

**FEDERAL TRADE COMMISSION
BUREAU OF CONSUMER PROTECTION
WASHINGTON, D.C.**

RE: Competition and Consumer Protection)
in the 21st Century Hearings; Project)
Number P181201; Topic 11: The Agency's)
Investigation, Enforcement and Remedial)
Processes;)
)
)

ATTORNEY GENERAL OF ARIZONA COMMENT

The Office of the Arizona Attorney General is the chief consumer protection agency in the State of Arizona, with power to enforce Arizona's consumer protection statute, A.R.S. § 44-1521, *et seq.* Like the Federal Trade Commission, the Arizona Attorney General's Office has broad enforcement and remedial authority as part of its consumer protection mandate. *See* A.R.S. §§ 44-1524; 44-1526 – 44-1528; 44-1531 – 44-1534.

In view of the shared mandate and similar authority of the two agencies, and the request for comment on the Commission's investigation, enforcement and remedial processes, Arizona Attorney General Mark Brnovich wishes to take this opportunity to commend the Commission for its increased effectiveness in delivering restitution to consumers in the course of enforcing federal unfair, deceptive and abusive practices laws. My office strongly believes that the most important type of relief in consumer enforcement actions is quickly delivering complete restitution to harmed consumers wherever possible. This comment, however, also provides feedback based on a concern that the Commission's use of suspended judgments against wrongdoers may not always serve this important aim.

I. Arizona’s Experience with the Consumer Restitution-Focused Model.

Delivering restitution to consumers has long been recognized as a touchstone of a “good consumer fraud program.”¹ Restitution is especially important for vulnerable consumers with lesser earning capacities, limited resources or fixed incomes, such as the uneducated, the poor or the elderly, for whom private legal representation is impractical and to whom even “small-dollar” losses can have a devastating impact.² For these reasons, the Commission has properly called restitution “the chief mechanism for ensuring that injured consumers are made whole.”³ In the same spirit, since at least January of 2015, the Office of the Arizona Attorney General has adopted an enforcement focus of quickly delivering restitution to harmed consumers, as well as protecting consumers from future harm. Several recent cases highlight this focus:

- One of the highest-profile results obtained for consumers by the Office was a \$4.65 million settlement with Theranos, the blood testing company. In that action, the Arizona Attorney General’s Office ensured full reimbursement of all amounts Arizonans paid out of pocket for Theranos blood tests between 2013 and 2016.⁴
- The Office obtained a \$1.85 million verdict after a five-week trial against a local car rental operation that charged consumers unlawful fees.⁵ Nearly \$1 million of the award consists of consumer restitution.
- The Office entered a consent judgment with automaker General Motors following state court litigation, in which \$6.28 million is available for Arizona consumers.⁶ Notably, although every state settled with General Motors, Arizona was the *only* state to provide restitution to the consumers who purchased the defective vehicles.

¹ Eric H. Steele, *Fraud, Dispute, and the Consumer: Responding to Consumer Complaints*, 123 U. Pa. L. Rev. 1107, 1186 (1975) (citing National Association of Attorneys General, Committee on the Office of Attorney General, Report on the Office of Attorney General 411 (Feb. 1971)).

² Terrie Lewis, *Fifty Ways to Exploit Your Grandmother: The Status of Financial Abuse of the Elderly in Minnesota*, 28 Wm. Mitchell L. Rev. 911, 948–50 (2001)

³ Jean Noonan, *Federal Trade Commission Developments in Consumer Financial Services*, 46 Bus. Law. 1093, 1094 (1991).

⁴ See <https://www.azag.gov/theranos>.

⁵ \$1.85 Million Verdict Against Car Rental Company for Defrauding AZ Consumers (February 14, 2018), available at <https://www.azag.gov/press-release/185-million-verdict-against-car-rental-company-defrauding-az-consumers>.

⁶ AG Brnovich Obtains \$6.28 Million for Arizonans Who Purchased Recalled GM Vehicles, Arizona Attorney General Press Release (March 7, 2018), available at <https://www.azag.gov/press-release/ag-brnovich-obtains-628-million-arizonans-who-purchased-recalled-gm-vehicles>.

- Only a few months ago, the Office secured a \$40 million settlement over Volkswagen’s marketing of “clean diesel” vehicles, of which \$10.5 million is directed to consumer restitution.⁷ Once again, although other states settled with Volkswagen, Arizona was the first state to obtain direct consumer restitution as part of its settlement.

II. The Commission Should Be Commended for Focusing on Consumer Restitution.

The nearly exponential success rate of the Commission’s enforcement efforts proves it is on the right track when it comes to restitution. In 2016, the Commission obtained substantial refunds for consumers in 12 cases; and, in 2017, refunds were secured in 18 cases—a 50% increase. Even more impressively, with five months left in 2018, the Commission had already announced **25** cases in which consumers will receive restitution.⁸ But the Commission’s restitution successes are revealed in more than the numbers of settlements or judgments.

Between July 1, 2016 and June 30, 2017, the Commission secured more than \$6.4 billion in refunds for consumers.⁹ Volkswagen, for example, was persuaded to take responsibility for its “clean diesel” emission misrepresentations by paying a settlement involving approximately \$6 billion in restitution. Uber, similarly, was persuaded to pay nearly \$20 million in restitution to drivers who were misled by false promotional claims.¹⁰ These resolutions were huge restitution wins for consumers. The resolutions also sent a powerful signal on deterrence, without being death sentences for companies that were capable of rehabilitation, and which have much more yet to contribute to the national and world economies. Other recent examples of consumer restitution wins by the Commission have notably included:

⁷ AG Brnovich Secures \$40 Million Volkswagen Consumer Fraud Settlement (May 2, 2018), available at <https://www.azag.gov/press-release/ag-brnovich-secures-40-million-volkswagen-consumer-fraud-settlement>.

⁸ <https://www.ftc.gov/enforcement/cases-proceedings/refunds>

⁹ <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-cases-resulted-more-64-billion-refunds-consumers-between-july>

¹⁰ <https://www.ftc.gov/news-events/press-releases/2018/07/ftc-send-refund-checks-uber-drivers-part-ftc-settlement>

- In March 2018, Allstar Marketing Group, LLC was required to mail out refund checks totaling \$7.2 million to consumers who were misled by the omission of the true costs associated with a “buy-one-get-one-free” offer;¹¹
- In July 2017, vacation packager “VGC Corp. of America” was made to refund \$532,000 to consumers who paid for expensive vacation packages they never received;¹² and
- In June 2017, Global Access Technical Support LLC was required to turn over \$1 million for restitution to victims of its negative option tech support scam.¹³

The Commission should be commended for its effectiveness in making consumers whole.

III. The Commission Should Reconsider the Extent of Its Use of Suspended Judgments.

Despite the Commission’s success in delivering restitution to consumers in many cases, the Attorney General is nevertheless concerned about the Commission’s use of suspended multi-million dollar judgments, which appear to include the suspension of any effort to recover restitution, not just civil penalties. Recent examples include:

- In July 2018, the Commission suspended a \$54 million judgment against the principal of a fraudulent business coaching scheme, apparently without any up-front or installment payment terms;¹⁴
- In June 2018, the Commission suspended a \$15.5 million judgment against the principal of a fraudulent debt relief business, apparently without any up-front or installment payment terms;¹⁵
- In January 2018, the Commission almost entirely suspended a \$12.4 million judgment against three businesses and two individuals for tricking consumers into believing their computers were infected with viruses and then charging for repairs, apparently only requiring a one-time payment of \$27,000;¹⁶ and
- In August 2017, the Commission suspended a \$6.5 million judgment against a business

¹¹ <https://www.ftc.gov/enforcement/cases-proceedings/refunds/allstar-marketing-group-refunds>

¹² <https://www.ftc.gov/news-events/press-releases/2017/07/ftc-returns-money-vacation-prize-scheme-victims>

¹³ <https://www.ftc.gov/news-events/press-releases/2017/06/operators-tech-support-scam-settle-ftc-charges>

¹⁴ <https://www.ftc.gov/news-events/press-releases/2018/07/operator-corporate-associate-business-coaching-scheme-settle-ftc>

¹⁵ <https://www.ftc.gov/news-events/press-releases/2018/06/mortgage-relief-defendant-banned-debt-relief-business-settlement>

¹⁶ <https://www.ftc.gov/news-events/press-releases/2018/01/tech-support-operators-agree-settle-charges-ftc-state-ohio>

and its owner for false and misleading free-trial offers, apparently without requiring any up-front or installment payments.¹⁷

In each case, the suspension appears to be related to the business' or individual's "inability to pay" at the time of the settlement. The Attorney General respectfully submits that the legitimacy and credibility of the Commission is not enhanced by securing massive multi-million dollar judgments that are immediately and permanently suspended, leaving wrongdoers without any future obligation to pay restitution for their fraudulent schemes.

Bad actors should have an obligation to make restitution to their victims whenever they have the resources to do so. The fact that a fraudster demonstrates an inability to pay restitution at a single point in time should not ordinarily yield a full suspension of that obligation—especially if his conduct warrants the entry of a multi-million dollar judgment. The current approach rewards bad actors who squandered their wrongful gains and locks out victims from ever getting restitution.

Instead, suspended judgments should ordinarily include a provision requiring the judgment debtor to periodically demonstrate his inability to pay. Whenever financially capable, such a judgment debtor should be required to make installment payments towards restitution until restitution is paid in full. The Attorney General urges the Commission to reconsider any policy or practice of permanently suspending the restitution portion of a consumer fraud judgment.

Conclusion

Securing restitution for consumer harm is a critically important goal of the Commission's consumer fraud program. The Commission has long recognized that fact and acted upon it to great success, including a recent rise in providing refunds to consumers. But there is always room

¹⁷ <https://www.ftc.gov/news-events/press-releases/2017/08/three-dietary-supplement-marketers-settle-ftc-maine-ag-charges>

for improvement. My Office urges the Commission to take a hard look at its approach to assessing and suspending judgments, and ensure the responsible actors are not permanently released from making restitution based solely on their inability to pay at a single point in time.

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