IN THE

COURT OF APPEALS OF MARYLAND

No. 33

SEPTEMBER TERM, 2019

CRYSTAL LINTON, ET AL.,
Petitioners

v.

CONSUMER PROTECTION DIVISION,
Respondent.

ON WRIT OF CERTIORARI

TO THE COURT OF SPECIAL APPEALS

AMICUS CURIAE BRIEF BY THE CONSUMER FINANCIAL PROTECTION BUREAU IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

STATEMENT OF INTEREST

The Consumer Financial Protection Bureau ("Bureau") is a federal agency charged with regulating the market for consumer financial products and services. The Bureau was created by the Consumer Financial Protection Act of 2010 ("CFPA"), which Congress enacted as Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010) ("Dodd-Frank Act"). The Bureau is responsible for enforcement of "Federal consumer financial law," which includes eighteen enumerated consumer laws under its authority, as well as the CFPA's prohibition on unfair, deceptive, and abusive conduct. *See* 12 U.S.C. §§ 5481(12) & (14), 5531, 5536(a)(1)(B), 5564(a). Congress specifically charged the Bureau with protecting consumers from unfair, deceptive, and abusive acts and practices, *see* 12 U.S.C. §§ 5511, 5531(a), and for remediating the victims of such practices. *See id.* §§ 5497(d), 5565. In pursuit of this charge, the Bureau has brought a lawsuit against petitioners Access Funding, LLC and related persons and entities, which is pending in federal district court. *CFPB v. Access Funding*, No. 1:16-cv-03759-ELH (D. Md.).

This appeal asks this Court to determine whether a court order adopting a private class-action settlement should be permitted to interfere with the Bureau's ability to obtain redress for the victims of unfair, deceptive, or abusive conduct in a federal law-enforcement action by requiring those victims to assign any redress the

Bureau obtains for them to the very persons who caused their harm. *See* Pet. for Writ of Cert. by Pet'rs Access Funding Defs., *Linton v. Consumer Prot. Div.*, No. 116, Sept. Term, 2019, at 2 (Md. May 22, 2019); *see also* Pet. for Writ of Cert. by Pet'r Charles E. Smith, *Linton*, No. 116, at 3 (Md. June 6, 2019). The Bureau therefore has a significant interest in this Court's resolution of that question, including any interpretation and application of the CFPA.

STATEMENT OF THE CASE

This appeal concerns the approval of a private class-action settlement that, if approved, could interfere with the Bureau's ability to remedy consumer harm through a pending Bureau enforcement action in federal district court.

Plaintiffs seek to represent a class of approximately 100 persons – many of them lead-paint poisoning victims – who sold their rights to structured-settlement payments to Access Funding, LLC, a structured-settlement factoring company that advertised its services to Maryland residents. In July 2016, named plaintiffs filed a class-action complaint in the Circuit Court for Baltimore City alleging negligence, misrepresentation, and other common-law claims against the company and other associated entities and persons. Among other allegations, the complaint alleged that the defendants misrepresented the role of an attorney who purported to provide the independent professional advice required under Maryland law for the transfer of structured-settlement payments. *See* E. 80; Compl., *Linton v. Access Funding*, No. 24-C-16-003894-OT (Cir. Ct. Balt. City July 6, 2016).

The conduct at issue in *Linton* is also the subject of two separate actions brought by state and federal authorities. In May 2016, the Consumer Protection Division of the Maryland Attorney General's Office ("CPD") filed a complaint in the Circuit Court for Baltimore City alleging that Access Funding violated the Maryland Consumer Protection Act, Md. Code Ann., Com. Law § 13-101 *et seq*., in its purchase of structured-settlement payments. *See* E. 172, 188. And in November 2016, the Bureau filed a complaint in the United States District Court for the District of Maryland, alleging that similar conduct by Access Funding violated the CFPA's prohibition on unfair, deceptive, and abusive acts and practices. *See* Compl., *CFPB v. Access Funding*, No. 1:16-cv-03759-ELH, Dkt. No. 1 (D. Md. Nov. 11, 2016).[1]

[1] The defendants named in *Linton* include Access Funding, LLC and related corporate entities, as well as Charles E. Smith (the attorney alleged to have provided consumers the purported independent professional advice) and his law firm, and Anuj Sud (attorney to Access Funding, LLC and its related corporate entities) and his law firm. *See* E. 80-86. The CPD and Bureau actions name as defendants the Access Funding entities and Mr. Smith, and also name the individual principals and owners of the Access Funding entities. *See* E. 188-89; Compl., *CFPB v. Access Funding*, No. 1:16-cv-03759-ELH, Dkt. No. 1 (D. Md.). In this brief the Bureau collectively refers to defendants in these actions as "Access Funding" except where otherwise indicated.

In March 2017, before conducting any discovery and while the two government actions were pending, the parties in *Linton* filed a joint motion seeking approval under Md. Rule 2-231 of a proposed class-wide settlement. *See* E. 123. Although, according to the circuit court's final approval order, class-wide damages totaled approximately $17 million (the difference between the amount Access Funding paid consumers and the discounted present value of their structured settlements), the parties claimed that defendants were insolvent or lacked funds for settlement and, accordingly, proposed that Access Funding pay $1.1 million, which represented the amount remaining in its declining insurance policy. E. 50, 126, 128. Thirty percent of this total amount, or $330,000, would be paid as fees to class counsel. *See* E. 51. The remaining $770,000 available to class members represents less than 5% of their estimated damages.

Among other provisions, the settlement agreement includes a release of liability for the defendants named in *Linton* as well as the principals and owners of Access Funding not named as defendants in the case. E. 140-41, 143-44. Despite the release extended to these individuals, the trial court in adopting the settlement agreement declined to consider whether the owners and principals of Access Funding might have assets that could supplement the $1.1 million settlement fund. *See* E. 46-47.

The agreement also contains provisions purporting to release all class members' claims for relief obtained by the CPD and the Bureau in their respective state and federal actions. E. 144. It also purports to enjoin class members from "receiving any benefits" from the Bureau's or CPD's lawsuits, and purports to have class members assign to Access Funding all "benefits or recoveries" obtained in those actions for the benefit of class members, including any recovery based on restitution or other relief. *Id*.

In April 2017, the CPD filed a motion to intervene in *Linton* raising concerns about the fairness and adequacy of the settlement given the relatively small financial benefit to class members and the breadth of the release granted to Access Funding's principals and owners. *See* E. 175-77. The trial court granted the motion to intervene but, over the CPD's objections, in February 2018 issued a final approval order adopting the terms of the settlement agreement, including its release and assignment provisions, and dismissed the case with prejudice. *See* E. 73, 26. The CPD noted a timely appeal to the Maryland Court of Special Appeals. *See* E. 1526-29.

In April 2018, while the CPD's appeal was pending, the Access Funding defendants in the Bureau's federal action filed a motion for partial summary judgment, arguing that the release and assignment of claims in *Linton* precluded the Bureau's claims for restitution and other consumer relief. *See CFPB v. Access*

Funding, *LLC*, No. 1:16-cv-03759-ELH, Dkt. No. 59 (D. Md. Apr. 6, 2018). The federal district court denied the motion in January 2019. *CFPB v. Access Funding, LLC*, No. 1:16-cv-03759-ELH, 2019 WL 266280 (D. Md. Jan. 18, 2019). The district court concluded that the preclusion question was not ripe because the settlement agreement was subject to the then-pending appeal in the Court of Special Appeals and therefore, by its own terms, not yet final. *See id.* at *12. The district court did not reach the merits of Access Funding's preclusion argument, and its denial of the motion was without prejudice to renewal if the settlement becomes final. *Id.* at *13.[2]

In April 2019, the Court of Special Appeals issued an opinion reversing the circuit court's approval of the settlement agreement on the ground that the settlement agreement "interferes with the [CPD's] and Bureau's enforcement authority." *Consumer Prot. Div. v. Linton*, No. 2609, Sept. Term, 2017, 2019 WL 1770524, at *6 (Md. Ct. Spec. App. Apr. 22, 2019). The court concluded that, in contrast to private claims for damages, restitution is a public remedy "not aimed at compensating the plaintiff but at forcing the defendant to disgorge benefits it

[2] Access Funding filed a similar motion for summary judgment on the CPD's claims for restitution in *CPD v. Access Funding*, which the Circuit Court for Baltimore City granted in August 2018. *See* E. 487 (Vol. II of the Record Extract, as corrected Jan. 25, 2019); Pet. for Writ of Cert. and Condition Cross Pet. by the Consumer Prot. Div., *Linton v. Consumer Prot. Div.*, No. 116, at 10 (Md. June 7, 2019).

would be unjust for him to keep." *Id.* at *7 (quoting Dobbs, *Law of Remedies* § 4.1 at 224 (1973)). Class members therefore "never had a restitution claim to settle." *Id.* Giving primacy to their private claims therefore "would intrude on the State's independent enforcement authority." *Id.* at *9 (citing *Herman v. S.C. Nat'l Bank*, 140 F.3d 1413 (11th Cir. 1998)).[3]

The dissent disagreed and concluded that the restitution sought by the CPD was "personal and private to the Class Members" and that plaintiffs therefore could "release their right to obtain that remedy." *Id.* at *13 (citing *California v. IntelliGender, LLC*, 771 F.3d 1169 (9th Cir. 2014); *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985)). The dissent did not analyze the CFPA or the remedies sought by the Bureau. However, on the issue of releasing the CPD's restitution claim, the dissent "agree[d] with the majority that private parties may not settle a government agency's pending claim without the agency's consent." *Id.* Accordingly, the dissent would have held that although plaintiffs could release their "right to obtain" any restitution that might flow from a government agency's claim, they could not release the claim itself. *Id.* at *18.

Defendants in *Linton* filed timely petitions for certiorari, and the CPD filed a cross-petition on issues regarding the procedural and substantive fairness of the

[3] The court's analysis was limited to Maryland's state-law claims and did not further address the CFPA or the Bureau's interests.

settlement not addressed by the Court of Special Appeals. This Court granted certiorari on the petitions and cross-petition on August 26, 2019. *Linton v. Consumer Prot. Div.*, 465 Md. 664 (2019).

STATEMENT OF FACTS

The facts relevant to the Bureau's arguments are set forth in the Statement of the Case, *supra*.

QUESTION PRESENTED

Should a court grant final approval to a class-action settlement agreement that threatens to interfere with the Bureau's authority under the Consumer Financial Protection Act by purporting to release the Bureau's claims in a pending Bureau enforcement action, to enjoin class members from receiving any benefits from the Bureau's action, and to assign to the parties who caused the class members' injuries all benefits the Bureau may obtain for class members in that action?[4]

ARGUMENT

The Court of Special Appeals correctly held that the *Linton* settlement agreement should not be approved because it threatens to interfere with the Bureau's authority under the CFPA. Specifically, the settlement agreement

[4] The petitions for certiorari raise additional questions of state law not directly related to the CFPA on which the Bureau does not opine as amicus curiae.

purports to release the Bureau's claims in a pending federal action, to enjoin class members from receiving benefits from the Bureau's lawsuit, and to assign any benefits the Bureau might obtain for class members to the class-action defendants. These provisions threaten to interfere with the Bureau's authority under the CFPA in two significant ways.

First, they could interfere with the Bureau's ability to carry out its statutory function of remediating consumer harm through its Civil Penalty Fund (the "Fund"). In particular, Access Funding could attempt to argue that the settlement provisions that purport to enjoin class members from "receiving any benefits" from the Bureau's lawsuit and to assign to Access Funding any "benefits" that the Bureau obtains for the benefit of class members either bar Access Funding's victims from receiving payments from the Fund at all or require those victims to turn any such payments over to Access Funding.

If Defendants succeeded in this argument, it would pervert the purposes of the Fund by diverting payments Congress intended the Bureau to provide to the victims of unlawful conduct to the very entities whose unlawful conduct caused their victims' harm. Such a result would prevent the Bureau from compensating Access Funding's victims as Congress intended, either because the payments would be assigned to Access Funding or because, to avoid giving Access Funding a windfall, the Bureau would exercise its discretion to decline to make them.

Assignment of these payments to the entities who caused their victims' harm would offend fundamental equitable principles. There are serious questions about whether these aspects of the settlement agreement should be construed to cover payments that consumers might receive from the Fund and, if so, whether such provisions could be enforced. But the uncertainty alone threatens to undercut the Bureau's ability to carry out the purposes of the Civil Penalty Fund that Congress established.

Second, the order's provisions would interfere with the Bureau's authority to remediate consumer harm through restitution. Consistent with the opinion of the Court of Special Appeals, restitution under the CFPA is a public remedy sought to vindicate the public interest in effective law enforcement and the remediation of consumer harm. The approval of a settlement agreement purporting to release and assign such remedies would interfere with the Bureau's authority under federal law to enforce Federal consumer financial law and to remediate victims harmed by such violations. Accordingly, the decision of the Court of Special Appeals should be affirmed.

A. Approval of the settlement agreement could interfere with the Bureau's authority to remediate consumer harm through the Bureau's Civil Penalty Fund.

1. The Civil Penalty Fund supports the Bureau's purpose of remediating consumers.

The Dodd-Frank Act establishes a "victims relief fund" known as the Civil Penalty Fund to provide relief to victims of violations of Federal consumer financial law for which the Bureau has obtained a civil penalty in an enforcement action. 12 U.S.C. § 5497(d). Composed of all civil penalties the Bureau obtains in its enforcement actions, the 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 Bureau enforcement action, often because the defendants lacked sufficient financial resources to fully remediate the harm they caused. *See id.*; *see also generally* 12 C.F.R. pt. 1075 (implementing this authority).

Victims are eligible for payment from the Fund if, in an action brought by the Bureau, a civil penalty is imposed for the violations that harmed the victims. 12 C.F.R. § 1075.103. Such payments are available for a victim's uncompensated harm,[5] and are available regardless of the size of the penalty imposed against the

[5] A victim's uncompensated harm takes into account other compensation the victim has received or is reasonably expected to receive for that harm. *See* 12 C.F.R. § 1075.104(b).

defendant who harmed the victim and regardless of whether the defendant actually pays the penalty.[6] *See id.* §§ 1075.103, 1075.104. This framework helps ensure the availability of remediation for victims of unlawful conduct, even when the perpetrators of the unlawful acts lack assets necessary to compensate their victims.

The Bureau's authority to compensate victims from the Civil Penalty Fund provides the public with significant benefits and advances the overall purposes of the CFPA. Specifically, the Bureau has distributed from the Fund more than $446 million to more than 900,000 victims in 20 cases.[7] Such payments for the most part compensate victims whose wrongdoers are insolvent or otherwise lack funds to remediate the harm they caused.

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[6] For example, civil penalties imposed in Bureau actions to date have ranged in size from $1 to $1,000,000,000. *See, e.g.*, Announcement of settlement with Hydra Group (Aug. 10, 2018), available at https://go.usa.gov/xpCGt (imposing $1 civil penalty); Announcement of settlement with Wells Fargo Bank, N.A. (Apr. 20, 2018), available at https://go.usa.gov/xpCGJ (imposing $1,000,000,000 penalty while crediting $500 million of that sum for a related penalty collected by the Office of the Comptroller of the Currency). Neither the size nor payment of such penalties affects a consumer's eligibility for compensation from the Fund.

[7] These figures are derived from the Bureau's annual financial reports for fiscal years 2014–2018, as well as the Bureau's CFO update for the third quarter of fiscal year 2019. *See* https://go.usa.gov/xp2Un.

2. The settlement agreement could frustrate the Bureau's ability to remediate consumer victims and contravene fundamental equitable principles.

Granting final approval to the settlement agreement threatens to interfere with the Bureau's ability to fulfill the CFPA's purpose of remediating consumer harm. That potential interference stems from the provisions of the settlement agreement adopted by the order that purport to enjoin class members from "receiving any benefits" from the Bureau's lawsuit and to assign to Access Funding "*any and all* benefits or recoveries . . . obtained by the [Bureau]" for the benefit of class members in the Bureau's pending lawsuit against Access Funding. E. 36 (emphasis added). Access Funding could argue that these provisions would bar consumers from receiving any payments that result from the Bureau's lawsuit and, worse, assign to Access Funding any monetary relief class members obtain as a result of the Bureau's pending federal action. While the parties and the lower courts have focused on the application of this assignment clause to remedies such as restitution, no briefing or opinion has considered its potential effects on the Bureau's role under federal law in remediating consumer harm through payments from the Fund.[8]

[8] For instance, the Court of Special Appeals characterized the assignment of restitution, disgorgement, and damages back to Access Funding as "more than a little ironic" given that its victims "were duped into assigning their structured settlements." *Linton*, 2019 WL 1770524, at *7. The court did not consider the

Those effects could be profound. If the federal district court imposes a civil penalty for Access Funding's violations, that would make Access Funding's victims potentially eligible for payment from the Fund to compensate all uncompensated harm caused by Access Funding – regardless of whether Access Funding actually pays any such penalty. *See* 12 U.S.C. § 5497(d); 12 C.F.R. § 1075.103. Accordingly, if the federal district court were to impose even a nominal penalty, Access Funding's victims may be eligible for payment from the Fund of the uncompensated portion of their more than $17 million in estimated harm, or roughly $16 million should Access Funding pay the amounts contemplated by the *Linton* settlement.

Under the terms of the settlement agreement, Access Funding could argue that this $16 million in compensation should be construed as "benefits from" the Bureau's lawsuit that class members are enjoined from receiving or, worse, as "benefits or recoveries" obtained by the Bureau in its lawsuit that, if paid to consumers, would be assigned to Access Funding. That argument should not succeed because Civil Penalty Fund payments do not directly derive "from" the Bureau's lawsuit; they arise after the Fund Administrator decides to allocate funds to a victim class. *See* 12 C.F.R. § 1075.106. And they are not benefits that the

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assignment of other forms of relief that might result from the Bureau's pending federal action.

Bureau "obtain[s]" in a lawsuit. Although the Bureau may obtain civil penalties in a lawsuit and that fact may make consumers eligible for payment from the Fund, the payments themselves come from the Bureau's Civil Penalty Fund, not from any lawsuit. But the risk still exists. And if Access Funding prevailed on this argument, Access Funding's victims would retain nothing, while Access Funding would enjoy a windfall of $16 million for committing unfair, deceptive, and abusive acts or practices that injured cognitively impaired lead-paint victims.

This perverse potential outcome – effectively enriching Access Funding with more than $16 million in funds intended, under federal law, to compensate its victims – would subvert the remedial purpose of the CFPA generally and of the Fund specifically.[9] The Bureau could avoid such an outcome by undertaking

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[9] It could also raise potential due process concerns for a class settlement to go beyond merely releasing absent class members' claims and to also enjoin those class members and effect an assignment of their rights. While class-action procedures are designed to provide individuals adequate due process protections when they are releasing claims, we are aware of no case holding that such procedures also satisfy due process requirements for assigning away an absent class member's future property rights to the kinds of remediation at issue here. Those due process concerns are heightened where, by operation of a class-action settlement agreement, absent class members unknowingly assign away future property interests not specifically mentioned in the settlement notice they received and that consumers could not reasonably be expected to know they might otherwise receive. It is one thing to give up a right to additional compensation from defendants who claim to be insolvent; it is quite another to give up additional payments from a federal agency's Civil Penalty Fund. Moreover, had class members been provided notice that they might receive full remediation from the Bureau's Civil Penalty Fund, they might have elected to opt out of or object to the

costly and time-consuming litigation to establish that Access Funding will not be able to use the settlement to take any Civil Penalty Fund payments from their victims, or by avoiding the risk of enriching Access Funding by exercising its discretion to decline to allocate money from the Fund to compensate Access Funding's victims. *See* 12 C.F.R. § 1075.106(d)(1).

Should this Court nevertheless uphold approval of the settlement, the consequences could be far reaching. If upheld and construed to permit Access Funding to block or even collect for themselves consumers' Civil Penalty Fund payments, the settlement could serve as a model for wrongdoers seeking to interfere with the Bureau's statutory role of using the Fund to remediate consumer harm. Following Access Funding's lead, defendants in Bureau enforcement actions could attempt to enter into similar private class-action settlements that purport to assign any benefits the Bureau might obtain for consumers – whether to obtain a windfall or, at a minimum, to thwart the Bureau's ability to remediate consumers. As with its pending federal action, the risk of windfalls to such wrongdoers could force the Bureau to decline to award Fund payments to victims, thus depriving the Bureau and the public of a powerful statutory tool for fulfilling the CFPA's purpose of remediating consumer harm.

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settlement. Such concerns may be particularly acute here given that many of the class members were cognitively impaired.

Upholding approval of the settlement agreement would also threaten to offend basic principles of equity. The enrichment of wrongdoers with funds intended to remedy the very harm they caused would contravene the "fundamental equitable principle" recognized by both the U.S. Supreme Court and this Court that "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119 (1991) (citations and quotations omitted); *Murphy v. Merzbacher*, 346 Md. 525, 562 (1997) (noting the "general equitable principle" that "no one should profit by his own conscious wrong"). This Court should not permit approval of a settlement that defendants could attempt to use to reap the benefit of payments intended to compensate their victims.

B. Approval of the settlement agreement would threaten to interfere with the Bureau's authority to remediate consumer harm through restitution.

In addition to civil penalties and other relief, the CFPA authorizes the Bureau to seek restitution in actions brought under the Act. 12 U.S.C. § 5565(a)(2). Although the Court of Special Appeals did not analyze the CFPA's restitution provision, it was correct in concluding that restitution under the CFPA constitutes a public remedy and that, in purporting to release the Bureau's restitution claim and assign any benefits consumers might receive, the settlement agreement as adopted in the circuit court's final approval order interfered with the Bureau's authority to enforce federal law. *See Linton*, 2019 WL 1770524, at *6-7.

The Court of Special Appeals based its conclusion in part on the difference between a claim for relief that a private individual can pursue on his or her own and relief that a government entity is authorized to seek. *See id.* at *7. The court stated that class members "each had the right to pursue damages" under the Maryland Consumer Protection Act and "were free to agree . . . not to pursue those claims." *Id*. But that statutory scheme separately gave the State the right to obtain "restitution of money or property." *Id.* The members of the class therefore "never had a restitution claim to settle." *Id.* So too with the Bureau's action under CFPA: "[t]he right to seek restitution" for violations of the CFPA lies with the government – not private parties. *Id.* The restitution sought by the Bureau, moreover, is designed not just to compensate consumers for their harm but also to vindicate the public's interest in the "avoidance of unjust enrichment." *See id.* The Court of Special Appeals therefore correctly determined that the *Linton* class members "never had a restitution claim to settle" – let alone a right to release the Bureau's claims brought in the public interest. *Id.* at *7.

Given the public purpose of restitution under the CFPA, petitioners are mistaken in suggesting that this Court should analyze this question from the standpoint of "who will benefit" from the government's pursuit of restitution, or whether restitution might "remedy any loss suffered by the State." Br. of Class Member Pet'rs at 28; Br. of Access Funding Defs. at 14. Even though restitution may ultimately be distributed to the victims of unlawful conduct, the Bureau pursues restitution to vindicate the public interest in effective law enforcement.

That interest is reflected in the CFPA's twin purposes of deterring violations of Federal consumer financial law and remediating victims harmed by such violations. Restitution accomplishes both goals. As the Supreme Court has recognized in another context, even when a government agency acts "at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing" unlawful conduct. *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980).[10] Public remedies such as "full and ample restitution . . . serve distinct deterrence functions that are vital to the 'national public interest.'" *CFTC v. Commercial Hedge Servs., Inc.*, 422 F. Supp. 2d 1057, 1061 (D. Neb. 2006) (quoting *Herman v. S.C. Nat'l Bank*, 140 F.3d 1413, 1425 (11th Cir. 1998)).

[10] Petitioners cite a Supreme Court case that later noted that it was an open question whether private settlements could limit relief recoverable by the EEOC. *See* Br. of Access Funding Defs., at 24 n.5 (citing *EEOC v. Waffle House*, 534 U.S. 279, 296-97 (2002)). But that case recognizes that the government "may be seeking to vindicate a public interest . . . even when it pursues entirely victim-specific relief." 534 U.S. at 296. And even if a private settlement could potentially bar the EEOC from obtaining backpay on claims originally brought by private individuals under the EEOC's unique statutory scheme, that would not suggest that a private class-action settlement could likewise preclude the Bureau from obtaining restitution under the CFPA. *See Waffle House*, 534 U.S. at 296-97.

Consistent with these principles, the Court of Special Appeals properly relied on the Eleventh Circuit's analysis in *Herman v. S.C. Nat'l Bank* in concluding that restitution under the CFPA serves a public purpose that would be undermined by the settlement agreement here.[11] *See Linton*, 2019 WL 1770524, at *8-9 (discussing *Herman*, 140 F.3d 1413). In *Herman*, the Eleventh Circuit held that a prior class-action settlement did not bar the Secretary of Labor from pursuing rescission and restitution claims for alleged ERISA violations. *Herman*, 140 F.3d at 1422-26, 1428. To conclude otherwise, the court stated, would contravene the Supreme Court's affirmation of the "the well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests." *Id.* at 1425 (citing, *inter alia*, *Hathorn v. Lovorn*, 457 U.S.

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[11] The dissent in the court below and Petitioners in their briefs attempt to distinguish *Herman* by relying on cases from the Ninth and Second Circuits, but those cases are inapposite for reasons set forth in the court's majority opinion. *See Linton*, 2019 WL 1770524, at *8 (discussing *California v. IntelliGender, LLC*, 771 F.3d 1169 (9th Cir. 2014) and *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985)). As the majority explained, *IntelliGender* is different, in part because (as opposed to the settlement here) the settlement in that case "was fully approved before the [government] brought suit." *Id.* Moreover, in both *IntelliGender* and *In re Baldwin*, the underlying claims and relief sought by the government were identical to or derivative of those pursued by the plaintiff class members. *See id.* In contrast, the settlement agreement here purports to release and assign claims under an entirely separate federal law (*i.e.*, the CFPA) that class members did not, and could not, bring themselves, and the Bureau seeks remedies that are not derivative of any private claims for relief.

255, 268 n. 23 (1982)). That principle applies with equal force here. The Bureau's pursuit of restitution in its federal action may implicate the interests of those harmed by Access Funding, but it also vindicates the public interest in the prevention of unjust enrichment and the enforcement of Federal consumer financial law.

Petitioners attempt to distinguish *Herman* by suggesting, as did the dissenting opinion of the Court of Special Appeals, that this appeal does not implicate matters of public interest as significant as those implicated in ERISA actions. *See* Br. of Class Member Pet'rs, at 34 ("ERISA enforcement actions are brought to prevent the economy from collapsing") (discussing *Linton*, 2019 WL 1770524, at *15). Petitioners are mistaken. The settlement agreement in this matter puts at stake interests above and beyond the individual interests at issue in any single case. No less than ERISA, the CFPA is also designed to protect public interests of national import. Congress identified those interests when it passed the Dodd-Frank Act as "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008." S. Rep. No. 111-176, 111th Cong., 2d Sess. 2 (2010). Congress concluded that the "failure of the federal banking and other regulators to address significant consumer protection issues" led to the Great Recession that began in 2008, "in which millions of Americans have lost jobs; millions of American families have lost trillions of dollars in net worth;

millions of Americans have lost their homes; and millions of Americans have lost their retirement, college, and other savings." *Id.* at 9. It was in response to this financial crisis that Congress passed the Dodd-Frank Act with the overarching purpose to "promote the financial stability of the United States" and consolidated under the Bureau authority to enforce, in addition to the CFPA itself, eighteen separate consumer-protection statutes. *Id.* at 2. *See also* 12 U.S.C. §§ 5481(12) & (14), 5531, 5536(a)(1)(B), 5564(a).

In light of Congress' purpose in enacting the CFPA, the Bureau's pursuit of restitution vindicates, as in *Herman*, an important "national public interest" transcending the interests of any particular individual who might benefit from a government enforcement action. *See Herman*, 140 F.3d at 1423 ("Congress granted the Secretary an independent and unqualified right to sue and seek redress for ERISA violations because ERISA plans significantly affect the 'national public interest.'") (quoting 29 U.S.C. § 1001(a)). Likewise, while the Bureau's authority to seek restitution may benefit individual victims, those individual benefits do not eclipse the national public interest in the enforcement of Federal consumer financial laws, or the pursuit of public remedies authorized by Congress. The Court of Special Appeals was correct to hold that approval of the settlement agreement interferes with that public purpose by purporting to effect an assignment of any restitution the Bureau might obtain back to Access Funding and the other wrongdoers.[12]

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Special Appeals.

Respectfully submitted,

Dated: November 6, 2019

Mary McLeod
General Counsel

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[12] Because an order approving the settlement could interfere with the Bureau's ability to obtain restitution or remediate consumer harm through the Civil Penalty Fund, enforcing it provisions "would stand as 'an obstacle to the accomplishment and execution of the full purposes and objectives of' Congress." *See In re Thorpe Insulation Co.*, 677 F.3d 869, 890 (9th Cir. 2012) (holding that anti-assignment provisions in contracts were preempted by federal bankruptcy code). The final approval order binding absent class members to this settlement thus raises potential preemption issues under federal law. *See In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 476 (3d Cir. 2015) (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). In *In re Commonwealth*, the Third Circuit held that the Pennsylvania Supreme Court's orders seeking to disqualify federal public defenders for alleged misuse of federal grant money "interfere[d] with the regulatory scheme" created by Congress because the office empowered to supervise those grants "could be hindered in its ability to craft an appropriate response." *Id.* at 477. The final order approving the settlement agreement here would also "'exert an extraneous pull on the scheme established by Congress' in a manner that conflicts with federal objectives." *Id.* (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001)). *Accord Barbieri v. United Techs. Corp.*, 771 A.2d 915, 931-39 (Conn. 2001) (breach of contract claims preempted by National Labor Relations Act); *Mich. S. Cent. Power Agency v. Constellation Energy Commodities Grp., Inc.*, 466 F. Supp. 2d 912, 925-26 (W.D. Mich. 2006) (indemnification provision in contract preempted by the Federal Power Act).

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CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

1. This brief contains 5,644 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief was prepared with 14-point Times New Roman font and complies with the font, spacing, and type size requirements stated in Rule 8-112.

Thomas McCray-Worrall

STATUTORY ADDENDUM

12 U.S.C. § 5481. Definitions

* * *

(12) Enumerated consumer laws. Except as otherwise specifically provided in section 1029 [12 USCS § 5519], subtitle G or subtitle H, the term "enumerated consumer laws" means—

(A) the Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. 3801 et seq.);

(B) the Consumer Leasing Act of 1976 (15 U.S.C. 1667 et seq.);

(C) the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), except with respect to section 920 of that Act [15 USCS § 1693r];

(D) the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.);

(E) the Fair Credit Billing Act (15 U.S.C. 1666 et seq.);

(F) the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), except with respect to sections 615(e) and 628 of that Act (15 U.S.C. 1681m(e), 1681w);

(G) the Home Owners [Homeowners] Protection Act of 1998 (12 U.S.C. 4901 et seq.);

(H) the Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.);

(I) subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act (12 U.S.C. 1831t(c)-(f));

(J) sections 502 through 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6802-6809) except for section 505 [15 USCS § 6805] as it applies to section 501(b) [15 USCS § 6801(b)];

(K) the Home Mortgage Disclosure Act of 1975 (12 U.S.C. 2801 et seq.);

(L) the Home Ownership and Equity Protection Act of 1994 (15 U.S.C. 1601 note);

(M) the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.);

(N) the S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.);

(O) the Truth in Lending Act (15 U.S.C. 1601 et seq.);

(P) the Truth in Savings Act (12 U.S.C. 4301 et seq.);

(Q) section 626 of the Omnibus Appropriations Act, 2009 (Public Law 111-8); and

(R) the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701).

* * *

(14) Federal consumer financial law. The term “Federal consumer financial law” means the provisions of this title, the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H, and any rule or order prescribed by the Bureau under this title, an enumerated consumer law, or pursuant to the authorities transferred under subtitles F and H. The term does not include the Federal Trade Commission Act [15 U.S.C. § 41 et seq.].

* * *

12 U.S.C. § 5497. Funding; penalties and fines

* * *

(d) Penalties and fines.

(1) Establishment of victims relief fund. 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"). The Civil Penalty Fund shall be maintained and established at a Federal reserve bank, in accordance with such requirements as the Board of Governors may impose. 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.

(2) Payment to victims. 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. 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 U.S.C. § 5511. Purpose, objectives, and functions

(a) Purpose. The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.

(b) Objectives. The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services—

(1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions;

(2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;

(3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;

(4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and

(5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

(c) Functions. The primary functions of the Bureau are—

(1) conducting financial education programs;

(2) collecting, investigating, and responding to consumer complaints;

(3) collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets;

(4) subject to sections 1024 through 1026 [12 USCS §§ 5514–5516], supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law;

(5) issuing rules, orders, and guidance implementing Federal consumer financial law; and

(6) performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau.

12 U.S.C. § 5531. Prohibiting unfair, deceptive, or abusive acts or practices

(a) In general. The Bureau may take any action authorized under subtitle E [12 USCS §§ 5561 et seq.] to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.

(b) Rulemaking. The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Rules under this section may include requirements for the purpose of preventing such acts or practices.

(c) Unfairness.

(1) In general. The Bureau shall have no authority under this section to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that—

(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and

(B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

(2) Consideration of public policies. In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

(d) Abusive. The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—

(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

(2) takes unreasonable advantage of—

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

* * *

12 U.S.C. § 5536. Prohibited acts

(a) In general. It shall be unlawful for—

(1) any covered person or service provider—

(A) to offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law; or

(B) to engage in any unfair, deceptive, or abusive act or practice;

(2) any covered person or service provider to fail or refuse, as required by Federal consumer financial law, or any rule or order issued by the Bureau thereunder—

(A) to permit access to or copying of records;

(B) to establish or maintain records; or

(C) to make reports or provide information to the Bureau; or

(3) any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the provisions of section 1031 [12 USCS § 5531], or any rule or order issued thereunder, and notwithstanding any provision of this title, the provider of such substantial assistance shall be deemed to be in violation of that section to the same extent as the person to whom such assistance is provided.

(b) Exception. No person shall be held to have violated subsection (a)(1) solely by virtue of providing or selling time or space to a covered person or service provider placing an advertisement.

12 U.S.C. § 5564. Litigation authority

(a) In general. If any person violates a Federal consumer financial law, the Bureau may, subject to sections 1024, 1025, and 1026 [12 USCS § 5514, 5515, and 5516], commence a civil action against such person to impose a civil penalty or to seek all appropriate legal and equitable relief including a permanent or temporary injunction as permitted by law.

(b) Representation. The Bureau may act in its own name and through its own attorneys in enforcing any provision of this title, rules thereunder, or any other law or regulation, or in any action, suit, or proceeding to which the Bureau is a party.

* * *

12 U.S.C. § 5565. Relief available

(a) Administrative proceedings or court actions

(1) Jurisdiction

The court (or the Bureau, as the case may be) in an action or adjudication proceeding brought under Federal consumer financial law, shall have jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law, including a violation of a rule or order prescribed under a Federal consumer financial law.

(2) Relief

Relief under this section may include, without limitation--

(A) rescission or reformation of contracts;

(B) refund of moneys or return of real property;

(C) restitution;

(D) disgorgement or compensation for unjust enrichment;

(E) payment of damages or other monetary relief;

(F) public notification regarding the violation, including the costs of notification;

(G) limits on the activities or functions of the person; and

(H) civil money penalties, as set forth more fully in subsection (c).

(3) No exemplary or punitive damages. Nothing in this subsection shall be construed as authorizing the imposition of exemplary or punitive damages.

* * *

29 U.S.C. § 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

12 C.F.R. § 1075.103 Eligible victims

A victim is eligible for payment from the Civil Penalty Fund if a final order in a Bureau enforcement action imposed a civil penalty for the violation or violations that harmed the victim.

12 C.F.R. § 1075.104 Payments to victims

(a) In general. The Bureau will use funds in the Civil Penalty Fund for payments to compensate eligible victims' uncompensated harm, as described in to paragraph (b) of this section.

(b) Victims' uncompensated harm.

(1) A victim's uncompensated harm is the victim's compensable harm, as described in paragraph (c) of this section, minus any compensation for that harm that the victim has received or is reasonably expected to receive.

(2) For purposes of paragraph (b)(1) of this section, a victim has received or is reasonably expected to receive compensation in the amount of:

(i) Any Civil Penalty Fund payment that the victim has previously received or will receive as a result of a previous allocation from the Civil Penalty Fund to the victim's class;

(ii) Any redress that a final order in a Bureau enforcement action orders to be distributed, credited, or otherwise paid to the victim, and that has not been suspended or waived and that the Chief Financial Officer has not determined to be uncollectible; and

(iii) Any other redress that the Bureau knows that has been distributed, credited, or otherwise paid to the victim, or has been paid to an intermediary for distribution to the victim, to the extent that:

(A) That redress compensates the victim for the same harm as would be compensated by a Civil Penalty Fund payment; and

(B) It is not unduly burdensome, in light of the amounts at stake, to determine the amount of that redress or the extent to which it compensates the victim for the same harm as would be compensated by a Civil Penalty Fund payment.

(3) If the Fund Administrator deems it impracticable to assess the uncompensated harm of individual victims in a class, each individual victim's uncompensated harm will be the victim's share of the aggregate uncompensated harm of the victim's class.

(c) Victims' compensable harm. Victims' compensable harm for purposes of this part is as follows:

(1) If a final order in a Bureau enforcement action ordered redress for a class of victims, the compensable harm of each victim in the class is equal to that

victim's share of the total redress ordered, including any amounts that are suspended or waived.

(2) If a final order in a Bureau enforcement action does not order redress for a class of victims, those victims' compensable harm is as follows:

(i) If the Bureau sought redress for a class of victims but a court or administrative tribunal denied that request for redress in the final order, the victims in that class have no compensable harm.

(ii) Except as provided in paragraph (c)(2)(i) of this section, if the final order in the Bureau enforcement action specifies the amount of the victims' harm, including by prescribing a formula for calculating that harm, each victim's compensable harm is equal to that victim's share of the amount specified.

(iii) Except as provided in paragraph (c)(2)(i) of this section, if the final order in the Bureau enforcement action does not specify the amount of the victims' harm, each victim's compensable harm is equal to the victim's out-of-pocket losses that resulted from the violation or violations for which a civil penalty was imposed, except to the extent such losses are impracticable to determine.

12 C.F.R. § 1075.106 Allocating funds to classes of victims

(a) Allocations when there are sufficient funds available to compensate all uncompensated harm. If the funds available under § 1075.105(c) are sufficient, the Fund Administrator will allocate to each class of victims the amount necessary to compensate fully the uncompensated harm, determined under § 1075.104(b) as of the last day of the most recently concluded six-month period, of all victims in that class to whom it is practicable to make payments.

(b) Allocations when there are insufficient funds available to compensate all uncompensated harm. If the funds available under § 1075.105(c) are not sufficient to make the allocations described in paragraph (a) of this section, the Fund Administrator will allocate the available funds to classes of victims as follows:

(1) Priority to classes of victims from the most recent six-month period. The Fund Administrator will first allocate funds to classes of victims from the most recently concluded six-month period, as determined under paragraph (b)(2) of this section. If funds remain after allocating to each class of victims from that six-month period the amount necessary to compensate fully the uncompensated harm, determined under § 1075.104(b) as of the last day of the most recently concluded six-month period, 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.

(2) Assigning classes of victims to a six-month period. For purposes of this paragraph (b), the Fund Administrator will assign each class of victims to the six-month period in which the victims first had uncompensated harm as described in § 1075.104(b). When a class of victims first had uncompensated harm as described in § 1075.104(b) will be determined as follows:

(i) If redress was ordered for a class of victims in a Bureau enforcement action but suspended or waived in whole or in part, the class of victims first had uncompensated harm as described in § 1075.104(b) on the date the suspension or waiver became effective.

(ii) If redress was ordered for a class of victims in a Bureau enforcement action but determined by the Chief Financial Officer to be uncollectible in whole or in part, the class of victims first had uncompensated harm as described in § 1075.104(b) on the date the Chief Financial Officer made that determination.

(iii) If no redress was ordered for a class of victims in a Bureau enforcement action, the class of victims first had uncompensated harm as described in

§ 1075.104(b) on the date the order imposing a civil penalty became a final order.

(c) No allocation to a class of victims if making payments would be impracticable. Notwithstanding any other provision in this section, the Fund Administrator will not allocate funds available under § 1075.105(c) to a class of victims if she determines that making payments to that class of victims would be impracticable.

(d) Fund Administrator's discretion.

(1) Notwithstanding any provision in this part, the Fund Administrator, in her discretion, may depart from the procedures specified by this section, including by declining to make, or altering the amount of, any allocation provided for by this section. Whenever the Fund Administrator exercises this discretion, she will provide the Civil Penalty Fund Governance Board a written explanation of the reason for departing from the procedures specified by this section.

(2) If, in allocating funds during a given time period described in § 1075.105(b)(2), the Fund Administrator exercises her discretion under paragraph (d)(1) of this section, she may allocate funds to consumer education and financial literacy programs under 1075.107 during that time period only to the same extent she could have absent that exercise of discretion.