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RESTITUTION IN CONSUMER PROTECTION ACTIONS: STOP THE RELIANCE ON RELIANCE

I. INTRODUCTION

In Maryland, it is fairly simple to cheat people out of their money and not have to return it, even if you get caught. The key is to cheat a very large group of people, but cheat each person out of very little money. That way, it is not worth it for any individual to bring a lawsuit against you.¹ The Consumer Protection Division (hereinafter “CPD” or “the Division”) might bring a public action on behalf of the people you wronged; that is, after all, the function of the Division.² The Division might issue an injunction so that you can not continue to cheat people.³ The Division might even penalize you.⁴ The Division *should* make you give up the money you made wrongfully,⁵ but you probably do not have to worry about that.

To make you give up the money, the Division first would have to come up with a plan to get that money back to the people you wronged.⁶ Then, each person who wanted his or her money back (and remember, you were smart about that, so each person only lost a little money, but there were a lot of people) would have to ask for it.⁷ So all of the money you made from people the Division cannot locate or people who do not want to bother reclaiming a few dollars, or a few cents, all of that money would be yours to keep. At least that is how it seems to go under Maryland’s current laws.

Using restitution, Maryland courts theoretically move ill-gotten benefits from a wrongdoer’s possession back to the rightful owner’s possession.⁸ In reality, Maryland courts’ restrictions on restitution in cases arising under the Consumer Protection Act (hereinafter “CPA” or “the Act”) benefit offending businesses and organizations and unduly burden consumers, contrary to the intent of the Act.⁹ Judicial interpretation and legislative reform could redirect restitution such that courts and the Consumer Protection Division could help consumers through restoration of their losses, as well as punish and deter offending businesses.¹⁰

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1. *See generally infra* note 149 and accompanying text.
 2. *See generally infra* notes 15-20 and accompanying text.
 3. *See generally infra* note 16 and accompanying text.
 4. *See generally infra* note 18 and accompanying text.
 5. *See generally infra* notes 17-20 and accompanying text.
 6. *See infra* note 91 and accompanying text.
 7. *See infra* note 91 and accompanying text.
 8. *See discussion infra* Part II(B).
 9. *See discussion infra* Part III(A).
 10. *See discussion infra* Part III.

Part II(A) of this Comment will explain the CPA, how it protects consumers and regulates businesses, and the roles reliance and restitution play in the process. Part II(B) will differentiate between the disgorgement and return aspects of restitution. Part II(C) will describe court-imposed restrictions on restitution orders, and Part II(D) will provide case examples of such restrictions in Maryland. Part III(A) will address the outcomes and implications of these cases, and it will suggest how and why to limit the proof of reliance that the courts demand. Part III(B) will propose new legislation defining two categories of consumer protection actions, eliminating the reliance requirement in one category and introducing fluid recovery in the other category. Part IV will indicate how these proposals will allow for the CPD to operate more effectively and efficiently, serving consumers and deterring offending businesses.

II. BACKGROUND

A. *The Consumer Protection Act*

The Consumer Protection Act, as its name indicates, protects consumers from unfair or deceptive trade practices.¹¹ It also punishes businesses for engaging in such practices and deters businesses from similar conduct in the future.¹² The General Assembly enacted the CPA in response to an increase in deceptive consumer practices and a decrease in “public confidence in merchants offering goods, services, realty, and credit.”¹³ To counteract these problems, the General Assembly promulgated in the CPA “improved enforcement procedures” that constituted “strong protective and preventive steps . . . to assist the public in obtaining relief from these [unlawful consumer] practices, and to prevent these practices from occurring in Maryland.”¹⁴ The Act provides for the CPD to investigate businesses and organizations that might be engaging in “unfair and deceptive trade practice[s],”¹⁵ issue “cease and desist order[s]” to offending businesses,¹⁶ “[u]ndertake activities to encourage business and industry to maintain high standards of honesty,”¹⁷ and “[e]xercise and perform any other function, power, and duty appropriate to protect and promote the welfare of consumers.”¹⁸ The CPD has

11. See MD. CODE ANN., COM. LAW § 13-102(b)(3) (2005).

12. *Id.*

13. *Id.* § 13-102(a)(3), (b)(2).

14. *Id.* § 13-102(b)(3).

15. *Id.* § 13-204; see also § 13-301 (defining unfair and deceptive trade practices).

16. *Id.* § 13-204(4).

17. *Id.* § 13-204(9).

18. *Id.* § 13-204(11).

the authority to determine an appropriate remedy.¹⁹ The Act provides for restitution pursuant to public hearing where the CPD finds a violation of the Act²⁰ and as a remedy in conciliation procedures.²¹

1. No Reliance for Proof of Violation

To prove a violation of the Act—the precursor to a restitution order—the CPD need not prove reliance.²² Reliance is defined as “[d]ependence or trust by a person, esp[ecially] when combined with action based on that dependence or trust.”²³ A plaintiff typically must prove reliance when arguing a case in which the defendant obtained the plaintiff’s money or property through some unfair or deceptive practice.²⁴ However, Uniform Commercial Code (U.C.C.)²⁵ language suggests that reliance is no longer a requirement for restitution in some contractual situations.²⁶ Consumer protection actions brought by the CPD also present a special circumstance.²⁷

19. *Consumer Prot. Div. v. Consumer Publ’g Co.*, 304 Md. 731, 747, 501 A.2d 48, 56-57 (1985).

20. MD. CODE ANN., COM. LAW § 13-403(b)(1)(i) states the following:

If, at the conclusion of the hearing, the Division determines on the preponderance of the evidence that the alleged violator violated this title, the Division shall state its findings and issue an order requiring the violator to cease and desist from the violation and to take affirmative action, including the restitution of money or property.

See also id. § 13-406 (available remedies include restoration of money or property to wronged consumer).

21. *See id.* § 13-402(b)(1)(ii).

22. *Id.* § 13-302 (“Any practice prohibited by this title is a violation of this title, whether or not any consumer in fact has been misled, deceived, or damaged as a result of that practice.”). This statute is consistent with other states’ handling of restitution in consumer protection actions. *See infra* note 61 and accompanying text.

23. BLACK’S LAW DICTIONARY 1316 (8th ed. 2004).

24. *See Luskin’s, Inc. v. Consumer Prot. Div.*, 353 Md. 335, 386, 726 A.2d 702, 727 (1999) (citing *Consumer Publ’g*, 304 Md. at 779, 501 A.2d at 73).

25. The U.C.C. is a statute created by The National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) in an effort to simplify interstate transactions by providing for laws shared among the states. SELECTIONS FOR CONTRACTS: UNIFORM COMMERCIAL CODE, RESTATEMENT SECOND, UN SALES CONVENTION, UNIDROIT PRINCIPLES, FORMS, 1-2 (E. Allan Farnsworth & William F. Young eds., Foundation Press 2003). All states but Louisiana have adopted the U.C.C. such that it is the governing law where applicable. *Id.* at 2. The U.C.C. applies in various commercial and contractual matters. *Id.* at 2-3.

26. *See John W. Wade & Robert D. Kamenshine, Restitution for Defrauded Consumers: Making the Remedy Effective Through Suit by Governmental Agency*, 37 GEO. WASH. L. REV. 1031, 1038 (1969) (regarding warranties); U.C.C. § 2-313 cmt. 3 (2004).

27. *See infra* note 32 and accompanying text.

Maryland's consumer law statutes, like those in most states, derive from the Federal Trade Commission Act (FTCA).²⁸ The federal courts have held that the FTC has the expertise to determine whether a practice is unfair or deceptive without regard to the practice's actual impact on consumers.²⁹ "It is well established with regard to Section 13 of the FTC Act (which gives district courts the power to order equitable relief) that proof of individual reliance by each purchasing customer is not needed."³⁰ The Maryland CPD also has the necessary expertise to determine whether advertisements can deceive or mislead the public.³¹ Therefore, consistent with federal practices under the FTCA, reliance is unnecessary for the Division to prove a violation.³²

Not requiring reliance to find a violation³³ helps further the legislative intent of the Act.³⁴ "It would be inconsistent with the statutory purpose for the court to stifle effective prosecution of large consumer redress actions by requiring proof of subjective reliance by each individual consumer."³⁵ Such proof would be repetitive and slow the process; requiring each consumer to bring an individual claim would compound the problem.³⁶ Actions in which the CPD may represent multiple consumers without proving reliance expedite the matter.³⁷

2. Restitution in Consumer Protection Actions

Restitution, which involves demanding something of the wrongdoer and delivering something to the victim,³⁸ has become integral to consumer protection actions in various states.

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28. See Michael F. Brockmeyer, *An Overview of State Consumer Protection Acts*, 14 A.L.I.-A.B.A. COURSE STUDY J. 59-60, 64 (Aug. 1989); Seth William Goren, *A Pothole on the Road to Recovery: Reliance and Private Class Actions Under Pennsylvania's Unfair Trade Practices and Consumer Protection Law*, 107 DICK. L. REV. 1, 13-14 (2002).
29. See *Consumer Publ'g*, 304 Md. at 771, 501 A.2d at 69; see also *Luskin's*, 353 Md. at 349, 726 A.2d at 709 (quoting *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963)).
30. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993).
31. *Consumer Publ'g*, 304 Md. at 771, 501 A.2d at 69.
32. See *id.* at 770-71, 501 A.2d at 68 (citing *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982)); *Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1146 n.11 (9th Cir. 1978); *Spiegel, Inc. v. FTC*, 494 F.2d 59, 61-62 (7th Cir. 1974)).
33. See *supra* notes 25-30 and accompanying text.
34. See *infra* notes 35-37 and accompanying text.
35. David J. Federbush, *Rebuttable Presumption of Reliance in Class Actions*, 36 MD. BAR J. 52, 54 (2003) (quoting 1983-2 Trade Cases. (CCH) 69,709 (N.D. Cal. 1983)).
36. Goren, *supra* note 28, at 16 (citing *Janicik v. Prudential Ins. Co.*, 451 A.2d 451, 456 (Pa. Super. Ct. 1982) (stating that "the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants")).
37. See Goren, *supra* note 28, at 15.
38. See RESTATEMENT OF RESTITUTION § 1 cmt. a (1937).

Over the last thirty years, many states have adopted legislation permitting restitution in cases where the state attorney general or a state agency seeks to prohibit deception, deceptive acts and practices, or misrepresentation in connection with the sale or advertisement of any merchandise. Maryland's Consumer Protection Act is one such statute. These statutes empower the courts, and in some instances agencies, to issue orders requiring the restoration of money or other property acquired by any of the practices declared unlawful.³⁹

Black's Law Dictionary defines restitution as "[r]eturn or restoration of some specific thing to its rightful owner or status" or "[c]ompensation for loss."⁴⁰ As a remedy for unjust enrichment, "the measure of recovery is usu[ally] based not on the plaintiff's loss, but on the defendant's gain."⁴¹ The remedy applies in contractual situations and instances of unfair or deceptive trade practices such as "insurance frauds, investment swindles, chain-letter-like schemes, gifts or contributions, gaming and miscellaneous swindles,"⁴² which the CPD works to prevent.⁴³

With restitution, the courts can achieve the CPA's legislative intent to a greater extent than through civil penalties and injunctions alone.⁴⁴ An injunction prevents future harm but does not remedy past wrongs, whereas restitution does.

Businesses faced only with the possibility of a prospective injunctive order would have little incentive to avoid commercial practices of dubious legality. Only a substantial likelihood that defendants who have engaged in unfair or deceptive trade practices will be subject to restitutionary orders will deter many with a mind to engage in sharp practices.⁴⁵

An offender might perceive civil penalties "as merely a hunting license for earning large profits."⁴⁶ However, through restitution,

39. *Consumer Prot. Div. v. Consumer Publ'g Co.*, 304 Md. 731, 777, 501 A.2d 48, 72 (1985) (citing *Wade & Kamenshine*, *supra* note 26, at 1059 n.184).

40. BLACK'S LAW DICTIONARY 1339 (8th ed. 2004). A court may order compensation as part of a criminal sentence. *Id.*

41. *Id.*

42. *Wade & Kamenshine*, *supra* note 26, at 1046 (citing multiple case examples of where restitution was allowed as a remedy).

43. See MD. CODE ANN., COM. LAW § 13-102(b)(3) (2005).

44. See *id.* §§ 13-204(1), (11), 13-403(b)(1)(i), 13-406; see also *Consumer Prot. Div. v. Morgan*, 387 Md. 125, 155, 874 A.2d 919, 936-37 (2005).

45. *State ex rel. Kidwell v. Master Distributors, Inc.*, 615 P.2d 116, 124-25 (Idaho 1980).

46. *Wade & Kamenshine*, *supra* note 26, at 1051.

the court may take away all of the offender's profits and ensure that the offender does not benefit.⁴⁷

3. The Special Case of Public Actions for Multiple Consumers

Suits brought on behalf of multiple consumers differ from individual consumer actions in terms of the practicality of proof of reliance, both to establish a violation and to order restitution.⁴⁸ An individual who brings an action under consumer protection statutes is aware of why he or she is bringing the action and is available to address any Division or court concerns. The individual cannot access his or her remedies until he or she establishes the violation, but establishing the violation is inherent in bringing the action.⁴⁹ Reliance is a part of establishing the violation and, therefore, the court will have established reliance already when considering whether to issue a restitution order.⁵⁰ In contrast, if the Division represents multiple consumers, then proof of reliance involves the additional steps of identifying and contacting each consumer, and having each consumer indicate reliance as the individual consumer did.⁵¹ To streamline the process, the Division need not prove reliance to order restitution in an action involving multiple consumers.⁵²

B. *The Dual Nature of Restitution*

Restitution is a two-part remedy, each part serving one aspect of the CPA's legislative intent.⁵³ In consumer protection actions, the first part is the disgorgement of the unlawfully gained profits from the offending business, which discourages future offenses.⁵⁴ "The restitution claim . . . is not aimed at compensating the plaintiff but at forcing the defendant to disgorge benefits it would be unjust for him to keep."⁵⁵ In contract terms, restitution prevents "gain by

47. *Id.* at 1034.

48. *Consumer Prot. Div. v. Consumer Publ'g Co.*, 304 Md. 731, 778-79, 501 A.2d 48, 72-73 (1985).

49. *See* MD. CODE ANN., COM. LAW § 13-401. Individual attempts at recovery begin when the consumer files a complaint with the CPD; that complaint must state the "particulars of the violation." *Id.* § 13-401(a). Then, the CPD investigates the allegations, *id.* § 13-401(b), and, if appropriate, attempts conciliation, seeks an injunction, and/or holds a hearing. *Id.* §§ 13-402(a)(1)-(2), 13-403(a).

50. "Traditionally, to be entitled to restitution because of misrepresentation [as which CPA violations under section 13-301 qualify], the plaintiff must prove reliance on a material misrepresentation." *Consumer Publ'g*, 304 Md. at 777, 501 A.2d at 72 (citing RESTATEMENT OF RESTITUTION § 9 (1937)).

51. *See supra* notes 35-37 and accompanying text.

52. *See infra* Part II(C).

53. *See supra* notes 11-12, 14 and accompanying text.

54. *Consumer Publ'g*, 304 Md. at 776, 501 A.2d at 71 (quoting DAN B. DOBBS, LAW OF REMEDIES § 4.1 (1973)).

55. *Id.* (quoting DAN B. DOBBS, LAW OF REMEDIES § 4.1 (1973)).

the defaulting promisor at the expense of the promisee.”⁵⁶ The Federal Trade Commission promoted restitution as a measure that should “drive the huckster out of the marketplace without interfering with the rights of the great majority of honest businessmen.”⁵⁷

The second part of restitution is the return to the consumers of what the consumers lost through the unfair or deceptive trade practice; this part provides protection to the consumers.⁵⁸ Often, restitution offers consumers their best possibility of recovery.⁵⁹ Restitution presents a more compelling case to the courts than other interests because restitution “involv[es] a combination of unjust impoverishment with unjust gain.”⁶⁰ This second part allows the Division to actualize the legislative intent by not only removing the profits from the violator but also returning them to the consumers.

C. *The Role of Reliance in Restitution*

In Maryland and other states, restitution applies without regard to the victim’s reliance when the state’s consumer protection division brings an action on behalf of multiple consumers,⁶¹ but courts still limit the Division’s ability to order restitution.⁶² The Maryland CPD may issue a general order of restitution without indicating how the Division will address consumer reliance, but the circumstances under which such an order is appropriate are very limited.⁶³ Some state courts require forethought by the state’s consumer protection division on how money disgorged from the

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56. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: Part I*, 46 YALE L.J. 52, 54 (1936).
57. FEDERAL TRADE COMMISSION, REPORT ON THE DISTRICT OF COLUMBIA CONSUMER PROTECTION PROGRAM 19-20 (1968).
58. See Fuller & Perdue, *supra* note 56, at 53-54. Even in restoring consumers to their position before the unfair trade practices, “[t]he measure of recovery is the value of the benefit received by the defendant.” Wade & Kamenshine, *supra* note 26, at 1034. Emphasis remains on disgorgement of the violator. See generally *id.*
59. Wade & Kamenshine, *supra* note 26, at 1033.
60. Fuller & Perdue, *supra* note 56, at 56. The result of restitution is that the other regains what he or she lost, but that result is secondary to the primary object of disgorging the offender. See *id.* at 52-54.
61. See, e.g., MD. CODE ANN., COM. LAW § 13-302 (2005); Consumer Prot. Div. v. Morgan, 387 Md. 125, 162, 874 A.2d 919, 940-41 (2005); Comm. on Children’s Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 668-69 (Cal. 1983) (restitution orders without proof of reliance are acceptable if necessary to prevent unfair practices); State *ex rel.* Kidwell v. Master Distributors, Inc., 615 P.2d 116, 123 (Idaho 1980); Dix v. Am. Bankers Life Assurance Co., 415 N.W.2d 206, 209 (Mich. 1987).
62. See discussion *infra* Part II(D)(1) & (4).
63. See Morgan, 387 Md. at 165-66, 874 A.2d at 943 (quoting Consumer Prot. Div. v. Consumer Publ’g Co., 304 Md. 731, 781, 501 A.2d 48, 74 (1985)) (general restitution order inappropriate if some consumers “may not want refunds”).

offending business shall reach the consumers.⁶⁴ The California Supreme Court only permits the attorney general to obtain restitution specifically for identified consumers.⁶⁵ That court previously had emphasized the importance of the disgorgement aspect of restitution:

[T]he Legislature obviously intended to vest the trial court with broad authority to fashion a remedy that would effectively “prevent the use . . . of any practices which violate [the] chapter [proscribing unfair trade practices]” and deter the defendant, and similar entities, from engaging in such practices in the future. The requirement that a wrongdoing entity disgorge improperly obtained money surely serves as the prescribed strong deterrent.⁶⁶

Yet the California Supreme Court later limited restitution by classifying the aforementioned language as a “comment” rather than a holding.⁶⁷ The Idaho Supreme Court requires a procedure “by which consumer claims may be efficiently and fairly processed.”⁶⁸ The procedure provided a means to effect “the greatest possible good for the greatest possible number of consumers who have common problems and complaints vis-a-vis the seller.”⁶⁹ The court did not address the possibility that where the group of consumers involved is discrete, mailing refunds might be more efficient than processing consumer claims.⁷⁰ Mailing refunds might indeed obviate the need for individual claims.⁷¹

The Maryland courts follow the Idaho precedent by requiring that before the CPD may award restitution to specific individuals, the CPD’s restitution “order [must provide] a mechanism for processing individual claims.”⁷² Individuals must take affirmative action to state not only that they purchased the goods or product at issue but also that they relied on the violator’s acts.⁷³ As a result, if the CPD does not present a procedure that requires consumer

64. See, e.g., *Consumer Publ’g*, 304 Md. at 780-81, 501 A.2d at 73-74, and cases cited therein.

65. See *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 732 (Cal. 2000).

66. *Fletcher v. Sec. Pac. Nat’l Bank*, 591 P.2d 51, 56 (Cal. 1979) (citation omitted).

67. *Kraus*, 999 P.2d at 724.

68. *State ex rel. Kidwell v. Master Distributors, Inc.*, 615 P.2d 116, 126 (Idaho 1980).

69. *Id.* (quoting *Kugler v. Romain*, 279 A.2d 640, 649 (N.J. 1971)).

70. Mailing refunds would involve sending each identifiable customer his or her share in a stamped envelope. Processing claims might result in fewer shares to mail, yet it would involve company time dedicated to reading, sorting, verifying and recording each claim received.

71. See discussion *infra* Part III(B).

72. *Consumer Prot. Div. v. Consumer Publ’g Co.*, 304 Md. 731, 775, 501 A.2d 48, 71 (1985); see also *Consumer Prot. Div. v. Morgan*, 387 Md. 125, 166, 874 A.2d 919, 943 (2005).

73. See *Morgan*, 387 Md. at 166, 874 A.2d at 943.

action toward obtaining reimbursements, the ill-gotten gains are not available to the consumers.⁷⁴ Rather, even though restitution applies and the courts can prove a violation, the profits may remain in the hands of the offender.⁷⁵

Two sides exist to restitution,⁷⁶ but these requirements of reliance are relevant only to one side. On that side, the court should only award restitution to individuals who suffered loss due to the violation.⁷⁷ Therefore, the court might ask the CPD to have individuals prove their reliance if it is not evident. The other side of restitution considers only the profit the violation generated, without regard to the number of individuals harmed or the amount of harm caused to each.⁷⁸ Consumer indications of reliance have no bearing on this side.⁷⁹ Therefore, denying general orders because “some . . . consumers may not want refunds”⁸⁰ or requiring that the order include a plan for individuals to prove more than their purchase “might [result in] less effective implementation of the statute’s goals. On balance, it is better for a court to keep the consumer’s burden at a minimum, even though in rare cases some injustice to the defendant might result.”⁸¹ The CPD should be able to use restitution to deny CPA violators their profits without having to address individual claims from the outset.

D. Grants and Denials of Restitution in Maryland

*1. Consumer Protection Division v. Consumer Publishing Co.*⁸²

Maryland’s requirements for restitution orders resulted from a case in which a company, Consumer Publishing, advertised and sold diet pills to Maryland consumers through newspaper advertisements.⁸³ The advertisements promoted the pills as appetite suppressants that increased the body’s metabolic rate and thereby caused weight loss.⁸⁴ Following an administrative hearing on complaints filed by the CPD, the Division issued a cease and desist order regarding Consumer Publishing’s advertising practices.⁸⁵ The order further required restitution to all customers

74. *Id.*

75. *See generally id.*

76. *See* discussion *supra* Part II(B).

77. *See* Fuller & Perdue, *supra* note 56, at 53-54.

78. *See id.*; Consumer Prot. Div. v. Consumer Publ’g Co., 304 Md. 731, 770-71, 776, 501 A.2d 48, 68, 71 (1985).

79. *See* Wade & Kamenshine, *supra* note 26, at 1061-62.

80. *Consumer Publ’g*, 304 Md. at 781, 501 A.2d at 74.

81. Wade & Kamenshine, *supra* note 26, at 1061-62.

82. 304 Md. 731, 501 A.2d 48.

83. *Id.* at 737, 501 A.2d at 51.

84. *Id.* at 739-40, 501 A.2d at 52-53.

85. *Id.*

who purchased the pills during the period of advertising, and it indicated that Consumer Publishing's business records would identify the purchasers.⁸⁶ Consumer Publishing challenged the restitution order.⁸⁷ The Circuit Court vacated the Division's final order,⁸⁸ and the Court of Appeals issued a writ of certiorari.⁸⁹ The Court of Appeals held "that the Division may enter a general order of restitution without proof of purchaser reliance, as long as the order provides a mechanism for processing individual claims."⁹⁰ The appropriate procedure is:

Purchasers should be notified that they may obtain a refund; in order to be entitled to such refund, they should be required to state that they relied on the false impressions created by the advertising It should not be necessary that each purchaser present additional evidence that he was actually deceived and relied on the misrepresentations in the advertisements.⁹¹

This procedure prevents consumers who were not deceived from receiving restitution.⁹²

The court further held that in *Consumer Publishing*, the order "did not provide a procedure for processing individual consumer claims."⁹³ In coming to this holding, the court considered cases in other jurisdictions,⁹⁴ such as the Idaho case discussed above.⁹⁵ The court did not consider that, for the Idaho courts, the purpose of a procedure was efficiency and fairness.⁹⁶ Nor did the court consider that the plan to use the company's business records, and not to provide restitution to repeat customers, took efficiency and fairness into account.⁹⁷ Rather, the court held the procedure inadequate because "[s]ome of [the identified] consumers may not want refunds."⁹⁸ The court did not explain under what circumstances someone would not want to receive a refund.⁹⁹

86. *Id.* at 775-76, 501 A.2d at 71.

87. *Id.*

88. *Id.* at 740-41, 501 A.2d at 53.

89. *Id.* at 741, 501 A.2d at 53.

90. *Id.* at 775, 501 A.2d at 71.

91. *Id.* at 781, 501 A.2d at 74. An individual claim is "the consumer's statement that he/she relied on the targeted misrepresentations." Federbush, *supra* note 35, at 52.

92. *Consumer Publ'g*, 304 Md. at 781, 501 A.2d at 74.

93. *Id.* at 775, 501 A.2d at 71.

94. *Id.* at 779-80, 501 A.2d at 73.

95. *See supra* notes 68-69 and accompanying text.

96. *See State ex rel. Kidwell v. Master Distributors, Inc.*, 615 P.2d 116, 126 (Idaho 1980). *See generally Consumer Publ'g*, 304 Md. 731, 501 A.2d 48.

97. *See Consumer Publ'g*, 304 Md. at 775-76, 501 A.2d at 71-72.

98. *Id.* at 781, 501 A.2d at 74.

99. *See Consumer Publ'g*, 304 Md. 731, 501 A.2d 48.

2. *Luskin's, Inc. v. Consumer Protection Division*¹⁰⁰

In *Luskin's, Inc. v. Consumer Protection Division*, the Court of Appeals considered the situation in which the group of affected customers was not clearly defined.¹⁰¹ Through television and newspaper advertisements, Luskin's advertised that consumers who purchased a set amount of the retailer's electric and household goods and services would receive a free airline ticket.¹⁰² Following a series of communications and court actions regarding the advertisement and its revisions, which the CPD alleged violated the CPA,¹⁰³ the CPD issued a final order for monetary relief beyond restitution.¹⁰⁴ On appeal, the Court of Appeals held that "[t]he appropriate remedy under the circumstances of this case is to require Luskin's to disgorge the net profit it realized from the deceptive practice."¹⁰⁵

The court differentiated this case from *Consumer Publishing* because this case did not involve a discrete group of consumers.¹⁰⁶ Consumer Publishing's customers all responded to an advertisement and, therefore, "reliance on the seller's advertising was inherent to a great degree in customer purchases."¹⁰⁷ In contrast, some Luskin's customers might have purchased without seeing the advertisements and, consequently, the restitution procedure should exclude such customers.¹⁰⁸

3. *B&S Marketing Enterprises, LLC v. Consumer Protection Division*¹⁰⁹

Special circumstances arise when "there is no dispute that every person who entered such transaction paid money as a result of the 'prohibited practice.'"¹¹⁰ In *B&S Marketing Enterprises, LLC v. Consumer Protection Division*, the defendants were businesses that offered a two-step process, advertised by television and radio, for consumers to obtain cash immediately.¹¹¹ The defendants first "bought"¹¹² consumers' electronics for \$100 cash per item and then leased the electronics back to their original owners at \$30 per

100. 353 Md. 335, 726 A.2d 702 (1999).

101. *See id.* at 339, 726 A.2d at 703-04.

102. *Id.*

103. *Id.* at 342-43, 726 A.2d at 705-06.

104. *Id.* at 382-83, 726 A.2d at 725.

105. *Id.* at 385, 726 A.2d at 726.

106. *Id.* at 387, 726 A.2d at 727.

107. *Id.*

108. *Id.*

109. 153 Md. App. 130, 835 A.2d 215 (2003).

110. *Id.* at 169 n.15, 835 A.2d at 238 n.15.

111. *Id.* at 139-40, 835 A.2d at 220-21.

112. The defendants did not acquire possession but merely recorded the electronics' serial numbers. *Id.* at 141, 835 A.2d at 221.

15-day period.¹¹³ The defendants did not explain to their customers that the lease could be terminated at any time by simply returning the electronics to the company; consumers thought that they had to repay their loans to repurchase their electronics.¹¹⁴ The administrative law judge and the Division's Final Order required restitution.¹¹⁵ The Circuit Court and Court of Special Appeals affirmed.¹¹⁶ The Court of Special Appeals held that, because it was clear that all consumers' expenses resulted from violations of the CPA, "the Division did not have to show customer reliance to order restitution."¹¹⁷ The court did not mention a procedure associated with restitution.¹¹⁸

4. *Consumer Protection Division v. Morgan*¹¹⁹

In 2005, the Court of Appeals reaffirmed the need for a procedure to address individual claims and emphasized the unlikelihood of an appropriate general order of restitution.¹²⁰ Although the court had not had the opportunity to review *B&S Marketing*, less than two years later, the court had—and seized—the opportunity to address these issues in *Consumer Protection Division v. Morgan*.¹²¹ The case involved a complex scheme through which a property-investor, a mortgage lender and two appraisers enticed "unsophisticated, first-time homebuyers" to purchase homes with only \$1,000 down.¹²² The defendants in the administrative hearing had advertised on television, through the mail, and in newspapers.¹²³ They falsified documents, altered prices without informing the buyers, and deceived customers at various points in the home buying process, among other unfair and deceptive trade practices.¹²⁴ As a result of their collaborative efforts, they sold 48 homes to customers who otherwise might not

113. *Id.* at 139-41, 835 A.2d at 220-21.

114. *Id.* at 142-44, 835 A.2d at 222-23.

115. *Id.* at 146-48, 835 A.2d at 225-26.

Adopting what it called a "middle course," the Division only required appellants to pay as restitution to former customers the "net monetary gain" appellants received from violating the Consumer Protection Act Although that approach was less drastic than other alternatives, it had the desirable and lawful effect of preventing appellants from being unjustly enriched by their wrongful conduct.

Id. at 169, 835 A.2d at 238.

116. *Id.* at 150, 171, 835 A.2d at 227, 239.

117. *Id.* at 169, 835 A.2d at 238.

118. *See generally B&S Mktg.*, 153 Md. App. 130, 835 A.2d 215.

119. 387 Md. 125, 874 A.2d 919 (2005).

120. *Id.* at 165-66, 874 A.2d at 942-43.

121. *Id.*

122. *Id.* at 140, 150, 874 A.2d at 927, 934.

123. *Id.* at 150, 874 A.2d at 933.

124. *Id.* at 150-54, 874 A.2d at 933-36.

have been able to purchase homes.¹²⁵ As a further result, many of the customers defaulted on their mortgages, which they could not actually afford.¹²⁶ One of the lenders had an early default claim rate “236% higher than the average rate of other comparable lenders in Baltimore.”¹²⁷

The CPD issued a cease and desist order, a restitution order, and assessed civil penalties,¹²⁸ but the Court of Appeals vacated the restitution order as inadequate.¹²⁹ The Court of Appeals held that the CPD “can issue a general order of restitution without proving an individual consumer’s reliance, but may not award restitution to the individual consumer without a showing of individual reliance.”¹³⁰ By quoting its *Consumer Publishing* holding, the court renewed its belief that proof of individual reliance is necessary because “[s]ome . . . consumers may not want refunds.”¹³¹ The court held that such restitution orders (accompanied by procedures) could only be issued in situations involving “similarly situated individuals.”¹³²

In *Morgan*, the court increased the level of required proof of individual reliance for some circumstances by holding that statements of reliance were not enough; the consumers had to testify.¹³³ Thus, whether restitution necessitates consumer testimony must be decided on a case by case basis.¹³⁴ The CPD argued against additional testimony,¹³⁵ or other proof of reliance, on the premise that reliance was inherent.¹³⁶ The court rejected the

125. *Id.* at 140, 874 A.2d at 927-28.

126. *Id.* at 152, 874 A.2d at 934.

127. *Id.* at 153, 874 A.2d at 935.

128. *Id.* at 155, 874 A.2d at 936-37.

129. *Id.* at 167, 874 A.2d at 944. The CPD had the possibility of awarding restitution at a later date through a procedure involving testimony to prove individual reliance. *Id.* at 168, 874 A.2d at 944.

130. *Id.* at 166, 874 A.2d at 943.

131. *Id.* (quoting *Consumer Prot. Div. v. Consumer Publ’g Co.*, 304 Md. 731, 781, 501 A.2d 48, 74 (1985)).

132. *Id.* at 165, 874 A.2d at 943.

133. *Id.* at 162, 874 A.2d at 941.

134. *Id.* (“Consumer testimony . . . is not necessarily required to prove reliance for restitution. Whether consumer testimony is required to support a specific restitution order depends on the facts and circumstances of each case.”). *Contra* *Consumer Prot. Div. v. Consumer Publ’g Co.*, 304 Md. 731, 770-71, 776, 501 A.2d 48, 68-69 (1985) (“The Federal Trade Commission has consistently analyzed only the advertisements themselves, without requiring testimony by consumers [T]he Consumer Protection Division also has the expertise necessary to make that determination without testimony by consumers or consumer experts.”).

135. The administrative hearings already involved testimony from seventeen consumers and others, over the course of eighteen days. *Morgan*, 387 Md. at 149, 874 A.2d at 933.

136. *Id.* at 166-67, 874 A.2d at 943.

[T]he consumers could not have obtained the FHA-insured mortgages without the appraisers, sellers, and lenders’ misrepresentations

CPD's argument "because some consumers could have been complicit or willing purchasers."¹³⁷ Some knew of the misrepresentations or might have accepted the inflated prices simply for the opportunity to purchase a home.¹³⁸

III. ANALYSIS

A. *The Current Status of Restitution Orders at Maryland Common Law*

Following *Morgan*, consumers may find themselves without easy remedies and the CPD may find itself without effective measures to take against businesses that violate the CPA.¹³⁹ The CPD is the expert in these matters,¹⁴⁰ and the expert consistently ordered restitution in the aforementioned cases.¹⁴¹ Yet the courts held the restitution orders inadequate in two of the four cases.¹⁴² The courts should give the Division the deference the General Assembly intended it to receive.¹⁴³

So that the consumer protection process may maintain its efficiency and effectiveness, *Morgan* must be held to its facts.¹⁴⁴ Perhaps the Court of Appeals will reconsider the effects of its holding when it next considers a restitution order for a consumer protection action. In the meantime, the lower courts have little recourse to avoid the required procedure entailing consumer action prior to receipt of restitution, but they can limit it as much as

Similarly, the purchasers would not have been able to obtain the mortgages necessary for the property sale had [defendant] Shpritz not made illegal payments to the consumers and misrepresented the consumers' financial situation and had [defendants] American Skycorp and Woody not approved the mortgages.

Id.

137. *Id.* at 167, 874 A.2d at 943.

138. *Id.* at 167, 874 A.2d at 943-44.

139. *See infra* notes 147-150 and accompanying text.

140. *See Morgan*, 387 Md. at 149, 874 A.2d at 933; *Consumer Prot. Div. v. Consumer Publ'g Co.*, 304 Md. 731, 747, 771, 501 A.2d 48, 56-57, 69 (1985) (CPD has expertise to determine deceptiveness of advertisements; CPD determines appropriate remedy for CPA violations; the courts should not perform CPD's role).

141. *See Morgan*, 387 Md. at 155, 874 A.2d at 936-37; *Luskin's, Inc. v. Consumer Prot. Div.*, 353 Md. 335, 382-83, 726 A.2d 702, 725 (1999); *Consumer Publ'g*, 304 Md. at 775-76, 501 A.2d at 71; *B&S Mktg. Enters., LLC v. Consumer Prot. Div.*, 153 Md. App. 130, 148, 835 A.2d 215, 226 (2003).

142. *See Morgan*, 387 Md. at 167, 874 A.2d at 944 (order inadequate); *Luskin's*, 353 Md. at 385, 726 A.2d at 726; *Consumer Publ'g*, 304 Md. at 775-76, 501 A.2d at 71 (order inadequate); *B&S Mktg.*, 153 Md. App. at 170-71, 835 A.2d at 239.

143. *See supra* note 140.

144. *See infra* notes 147-150 and accompanying text.

possible.¹⁴⁵ *Morgan* presented a rare scenario in which consumers might have knowingly violated statutory law through their interactions with the defendants.¹⁴⁶ In most consumer protection actions, consumer violations should not be a factor. Therefore, consumer testimony typically should not be necessary and consumer proof of reliance should be no more than a statement to that effect.

The courts should limit requirements for individual consumer statements, thereby lowering the bar for general restitution orders, so that the procedure for restitution furthers the legislative intent rather than thwarting it. If the CPD issues restitution orders in compliance with the *Morgan* holding, the violator will not have to provide any restitution to individual consumers until and unless the consumers take action to demonstrate reliance.¹⁴⁷ Even though that consumer action may be nothing more than writing a letter, it may be enough to deter some consumers from pursuing the remedy.¹⁴⁸ In cases of minimal harm to individual consumers, the consumers may not find the action worth their while.¹⁴⁹ In cases of more significant harm, consumers may not hear of the remedy or may not understand their role.¹⁵⁰ The General Assembly designed the CPA to protect all levels of consumers.¹⁵¹ To protect educated and uneducated, motivated and unmotivated, gullible and skeptical consumers, the courts should not create hurdles when the consumers have already suffered loss. Making it harder for consumers to access restitution increases the likelihood that the money remains with the violator and the consumers do not receive refunds.¹⁵² Such results are contrary to the General Assembly's intent.¹⁵³

The Maryland courts should consider the purpose behind the introduction of procedures for restitution orders and uphold the law accordingly. The *Consumer Publishing* holding was issued over

145. AMY E. SLOAN, BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES 5 (Aspen Publishers 2d ed. 2003) (“[L]ower courts are required to follow decisions from higher courts in the same jurisdiction.”).

146. *Morgan*, 387 Md. at 167, 874 A.2d at 943-44.

147. *See id.* at 163-64, 874 A.2d at 941-42.

148. *Consumer Prot. Div. v. Consumer Publ’g Co.*, 304 Md. 731, 758, 501 A.2d 48, 62 (1985).

149. *Id.* at 758, 501 A.2d at 62; *see Fletcher v. Sec. Pac. Nat’l Bank*, 591 P.2d 51, 54 (Cal. 1979).

150. *See Fletcher*, 591 P.2d at 54 (the “lack of awareness of legal rights on the part of most borrowers” contributes to the impracticality of individual actions).

151. *See McGraw v. Loyola Ford, Inc.*, 124 Md. App. 560, 579, 723 A.2d 502, 511 (1999) (construing MD. CODE ANN., COM. LAW § 13-301 to protect “ordinary consumers” as a broader group than those protected under the FTCA).

152. *See Consumer Prot. Div. v. Morgan*, 387 Md. 125, 165-66, 874 A.2d 919, 942-43 (no general order when individuals not similarly situated; no specific order without consumer statement).

153. *See MD. CODE ANN., COM. LAW § 13-102(b)(3)* (2005).

twenty years ago as a restatement of common law in other jurisdictions, such as Idaho.¹⁵⁴ Idaho's purpose in consumer protection law, like Maryland's, involved efficiency and fairness.¹⁵⁵ To that end, Maryland courts should not add extra steps to the restitution process when they are not necessary, nor should Maryland courts allow violators to keep their ill-gotten gains.¹⁵⁶ Individual consumer claims contradict the purpose of allowing the CPD to bring a suit on behalf of multiple consumers by reintroducing multiple claims for the same wrong.¹⁵⁷ Where a discrete group of consumers suffered loss due to a violation such that their reliance is inherent in the transaction and the offender's profit is determinable, the CPD should be able to deliver restitution without the step of receiving individual claims from consumers.¹⁵⁸

Consumer interest should not be a factor when the case does not involve restoration, but the Maryland Court of Appeals set the precedent that general orders are inappropriate when some consumers might not want restitution.¹⁵⁹ The Louisiana courts also consider the consumer's interest in restitution: "Whether or not a consumer is entitled to restitution is dependent upon proof whether he was, in fact, aggrieved, the extent to which he was aggrieved or, indeed, *whether he desires restitution . . .*"¹⁶⁰ Under traditional rules for restitution, where restoration—returning the product to the deceitful seller—accompanies restitution, a consumer might not want a refund because the consumer might not want to return the product.¹⁶¹ However, under the CPA, restoration is not always a part of restitution.¹⁶² None of the aforementioned cases involved restoration.¹⁶³ Thus, it is only a question of whether individual consumers want to receive money.¹⁶⁴ Some might appreciate the product they receive, despite

154. *Consumer Prot. Div. v. Consumer Publ'g Co.*, 304 Md. 731, 780-81, 501 A.2d 48, 72-74 (1985).

155. *See supra* note 154 and accompanying text. *See generally* *State v. Andrews*, 73 Md. App. 80, 85, 533 A.2d 282, 285 (1987) (purpose of public action is to reduce time involved in litigation and make recovery accessible to more consumers).

156. *See generally supra* note 154 and accompanying text.

157. *See Andrews*, 73 Md. App. at 85, 533 A.2d at 285.

158. *See B&S Mktg. Enters., LLC v. Consumer Prot. Div.*, 153 Md. App. 130, 169 n.15, 835 A.2d 215, 238 n.15 (2003).

159. *See Consumer Publ'g*, 304 Md. at 781, 501 A.2d at 74, *quoted in* *Consumer Prot. Div. v. Morgan*, 387 Md. 125, 166, 874 A.2d 919, 943 (2005).

160. *State ex rel. Guste v. Gen. Motors Corp.*, 354 So. 2d 770, 776 (La. Ct. App. 1978) (emphasis added).

161. *See Wade & Kamenshine, supra* note 26, at 1041.

162. *See Luskin's, Inc. v. Consumer Prot. Div.*, 353 Md. 335, 386, 726 A.2d 702, 727 (1999) (no restoration when impractical).

163. *See generally Morgan*, 387 Md. 125, 874 A.2d 919; *Luskin's*, 353 Md. 335, 726 A.2d 702; *Consumer Publ'g*, 304 Md. 731, 501 A.2d 48; *B&S Mktg.*, 153 Md. App. 130, 835 A.2d 215.

164. *See generally supra* note 163 and accompanying text.

the evidence of misrepresentation or fraud, but that is not a reason to deprive them of a refund. To the contrary, a consumer's continued belief in a product or service that either is ineffective or detrimental to the consumer indicates the need for acts such as the CPA that protect such consumers.¹⁶⁵ Whether the consumer believes in the product is irrelevant; the facts prove that the consumer deserves a refund.¹⁶⁶ Furthermore, it is hard to conceive of the circumstances in which a consumer, content or not with his or her purchase, would object to a refund.

B. Legislative Reform

In the interest of efficiency, effectiveness, and eliminating the roadblock placed by *Morgan*, the General Assembly should consider additional provisions for the CPA. Actions that the CPD bring could be divided into two categories: those involving discrete consumer groups where reliance is evident without proof, and those involving a less-defined set of victims.¹⁶⁷ Each category needs a different form of legislative protection.

1. Restitution without Consumer Action

The first provision should allow restitution without consumer action for discrete consumer groups where reliance is evident without proof.¹⁶⁸ The question of whether consumers want a refund should not be considered.¹⁶⁹ Consumers who did not want the refund could mail it back.¹⁷⁰ Consequently, the statute would supersede *Morgan*, except as it applies to situations where

165. See CHARLES B. SHAFER, MARYLAND CONSUMER LAW: SALES, LEASES AND FINANCING 130-31 (MICPEL 2006) (complicit purchasers in *Morgan* should not be penalized for falling for a scheme they did not initiate).

166. Consider *Consumer Publishing*: The CPD and the court required disclosure that the pills did not do most, if not all, of what they claimed to do and would not work at all without dieting. 304 Md. at 739-40, 501 A.2d at 52-53. Yet consumers who reordered did not receive refunds because reordering indicated satisfaction with what might be little more than a placebo and coincidental weight loss. See *id.* at 775-76, 501 A.2d at 71. Gullible consumers should not be punished for their credulousness. See SHAFER, *supra* note 165, at 131.

167. The victims might be less defined either because they are unknown or because not all should receive refunds, such as was the case in *Morgan*. See *Morgan*, 387 Md. at 167, 874 A.2d at 943-44.

168. See discussion *supra* Part III(A).

169. See discussion *supra* Part III(A).

170. Consumers could also decide to spend their refunds on other consumer products, as a good number would probably choose to do. Thus, it is not only the consumers who would benefit from this reform but also other businesses. Those businesses that did not violate the Act and therefore could receive customer orders would be the ultimate recipients of a percentage of the disgorged funds. In effect, they would be rewarded for their compliance and consumers would benefit from the redirection to honest businesses and the perhaps more reliable products the honest businesses sold.

consumers might have been involved in the scheme.¹⁷¹ The statute would eliminate the required procedure for processing individual claims to the extent that it required consumers to write in, stating their reliance and requesting their restitution.¹⁷² This provision would further the legislative intent of protecting the customers and doing so efficiently.¹⁷³

The General Assembly could amend the Commercial Law Article of the Annotated Code of Maryland, section 13-403, with the addition of the following italicized words to subsection (b)(1):

(b)(1)(i) If, at the conclusion of the hearing, the Division determines on the preponderance of evidence that the alleged violator violated this title, the Division shall state its findings and issue an order requiring the violator to cease and desist from the violation and to take affirmative action, including the restitution of money or property

....

(iv) Restitution shall be made without consumer action when reliance is evident from the transaction. Consumer interest in restitution shall not be a factor unless restitution involves restoration of money or property to the alleged violator.

Section 13-402, regarding conciliation procedures, could include the same language in subsection (b)(1), as suggested in italics:

(b)(1) A written assurance of discontinuance or a settlement agreement may include a stipulation or condition for the violator or alleged violator to:

...

(ii) Make restitution to the consumer of money, property, or any other thing received from the consumer in connection with a violation or alleged violation of this title. *Restitution shall be made without consumer action when reliance is evident from the transaction. Consumer interest in restitution shall not be a factor unless restitution*

171. See *supra* notes 135-138. However, the courts should assess consumer involvement to see whether their involvement should disqualify them. See *supra* note 165.

172. See *supra* note 91 and accompanying text.

173. See MD. CODE ANN., COM. LAW § 13-102(b)(3) (2005); see *supra* notes 155-157 and accompanying text.

involves restoration of money or property to the alleged violator.

With such language in place, consumers would more frequently receive their refunds and violators would not be able to retain their profits simply due to lack of consumer action.¹⁷⁴ The process would be quicker and cheaper without the steps involved in individual claims.¹⁷⁵ Yet, when appropriate, the courts could follow their current protocol.¹⁷⁶ The overall result would be a more effective implementation of the CPA.

2. Fluid Recovery

The second provision should allow fluid recovery as a remedy when restitution is inappropriate without consumer action. Fluid recovery, also called *cy pres* distribution,¹⁷⁷ “is a means of putting unclaimed class funds to their ‘next best use,’ [which] usually takes the form of a consumer trust fund or an across-the-board price reduction for a defendant’s product until the ill-gotten gains are disgorged.”¹⁷⁸ It would help fully accomplish the purpose of the Act¹⁷⁹ by disgorging the offending businesses, even when the courts cannot identify or locate the wronged consumers or the consumers cannot (or simply do not) prove reliance.¹⁸⁰ Fluid recovery would also be useful in cases involving “individual damages . . . so small that notification and distribution costs exceed the recoverable amount or reduce it to a pittance.”¹⁸¹ The remedy should only apply when disgorgement is appropriate yet the courts cannot distribute the funds to the consumers,¹⁸² either for the

174. See discussion *supra* Part III(A).

175. See discussion *supra* Part III(A).

176. See *supra* notes 91, 135-138, 172 and accompanying text.

177. See *Cicelski v. Sears, Roebuck & Co.*, 348 N.W.2d 685, 689 (Mich. App. 1984); see also *Madrid v. Perot Sys. Corp.*, 30 Cal. Rptr. 3d 210, 225 n.8 (Cal. Ct. App. 2005) (“‘Fluid recovery’ refers to the application of the equitable doctrine of *cyprès* (putting charitable trust funds to the next best use if the trust purpose can no longer be accomplished) in the context of a modern class action.”) (citing *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718 (Cal. 2000)).

178. Stan Karas, Note, *The Role of Fluid Recovery in Consumer Protection Litigation: Kraus v. Trinity Management Services*, 90 CAL. L. REV. 959, 961-62 (2002) (citing Natalie A. DeJarlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729, 730, 753-55, 759-65 (1987)).

179. See MD. CODE ANN., COM. LAW § 13-102(b)(3) (2005).

180. See *Simer v. Rios*, 661 F.2d 655, 675 (7th Cir. 1981).

181. DeJarlais, *supra* note 178, at 730 (citing *State v. Levi Strauss & Co.*, 715 P.2d 564, 565 (1986) (“35 to 40 cent recovery per pair of jeans, with an average individual recovery of \$2.60-\$3.00”)); *Cartt v. Superior Court*, 124 Cal. Rptr. 376, 385 (Cal. Ct. App. 1975) (stating that damages to individual consumers misled by defendant’s advertising were “trifling”).

182. *Madrid*, 30 Cal. Rptr. 3d at 225 n.8 (quoting *Kraus*, 999 P.2d at 725).

aforementioned reasons or because the consumers conspired with the business in violating the Act.¹⁸³

Fluid recovery in consumer protection actions is a logical progression from the current practices in Maryland and other states.¹⁸⁴ In *Morgan*, the court noted that the Division's Final Order mentioned that "it is possible that a person other than the consumer, such as the FHA, might be the appropriate recipient of some of the restitution."¹⁸⁵ The court's reference to this language shows that the Division considers—and the court approves of—restitution as a means of prohibiting the violator from profiting, even when the profit is not restored to the consumers.¹⁸⁶ The Act already provides for the Division to "[a]ssist, develop, and conduct programs of consumer education and information through publications and other materials prepared for distribution to consumers,"¹⁸⁷ an area that could benefit from fluid recovery fund money.¹⁸⁸ In Illinois, the Appellate Court concluded that fluid recovery was appropriate for an action brought under Illinois's Consumer Fraud Act:

Plaintiffs allege, *inter alia*, that defendants violated the Consumer Fraud Act. "The Act is a regulatory and remedial enactment intended to curb a variety of fraudulent abuses and to provide a remedy to individuals injured by them." Section 11a of the Act provides that "[the] Act be liberally construed to effect the purposes thereof." It is quite established that "[t]he provision is a clear mandate from the Illinois legislature that our courts utilize the Act to the utmost degree in eradicating all forms of deceptive and unfair business practices and grant appropriate remedies to injured parties." This legislative intent and mandate necessarily include policies of deterrence, disgorgement, and compensation. Thus, we hold that fluid recovery is available in at least the claim brought under the Consumer Fraud Act.¹⁸⁹

The Maryland courts similarly construed the CPA to grant the Division "broad authority to construct the roadblock necessary to

183. See, e.g., *Consumer Prot. Div. v. Morgan*, 387 Md. 125, 874 A.2d 919 (2005).

184. See *infra* notes 185-92 and accompanying text.

185. *Morgan*, 387 Md. at 168 n.24, 874 A.2d at 944 n.24.

186. See generally *id.*

187. MD. CODE ANN., COM. LAW § 13-204(8), (2005).

188. See *infra* notes 189-190 and accompanying text.

189. *Gordon v. Boden*, 586 N.E.2d 461, 468 (Ill. App. Ct. 1991) (citations omitted).

'close all roads to the prohibited goal,' [albeit] within the confines of the statutory authorization."¹⁹⁰

Furthermore, other states and the federal courts recognize and employ fluid recovery in class actions.¹⁹¹ Fluid recovery is

being used or advocated increasingly where direct distribution of settlement funds to individual class members is impractical; and where important consumer goals, such as disgorgement of ill-gotten gains from and deterrence of future over-pricing and manipulation of market allocation by the offending entities, can be achieved.¹⁹²

Such situations present themselves in the first part of restitution as a remedy in CPD-initiated actions in Maryland.¹⁹³ A California Law Review article noted the similarity between class actions and actions brought under consumer protection laws, suggesting the applicability of fluid recovery to consumer protection actions.¹⁹⁴

Fluid recovery is appropriate as a remedy when the CPD brings a suit, and the Maryland legislature should codify it as a part of the CPA.¹⁹⁵ Courts have noted that fluid recovery should not apply in all circumstances, but rather when its application "is consistent with the policy or policies reflected by the statute violated."¹⁹⁶ Courts should consider "to what extent the statute embodies policies of deterrence, disgorgement, and compensation."¹⁹⁷ The

190. *Consumer Prot. Div. v. George*, 383 Md. 505, 521, 860 A.2d 896, 905 (2004).

191. *See, e.g., Simer v. Rios*, 661 F.2d 655, 675 (7th Cir. 1981); *Madrid v. Perot Sys. Corp.*, 30 Cal. Rptr. 3d 210, 225 n.8 (Cal. Ct. App. 2005); *Boyle v. Giral*, 820 A.2d 561, 569-70 (D.C. 2003); *Miles v. Philip Morris Cos.*, No. 00L0112, 2001 WL 34366710, at *2 (Ill. Cir. Feb. 1, 2001); *Cicelski v. Sears, Roebuck & Co.*, 348 N.W.2d 685, 691-92 (Mich. Ct. App. 1984); *Buchholz Mortuaries, Inc. v. Dir. of Revenue*, 113 S.W.3d 192, 195-96 n.1 (Mo. 2003) (en banc) (Wolff, J., concurring); *Muise v. GPU, Inc.*, 851 A.2d 799, 823 (N.J. Super. Ct. App. Div. 2004); *Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc.*, 623 N.W.2d 424, 429 (N.D. 2001) (citing N.D. R. Civ. P. 23(o)); *see also Dallas County Cmty. Coll. Dist. v. Bolton*, 89 S.W.3d 707, 722 (Tex. App. 2002) (fluid recovery not held unlawful by Texas courts).

192. *Boyle*, 820 A.2d at 569-70 (citing *New York v. Reebok Int'l Ltd.*, 96 F.3d 44 (2d Cir. 1996); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir. 1987); *New York v. Keds Corp.*, No. 93 CIV 6798, 1994 WL 97201 (S.D.N.Y. Mar. 21, 1994) (footnote and citation omitted).

193. *See discussion supra* Part II(B).

194. *Karas, supra* note 178, at 962 ("Although representative actions under the UCL [which is California's consumer protection statute] are not class actions, they provide plaintiffs with many of the benefits of class actions without imposing some of the burdensome legal requirements of that device, such as those related to standing, notice, and class certification.").

195. The scope of this Comment does not reach the question of whether fluid recovery should apply to class actions.

196. *Simer*, 661 F.2d at 676 (quoted in *Cicelski*, 348 N.W.2d at 690-91) (footnotes omitted).

197. *Id.* (quoted in *Cicelski*, 348 N.W.2d at 691) (footnotes omitted).

objectives of Maryland's CPA are to discourage future violations and to protect consumers, and restitution already exists as a statutory remedy elsewhere in the Maryland Commercial Code.¹⁹⁸ Therefore, fluid recovery is an appropriate remedy under the Maryland CPA.

With fluid recovery, the required proof of reliance would still stand between consumers and the recovery of any losses, but the proof would not hinder disgorgement of the offending businesses.¹⁹⁹ Fluid recovery provides a procedure for handling proof of damages through an administrative claims process rather than prolonged litigation.²⁰⁰ First, the court orders the disgorgement of the violator and establishes a fund for the money.²⁰¹ Second, wronged consumers make individual claims and receive refunds upon proof of reliance,²⁰² as provided for in *Morgan*.²⁰³ Alternatively, the violator might first provide restitution to all consumers who submit claims and then the violator would remit the remainder of his or her profits to create the fund.²⁰⁴ Third, "[t]he remainder of the fund is: (1) distributed through the market, usually in the form of reduced charges, or (2) used to fund a project which will likely benefit class members."²⁰⁵ Examples of uses include "nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives of the underlying lawsuit."²⁰⁶

Codifying fluid recovery under the CPA would provide an appropriate use for the money obtained from disgorging the offending business.²⁰⁷ As explained in a California Court of Appeals decision:

198. See MD. CODE ANN., COM. LAW §§ 13-102(b)(3), 13-402(b)(1)(ii), 13-403(b)(1)(i), 13-406 (2005).

199. Cf. *supra* note 152 and accompanying text.

200. See *Miles v. Philip Morris Cos.*, No. 00L0112, 2001 WL 34366710, at *2 (Ill. Cir. Feb. 1, 2001).

201. See *Cicelski*, 348 N.W.2d at 689. The federal legislature has codified federal trust funds for similar circumstances involving individuals whom the court cannot locate. See *Wade & Kamenshine*, *supra* note 26, at 1056 (quoting 31 U.S.C. § 725p (1964) and citing 28 U.S.C. § 2042 (2001)). "Thus, 'the United States has no beneficial interest . . . but holds the money as a statutory trustee for the rightful owners when and if they are determined by the court.'" *Id.* (quoting *In re Moneys Deposited Etc.*, 243 F.2d 443 (3d Cir. 1957)).

202. See *Cicelski*, 348 N.W.2d at 689.

203. See *supra* note 130 and accompanying text.

204. See CAL. CIV. PROC. CODE § 384 (West 2004). In either version, the consumers should submit claims by a court-proclaimed deadline so that it is clear what money remains for distribution in Step 3.

205. *Gordon v. Boden*, 586 N.E.2d 461, 467 (Ill. App. Ct. 1991).

206. *Madrid v. Perot Sys. Corp.*, 30 Cal. Rptr. 3d 210, 225 n.8 (Cal. Ct. App. 2005).

207. See *infra* notes 208-210 and accompanying text.

The theory underlying fluid class recovery is that since each class member cannot be compensated exactly for the damage he or she suffered, the best alternative is to pay damages in a way that benefits as many of the class members as possible and in the approximate proportion that each member has been damaged, even though some class members may not receive compensation and some non-class-members will benefit from the distribution.²⁰⁸

That way, the second part of restitution, involving refunds, would not present a roadblock to the first part, involving disgorgement.²⁰⁹ The court could provide “the next best use”²¹⁰ of the money after a direct refund to individual consumers, and the violator would not be able to retain the ill-gotten goods.²¹¹

The General Assembly could amend the Commercial Law Article of the Annotated Code of Maryland, section 13-406, to include another available remedy, and the General Assembly could add a section codifying fluid recovery under the CPA. For section 13-406, the General Assembly could augment subsection (c) as follows in italics:

(c) The court may enter any order of judgment necessary to:

...

(4) Disgorge from a person any money or real or personal property acquired by him by means of any prohibited practice.

The General Assembly could then codify fluid recovery as follows:

Collection and Distribution of Restitution in Actions Brought by the Consumer Protection Division²¹²

(a) This section applies only to actions brought by the Consumer Protection Division.

(b) Prior to the entry of any restitution order, the court shall determine the total amount that the party found in violation of the Act must surrender. The court shall also set a date when the parties shall

208. *Madrid*, 30 Cal. Rptr. 3d at 225 n.8 (citing *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 726 (Cal. 2000)).

209. See discussion *supra* Part II(B).

210. See *Kraus*, 999 P.2d at 726.

211. See *supra* notes 201, 204.

212. Language adapted in part from CAL. CIV. PROC. CODE § 384 (West 2004).

report to the court the total amount that the defendant actually paid to the affected consumers as per the restitution order. After receiving the report, the court²¹³ shall amend the judgment to direct the defendant to pay the remainder of the restitution, plus interest on that sum at the legal rate of interest from the date of entry of the initial judgment, according to a distribution schedule that the court shall provide with the amended judgment, to a combination of one or more of the following entities:

- (i) nonprofit organizations or foundations to support projects that will benefit the consumers or similarly situated persons,
- (ii) nonprofit organizations or foundations that promote the law consistent with the objectives and purposes of the underlying cause of action,
- (iii) child advocacy programs, or
- (iv) nonprofit organizations providing civil legal services to the indigent.

The court shall ensure that the distribution of any unpaid residual derived from cases brought under Maryland law, against out-of-state defendants, shall provide substantial or commensurate benefit to Maryland consumers.

IV. CONCLUSION

Restitution orders should help defrauded consumers and “deter unscrupulous businessmen from pursuing new schemes.”²¹⁴ Holding *Morgan* to its facts will allow restitution to reach more consumers; overturning *Morgan* on this issue would do so more effectively.²¹⁵ Legislative reform also can help the CPD realize the purpose of the Act.²¹⁶ Eliminating the need for individual proof of reliance where reliance is inherent in the violation and the consumers form a discrete group will provide better consumer

213. This proposed language does not provide for the other means of fluid recovery (mandatory reduction of the defendant's prices) because such reduction might attract new customers to the defendant, thereby indirectly benefitting the defendant. *But see* DeJarlais, *supra* note 178, at 753 (“This solution is useful because the benefits of lower prices are bestowed on a similar, although ‘fluid’ class of plaintiffs.”).

214. Wade & Kamenshine, *supra* note 26, at 1050.

215. See discussion *supra* Part III(A).

216. See discussion *supra* Part III(B).

protection and enhanced efficiency.²¹⁷ Adding fluid recovery will further discourage businesses from future violations by making it unlikely that a business could retain its wrongful gains.²¹⁸ As a result, the CPA will work more effectively.²¹⁹

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217. See discussion *supra* Part III(B)(1).

218. See discussion *supra* Part III(B)(2).

219. See discussion *supra* Part III.