harmed in twenty cases) and allocating an additional $190.9 million for consumers harmed in another seven cases.[237]

TABLE 9

Distributions	Number of Cases	Amount Allocated	Amount Distributed	Number of Checks Sent	Estimated Amount Cashed
Completed with Data on Cashing[238]	15	$226,656,930	$220,745,469	816,603	$192,430,905
Completed without Data on Cashing	1	$3,459,336	$2,419,473	2,716	
Begun But Not Completed	4	$250,144,939	$224,326,019	85,753	
No Data On Distribution	7	$190,905,529			
Total	**27**	**$671,166,734**	**$447,490,961**	**905,072**	**$192,430,905**

The totals in this chart actually understate the actual work completed by the Fund. There is a significant delay in reporting by the CFPB from the time it actually takes actions related to the Fund.[239] For example, the Estimated Amount Cashed understates the actual amounts cashed, because one completed distribution is not included in that amount and at least four others had started, and therefore consumers presumably had cashed some checks, but the CFPB had not yet reported the cashing rates for those distributions. As another example, the distributions listed as having no data may have begun although the CFPB has not reported on that fact yet.

Furthermore, the metrics actually understate the Fund's effectiveness and likely will improve as the CFPB releases additional data. First, the CFPB has completed one distribution for which it had not yet published data, meaning that checks had been sent and cashed; including those cases will increase the amount distributed per dollar set aside and reduce the amount set aside per check. Second, as more cases are distributed, the effect of any initial set-up costs will be spread across more cases, thereby reducing any impact. As a result, all of the metrics will improve. Third, it is possible that although the CFPB had not reported any data, it had begun sending checks in some of the seven distributions

237. *See infra* Table 9.

238. Although the Bureau had completed sixteen distributions by December 16, 2019, it had published data regarding only fifteen of the distributions.

239. *See, e.g.*, CFPB, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU: FISCAL YEAR 2016 36–38, 46 (Nov. 15, 2016) (providing the first distribution data on the *Culver Capital* matter when that distribution began between October 1 and December 31, 2015, and the funds were allocated on November 28, 2014).

for which there is no data. If so, the amount set aside per check again would decrease and the amount distributed per dollar set aside would increase.

The Bureau and the FTC have been able to achieve these levels of efficiency in part by outsourcing the actual distributions to expert vendors and thereby incurring those costs only when necessary to complete distributions. Any other entity implementing a similar fund also could use vendors, and thus could set up a fund with only minimal burden on its existing staff and could use the fund to pay for the vendors.

V. STATES SHOULD IMPLEMENT CONSUMER RESTITUTION FUNDS TO PROVIDE MONETARY RELIEF TO HARMED CONSUMERS WHO OTHERWISE WOULD RECEIVE NONE

States should consider implementing a consumer restitution fund to remediate consumers harmed by violations of consumer law.[240] Although the CFPB's Civil Penalty Fund is funded only by penalties, a state fund would not have to be so limited and could be funded by orders requiring disgorgement or payment of undesignated money into the fund in addition to orders requiring payment of penalties. As noted above, such a fund can provide substantial relief to consumers with minimal overhead, can pay for itself, and can provide relief in situations in which it is extremely unlikely that the consumers would receive relief from any other source.[241] Generally speaking, one would not expect most states to be able to operate a fund on the same scale as the CFPB, both because states often prosecute fewer cases and they typically collect lower penalties.[242] Nonetheless, a state can operate a fund successfully even if it prosecutes relatively few consumer cases or prosecutes cases primarily against small defendants. Furthermore, implementing a fund will encourage states to bring important cases they might not otherwise bring and will undermine potential incentives that might encourage undesirable prosecutorial decisions.

240. Although this section focuses on states, the same arguments could apply to tribes or to Congress in other contexts (*e.g.*, allowing the FTC to implement a similar fund).

241. *See* discussion *supra* Sections IV.C, IV.D.

242. *Compare infra* Table 10, *with* Cox *supra* note 2, at 75 tbl.9 (noting mean and median net government money), *and id.* at 86 fig.8 (noting mean number of cases brought by states). The exception is the large multi-enforcer cases, which included: seven total cases, each of which was joined by at least forty-two states. *See* Cox, *supra* note 2, at 58–59. These cases had a mean and median net government money that were significantly higher than the mean and median penalties collected by the CFPB. *See id.* at 75 tbl.9. It is not clear, however, how much government money any individual state received from these cases.

A. For a Fund to Operate, a State Must Have Authority to Collect Money from Defendants and Must Bring Cases Where Consumers Have Uncompensated Harm

There are two basic preconditions that must be met for a fund to function: 1) The relevant enforcers must have the power to collect money from defendants in consumer actions, *e.g.*, penalties or other orders to pay money to the state that are appropriate given the facts of each case,[243] and 2) such enforcers must prosecute cases where the defendants do not have the resources to remediate the consumers they harmed, meaning that there will be consumers with uncompensated harm.

In a study of actions by states in 2014, Cox, Widman, and Totten reported data that indicate that both preconditions will be met for many states.[244] First, state enforcers imposed penalties in 72.7% of the state cases in the study.[245] Thus, many, if not all, states already have the authority to seek penalties and actually exercise that authority.[246] Second, they also found that state enforcers prosecute consumer cases that result in default judgments: forty-one states had a combined rate of default judgments in 6.6% of their cases; five other states had a combined rate of 14.1%, and six states had a rate of 32.2%.[247] A default judgment indicates that a defendant failed to defend against an enforcement action. Whether the default was because the defendant was insolvent, absconding, or something else, it seems likely that the enforcer will have trouble getting enough money from defaulting defendants to compensate harmed consumers fully. Given that many, if not all, states prosecute at least some cases that result in default judgments, there likely are consumers from at least those cases with uncompensated harm.

By comparison, the CFPB used its fund in 17% of eligible cases.[248] In roughly 30% of the cases in which the Fund was used, the defendants did not pay the full amount of penalties imposed, and most of those cases involved at least one default judgment.[249] Because the CFPB and courts must consider "the size

243. Although the money could be in the form of penalties, including disgorgement, a state also could authorize its enforcers to order defendants to pay money into the fund in lieu of paying a penalty. Any such monies should be earmarked for use only by the consumer restitution fund. *See infra* Appendix A. If states allow private attorney general actions for consumer cases, those provisions would have to be modified so that penalties given to the state would go into the consumer restitution fund as well. *Cf.* Cal. Lab. Code § 2699(a),(f),(i),(j) (West 2016); Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era*, 98 TEX. L. REV. 489, 494 (2020).

244. *See* Cox, *supra* note 2, at 68–69.

245. *Id.* at 73–74.

246. If a state enforcer does not have this authority currently, the state legislature can provide that authority in the legislation that creates the fund.

247. *See* Cox *supra* note 2, at 63, 94 (noting that the states had an overall default rate of 15.5%, although that rate is skewed high by the states using two particular strategies, and that 6.4% of FTC cases resulted in default judgments).

248. Cowie, *supra* note 1. Consumers may receive payments from the Civil Penalty Fund only for activity for which a civil money penalty was imposed. 12 C.F.R. § 1075.103 (2020). This percentage reflects cases wherein at least one order imposing a penalty issued prior to March 31, 2019.

249. Cowie, *supra* note 1.

of financial resources" of parties when assessing penalties,[250] many of the remaining cases involve defendants that pay the full amount assessed—and therefore do not default—but do not have sufficient resources to compensate fully the consumers they harmed. As noted *supra*, the defendants in those CFPB actions caused consumers substantial monetary harm.[251] Similarly, consumers in the defaulted state actions likely also had unremediated harm, and as with the CFPB, it seems possible that there may be additional state actions wherein the defendants do not default but cannot remediate fully the harmed consumers.[252]

B. States Can Benefit from a Fund Even if They Prosecute Relatively Few Consumer Cases or Prosecute Them Primarily Against Smaller Defendants

As long as a state can collect and distribute a significant amount[253] to consumers while covering its costs, a state can operate a successful fund. The key is that the state's enforcers must pursue a mix of cases wherein enough penalties are collected to allow the fund to provide significant relief to those consumers harmed by defendants who cannot compensate them. This does not mean, however, that a state must prosecute a large number of cases or sue large defendants in order to operate a successful fund. Instead, a fund could be operated with a wide variety of enforcement strategies.

As an initial matter, states that pursue a mix of cases similar to the mix pursued by the CFPB likely can operate a fund successfully. The CFPB brings a mix of cases against large entities (like banks), smaller entities, and individuals. For orders issued during the 2019 fiscal year or before, most of the orders were against non-banks or jointly against non-banks and individuals (71%)[254] with

250. 12 U.S.C. § 5565(c)(3)(A).

251. *See* discussion *supra* Section IV.C.1.

252. A state enforcer may resolve an action in a way that does not provide complete relief to consumers based on a variety of legitimate concerns, including, *inter alia*, the reality that the defendants in question simply do not have sufficient resources, the realization that the enforcer likely would not be able to collect significantly more after litigation, the depletion of defendants' resources from extended litigation, the harm to consumers from continued delay in receiving any compensation, the impracticability of calculating individual harm caused by the specific unlawful acts or practices, and the opportunity costs of the enforcer continuing this litigation rather than investigating and prosecuting other unlawful conduct. Cox, Widman & Totten found that state enforcers received public compensation in 62.8% of non-default cases, although 8.6% of the cases had no monetary compensation (*e.g.*, rescission). Cox *supra* note 2, at 76–77.

253. Individual states could determine what level constitutes "significant" relief, but the CFPB has used its Fund when the average check amount was as low as $27, and thousands of consumers considered those checks worth cashing. See *supra* Sections III.D, IV.B for a discussion regarding the average check amounts and comparisons with relief in other types of actions. In cases where the typical amount per consumer would be too low to justify the cost of a distribution, a state could exercise its discretion not to allocate monies from the fund (either at that time or at all for those consumers).

254. Cowie, *supra* note 1. Fifty-six percent of the total of all orders were against non-banks alone and 16% of all orders were against non-banks and individuals jointly. Non-banks range in size from very large (*e.g.*, Equifax, which paid a $100 million penalty) to quite small (*e.g.*, Park View Law which had a single employee). Stipulated Order for Permanent Injunction and Monetary Judgment at 59–60, CFPB v. Equifax, Inc., No. 19-cv-03300 (N.D. Ga. July 23, 2019); Complaint for Permanent Injunction and Other Relief at 4, CFPB v. Park View Law, Inc., No. 17-cv-04721 (C.D. Cal. June 27, 2017).

another 21% against banks and 8% against only individuals.[255] The CFPB collected the entire penalty from the vast majority (93%) of orders imposing penalties.[256] The CFPB collected 100% of the penalties imposed on banks, 95% on non-banks alone, 86% on non-banks and individuals, and 73% on individuals alone.[257]

The data indicate that the CFPB has prosecuted cases against defendants with a range of resources. Although the size of the average penalty collected is not a proxy for the size of the defendant, the ability to pay a large penalty indicates significant resources, and the existence of a de minimis penalty suggests a lack of resources.[258] The average penalty collected from a bank was $23.4 million, although that figure drops to $8 million if two outlier penalties ($500 million[259] and $100 million[260] respectively) are excluded. The average penalties collected from other types of entities are much smaller. When one considers the medians and modes, it is clear that a few higher penalties skew the averages higher in all categories, and in fact, in the majority of cases, the penalties are significantly below the mean for that category. In addition, in each category aside from banks, there were instances wherein the defendants paid penalties of only one or two dollars, indicating that those defendants had few resources.[261]

TABLE 10: PENALTY STATISTICS BY DEFENDANT TYPE

Type of Defendant	Bank	Non-Bank	Non-Bank and Individual	Individual
Mean	$23,387,230 / $8,019,854	$3,004,197 / $1,993,824[262]	$1,237,159	$36,501
Median	$4,550,000	$400,000 / $362,500	$89,400	$1
Mode	$3,500,00	$100,000	$1	$1
Minimum	$34,000	$1	$1	$1

Because the CFPB pursues this mix of cases, the Civil Penalty Fund has had sufficient monies to remediate all uncompensated, compensable harm to date.

255. Cowie, *supra* note 1; *see also infra* Table 10.

256. Cowie, *supra* note 1.

257. *Id.*

258. *See* 12 U.S.C. § 5565(c)(3)(A) (requiring consideration of the defendants' resources in determining the amount of penalties to be assessed).

259. In re Wells Fargo Bank, N.A., Consent Order at 23–24, CFPB No. 2018-BCFP-0001 (Apr. 20, 2018) (imposing a $1 billion penalty but remitting $500 million based on the payment to the OCC of a $500 million penalty for related conduct). *See generally* Craig Cowie, *Is the CFPB Still on the Beat? The CFPB's (Non)Response to the COVID-19 Pandemic*, 82 MONT. L.R. 41, 76 n.164 (2021) (discussing penalties of $100 million or more as outliers in the CFPB's enforcement).

260. In re Wells Fargo Bank, N.A., Consent Order at 17, CFPB No. 2016-CFPB-0015 (Sept. 8, 2016) (imposing a $100 million penalty).

261. The CFPB has used the Fund in all cases in which an order imposed a one- or two-dollar penalty prior to April 1, 2019, and allocation data was not yet available for the orders issued after that date.

262. One case against a nonbank also resulted in an outlier penalty. Stipulated Order for Permanent Injunction and Monetary Judgment at 60, CFPB v. Equifax, Inc., No. 1:19-cv-03300 (N.D. Ga. July 23, 2019) (imposing a $100 million penalty).

Cox, Widman, and Totten found that states also sue "a large number of very small actors, yet also bring actions against some of the nation's largest companies."[263] In particular, they identified an enforcement strategy[264] pursued by some states wherein they prosecuted a large number of consumer cases against smaller entities and individuals mixed with cases against larger defendants, which correspondingly recovered greater monetary relief.[265] In addition, the case volumes for the states pursuing this strategy and for the CFPB are comparable.[266] Given the similar mix of cases, it seems likely that these states could benefit from a fund just as the CFPB has benefited.

The benefits of a fund, however, would not be limited just to those states with a strategy similar to the CFPB's. A number of states prosecuted a smaller volume of cases, but still pursued at least one larger defendant wherein they recovered relief higher than the median.[267] If that large defendant caused harm that warranted a large penalty, the collection of that penalty could fund relief to many consumers in smaller cases.[268] Also, some states outsourced their enforcement activities, pursued larger defendants, and received money "far greater than any other strategy."[269] In addition, those states obtained only government money (*i.e.*, no redress for consumers) in almost half of those cases, suggesting that there might be substantial unremediated consumer harm, and the money in those cases was often given to the attorney general for "discretionary use,"[270] meaning it might be possible to direct the funds toward providing relief to consumers instead. In each of these cases, it seems likely that states pursuing these strategies would collect enough penalties to fund relief to consumers.

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263. Cox, *supra* note 2, at 83; *see also id.* at 61 tbl.1 (noting that the statistics indicate "a number of cases against very large defendants), 93 fig.13 (noting percentages of cases against various sized defendants by enforcement strategy), 97 fig.18 (same).

264. This discussion does not assume that any given state uses any given strategy currently, as states can alter their strategies over time. Rather, it uses these strategies as a framework for assessing whether a state could use of a civil penalty fund successfully if it pursued such an enforcement strategy.

265. Cox *supra* note 2, at 84–85, 96–97 figs.16, 17 &18 (discussing strategy seven where states pursued cases against defendants with a range of sizes and recovered more net government money and public compensation than state actions from other strategies).

266. Through its 2019 fiscal year, the CFPB resolved an average of thirty-three orders per fiscal year (beginning with fiscal year 2013) and imposed penalties in an average of twenty-six. *See* Cox, *supra* note 2, at 86 fig.8. (noting the mean number of state enforcement actions). The average from prior to the CFPB's 2013 fiscal year were excluded from this comparison because the CFPB did not have its complete authority until July 21, 2011 (the designated transfer date). *See* 12 U.S.C. § 5582; Designated Transfer Date, 75 Fed. Reg. 57,252, 57,253 (Sept. 10, 2010). The CFPB issued only two orders in fiscal year 2012, which was the first full fiscal year after the designated transfer date, far fewer than in any other fiscal year since. *See also* Peterson, *supra* note 2, at 1076 (discussing how the CFPB began its enforcement activities).

267. Cox, *supra* note 2, at 84–85, 88 (discussing strategies two and three).

268. For example, large, multi-state actions that include all or nearly all states and the District of Columbia often include large penalties paid to participating states. *See, e.g.*, Press Release, Cal. Dep't Just., Attorney General Becerra Announces Settlement Against Equifax Providing $600 Million in Consumer Restitution and State Penalties (July 22, 2019), https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-settlement-against-equifax-providing-600 [https://perma.cc/G8HR-SRM2] (stating that Equifax paid $175 million in penalties to the prosecuting states).

269. *See* Cox *supra* note 2, at 90–91 (discussing strategy four).

270. *Id.*

Even states that pursue relatively few consumer actions[271] may benefit from a fund. Assume a state brings only three or four consumer cases in an average year with an average default rate of 7%. Such a state typically would have one default case every four years with thirteen cases that did not default. As long as defendants in the thirteen cases pay penalties that can cover a significant amount of uncompensated harm, the fund makes operational sense, as it will have minimal costs until the distribution for that one case[272] and the operating costs are covered by penalties paid by defendants. In addition, a single large case might provide funds sufficient to remediate consumers harmed in many smaller cases.[273] Ultimately, the only way a fund does not work operationally is if the enforcer consistently recovers so few penalties that the fund would not be able to remediate a significant amount of harm caused by defendants and the enforcer does not wish to alter its enforcement strategy (or cannot) by altering the mix of cases or bringing more cases.[274]

Similarly, some states pursue a high volume of cases but recover relatively low amounts of relief (both in government money, including penalties, and in redress for consumers).[275] Although these states also have had higher default rates,[276] they also frequently specifically identify a small number of consumers who have been harmed by the defendants.[277] If there are a small number of identified consumers in the defaulted cases as well, the penalties collected may be sufficient to provide significant relief to those consumers, especially given the high volume of cases. Thus, the fund may work even though the overall amount of relief may be low compared to other states or the CFPB.

In addition, if the state typically is identifying a small number of consumers who are harmed, the structure of a fund could reflect that approach, resulting in lower overhead costs. For example, the fund could just be used to provide relief to consumers whose identity and harm are specified in an order. Such a structure would not have the scope of other funds but would be tailored to the individual state's enforcement practices and would be more straightforward to administer.

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271. *Id.* at 86 fig.8 (noting that the twenty-seven states in strategies one through four resolved an average of less than five cases, although there were states in both strategies three and four that received large amounts of relief).

272. The timing of the defaulted case may matter, especially in the initial years of the fund where the balance of the fund may be quite low. If the fund does not contain enough to compensate consumers fully, however, the state could either order a partial distribution or could exercise its discretion to wait until there are sufficient funds. *See infra* Appendix A.

273. *See* Cox, *supra* note 2, at 85 (noting that states using low-volume strategies three and four do have cases with large recoveries).

274. Even if a state has a history of not prosecuting consumer actions. *See id.* at 88 (identifying four states that brought zero UDAP cases in 2014), a legislature might mandate (or an enforcer might request) establishment of a fund in an attempt to incentivize (by creating reputational rewards) its enforcers to bring such cases. *See* discussion *infra* Section V.C. Obviously if there are no consumer cases, and therefore no identified classes of harmed consumers, establishing a fund does not make sense. *See infra* Appendix A.

275. Cox, *supra* note 2, at 91–95.

276. *Id.* at 94.

277. *Id.* at 93.

C. The Existence of a Consumer Restitution Fund Will Encourage Enforcers to Bring Important Cases and Undercut Potential Incentives Leading to Undesirable Outcomes

Large defendants operate on a scale that means they can cause enormous amounts of harm when they violate the law, and it is important that enforcers prosecute such cases and impose commensurate penalties to deter future wrongdoing.[278] These defendants often have substantial legitimate lines of business and have the resources to pay redress and appropriate penalties. But as this Article demonstrates, defendants with few resources, and often with business models that cannot operate lawfully, also cause a significant amount of harm, and enforcers should prosecute them as well.

As an initial matter, there is some debate as to whether enforcers should pursue "judgment-proof defendants."[279] Of course, if an enforcer prosecutes defendants with limited resources, there is a risk, or even a likelihood, that the defendants will not be able to pay much, either in penalties or in redress. This fact then raises the question of whether it is an appropriate use of limited enforcement resources to pursue such cases. Given the amount of harm these defendants can cause, as demonstrated herein,[280] the answer is unequivocally yes,[281] especially given that the defendants' limited resources likely will prevent any private action.[282]

Simply stopping the harm is a significant goal in and of itself. As just one example, in an action against the Hoffman Law Group and others, the CFPB and the State of Florida seized the assets of the defendants, recovering more than $650,000 from them and ceasing their operations.[283] Despite the defendants' lim-

278. *See, e.g.*, Stipulated Order for Permanent Injunction and Monetary Judgment at 3, 49, 59–60, CFPB v. Equifax, Inc., No. 19-cv-3300 (N.D. Ga. July 23, 2019) (imposing a $100 million penalty and $425 million judgment for illegal conduct that harmed approximately 147 million consumers); Consent Order at 36, 45, In re Citibank, N.A., CFPB No. 2015-CFPB-0015 (July 21, 2015) (imposing a $35 million penalty for illegal conduct that caused at least $700 million in harm to approximately 8.8 million consumers); Consent Order at 10, 24 & 31, In re Bank of America, N.A., CFPB No. 2014-CFPB-2014 (Apr. 9, 2014) (imposing a $20 million penalty for illegal conduct that caused over $459 million in harm to approximately 1.5 million consumers).

279. Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 884 (2014) (noting concerns with enforcers failing to collect penalties from defendants with limited resources).

280. *See* discussion *supra* Sections III.B, IV.C.

281. This is not to say that an enforcer always should bring cases against defendants with limited resources, rather the fact that a defendant may have few resources should not rule out bringing a case. An enforcer's determination whether to bring a given case always will depend on the enforcer's policy goals and the specific facts of each case. *See, e.g.*, Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 MINN. L. REV. 2313, 2350 & 2350 n.190 (2016) (noting that deterrence is a "core goal of civil law enforcement" and citing others). There are many valid considerations in addition to the amount of harm being caused, including, *inter alia*, establishing case law on a specific issue, deterring similar actions by other defendants, and training enforcement attorneys on cases with lower stakes.

282. Given the defendants' limited resources, if a government enforcer does not stop the conduct, it is not clear it will be economically viable for anyone else to do so. *See* discussion *supra* Section IV.C.

283. Default Judgment & Ord. as to Corp. Defs. at 16–17, CFPB v. Michael Harper, No. 9:14-cv-80931 (S.D. Fla. May 28, 2015); Stipulated Final Judgment & Ord. as to Def. Benn Wilcox at 13–14, CFPB v. Michael

ited assets, however, they had caused more than $11.7 million in harm by collecting substantial unlawful fees from distressed homeowners.[284] Absent action, these defendants would have continued to hemorrhage the savings of already distressed consumers.

Despite the benefit of bringing cases against defendants with limited resources, there may be incentives *against* bringing such cases. Implementing a consumer restitution fund would create positive counter-incentives to bring such cases while also creating incentives that would encourage enforcers not to ignore larger defendants whose illegal conduct is having a widespread impact. In other words, a fund encourages enforcers to bring cases against a beneficial mix of defendants.

Commentators have argued that financial incentives derived from large penalties will cause enforcement agencies to focus on "deep-pocketed" defendants rather than cases like the above.[285] These incentives arise both because some enforcers may keep the recoveries for their own use[286] and because the enforcer will receive a reputational reward (*i.e.*, good press) from the imposition, and collection, of a large penalty.[287] Although there is debate on this argument,[288] the

Harper, No. 9:14-cv-80931 (S.D. Fla. May 5, 2015) (requiring defendant to turn over $90,000 in personal property); Stipulated Final Judgment & Ord. as to Def. Michael Harper at 15–17, CFPB v. Michael Harper, No. 9:14-cv-80931 (S.D. Fla. May 5, 2015) (requiring defendant to turn over $50,000 in jewelry); Stipulated Final Judgment & Ord. as to Def. Marc Hoffman at 14–15, CFPB v. Michael Harper, No. 9:14-cv-80931 (S.D. Fla. May 6, 2015) (requiring defendant to transfer rights to any outstanding estates or inheritances to the receiver).

284. The corporate defendants forfeited all remaining seized assets. Default Judgment & Ord. as to Corp. Defs. at 16–17, CFPB v. Michael Harper, No. 9:14-cv-80931 (S.D. Fla. May 28, 2015) (requiring defendants to pay the full balance of the receivership estate, and requiring any person holding corporate assets to turn them over); Stipulated Final Judgment & Ord. as to Def. Benn Wilcox at 13, 15–16, CFPB v. Michael Harper, No. 9:14-cv-80931 (S.D. Fla. May 5, 2015) (basing suspension of judgment on sworn financial documents and testimony regarding his and the corporate defendants' financial resources); Stipulated Final Judgment & Ord. as to Def. Marc Hoffman at 14, 16 CFPB v. Michael Harper, No. 9:14-cv-80931 (S.D. Fla. May 6, 2015) (same); Ord. at 15–17, CFPB v. Michael Harper, No. 9:14-cv-80931 (S.D. Fla. May 5, 2015) (same).

285. Lemos & Minzner, *supra* note 279, at 903 ("We have argued that, on balance, financially motivated public enforcement means more public enforcement; that such enforcement will tend to focus on maximizing financial recoveries rather than securing injunctive relief and, thus, often will target deep-pocketed defendants[.]").

286. *Id.* at 863; *see also* DEL. CODE ANN. tit. 6, § 2527 (West 2019) (mandating payment of penalties into a fund for payment of operational expenses related to enforcing consumer laws); MONT. CODE ANN. § 30-14-143 (2019) (requiring payment of penalties into either the general fund or a special revenue account for defraying certain expenses).

287. Bill Chappell, *Wells Fargo Hit with $1 Billion in Fines Over Home and Auto Loan Abuses*, NPR (Apr. 20, 2018, 9:12 AM), https://www.npr.org/sections/thetwo-way/2018/04/20/604279604/wells-fargo-hit-with-1-billion-in-fines-over-consumer-abuses [https://perma.cc/MDC2-T476]; Renae Merle, *U.S. to Fine Wells Fargo $1 Billion–the Most Aggressive Bank Penalty of the Trump Era*, WASH. POST (Apr. 19, 2018, 4:21 PM), https://www.washingtonpost.com/business/economy/regulators-planning-to-slap-wells-fargo-with-1-billion-fine/2018/04/19/ec1f58c6-4415-11e8-ad8f-27a8c409298b_story.html [https://perma.cc/KV5V-SJHE]; Patrick Rucker, *Exclusive: U.S. Watchdog Seeks Record Fine Against Wells Fargo for Abuses–Sources*, REUTERS (Apr. 9, 2018, 12:27 PM), https://www.reuters.com/article/us-wells-fargo-accounts-fine-exclusive/exclusive-u-s-watchdog-seeks-record-fine-against-wells-fargo-for-abuses-sources-idUSKBN1HG2PO [https://perma.cc/B7RQ-ELFJ].

288. *See, e.g.*, Cox, *supra* note 2, at 80–83 (noting a sizeable number of FTC cases against a "large number of smaller entity defendants and related individuals" and of state enforcers against "a large number of very small

existence of a fund will eliminate the first incentive, and create a similar reputational reward for pursuing defendants that cannot pay huge sums, thereby counteracting the second incentive.

First, because any civil money penalties will be directed to a fund, rather than to the enforcer's own coffers, there will not be a direct financial incentive to pursue only cases against defendants that can pay significant penalties. Second, the fund will create a new incentive—in addition to the existing incentive simply to stop the substantial harm that defendants with limited resources can cause—to bring cases against defendants with shallow or empty pockets, because the enforcer will be able to receive a reputational reward by providing redress through the fund. In addition, if the fund remains unused, pressure will grow to bring cases where it can be used in order to avoid reputational harm from claims that the funds are being wasted. Third, while encouraging cases against defendants with limited resources, the fund also creates an incentive for the enforcer *not* to focus solely on those types of defendants,[289] because a fund will only generate reputational rewards if the enforcer pursues cases where the defendants can pay the penalties in addition to pursuing those who cannot.

The use of a fund also allows an enforcer to signal to stakeholders—including consumers, legislatures, and others—the importance of a case that might not otherwise be visible.[290] First, absent a fund, an enforcer may have an incentive not to publicize the amount of harm caused when the defendant cannot remediate the harm. The enforcer can do nothing to remediate the harm, and if it publicizes the amount, it may just highlight that fact and be criticized as ineffectual. Second, although an enforcer can signal the importance of a case by imposing a significant penalty, that signal may be seriously undermined if it becomes public that the defendants never paid the penalty. Third, the value of preventing future harm, from this defendant or others, is hard to quantify,[291] especially if there is no indication of the amount of harm already caused by these defendants. By contrast, if there is a fund, the enforcer has an incentive to publish the amount of harm it remediated through the fund. Stakeholders then can compare the harm addressed across various cases[292] and can use the harm to estimate the benefit from preventing the future harm as well.

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actors"). Cox, Widman & Totten also noted at least two categories of state enforcers that brought a large number of cases against "individuals or tiny businesses." *Id.* at 85 (strategies five and six).

289. *See, e.g.*, *id.* at 84–85, 87 fig. 9 (identifying a number of states in 2014 that prosecuted only, or primarily, defendants and individuals with few resources).

290. Lemos & Minzner, *supra* note 279, at 879 (stating that "[e]nforcement is often invisible to those who benefit from it").

291. *Id.* at 875.

292. This metric can be valuable even if a primary benefit of the enforcement action is requiring the defendant to adopt affirmative measures (*e.g.*, implement compliance systems), because it highlights the need for those systems. Of course, there will be cases where monetary harm to consumers is impracticable to quantify (*e.g.*, the harm from an illegal kickback that does not have an easily determined impact on the prices paid by a consumer), but where the enforcer's policy goals justify the action.

Indeed, Lemos & Minzner have noted that using penalties as a signal may be problematic,[293] and any such concerns only grow if the defendants have defaulted or otherwise cannot pay them. Assuming *arguendo* that there is any incentive to impose steep, but toothless, penalties on defendants with few resources in order to justify the action (and receive a reputational reward), a fund allows enforcers to achieve a similar reputational reward and to demonstrate the importance of the case by redressing the harm, while also providing actual relief to harmed consumers. Further, the harm arguably is a more accurate signal, as it reflects a direct impact on the marketplace from the defendants' unlawful conduct.[294] It also allows the stakeholders to compare cases and reach their own determination as to the importance of cases, whereas penalties reflect only the enforcer's perspective.

In addition, the payments themselves may act as a different kind of signal to consumers, informing them, and perhaps by extension their communities, about types of services or products that are unlawful. These consumers may then be less likely to be deceived in the first instance by similarly unlawful services or products or more likely to complain to the enforcer about other unlawful acts or practices.

Because a fund encourages the prosecution of a mix of cases, it also generates valuable signals to other market participants, both those with substantial resources and those without. Participants with resources understand their own possible exposure from engaging in similar conduct. They understand how the enforcer will quantify harm, and because the fund eliminates reputational penalties that may result from transparency regarding a defendant's lack of resources, they can evaluate the amount of penalties against a given defendant in the context of that defendant's resources,[295] and thereby make more accurate projections as to their own possible exposure based on their resources. They also understand that the enforcer will have incentives to pursue participants like them. Likewise, participants without resources will understand that their lack of resources will not make them immune to prosecution.

A fund also creates an incentive to actually collect the penalties imposed. Lemos and Minzner have argued that some enforcers do not collect penalties and that—assuming they cannot keep the penalties themselves—they do not lose reputation by failing to collect.[296] For that to be true, it must be the case that the

293. *See, e.g.*, Lemos & Minzner, *supra* note 279, at 877, 907 ("Penalty amounts are—at best—an imperfect metric for gauging the importance of any given case. . . . [Enforcers] may be tempted to use high-value monetary recoveries to make unimportant cases seem important"); *cf. id.* at 856–57, 869 (discussing similar concerns with civil asset forfeiture); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 513 (2012); Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 45 (2014).

294. Lemos & Minzner, *supra* note 279, at 875. There may be additional impacts that harm alone cannot signal, like any competitive disadvantage faced by lawful actors.

295. 12 U.S.C. § 5565(c)(3)(A); *see infra* Table 10. For example, the CFPB has sought penalties of only $1 in some cases involving limited resources.

296. Lemos & Minzner, *supra* note 279, at 875, 886

failure to collect is unnoticed, at least to some audience. Even if the failure remains hidden to the general public, including both consumers and other stakeholders like legislatures, word will get around to potential defendants (and their lawyers) that the enforcers' orders are toothless, drastically undercutting if not completely eliminating any deterrence effect from the orders. Having a fund, however, creates an incentive to collect the penalties, as otherwise the fund cannot work. It also increases the likelihood that any failure to collect will become public, either because of reporting required by the legislation creating the fund[297] or because interested stakeholders will want to know why the fund is not being funded and used.

The CFPB has collected in full at least 94% of the penalties imposed in orders from March 31, 2019, or earlier.[298] Even among the cases where the CFPB's Civil Penalty Fund has been used, because the defendants did not have sufficient resources to remediate the harm themselves, the defendants in twenty of the twenty-seven cases paid in full the amounts ordered.[299] The CFPB and courts must take into account, however, the defendant's resources in imposing penalties,[300] and the total penalties imposed in nine of the twenty cases was $2 or less.[301]

Some may argue that a fund will create a perverse incentive to impose high penalties on one defendant, who can afford to pay them, in order to use those penalties to receive an additional reputational reward by remediating consumers harmed by a different defendant—in essence robbing Peter to pay Paul. An assessment of the proper considerations in imposing civil money penalties is beyond the scope of this Article. Such an argument, however, has little merit. First, to avoid missing the forest for the trees, it bears noting that remediating consumers harmed by unlawful conduct is in the public interest, and incentivizing such payments is in the public good. That being said, the ability to remediate consumers in one case is not an acceptable consideration in the determination of an appropriate penalty in another case. Penalties must be imposed based on only the facts of the case in question.[302] If one assumes that enforcers will impose inappropriately large penalties in order to achieve reputational rewards, or in order to fund its operations, a civil restitution fund would not exacerbate that problem because the enforcer already has an incentive to impose as high a penalty as is possible, either to get the largest reputational reward from the imposition of the penalty itself or to collect the most money for itself. Furthermore, any incentive to increase the penalties to achieve a reputational reward from providing redress

297. *See infra* Appendix A.

298. Cowie, *supra* note 1.

299. *Id.*

300. 12 U.S.C. § 5565(c)(3)(A).

301. Cowie, *supra* note 1.

302. *See, e.g.*, 12 U.S.C. § 5565(c)(2) (establishing various maximum penalty amounts based, in essence, on whether the defendants recklessly or knowingly engaged in the unlawful conduct), § 5565(c)(3) (mandating consideration of various factors in determining penalty amounts, including the gravity of the violations, the amount of consumer harm, and the defendants' financial resources).

to harmed consumers is far, far weaker than the possible direct incentive to increase penalties created by a framework that requires penalties to be paid into the state's general fund or allows them to be used by the enforcer itself—an incentive that a consumer restitution fund eliminates completely. To the extent one wishes to address the question of how to determine an appropriate penalty, one should address that question directly by creating statutory guidelines for the assessment of penalties, rather than approaching the question indirectly through an incentive structure and in so doing losing the opportunity implement a mechanism that will remediate consumers' actual, substantial, monetary harm.

D. In Creating a Fund, States Should Establish Guidelines on Its Operations

As noted above, states can create a fund that is tailored to their expected volume of cases and scope of harm to be remediated. For example, a state with a small volume of cases might create a streamlined fund wherein payments go into the fund and payments are made from the fund only as directed by the orders in the relevant enforcement actions. Such a fund would require few resources and would be administratively simple. A state with a higher volume, on the other hand, may want to create a more formal structure that guides the exercise of discretion in allocating and distributing funds. Either way, states must decide on the appropriate balance of discretion and formal requirements (*e.g.*, with respect to what money is paid into the fund and how payments are made from the fund). In so doing, states considering implementing a consumer restitution fund should consider three key issues: what money goes into the fund, who can receive payments from the fund, and what happens if the fund is not large enough to compensate all of the consumers eligible to receive payments. By considering these issues at the creation of the fund, a state can avoid critiques of arbitrariness, favoritism, or partisanship and can ensure that a fund operates as it intended.

First, penalties imposed in CFPB enforcement actions must go into the Civil Penalty Fund, and no other payments by defendants do. States can require that payments in addition to penalties go into a consumer restitution fund, including disgorgement or orders to pay amounts other than penalties into the fund. States also can make payments into the fund discretionary rather than mandatory. Making payments into the fund discretionary or allowing payments from the fund for anything other than remediating consumers, however, reduces stakeholder clarity regarding when and how the fund will be used, may expose the state to critiques regarding the use, and will undermine the incentive benefits derived from a fund.

Second, the CFPB also limits payments to consumers harmed by defendants who have been assessed a civil money penalty for the unlawful conduct that harmed the consumers[303] and provides relief to all consumers harmed by that conduct,[304] but neither is required. A state could allow payments to consumers harmed by defendants against whom any relief (*e.g.*, injunctive relief) is ordered

303. 12 C.F.R. § 1075.103 (2020).

304. To the extent it is practicable to identify them and remediate their harm. *See id.* § 1075.104.

for violations that harmed the consumers or in cases in which the enforcer has proved harm from violations of consumer law but cannot identify the perpetrator (*e.g.*, a default judgment against a Doe defendant). And as is noted above, states might limit relief to those individuals specifically identified in the orders. In order to make remediation more effective and to lower administrative costs, enforcers should require defendants to produce information identifying harmed consumers whenever possible (*e.g.* contact information and data on the amount of harm suffered).[305]

Third, the state will have to decide how to apportion funds if there are not sufficient amounts in the fund to compensate all of the uncompensated harm from the state's relevant cases. The Civil Penalty Fund Rule leaves this to the discretion of those in charge of the fund. A state could do likewise, or it could require that there be available funds when its enforcers identify those who are eligible for payments. Because many consumers will benefit from even partial remediation, allowing for partial payments in some fashion likely is the best course, especially given that these consumers are not likely to recover anything from any other source. In addition, a state may want to consider limiting the rights to assign payments from the fund to ensure the relief goes completely to harmed consumers. Regardless of the ultimate determination, establishing these guidelines from the beginning will reduce claims of favoritism or arbitrariness in the way the funds are distributed. Sample language creating a fund is provided in Appendix A.

V. CONCLUSION

As demonstrated by the empirical analyses above, the CFPB's Civil Penalty Fund efficiently provides consumers with substantial monetary relief, putting money back into consumers' pockets in cases where consumers could get little or no compensation from the wrongdoers. The Fund has allocated more than $671 million in 27 cases through the end of the CFPB's 2019 fiscal year. The defendants in these cases typically have caused individual consumers tremendous amounts of harm. In the great majority of these cases, the average check sent from the Fund was $1,000 or more. But in 85% of the cases, the data strongly suggests that the companies who broke the law could pay very little back to consumers, as they had few resources, were bankrupt, were ordered to cease operations, or went out of business. Overall, the companies in all 27 cases paid only for 7% of the harm they caused, and in half of the cases, they paid less than 1%

305. *See, e.g.*, *How the FTC Provides Refunds*, FTC, https://www.ftc.gov/enforcement/cases-proceedings/refunds/how-ftc-provides-refunds (last visited May 13, 2021) [https://perma.cc/7Z4U-FGBH] ("FTC court orders typically require the company to provide a list of customers, their contact information, and how much each customer paid."); *cf.* 2019 FTC CLASS ACTION REPORT, *supra* note 105, at 7 (noting that remediation by the FTC depends on the quality of the consumer data available); Velikonja, *supra* note 54, at 342 (noting that one of the two key factors the SEC considers in determining whether to distribute money from a fair fund to harmed investors is whether there is an identifiable class of victims with identifiable harm); 12 C.F.R. § 1075.104(b)(3) (providing for a pro rata share of the allocation if it is "impracticable to assess the uncompensated harm of individual victims in a class"), 1075.109(a)(3) (deeming payments as impracticable when the "victim cannot be located with effort that is reasonable in light of the amount of the payment").

of the harm. The CFPB provided consumers with relief for the remaining 93% of their harm by using the Fund. In addition to providing consumers with relief that they otherwise likely would not get, the Fund creates incentives for government enforcers to bring a healthy mix of cases, including cases against large defendants with many resources as well as cases against smaller defendants with few resources who nonetheless cause substantial harm.

States and other enforcers also have constituent consumers who are harmed by defendants who cannot pay consumers back, and these enforcers would benefit in similar ways from the creation of a fund to provide harmed consumers with restitution. These enforcers could implement such a fund in a way that dovetails with their particular enforcement strategy, and even enforcers who bring relatively few consumer cases or prosecute cases primarily against smaller defendants could operate a consumer restitution fund successfully.

VI. APPENDIX A - MODEL LANGUAGE TO CREATE A CONSUMER RESTITUTION FUND

There is established a separate fund, to be known as the "Consumer Restitution Fund." All civil money penalties[306] collected as a result of any action prosecuting violations of consumer law shall be deposited in the Consumer Restitution Fund.

Monies deposited in the Consumer Restitution Fund may be used only for payments to consumers for harm from violations of consumer law that are prosecuted in actions for which a final order has issued. Determinations regarding the use of monies in the Consumer Restitution Fund must be made regularly, and on at least an annual basis.

Reports regarding the operation of the Consumer Restitution Fund, including descriptions of the monies paid into the Consumer Restitution Fund, the payments made from the Consumer Restitution Fund, and the costs of operating the Consumer Restitution Fund, must be published regularly, and on at least an annual basis.

This Act does not create a right to a payment from the Consumer Restitution Fund of any amount for any person, and this Act does not create a private right of action for any person with respect to a payment from the Consumer Restitution Fund to that person or any other person.

306. Note: Other existing laws regarding the imposition of civil money penalties and where they must be deposited may have to be amended to conform with the intent of this Act. In addition, if the Department does not have the authority to seek penalties in Consumer Enforcement Actions currently, that authority will have to be added as well. Finally, in resolving matters, the Department should be sure to include language making the failure to comply with the settlement's terms (including the payment of civil money penalties) a violation of the settlement that the Department may prosecute independently without litigating the underlying violations of Consumer Law and should require the defendants to waive any right to contest the underlying facts in any action regarding a breach of the settlement.

Definitions:

- "Consumer" means a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes.
- "Consumer Law" means [define the state laws to be considered consumer law, *e.g.*, the state consumer protection act, and for which remediation from the Fund will be possible] and Federal consumer financial law, as that term is defined at 12 U.S.C. 5481(14).
- "Final Order" means a consent order, settlement, stipulation, or other court order that is no longer appealable and for which no appeals are pending. For purposes of this definition, "appeals" includes any petitions for reconsideration, rehearing, or certiorari.