STATE OF MINNESOTA

IN SUPREME COURT

A17-1740

Court of Appeals

Thissen, J.
Concurring in part, dissenting in part, Anderson, J.,
Gildea, C.J.

State of Minnesota,

Appellant/cross-respondent,

vs.

Filed: November 6, 2019
Office of Appellate Courts

Minnesota School of Business, Inc. d/b/a
Minnesota School of Business, et al.,

Respondents/cross-appellants.

Keith Ellison, Attorney General, Liz Kramer, Solicitor General, Jason Pleggenkuhle, Adam Welle, Assistant Attorneys General, Saint Paul, Minnesota, for appellant/cross-respondent.

Joseph W. Anthony, Brooke D. Anthony, Mary L. Knoblauch, Anthony Ostlund Baer & Louwagie P.A., Minneapolis, Minnesota, for respondents/cross-appellants.

Mark R. Bradford, Christine E. Hinrichs, Bassford Remele, P.A., Minneapolis, Minnesota, for amicus curiae Minnesota Chamber of Commerce.

S Y L L A B U S

1. In a case brought by the Attorney General under Minn. Stat. § 8.31, subd. 3a (2018), and his *parens patriae* power, a causal nexus under the Minnesota Consumer Fraud Act between fraudulent and misleading statements and harm caused to consumers may be established without proof of direct evidence of reliance by each consumer. Evidence showing longstanding, pervasive, and widespread false statements about the nature of a

product, that those statements were made with an intent to induce reliance, and that the fraudulent statements are of the kind a consumer would be expected to rely upon under the circumstances are relevant to show that a causal nexus has been established.

2. The district court did not abuse its discretion by ordering restitution and fashioning a restitutionary remedy and claims process.

Affirmed in part, reversed in part.

O P I N I O N

THISSEN, Justice.

The Attorney General, on behalf of the State of Minnesota, sued two for-profit universities, the Minnesota School of Business, Inc. and Globe University, Inc. (the Schools), alleging that the Schools misled prospective students about the value of criminal justice degrees offered by the schools. The Attorney General invoked his *parens patriae* power and statutory authority under Minn. Stat. § 8.31, subd. 3a (2018), to pursue violations of the Minnesota Consumer Fraud Act (MCFA), Minn. Stat. § 325F.69 (2018), and the Uniform Deceptive Trade Practices Act (DTPA), Minn. Stat. § 325D.44 (2018).[1]

[1] The Attorney General also alleged that the Schools made false and misleading statements regarding the transferability of credits to other institutions, among other misrepresentations, regarding the sales team, admissions process, and statements about job placement rates. The district court concluded that the Attorney General did not prove those allegations and that determination is not challenged in this appeal. The Attorney General additionally alleged that the Schools' institutional loans violated Minnesota lending laws. We addressed the lending issue in *State v. Minnesota School of Business, Inc.*, 899 N.W.2d 467 (Minn. 2017).

The parties agree that, to prevail, the Attorney General must establish a "causal nexus" between the Schools' uncontested violations of the MCFA and the harm suffered by the students who entered the Schools' criminal justice program seeking to become police and probation officers. But the parties disagree about the showing required to prove a causal nexus. The court of appeals held that the evidence in the record supported the district court's finding that the Attorney General established a causal nexus between the Schools' wrongful conduct and the harm identified by testifying students but failed to establish a causal nexus as to nontestifying students. *State v. Minn. Sch. of Bus.*, 915 N.W.2d 903, 910–13 (Minn. App. 2018). Accordingly, we must decide what the Attorney General must show to establish a causal nexus and whether the Attorney General met that burden in this case. In addition, we must address whether the equitable restitution process ordered by the district court is proper.

We conclude that the Attorney General proved that a causal nexus was established between the Schools' fraudulent statements and the harm suffered by the students. We also hold that the district court did not abuse its discretion when it ordered the equitable restitution process. Accordingly, we affirm in part and reverse in part the decision of the court of appeals.

FACTS

The Schools are for-profit, postsecondary educational institutions that offer certificates and associates', bachelors', masters', and doctoral degrees in several different

fields including criminal justice.[2] This case focuses on the Schools' criminal justice program.

Most prospective students who signed up for the criminal justice program wanted to be either a police officer or a probation officer. As described to prospective students and put into practice, the criminal justice curriculum focused on police work like crime scene investigations and many classes were taught by former or current police officers. In marketing materials and through admissions practices, the Schools made statements to prospective students that graduates of their criminal justice program were qualified to become a police officer, or at least qualified to enter programs providing the additional training required to become a police officer. Some advertisements referenced mandated additional skills training and stated that the Schools would help the student find a program to complete the training. The Schools also advertised that an associate's degree from their criminal justice program qualified a student for a career as a probation or parole officer.

During the relevant time period, the Schools spent approximately $120 million on marketing all of their programs to the public through online advertising, other mass marketing, and sales interactions between prospective students and admission representatives. The Schools disseminated the information on their website and by using media platforms to target people interested in a career in policing. The Schools placed advertisements for, or otherwise recruited potential students to, their criminal justice

[2] The Schools are separate legal entities, but they have the same corporate management team, the credits from one can be applied to programs at the other, and they use joint course catalogs. The Schools are now shut down.

program on sites like PoliceLink.com, military.com, policemag.com, policeone.com, and officer.com.

The Schools also placed advertisements for their criminal justice program on Google and other search engines. The ads would appear as results to search inquiries that included "law enforcement schools" and "police schools." These online ads made statements such as: "A degree in criminal justice is useful in a wide variety of positions including . . . police officer. [. . .] A degree in criminal justice provides the industry knowledge and credentials potential employers seek," and "When designing our criminal justice degrees . . . we called on seasoned professionals in . . . law enforcement. . . . And you can be sure, as a graduate of a Globe University/Minnesota School of Business criminal justice program, you will have those qualifications." Other advertisements by the Schools were accompanied by images of police officers.

The Schools' claims about the value of a criminal justice degree were false. The Schools do not contest that to become a police officer in Minnesota, one must have either a criminal justice degree from a program approved by the Police Officer Standards and Training (P.O.S.T.) Board or a bachelor's degree in any field and complete a certified professional peace officer education (P.P.O.E.) program offered by a college. The Schools were not P.O.S.T. Board approved, and the Schools' credits did not transfer to any college that offered certified P.P.O.E. programs.

The Schools' statements that an associates' degree in criminal justice would qualify a student to be a probation or parole officer were also misleading. The Schools do not contest that while the qualifications to become a probation or parole officer in Minnesota

vary by county, every county requires probation officers to hold at least a bachelor's degree as a prerequisite to employment. Many counties (including the state's large metropolitan counties) also require in-field experience. The Schools' criminal justice associate's degree program did not meet these prerequisites.

The district court conducted a 17-day bench trial on the Attorney General's claims against the Schools. Over 60 witnesses testified, including 15 students who had enrolled in the criminal justice program. For example, one student testified that he transferred into the criminal justice program because the school "assured him that the program would allow him to become a Minnesota police officer" and that he would not have pursued that program had he known the school was not P.O.S.T. certified. Another student enrolled in the criminal justice program after being told that he could attend training after graduating and thereafter become a Minnesota police officer. After graduation, when he attempted to enroll in a skills training as recommended by the Schools, he learned that he was not eligible to attend because the School was not P.O.S.T. certified. The 15 students' testimony had some variations, but they all testified that, based on statements made by the Schools (or their agents), they enrolled in the program to become a police officer or probation officer.

After reviewing the evidence and testimony, the district court found the Schools' false advertising pervasive and characterized the Schools' practices as "a trap for the unwary." It determined that the "evidence [presented at trial] is sufficient to establish fraud and/or deception in the marketing of [the Schools'] Criminal Justice program." The district court ruled:

> 16. The Court concludes that [the Schools] violated the CFA . . . by advertising and marketing their criminal justice program as providing all or some portion of the education and training necessary to become a Minnesota police officer. [The Schools'] program was not in fact certified by the POST board to permit a graduate to become a police officer, nor was it a regionally-accredited program that permitted its graduates to attend a PPOE or "skills training" course to become a licensed Minnesota police officer. Yet, [the Schools] targeted their criminal justice program to students interested in careers as Minnesota police officers; advertised that their program could make graduates eligible to become police officers or participate in additional training to do so; had recruiters recommend the program to students who expressed an interest in becoming police officers in Minnesota; and told prospective students that they could become police officers or would only need "additional training" to become police officers. These representations were false and misleading and in violation of the CFA . . . . In addition, [the Schools] failed to disclose material facts.
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> 19. The Court concludes that [the Schools] violated the CFA . . . by marketing their criminal-justice associate's degree program as a means for becoming a probation officer in Minnesota . . . . [P]robation officer jobs in Minnesota at a minimum require a bachelor's degree, and [the Schools] knew this. Yet, [the Schools] advertised and recommended their criminal justice associate's degree program as a means for students to become probation officers and failed to disclose to students material facts.

Notably, the Schools do not challenge any of these findings of fact or conclusions of law on appeal.

The district court found that the student witnesses produced by the Attorney General "credibly testified to being injured by these false and misleading practices." The district court concluded that the Schools violated the MCFA regarding students who wanted to be police officers and those who wanted to become probation or parole officers.

Further, the district court found that the students were harmed by paying tuition for degrees that would not allow them to become police or probation officers and that such

economic harm "is an inevitable and foreseeable consequence of the misrepresentations and obfuscations in [the Schools'] marketing of the program." Consequently, the court stated that the Attorney General proved a causal nexus between the Schools' misrepresentations and the harm suffered by the criminal justice program students required under the MCFA. In its Order for Restitution, the district court explained its reasoning:

> Thus, [the Schools] argue, there is no evidence of widespread public injury. [The Schools'] argument ignores the Court's finding that the harm suffered by those students was foreseeable and inevitable. [The Schools'] attempt to understate the breadth of that finding cherry-picks the Court's Order and misreads its intent. There can be no question that [the Schools'] fraudulent practices caused significant public injury to any students . . . who enrolled in the criminal justice program with the goal of becoming a Minnesota police or probation officer.
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> It stands to reason that if the Court adopts [the Schools'] interpretation of the relevant case law, then only consumers that are perfectly similarly-situated are entitled to restitution even though there has been a finding of fraud under the CFA . . . related to a specific class of persons. Here, the [Attorney General] has proven that [the Schools] violated the CFA . . . with respect to the marketing of its criminal justice program. A restitutionary process, as requested by the [Attorney General], is necessary in this case to determine the appropriate amount of restitution for each affected student while giving [the Schools] an opportunity to respond to claims for restitution.

The court issued an injunction and imposed other civil penalties. The district court also ordered equitable restitution requiring the Schools to disgorge the tuition collected from the criminal justice program students.[3] To assess the proper scope of the equitable restitution remedy, the district court established a process for determining how many students entered the Schools' criminal justice program with the goal of becoming a police

[3] Three total Orders for Restitution were issued; two amended Orders for Restitution were issued after the first. For purposes of our discussion here, when we refer to the Order for Restitution we are referencing the latest Order.

or probation officer because they relied on the Schools' fraudulent statements and the amount each student paid in tuition and other fees and costs.

Under the Order for Restitution, students who were enrolled in the criminal justice program during the relevant time period are to be notified and given the opportunity to submit a claim for restitution within 50 days. This process was put in place for both the testifying and nontestifying students and included the appointment of a special master under Minn. Stat. § 8.31 and Minn. R. Civ. P. 53.07 to resolve disputes. The process includes:

> 5. **Substantive Guidelines**. For any eligible claimant who files a claim form representing that they enrolled in [the Schools'] criminal justice program based on an understanding they could become (a) a police officer in Minnesota or (b) a parole or probation officer in Minnesota with an associate's degree, there shall be a rebuttable presumption of injury and causal nexus. . . . The restitution amount for such claimants shall include (a) the amount of tuition paid to [the Schools] by or on behalf of the claimant, (b) payments to [the Schools] by or on behalf of the claimant for books, enrollment or student expenses or fees, and (c) any interest or finance charges incurred by the claimant for student loans taken out to pay for such tuition, expenses, or fees.
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> 6. **Process**. The parties shall oversee the claims review process and mutually agree on whether a claimant should receive restitution and in what amount consistent with this Order. The parties may provide or make reasonable requests for documents regarding a claim, and shall act promptly in conferring and determining claims. Upon written agreement of any restitution sum, [the Schools] shall make payment to the claimant within 7 days of the written agreement. If the parties cannot resolve a dispute, the matter shall be submitted to the Special Master pursuant to the Special Master's instructions. The parties may agree that the Special Master's decisions on disputed claims is binding. The Special Master shall review each disputed claim and issue a written decision to the parties determining the amount of restitution for that student.
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> . . . .

> 8. **Judgment**. The Attorney General's Office may request that judgment be entered as to any unpaid claim that has been agreed to, determined by the Special Master and not objected to, or determined by the Court.

The Schools appealed, arguing among other things that the Attorney General "failed to prove the necessary elements of a MCFA violation" and "the restitution order violated Minnesota law." *State v. Minn. School of Bus.*, 915 N.W.2d 903, 905 (Minn. App. 2018).

The court of appeals upheld the district court's restitution order for the students who testified at trial because there was direct evidence that those students relied on fraudulent statements and were harmed by paying for "a degree that did not serve its purpose—to enable them to become police or probation officers." *Id.* at 909. But the court of appeals reversed the district court's decision that the Attorney General could recover restitution on behalf of the nontestifying students. The court of appeals described the district court's "rebuttable presumption" to be employed in the restitution process as "problematic." *Id.* at 910. Further, it held that the restitution process "does not satisfy the [S]tate's burden to prove a causal nexus" and that it "cannot *presume* this element is met." *Id.* at 911.

The Attorney General sought review, asking us to reverse the court of appeals' decision that the evidence failed to show a causal nexus between the Schools' false and misleading statements and the harm suffered by nontestifying students. The Schools requested conditional review, arguing that the court of appeals erred in affirming the restitution for the testifying students because the causal nexus standard used by the district court—the "foreseeable and inevitable" analysis—was improper. The Schools also contest whether the restitution process established by the district court is proper. We granted both petitions for review.

ANALYSIS

We are asked to decide whether the evidence the Attorney General introduced at trial is sufficient to establish a causal nexus between the Schools' misleading statements about the criminal justice program and the harm suffered by the students who entered the program seeking to become either police officers or probation officers. The Schools do not challenge the district court's conclusion that the Schools made pervasive false statements about the value of a criminal justice degree for students who wanted to become a police officer or a probation or parole officer. Nor do the Schools challenge the district court's finding that enrolling in, and paying tuition for, a degree that does not provide what is promised is harm. Accordingly, our review is limited to whether the Attorney General proved that a causal nexus existed.

The broad legal contours of the concept of causal nexus is a question of law which we review de novo. *See, e.g.*, *Dougherty v. State Farm Mut. Ins. Co.*, 699 N.W.2d 741, 743 (Minn. 2005). But we also have acknowledged that consumer fraud claims are highly contextual and fact-based. Accordingly, we have held that a district court is best positioned to assess what evidence in a particular case is useful in determining whether a causal nexus has been established. *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 14 (Minn. 2001) (stating that where the damages "are alleged to be caused by a lengthy course of prohibited conduct that affected a large number of consumers, . . . the causal nexus and its reliance component may be established by other direct or circumstantial evidence *that the district court determines is relevant and probative*" in the context of the case (emphasis added)). Finally, we defer to the district court's findings of facts that underlie the legal

conclusion and accept them as true unless clearly erroneous. *See Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

We review equitable remedies like the parameters of a district court's Order of Restitution for an abuse of discretion. *Dakota Cty. HRA v. Blackwell*, 602 N.W.2d 243, 244 (Minn. 1999); *see State by Humphrey v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 896 (Minn. App. 1992) (stating that restitution under Minn. Stat. § 8.31 is equitable relief), *aff'd*, 500 N.W.2d 788 (Minn. 1993).

I.

The Legislature enacted the MCFA to help protect consumers against the unequal bargaining power present in consumer transactions. *Ly v. Nystrom*, 615 N.W.2d 302, 308 (Minn. 2000). Along with the DTPA, these statutes "are remedial in nature and are to be liberally construed in favor of protecting consumers." *Alpine Air Prods., Inc.*, 490 N.W.2d at 892; *see also State by Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d at 788, 790 (Minn. 1993) ("In passing consumer fraud statutes, the legislature clearly intended to make it easier to sue for consumer fraud than it had been to sue for fraud at common law. The legislature's intent is evidenced by the *elimination* of elements of common law fraud, such as proof of damages or reliance on misrepresentations."). Additionally, the elements of MCFA claims are distinct from common-law fraud actions and broaden the relief against fraud available to consumers. *Id.* The MCFA " 'reflects a clear legislative policy encouraging aggressive prosecution of statutory violations' and thus should be 'generally very broadly construed to enhance consumer protection.' " *Ly*, 615 N.W.2d at 308 (quoting *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 495–96 (Minn. 1996)). The

MCFA "provides the attorney general with [enforcement] authority . . . to protect consumers from unlawful and fraudulent trade practices in the marketplace." *Id.* at 308.

The Attorney General acted to enforce the MCFA in this case under his inherent *parens patriae* powers[4] as well as his statutory authority under Minn. Stat. § 8.31. "[T]he remedies available to the State [Attorney General] are broader than those available to a private litigant." *Curtis v. Altria Grp., Inc.*, 813 N.W.2d 891, 899 (Minn. 2012). The Attorney General's *parens patriae* power authorizes him to act on behalf of all Minnesotans harmed by a pattern and practice of fraudulent conduct. *See Alpine Air Prods., Inc.*, 490 N.W.2d at 896 & n.4. This includes the power to seek equitable restitution. *See State by Swanson v. Amer. Family Prepaid Legal Corp.*, No. A11-1848, 2012 WL 2505843, at *4 (Minn. App. July 2, 2012) (citing *Alpine Air Prods., Inc.*, 490 N.W.2d at 896 & n.4).

Minnesota Statutes section 8.31, subdivision 3, also broadly authorizes the Attorney General to seek equitable relief to stop conduct that harms consumers. *See FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314–15 (8th Cir. 1991) (noting that the grant

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[4] *Parens patriae* is Latin for "parent of his or her country." *Parens Patriae*, *Black's Law Dictionary* (10th ed. 2014). *Black's Law Dictionary* also defines it as "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen." *Id.* The doctrine allows "a state to maintain a legal action where state citizens have been harmed, where the state maintains a quasi-sovereign interest," which occurs when "the health and well-being of its residents is affected, or where the state works to assure that its residents enjoy the full benefit of . . . [the] laws." *State by Humphrey v. Standard Oil Co. (Ind.)*, 568 F. Supp. 556, 563 (D. Minn. 1983). "Originally, the *parens patriae* doctrine allowed the state to represent individuals who were legally unable to do so for themselves. As time went on, however, the meaning of the doctrine changed, and *parens patriae* has become a different and more broad sovereign power." *Id.*

of injunctive power in a consumer fraud statute includes other forms of ancillary equitable relief). In addition, section 8.31 authorizes the Attorney General to require the payment of civil penalties, require payment of restitution into the general fund, and appoint administrators to "collect[], administer[], and distribut[e] judgments obtained by the attorney general for the benefit of persons." Minn. Stat. § 8.31, subds. 3, 3c. The statute contemplates that the Attorney General's authority includes the power to recover money on behalf of victims of a violation of the MCFA. *Id.*, subds. 2b, 3c (allowing the Attorney General to accept an assurance of discontinuance of any act the Attorney General deems in violation of the MCFA including a stipulation for the performance, provision, or payment by the alleged violator of any remedies under section 8.31); *see also id.*, subd. 2c (addressing sums recovered under section 8.31 for the benefit of injured persons). In section 8.31, the Attorney General is also allowed to pursue any remedies authorized under the private remedies subdivision including equitable relief. *Id.*, subd. 3a. These additional remedies include damages, together with costs and disbursements, and a consent judgment or decree without the finding of illegality. *Id.*

A.

We first articulated the causal nexus requirement for MCFA cases in *Group Health*, 621 N.W.2d at 13–15. In *Group Health*, several private Minnesota health plan companies sued tobacco companies in federal district court under the MCFA to, among other things, recover damages for the increased healthcare costs incurred by the companies due to health problems of their members who smoked. *Id.* at 4. The health plan companies claimed that the tobacco companies' misleading statements about the health impact of smoking caused

the health plan companies' members to smoke, and smoke more and longer, increasing costs to the health plan companies and their members. *Id.* We addressed the following question certified to our court by the federal district court: "[M]ust [the health plan companies] plead and prove individual purchaser reliance on the defendants' statements or conduct in order to be eligible for relief in the form of damages" under the MCFA? *Id.* at 5.

We held that a private plaintiff suing for a violation of the MCFA under Minn. Stat. § 8.31, subd. 3a, need not "plead[] and prov[e] traditional common law reliance." *Id*. at 13. Instead, we stated that an individual plaintiff must establish "a causal nexus between the conduct alleged to violate the [MCFA] and the damages claimed." *Id*. at 4. *Group Health* clearly held that circumstantial evidence is sufficient to establish a causal nexus. *Id*. at 14. We also observed that an element of individual reliance is embedded in the causal nexus requirement because a fraudulent or misleading statement cannot by its nature cause harm unless the statement "had some impact on" inducing the individual plaintiff's actions. *Id.*

Since our decision in *Group Health*, there has been an open question over whether, to establish a causal nexus, the evidence must show that each individual consumer (here, each individual criminal justice student) actually heard or read the misrepresentation and acted on those misrepresentations. Stated another way, is the Attorney General in this case limited to recovering equitable restitution only for those individual students who testified at trial and proved direct reliance on the Schools' misrepresentations? It is to that question that we now turn.

In *Group Health*, we plainly stated that "proof of individual reliance" is *not* needed to prevail under the MCFA. *Id.* at 14–15. In so holding, we rejected the analysis of the MCFA adopted in *Thompson v. American Tobacco Co., Inc.*, 189 F.R.D 544, 552 (D. Minn. 1999), and *Parkhill v. Minnesota Mutual Life Insurance Co.*, 188 F.R.D. 332, 345 (D. Minn. 1999). In each of those MCFA class-certification cases, the federal court concluded that each individual plaintiff must prove individual and direct reliance on the defendant's misrepresentations. By explicitly rejecting those decisions, *Group Health* indicated that where a defendant's misrepresentations were directed at and affected a broad group of consumers, proof of direct individual reliance is not required to establish a causal nexus between MCFA violations and the harm suffered by consumers. *Grp. Health*, 621 N.W.2d at 14–15.

Moreover, we determined in *Group Health* that a showing that "*some* legal nexus" exists between "the injury and the defendants' wrongful conduct" is a more relaxed requirement than the "*strict showing of direct causation* . . . required at common law." *Id.* at 14 (emphasis added) (citation omitted) (internal quotation marks omitted). We cited *In re Control Data Corporation Securities Litigation*, 933 F.2d 616, 619 (8th Cir. 1991), as an example of what such a "legal nexus" required. *Grp. Health*, 621 N.W.2d at 14. *Control Data Corp.* is a "fraud on the market" case. To recover for securities fraud under that theory, an investor in a security need not personally have heard or acted upon a direct misrepresentation when buying the security. *Id.* Rather, individual reliance is presumed as long as the plaintiff can show a material misrepresentation affected the market into which he bought. Our citation to this case shows that in *Group Health* we understood not

only that individualized direct proof of reliance is not necessary in an MCFA damages case, but that there are times when the materiality and pervasiveness of consumer fraud is relevant to support a court's finding that a causal nexus exists between the fraud and the consumer's decision to purchase the product.[5]

In a later case interpreting and applying *Group Health*, a Minnesota federal district court found that the seller's own intent about how a consumer would perceive and act on the seller's misrepresentations may be decisive in allowing consumers who purchased a product directly from a defendant seller to recover under the MCFA without proof of direct reliance by each purchaser on the defendants' false statements. *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, No. 99-MD-1309, 2004 WL 909741, at *4 (D. Minn. Apr. 28, 2004). The court reasoned that "evidence of what *the defendant [seller]* knew or thought about the effect its sales practices on consumers were having *is evidence*

[5] The dissent argues that there are reasons not to extend the fraud-on-the-market theory to consumer fraud cases. That is not what we are doing in this case. Fraud on the market theory focuses on whether a security buyer must prove individualized reliance—that the individual plaintiff actually knew of the fraudulent representation (or omission) that affected the price of a security. Because of the presumed efficient nature of securities markets in which a security's price reflects all material (including fraudulent) information, fraud on the market theory holds that individual reliance is not necessary. The argument of the dissent, and the case law the dissent cites regarding fraud on the market, addresses whether to relax individualized reliance requirements in other circumstances. But with regard to the MCFA, we have already crossed that bridge. In *Group Health*, we held that proof of individual reliance is not required. 621 N.W.2d at 13. The point of the citation in *Group Health* to a case involving fraud on the market theory—and our point here—is not to import the fraud-on-the-market theory into the MCFA. Rather, it is to highlight our insight in *Group Health*—by analogy as the dissent points out—that the materiality and pervasiveness of a representation is one factor a court may consider when deciding whether a causal nexus (again, something less demanding than individual reliance) exists.

that the consumers relied on the sales practices." *Id.* at *5 (emphasis added). Because the defendant-seller intended that potential customers rely on the misrepresentations to buy the product, the federal court concluded that the seller cannot "argue that the record contains no evidence of reliance." *Id.* We agree with the federal district court that the seller's intent to influence consumers and understanding that its advertising would influence consumers is important and relevant evidence to establish a causal nexus.

It also is important to our decision that this case (unlike *Group Health*) was brought by the Minnesota Attorney General rather than by a private plaintiff. Accordingly, cases brought under the Federal Trade Commission Act (FTCA) are instructive.[6] Among other things, the FTCA allows the Federal Trade Commission (FTC), acting on behalf of consumers, to seek restitution from companies that sold goods by use of false or deceptive statements for resulting losses the consumers suffered. In FTC enforcement cases, to "establish that an act or practice is deceptive, the FTC must show that the defendants made a material representation or omission *that is likely to mislead consumers* acting reasonably under the circumstances." *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995) (emphasis added).

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[6] There are differences in the statutory language used in the FTCA and in the MCFA. Nonetheless, because the enforcement powers of the FTC and Attorney General are both broad, cases under the FTCA are persuasive. The powers of the Minnesota Attorney General are discussed above. Under the FTCA, the FTC is expressly authorized to seek only injunctive relief. 15 U.S.C. § 53(b) (2018) (also known as Section 13(b)). Federal courts, however, have interpreted that grant of equitable power to include the "power to order any ancillary equitable relief necessary to effectuate the exercise of the granted powers" including equitable restitution on behalf of consumers. *Wilcox*, 926 F. Supp. at 1103 (citation omitted) (internal quotation marks omitted); *see Sec. Rare Coin & Bullion Corp.*, 931 F.2d at 1314.

Proof of individual reliance by each individual in consumer deception cases under the FTCA is not needed. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). Rather, the FTCA allows for a "presumption of actual reliance where the FTC has demonstrated that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product." *Wilcox*, 926 F. Supp. at 1105 (citation omitted) (internal quotation marks omitted). The reason is plain: "requir[ing] proof of each individual consumer's reliance on a defendant's misrepresentations would be an onerous task with the potential to frustrate the purpose of the FTC's statutory mandate." *FTC v. BlueHippo Funding, LLC*, 762 F.3d 238, 244 (2d Cir. 2014); *see also FTC v. Kitco of Nev., Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985) ("Requiring proof of subjective reliance by each individual consumer would thwart effective prosecution of large consumer redress actions and frustrate the statutory goals of the section.").

In other words,

> proof of subjective reliance by each [consumer] is [not] required for recovery of the monetary equivalent of rescission . . . . It would be virtually impossible for the FTC to offer such proof, and to require it would thwart and frustrate the public purposes of FTC action. This is not a private fraud action, but a government action brought to deter unfair and deceptive trade practices and obtain restitution on behalf of a large class of defrauded investors. It would be inconsistent with the statutory purpose for the court to require proof of subjective reliance by each individual consumer.

Sec. Rare Coin & Bullion Corp., 931 F.2d at 1316.

We reiterate what we held in *Group Health*: direct proof of reliance is not required to establish a causal nexus. Instead, in a case brought by the Attorney General, all the facts

surrounding the consumer fraud should be taken into account: Was the fraud longstanding, pervasive, and widespread in communications directed to consumers of the product? Did the seller intend and understand that consumers would rely on the misrepresentations? Was the information of a kind on which consumers would typically rely?[7]

B.

The district court and the court of appeals concluded that the Attorney General presented sufficient evidence to establish a causal nexus between the Schools' violations of the MCFA and the harm suffered by the 15 students who testified at trial. We agree.

The testifying students offered substantial evidence that the Schools' statements that obtaining a criminal justice degree would qualify the students for a police officer or probation officer career caused them to enroll and therefore caused their harm—paying for a degree that did not serve its intended purpose. In other words, for each testifying student, there was evidence of direct reliance by the student on false or misleading statements by the Schools. The causal nexus requirement is clearly met. Therefore, we affirm the

[7] We disagree with the dissent's suggestion that we are authorizing a district court to take "judicial notice" that the nontestifying students suffered harm as a result of the Schools' conduct. The rule we apply today does not create a presumption or turn on a district court taking judicial notice of facts. The case the dissent relies on to support its judicial notice argument, *Christensen v. Northern States Power Company of Wisconsin*, is properly read as a case about when expert testimony is needed, holding that a court cannot take judicial notice of a fact that "is not a matter of common knowledge." 25 N.W.2d 659, 660 (Minn. 1946). That is not this case. The district court's use of language about a "rebuttable presumption" is not relevant to our decision. We simply hold—consistent with the "some causal nexus" requirement of *Group Health* that does not require individualized reliance or direct proof of causation—that a district court sitting in equity and as a factfinder may broadly consider several common-sense factors when assessing whether a causal nexus exists under the MCFA.

judgment that the Attorney General established a violation of the MCFA on behalf of the testifying students and also affirm the trial court's Order for Restitution for those students to determine the proper restitution amount owed.

We also hold that the Attorney General established a causal nexus between the Schools' misrepresentations and the harm suffered by the nontestifying students. The district court found that the false advertising about the criminal justice program and the misleading recruitment promises were widespread and pervasive. The Schools do not dispute that finding.

Further, the Schools intended for the students to rely on their misleading statements and actions. The Schools specifically targeted the criminal justice program advertisements and directed recruitment efforts at those prospective students who wanted to be a police officer or a probation officer. The Schools' advertisements specifically stated that "[w]hen designing our criminal justice degrees . . . we called seasoned professionals in . . . law enforcement . . . . And you can be sure as a graduate of a Globe University/Minnesota School of Business criminal justice program, you will have these qualifications." The Schools would not have spent a total of $120 million in advertising and made law enforcement marketing materials available where they did if they did not believe that prospective students would rely on them.

The information that the Schools provided to prospective students in mailing materials and the recruitment process is precisely the type of information a reasonable prospective student would rely on in deciding whether to pursue a criminal justice degree at the Schools. And the evidence at trial showed that prospective students did so rely.

A person usually does not make lightly the decision to go to school, spend hundreds of hours in class, and pay thousands of dollars in tuition. We reasonably expect a person to look at materials provided by a potential school to assess whether the education program is consistent with his or her career objectives. It is reasonable to conclude that a person who wants to become a police officer or a probation officer will make such an investment of money and time only if the person believes that the classes will provide the requisite qualifications for that career. Moreover, the record shows that the Schools took advantage of the "unwary"—nontraditional, first-generation college students who usually attend for-profit schools.

In light of all the evidence and the findings by the district court, we conclude that the Attorney General established a causal nexus between the Schools' misleading statements and the harm suffered by the nontestifying students. The Schools should not profit from fraudulently providing a useless degree to their students.

II.

The Schools challenge the restitution process established by the district court. The Schools first argue that the district court's adoption of a "rebuttable presumption" that all criminal justice students relied on the Schools' false statements in deciding to enter into, and pay tuition for, a criminal justice degree is contrary to the causal nexus requirement of *Group Health*. We have already held that the Attorney General has satisfied the causal nexus requirement for all criminal justice students without the need to resort to any presumption.

Moreover, the Schools fundamentally misunderstand the remedy that the Attorney General seeks in this case. The district court has broad discretion to order equitable restitution and to fashion the appropriate restitutionary remedy. *See Dakota Cty. HRA*, 602 N.W.2d at 244; *see also Alpine Air Prods. Inc.*, 490 N.W.2d at 896. The Attorney General seeks equitable restitution on behalf of all the Schools' criminal justice students; not money damages for each individual student.[8] Equitable restitution, unlike money damages, is intended to force a wrongdoer to divest money improperly gained at the expense of another party. It is aimed as much (or more) at preventing the wrongdoer from profiting from its misdeeds as it is to make the injured party whole. *U.S. Commodity Futures Trading Comm'n v. Crombie*, 914 F.3d 1208, 1216 (9th Cir. 2019); *Restatement (Third) of the Law: Restitution and Unjust Enrichment* § 1 (Am. Law Inst. 2010); *see Parkhill v. Minn. Mut. Life Ins. Co.*, 188 F.R.D. 332, 345 (D. Minn. 1999); *Hendrickson v. Minn. Power & Light Co.*, 104 N.W.2d 843, 846 (Minn. 1960), *overruled in part on other grounds, Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977).

The Attorney General has the authority to bring a suit under Minn. Stat. § 8.31, subd. 3a, to seek restitution for violations of the MCFA. *See, e.g.*, *State v. Minn. Sch. of Bus., Inc.*, 899 N.W.2d 467, 471 (Minn. 2017); *Alpine Air Prods., Inc.*, 500 N.W.2d at 790. The United States District Court for the District of Minnesota and the Minnesota Court of Appeals also have correctly recognized the State's common law *parens patriae* authority

[8] The Schools repeatedly equate the equitable restitution ordered by the district court with "money damages." But as the district court noted, the Attorney General never framed this issue as one of seeking individual money damages for individual students.

to seek restitution for Minnesotans based on its quasi-sovereign interest in their economic health. *See State v. Standard Oil Co. (Ind.)*, 568 F. Supp. 556, 563 (D. Minn. 1983); *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 112 (Minn. App. 1987), *rev. denied* (Minn. Feb. 17, 1988). And a district court has the power to "appoint an administrator in actions brought by the attorney general . . . for the purposes of . . . collecting, administering, and distributing judgments obtained by the attorney general for the benefit of persons." Minn. Stat. § 8.31, subd. 3c.

The Attorney General seeks to divest the Schools of gains that they reaped as a result of their violations of the MCFA and then (rather than holding those proceeds for the State) distribute the proceeds to injured consumers—a power we interpret as within the Attorney Generals' *parens patriae* authority and granted to the Attorney General in Minn. Stat. § 8.31.

The Schools also argue that the restitution process the district court ordered violates due process. We disagree. The process is fair. The Order for Restitution requires this process to be overseen by a Special Master. The essential purpose of the restitution process is to determine the overall amount of restitution that the Schools must pay. The amount is a product of the number of students who sought a criminal justice degree and the total tuition, fees, and other costs they paid to the Schools. The process established by the district court allows the court to determine the number of affected students and the amount each paid to the Schools.

In addition, significant procedural safeguards are in place. Students are notified and have the opportunity to declare *under penalty of perjury* "that they were enrolled in the

Schools' criminal justice program based on an understanding that they could become (a) a police officer in Minnesota or (b) a parole or probation officer in Minnesota with an associate's degree." The students are given an opportunity to show how they relied on the fraudulent practices and provide the Special Master with information about the amount of tuition and fees that they paid as well as costs of books and student loan interest.[9]

Critically, the Schools retain the right to assert before the Special Master that the Schools' misrepresentations did not cause a prospective student to pursue a criminal justice degree to become a police officer or a probation officer. Further, "[t]he parties may provide or make reasonable requests for documents regarding a claim, and shall act promptly in conferring and determining claims." If the parties cannot reach accord on a prospective student's claim, the Special Master will "make a determination" or recommendation to the district court, which will make the final decision. This restitution framework satisfies due process.

The district court did not abuse its discretion by ordering restitution. We therefore agree with the district court that the restitution process should proceed.

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[9] The district court provided a form in the Order for Restitution, a Notice to Eligible Claimants and Claim Form, for the harmed students to complete that outlines what must be shown to receive restitution. The form requires the student to provide the amount of tuition that they paid to the Schools, other payments for books or other student expenses paid to the Schools, and any interest or finance charges that they incurred for student loans taken to pay for tuition and other student expenses.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals in part and reverse the court of appeals in part.[10]

[10] After oral argument, the Attorney General filed a letter citing to supplemental authority that came to his attention after he had filed his brief. The letter made additional legal arguments, and "reiterate[d]" to the court a point previously made in his brief. The Schools moved to strike the submission, relying on Minnesota Rules of Appellate Procedure 127 and 128.05 and *In re Medtronic, Inc. Shareholder Litigation*, 900 N.W.2d 401, 411 n.7 (Minn. 2017) (granting motion to strike supplemental authority because it went beyond the bounds of Minn. R. Civ. App. P. 128.05). Rule 128.05 allows a party to file such supplemental authority but it "must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to the point argued orally." Minn. R. Civ. App. P. 128.05. We agree that the Attorney General's letter goes beyond the bounds of this rule and therefore grant the motion to strike.

C O N C U R R E N C E & D I S S E N T

ANDERSON, Justice (concurring in part, dissenting in part).

I concur in that part of the court's opinion that affirms the district court's order awarding restitution for the 15 testifying students who attended either the Minnesota School of Business, Inc. or Globe University, Inc. (the Schools). Because I conclude that the Attorney General did not prove his claim for restitution on behalf of the students who did not testify, as required by our decision in *Group Health Plan, Inc. v. Philip Morris Incorporated*, 621 N.W.2d 2 (Minn. 2001), I dissent from the balance of the court's opinion. I would therefore affirm the court of appeals.

At issue here is a fundamental question of proof: whether the Attorney General has met the legal requirement to establish a causal nexus between the Schools' wrongful conduct and the harm claimed, when proceeding under Minn. Stat. § 8.31 (2018), to enforce the Minnesota Consumer Fraud Act (the Act). It is undisputed that the Attorney General enjoys broad powers under Minn. Stat. § 8.31 to enforce the Act, and I recognize, as we have said, that the Legislature intended to provide relaxed requirements for proof in a statutory misrepresentation case. *See Grp. Health*, 621 N.W.2d at 14. I also agree that the conduct of the Schools, relative to the testifying students, was appalling.

But these features do not relieve the Attorney General of his burden of proof, and here is where I part ways with the court. Faced with the Attorney General's evidentiary failures, the court implicitly adopts a rebuttable presumption based on assumptions about intent, i.e., the existence of pervasive fraud or an intent that consumers would rely on the misrepresentations. Alternatively, the court appears to deploy a form of judicial notice

based on assumptions about what information consumers typically rely on or the importance and cost of the purchase decision. Then, the court endorses the use of "mini trials" to determine the amount of restitution, if any, owed by the Schools to the nontestifying students. I cannot join this decision because even defendants who engage in appalling behavior are entitled to require the Attorney General to prove his claims. The Attorney General did not do.

I.

I begin with our decision in *Group Health* because it establishes the standard for the Attorney General's claims against the Schools.

We answered two certified questions in *Group Health*, only one of which is relevant here: must reliance "on the defendant's statements or conduct" be proved to "be eligible for relief in the form of damages." *Id.* at 5. We answered that question by stating that it is not necessary to prove reliance, but it is necessary "to prove a causal nexus between the conduct alleged to violate" the statute "and the damages claimed." *Id.* at 4. We explained in that decision that an individual plaintiff must establish "a causal nexus between the conduct alleged to violate the [MCFA] . . . and the damages claimed." *Id.* at 13. We noted that "causation remains an element" of the statutory claim because a damages action is available "only [to] someone injured *by* a violation." *Id.* We reasoned that a fraudulent or misleading statement cannot cause harm unless the statement "had some impact on" the individual plaintiff's action and, thus, causation is a "necessary element of an action to recover damages." *Id.* We acknowledged that "a strict showing of direct causation" may not be necessary in *Group Health* because "the root cause of the HMOs' claimed damages"

was their members' smoking-related injuries. *Id.* at 14. We also said that the "causal nexus and its reliance component" could be established by direct or circumstantial evidence that is "relevant and probative" to the claimed damages and conduct at issue. *Id.*

With the certified questions answered, the federal district court later rejected the plaintiffs' argument that causation could be presumed based on the substantial expenditures made by the defendants to influence consumers. *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 188 F. Supp. 2d 1122, 1126 (D. Minn. 2002). The federal district court also rejected the argument that causation could be presumed simply because it is self-evident that advertising affects consumer decisions. *Id.*

II.

I turn first to the court's conclusion that a causal nexus can be presumed. The court relies on our citation to a "fraud on the market" case, *In re Control Data Corp. Securities Litigation*, in which the United States Court of Appeals for the Eighth Circuit held that proof that the plaintiff was aware of a misrepresentation and relied on it was sufficient to prove fraud. 933 F.2d 616, 620 (8th Cir. 1991). Although the federal court held that a causal nexus could be presumed, it rested that decision on the nature of the case: a "fraud on the market case" in which "causation is not premised on any specific transaction between plaintiff and defendant" and for which there is no required "proof that the plaintiff was even aware that a misrepresentation was made." *Id.* at 619.

Control Data thus presumed a causal nexus in the context of a case that bears no resemblance to the Attorney General's claims here.[1] *See Grp. Health*, 621 N.W.2d at 15 n.10 (stating that the "type of proof required to satisfy the causation-based reliance factor may be different in a case of different scope or based on different causes of action"). Not only does this case bear no resemblance to *Group Health*, but also the holding of *Control Data Corp.* has no application outside of securities cases. "Presumption of deleterious consequence—commonly known as 'fraud on the market'—is accepted in securities fraud class actions but is explicitly rejected by courts that have interpreted their states' consumer fraud statutes liberally as not requiring reliance." Anthony J. Sebok, *Pretext, Transparency and Motive in Mass Restitution Litigation*, 57 Vand. L. Rev. 2177, 2205–06 (2004) (citations omitted). "Adhering to the contours enunciated by the Supreme Court, the overwhelming majority of courts have rejected efforts to export the fraud on the market theory of presumed reliance to common law or statutory fraud cases." 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8:11 (15th ed. 2018).[2] Moreover, *Control*

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[1] In *Group Health*, the court's citation to *Control Data Corp.* by a "*cf.*" signal indicates that the Eighth Circuit's law reflects an analogous, but different, proposition from the conclusion. *See Grp. Health*, 621 N.W.2d at 14. Contrast this to the preceding citation at the same point in the discussion, to a decision from the Minnesota Court of Appeals, which states that a causal nexus must be shown. *See LeSage v. Norwest Bank Calhoun-Isles, N.A.*, 409 N.W.2d 536, 539 (Minn. App. 1987) (stating that plaintiffs will bear the burden at trial "of proving the proper legal nexus between the complained of acts and their alleged monetary losses").

[2] Federal and state courts have overwhelmingly rejected extending the "fraud on the market theory," and its reliance on presumptions, beyond the unique nature of securities markets. *See CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1095 (10th Cir. 2014) ("[T]he presumption is uniquely applicable in the securities context and it has not

Data is of dubious applicability because the decision addressed the claims of a certified class—meaning that plaintiffs had already shown that the claims of the class representatives were sufficiently typical of the claims of the entire class. *See, e.g.*, Fed. R. Civ. P. 23(a)(3). This is not a burden the Attorney General has attempted to meet here.

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gained traction in other fields of law." (citing 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8:11 (10th ed. 2013))); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 224 (2d Cir. 2008) ("*Basic* [*Inc. v. Levinson*, 485 U.S. 224 (1988)] involved an efficient market—the market in securities traded on the New York Stock Exchange . . . the market for consumer goods, however, is anything but efficient."), *overruled in part on other grounds*, *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004) (stating that "*Basic* clearly requires that a market be efficient in order for the fraud-on-the-market presumption of reliance to be invoked" (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 248 n.27 (1988))); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1363 (11th Cir. 2002) (stating that "[t]The securities market presents a wholly different context than a consumer fraud case"), *abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008); *Gunnells v. HealthPlan Servs., Inc.*, 348 F.3d 417, 434–37 (4th Cir. 2003) (rejecting "fraud on the market" presumption of reliance in consumer fraud class action); *Stout v. J.D. Byrider*, 228 F.3d 709, 718 (6th Cir. 2000) (affirming denial of certification in consumer-fraud class action due to individualized reliance inquiries); *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561 (5th Cir. 2000) (stating that "[n]o court has accepted the use of [the fraud-on-the-market] theory outside the context of securities fraud"), *overruled in part on other grounds*, *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008); *Binder v. Gillespie*, 184 F.3d 1059, 1063–65 (9th Cir. 1999) (declining to presume reliance in other contexts in which no efficient market existed); *see also Heindel v. Pfizer Inc.*, 381 F. Supp. 2d 364, 380 (D.N.J. 2004) (stating that "the fraud on the market theory is flawed with respect to Plaintiffs' consumer fraud claims" and acknowledging the impropriety of using "the fraud on the market theory to circumvent the reliance element" in a consumer fraud action); *Coleman v. Danek Med., Inc.*, 43 F. Supp. 2d 629, 635 n.4 (S.D. Miss. 1998) ("[N]o court has ever adopted a 'fraud on the market' type theory outside the securities context." (citations omitted)); *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1088 (N.J. 2007) ("We have rejected the fraud on the market theory as being inappropriate in any context other than federal securities fraud litigation." (citations omitted)).

Further, we have not specifically adopted the Eighth Circuit analysis in the *Control Data* litigation.[3] *Control Data* applied only the presumptions allowed by the Supreme Court's decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), which was confined to securities markets. The Eighth Circuit in a post-*Control Data* decision rejected the application of "fraud in the market" beyond securities markets. *See Appletree Square I, Ltd. P'ship v. W.R. Grace & Co.*, 29 F.3d 1283, 1287 (8th Cir. 1994) (rejecting the use of the theory because a real estate market is not developed enough, noting that "[c]ourts have generally limited the use of the fraud-on-the-market theory to securities fraud cases"). But even if we were to adopt this rule and conclude that the fraudulent conduct was sufficiently "pervasive," the evidence is still insufficient to show how many, or which, students relied on the misrepresentations and were therefore harmed. There are no findings that show which, how many, or if all program participants viewed the marketing advertisements that the Attorney General offered as evidence or if they did view that advertising, the impact the advertising had on decisions made by the nontestifying students.[4]

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[3] Other federal courts also disagree with the Eighth Circuit's presumed causal nexus standard. *See, e.g.*, *D.E. & J. Ltd. P'ship v. Conaway*, 284 F. Supp. 2d 719, 748 n.24 (E.D. Mich. 2003) (identifying a "number of courts" that declined to apply the Eighth Circuit's rule because it "conflates transaction and loss causation").

[4] The majority alleges that the law is already decided and that I look to turn back *Group Health*, requiring a "strict showing of direct causation" under the MCFA. This is not the issue that separates the majority and the dissent.

In *Group Health*, the causal nexus was between the tobacco company's deceptive practices and the impact on the members of the HMOs, not on the plaintiff-HMOs themselves. Individual reliance was not at issue because it was not the plaintiff-HMOs that relied on the deceptive practices to their detriment, but rather the members of the HMOs—the members were not seeking damages; rather, the plaintiff-HMOs sought damages. In

The decisions in enforcement actions brought by the Federal Trade Commission are not helpful, despite the similar objectives between the federal law and Minnesota's consumer-fraud and deceptive-trade-practices acts.[5] We have not adopted the standard articulated in these federal decisions. Further, the Attorney General proceeds here under section 8.31. That statute allows the attorney general to recover, "*on behalf of the state*," injunctive relief and civil penalties, with "[a]ll sums recovered . . . [and] deposited in the general fund." Minn. Stat. § 8.31, subd. 3 (emphasis added). There is no need to find

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Group Health, it did not matter which specific members relied on the tobacco company's deceptive advertisements, but rather that across the group of members as a whole there was a causal nexus between the advertisements and increased smoking. The HMOs still had the burden to establish their direct injury of increased healthcare costs. And, although not binding on us, it is instructive that the federal district court, following the release of our *Group Health* decision, rejected the state's claim that it was self-evident that advertising affected consumer purchasing decisions. *See* 188 F. Supp. 2d at 1126–27. Put another way, in *Group Heath*, as here, the State did not prove the required causal nexus.

The majority justifies extending *Group Health* by analogy to the inapplicable fraud on the market theory and the now questionable Section 13 FTCA theory. *See infra* n.5. *Group Health* is good law, but it does not apply here where the claimants seeking restitution were individually, uniquely, and directly impacted by the deceptive practices. There is simply no basis to presume that just because 15 individuals relied on deceptive practices, 1,200 other individuals also relied on the same practices and suffered injury accordingly.

[5] The court argues that, under the Act, the FTCA is "instructive" on the availability of implied restitutionary relief. Whatever limited merit that argument previously had, it is weakened substantially because of the development of a circuit split. In a recent decision, the Seventh Circuit reversed, in light of the Supreme Court's decision in *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 487–88 (1996), its past holding that implied restitutionary relief was available under section 13(b), *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019). In doing so it held that "section 13(b)'s grant of authority to order injunctive relief does not implicitly authorize an award of restitution." 937 F.3d at 767, 771–75 (providing an extensive analysis of section 13(b) and why it does not imply authority for restitution awards).

guidance in federal decisions, addressing different claims under a different statutory scheme. While federal statutes can be useful to "guide our interpretation" of state statutes, the guidance is useful only when the "[state] provisions . . . are similar to provisions of the federal statutes." *Kolton v. County of Anoka*, 645 N.W.2d 403, 407 (Minn. 2002). Similarly, the federal district court's decision in *LensCrafters, Inc. v. Vision World, Inc.*, 943 F. Supp. 1481, 1489 (D. Minn. 1996), is of limited help here. The *LensCrafters* court explained that, under the Lanham Act, the "challenging party satisfies [the burden of proving fraud] by producing evidence . . . which can take the form of direct evidence, such as actual consumer testimony, or circumstantial evidence, such as consumer surveys, consumer reaction tests or market research." *Id.* Here, the Attorney General offered no evidence in the form of "actual consumer testimony," other than for 15 former students, and produced no circumstantial evidence in the form of consumer surveys, tests, or market research. It is clear that the Attorney General failed to carry his burden of proof for the nontestifying students.[6]

III.

I turn next to judicial notice as a theory to support the court's decision. The court observes, accurately, that it nowhere affirmatively alleges that it is taking judicial notice of the wrongful conduct of the Schools as proof of the causal link required by *Group Health*.

[6] The Attorney General did not challenge, either at the district court, or on appeal, the district court's puzzling decision to limit the Attorney General's introduction of evidence to support his claims. The Attorney General is thus bound by the limits of the record and we need not, and should not, decide whether the district court correctly imposed this limitation.

But the court asserts that "[t]here can be no question that [the Schools'] fraudulent practices caused significant public injury to any students who . . . enrolled in the criminal justice program with the goal of becoming a Minnesota police or probation officer." The only "fraudulent practices" proven by the Attorney General relate to the 15 testifying students; and the court assumes, without requiring the Attorney General to prove, that no student would otherwise enroll in the criminal justice program. A general notion in our judicial system is that "[p]rocedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting). When the district court announces, ex cathedra, "there can be no question" that unnamed and nonparty students have suffered injury as a result of the Schools' actions, that court essentially takes judicial notice of the defendant's liability. Affirming the district court, as the court does here, has the same effect. No matter how appalling the actions of the Schools were, the Attorney General is not entitled to judicial notice that the liability of the defendants to nontestifying individuals has been established.

We have long held that "[j]udicial notice is to be taken with caution," and we do so only when "every reasonable doubt" as to the propriety of doing so is resolved. *State ex rel. Remick v. Clousing*, 285 N.W. 711, 714 (Minn. 1939). "We may take judicial notice of that which may be regarded as common knowledge of every person of ordinary intelligence; of that which is or ought to be generally known." *Lickfett v. Jorgenson*, 229 N.W. 138, 139 (Minn. 1930) (declining to extend the use of judicial notice of such facts that are known only to a small, specially informed class of persons). But the very purpose

of a trial is to resolve disputes over issues large and small based on the evidence—we do not assume that the party with the burden of proof carries that burden simply because the party says so. Neither the direct testimony from the 15 students nor any additional circumstantial evidence offered by the Attorney General shows that the experience, decisions, and reactions of those 15 students are the same as, or even similar to, the more than 1,200 other students in the program.

Nothing in *Group Health* or the Attorney General's statutory authority specifically permits the court to presume that all 1,200 students have suffered damage as result of the actions of the Schools merely because the Attorney General provided sufficient evidence for the district court to conclude that 15 students, in fact, suffered damage as a result of those actions. Indeed, the district court concluded that there was "insufficient information" to rule in the Attorney General's favor on the claims of the nontestifying students. We have declined to take judicial notice of causation in the past; and on this record, we should decline to do so here.

In *Christensen v. Northern States Power Company of Wisconsin*, an electric company unsuccessfully used dynamite to dislodge ice surrounding two electrical poles near a lake and an electrical short occurred. 25 N.W.2d 659, 660 (Minn. 1946). The question before us was whether there was sufficient evidence to prove whether the explosions or the electrical short caused fish to die. *Id.* Because we held that no connection was established, we declined to take judicial notice on the effect of either the explosions or the electricity, as it would have been "mere conjecture." *Id.* "What effect, if any, the electricity would have is a matter of which this court cannot take judicial notice, for the

simple reason that it is not a matter of common knowledge." *Id.* We reasoned that "[p]roof of causal connection must be something more than consistent with plaintiff's theory." *Id.* at 661.

Here, the court essentially makes a judicial notice argument, without calling it that, based on a "common knowledge" claim with a dearth of evidentiary support. While it may be reasonable to conclude that a person pursuing a particular career will make an investment of money and time only on the belief that the investment will in fact translate into the career, it is equally reasonable to recognize that much more goes into these serious decisions than the simple equation the Attorney General advances and this court poses. Further, we rejected this analytical route in *Christensen* because it is not our role to unilaterally decide facts, particularly when doing so relieves the Attorney General of his burden of proof.

I am sympathetic to the court's analysis. It would hardly be surprising to learn that more than 15 students were damaged by the wrongful actions of the Schools. But we require parties making claims in court to prove those claims, and it is in only rare circumstances that we excuse the failure to do so. Here, not only did the Attorney General fail to offer any evidence as to the reliance by the general criminal justice program population upon the fraudulent conduct of the Schools but he also failed to connect the 15 testifying students to that broader student population. There is no evidence in the record

before us determining how many students were affected by the fraudulent conduct or how those students were affected.[7]

IV.

The district court held that "[a] restitutionary process . . . is necessary in this case to determine the appropriate amount of restitution for each affected student while giving [the Schools] an opportunity to respond to claims for restitution." The district court clearly erred here—evidence of which students were harmed and to what extent must be proven at trial, rather than after the fact during "mini restitution trials." The court of appeals correctly concluded that in this case, a causal nexus could not be presumed for the purpose of restitution awards for the vast majority of students because the Attorney General did not prove the basis for that award at trial. *State v. Minn. Sch. of Bus., Inc.*, 915 N.W.2d 903, 911 (Minn. App. 2018). The Attorney General made a strategic decision to attempt to fulfill its burden of proof for hundreds of students through the evidence offered by just 15 students. We cannot endorse this choice no matter how appalling the Schools' conduct. The posttrial restitution process ordered by the district court effectively provides the

[7] The court contends that "most prospective students who signed up for the criminal justice program wanted to be either a police officer or probation officer." In dismissing the admissions-practices claim brought by the State, the district court made a stray finding of fact that a representative of the Schools testified to that effect, but there are no factual findings supporting the district court's grant of relief to the nontestifying students. Further, there is no evidence in the record on the admissions-practices claim, the criminal-justice-program claim, or otherwise, that identifies specific nontestifying students who were harmed by the practices of the Schools or even attempts to quantify the number of students so harmed.

Attorney General with another bite at the apple to meet his burden of proof requirement and raises serious due process concerns.[8]

Because the application of a rebuttable presumption, or the use of judicial notice, to prove a causal nexus under Minn. Stat. § 8.31 is inconsistent with our case law and the Attorney General has not presented sufficient evidence to prove a causal nexus between the fraud committed by the Schools and the injuries suffered by the nontestifying students, I would affirm the court of appeals and reverse the district court.

GILDEA, Chief Justice (concurring in part, dissenting in part).

I join in the concurrence and dissent of Justice Anderson.

[8] In fact, the district court had due process concerns regarding the restitution process and asked the parties to file supplemental memoranda on the issue. This concern is not unfounded. *See, e.g.*, *SEC v. Elliott*, 953 F.2d 1560, 1567–68 (11th Cir. 1992) (holding that defendants were denied due process because they were not afforded the chance to present available affirmative defenses); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 370–71 (D.N.J. 1987) (holding in a class action suit brought by over 1300 company employees, that "[t]o proceed without permitting [the defendant] to raise" affirmative defenses particular to each plaintiff would "deprive defendant of the Fifth Amendment right to due process").