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In the fall of 1981, the Federal Trade Commission was emerging from a period of extended controversy and facing continued threats to key aspects of its jurisdiction. In consumer protection, the Commission had sought to become the second most powerful legislature in Washington. Using its unfairness authority under Section 5,[1] but unbounded by meaningful standards, in the 1970s the Commission embarked on a vast enterprise to transform entire industries. Over a 15-month period, the Commission issued a rule a month, usually without a clear theory of why there was a law violation, with only a tenuous connection between the perceived problem and the recommended remedy, and with, at best, a shaky empirical foundation.[2] This enterprise foun-

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[1] Section 5 of the Federal Trade Commission Act makes "unlawful" "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45.

[2] *See* Timothy J. Muris, *Rules Without Reason—The Case of the FTC*, Regulation, Sept./Oct. 1982, at 20. For similar criticisms of the FTC's rulemaking binge, see the extensive, contemporaneous studies by Barry Boyer, Report to the Administrative Conference of the United States, Trade Regulation Rulemaking Procedures of the Federal Trade Commission (1979); and Teresa Schwartz, *Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard*, 11 Akron L. Rev. 1 (1977). In 1980, the Commission itself recognized that Section 5 unfairness should be circumscribed. *See* FTC Policy Statement on Unfairness, *appended to* Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984). In 1982, the Commission again clarified the reach of unfairness, eliminating the possibility that public policy could form an independent basis for a finding of unfairness. *See* Letter to Senators Packwood and Kasten, Mar. 5, 1982, *reprinted in* Antitrust & Trade Reg. Rep. (BNA) 1055, at 568–70. In 1994, Congress codified the definition in 15 U.S.C. § 45(n).

dered, not only because of these substantive flaws, but also because of the internal inadequacies of the Commission's procedures and because of intense opposition from members of both parties in Congress.

Clearly, the Commission needed a new vision of its consumer protection mission. As discussed in detail elsewhere,[3] the FTC should be a referee, not a star player, in the economy, enforcing basic rules to protect consumers and the market process. Fraud was a major problem consumers faced, the consumer protection analog to price fixing in antitrust. The prestigious Kirkpatrick Commission of the American Bar Association had recommended in 1969 that the FTC systematically attack fraud, but the FTC largely had ignored this recommendation.

Given the limited set of tools the FTC thought it had, there was considerable justification for its decision to continue to ignore fraud. Fraudsters are unlikely to obey legal rules unless they are forced to do so, and the FTC had little ability to compel compliance. It had no criminal authority to impose personal sanctions, and its traditional remedy, the cease-and-desist order, left untouched the monetary gains from fraud.

To help remedy these problems, after years of trying, Congress had amended the FTC Act in 1975 to expand the FTC's ability to obtain monetary relief.[4] Primarily because the FTC Act's basic prohibitions against unfair and deceptive acts or practices were both broad and often ill defined, Congress rejected open-ended monetary relief. Instead, it enacted two provisions that provided for monetary relief, but only under carefully circumscribed conditions. Section 19 permitted the agency to seek consumer redress in federal court after an administrative proceeding to determine whether a violation had occurred, but only for practices that a reasonable person would have known were "dishonest or fraudulent."[5] Section 5(m)(1)(B) permitted the Commission to obtain civil penalties when a company engaged in an act or practice that the Commission had previously determined, in a litigated proceeding, was unfair or deceptive, but again only if the company had actual knowledge of that determination.[6] Although both of these provisions were potentially useful tools, neither would work against fraud. Each had the same fundamental flaw, namely, that the investigative target would have time to hide the money well before it could be ordered to pay redress.

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[3] *See* Timothy J. Muris & Robert Pitofsky, *More than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773 (2005).

[4] *See infra* Part I.C.

[5] 15 U.S.C. § 57b; *see also infra* Part I.C.

[6] *See* 15 U.S.C. § 45(m)(1)(B); *see also infra* note 76. In addition, Congress enacted Section 18, which also provided for monetary relief. 15 U.S.C. § 57a. Section 18, however, first required the Commission to promulgate a rule. Section 19, 15 U.S.C. § 57b, authorizes civil penalties for rule violations. *See infra* note 102 and accompanying text.

Thus, it was critical that the FTC be able to freeze assets pending a final determination on the merits. The agency therefore turned to the second proviso of Section 13(b), added to the FTC Act in 1973, which provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."[7] Relying on the authority to obtain permanent injunctions permitted the use of a single forum to attack fraudulent practices. The federal district court could not only issue an ex parte order freezing assets and enjoining ongoing violations, it could also dispose of the case on its merits, ordering, if appropriate, that the frozen assets be returned to consumers and that a permanent injunction be issued. This use of Section 13(b) became known as the "Section 13(b) Fraud Program."[8]

Admittedly, this use of Section 13(b) was something of a "stretch." Although many on the FTC staff, including the authors of this article, supported the new program, there was some internal opposition, arguing, with considerable force, that the 1975 amendments provided the exclusive road to financial relief. The response was two-fold. First, because the ability to freeze assets rested on a strong foundation, it would be nonsensical to force the Commission into three separate legal proceedings to resolve a single matter, as would have been required under Section 19.[9] Indeed, in the legislative history of the 1975 amendments, Congress recognized that judges might be reluctant to is-

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[7] 15 U.S.C. § 53(b). The first part of Section 13(b) provides, in pertinent part:

> Whenever the Commission has reason to believe—(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC], and (2) that the enjoining thereof pending the issuance of a complaint by the [FTC] and until such complaint is dismissed by the [FTC] or set aside by the court on review, or until the order of the [FTC] made thereon has become final, would be in the interest of the public—the [FTC] by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the [FTC's] likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond.

Id.

[8] *See generally* David R. Spiegel, *Chasing the Chameleons: History and Development of the FTC's 13(b) Fraud Program*, ANTITRUST, Summer 2004, at 43. The Commission had begun to explore possible uses of Section 13(b) and Section 19 before the fraud program launched late in 1981, but there was no systematic effort to attack fraudulent practices. After the fraud program was launched, two of those exploratory cases resulted in highly useful Circuit Court opinions in 1982 granting preliminary relief. *See* Appendix.

[9] *See* David M. Fitzgerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* 11–12, *available at* http://www.ftc.gov/ftc/history/docs/fitzgeraldremedies.pdf ("To obtain complete final relief, the Commission would need to litigate and win three separate actions: (1) a Section 13(b) preliminary injunction proceeding to obtain a preliminary asset freeze; (2) an administrative proceeding leading to a final cease and desist order; and (3) a district court action to obtain consumer redress under Section 19."); *see also id.* at 19 (describing such a "three-part process" as "lengthy and cumbersome" and noting that "[t]he permanent injunction proviso of Section 13(b) . . . offered a much more effective and efficient weapon against fraud").

sue preliminary relief unless it could assure that a final decision on the merits could occur expeditiously.[10] Second, and equally important, because the Commission was attacking fraud, it was respecting the carefully crafted congressional compromise that authorized monetary relief only when the conduct was dishonest or fraudulent.

The fraud program succeeded;[11] each successive Chairman embraced the program, improving and expanding it. For example, by 2004 there had been a total of 78 sweeps, resulting in 2,200 federal and state law enforcement actions. As the number of filings has increased, so too has the amount of consumer redress ordered. In fiscal year 2003, for example, nearly $873 million in consumer redress was ordered in 98 judgments.[12] More recently, between March 2008 and February 2009, the Commission filed 64 federal district court actions and secured 83 judgments and orders requiring defendants to pay more than $371 million in consumer redress or disgorgement of ill-gotten gains.[13]

But sometimes success can encourage overreaching. The FTC now threatens to expand the use of the Section 13(b) program beyond fraud cases, suggesting that it may use Section 13(b) to seek consumer redress even against legitimate companies when there are simply questions about the substantiation for claims made as part of national advertising campaigns.[14] This use of the Section 13(b) remedial authority is wrong as a matter of law, troubling as a matter of policy, and threatens to undermine the operation of the fraud program, which has proven critical to the FTC's consumer protection mission.

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[10] *See infra* note 53 and accompanying text.

[11] *See* Fitzgerald, *supra* note 9, at 2 (describing the program as a "mainstay of the Commission's consumer protection program"); *see also* Spiegel, *supra* note 8, at 1 (describing Section 13(b) as a "significant weapon in the Commission's fight against consumer fraud"); *see generally* Spiegel, *supra* note 8, at 43–44 (describing the program as "one of the FTC's potent consumer protection programs" and noting its "obvious success").

[12] *Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers: Hearing Before the Subcomm. on Consumer Protection, Prod. Safety, and Ins. of the S. Comm. on Commerce, Sci., and Transp.*, 111th Cong. 37 (2010) (Statement of Timothy J. Muris, George Mason University Foundation Professor of Law).

[13] *Id.* at 7.

[14] Consent Order, Oreck Corp., FTC File No. 102-3033 (Apr. 7, 2011) ($750,000); Consent Order, Beiersdorf, Inc., FTC File No. 092-3194 (June 29, 2011) ($900,000); Consent Order, NBTY, INC., FTC Docket No. C-4318, File No. 102-3080 (Dec. 13, 2010) ($2.1 million). In some cases, the redress is paid in conjunction with a settlement with other plaintiffs. *See* FTC v. Reebok Int'l Ltd., No. 1:11-cv-2046 (N.D. Ohio Sept. 29, 2011) ($25 million); Order Preliminary Certifying a Class for Settlement Purposes, *In re* Reebok Easytone Litig., No. 4:10-cv-11977-FDS (D. Mass. Oct. 6, 2011); FTC v. Skechers U.S.A., Inc., No. 1:12-cv-01214 (N.D. Ohio May 16, 2012) ($40 million); Grabowski v. Skechers U.S.A., Inc., No. 3:12-cv-00204 (W.D. Ky. May 13, 2013). (The authors advised Skechers during the course of the investigation.) *See also* Stipulation and Order, Gemelas v. The Dannon Co., No. 1:08-cv-236 (N.D. Ohio July 19, 2011).

This article proceeds in three parts. First, we discuss the legislative history surrounding the enactment of Sections 13(b), 19, and 5(m)(1)(B).[15] This legislative history has received vanishingly little attention in the cases that have addressed the legality of the Section 13(b) fraud program, even though it sheds considerable light on the proper scope of that provision. As we explain below, there is no hint in the legislative history that Congress intended to grant the FTC broad authority to seek monetary relief when it enacted Section 13(b). Moreover, two years *after* it enacted Section 13(b), Congress did grant the FTC authority to seek monetary relief in carefully circumscribed cases. This authority would have been wholly unnecessary under the current Commission's new reading of Section 13(b), raising questions about the validity of this interpretation.

Second, we discuss the Section 13(b) fraud program. Although Congress may not have specifically intended to grant the FTC the authority to seek broad monetary relief when it enacted Section 13(b), it became clear two years later that it did want the FTC to have the authority to seek monetary relief—in certain cases. Yet the tools it provided were, if interpreted narrowly, insufficient. Thus, the Section 13(b) fraud program was established to fill the breach. Because the FTC has, until recently, carefully limited its use of the Section 13(b) fraud program, the courts have blessed it, at least as applied to the narrow category of cases in which the FTC has used it. Expanded beyond that narrow category, however, the use of Section 13(b) is bad law that threatens to do more harm than good, especially when coupled with recent changes in the FTC's advertising substantiation program that have increased dramatically the amount of substantiation required for certain claims.[16]

Third, we explain why expansion of Section 13(b) beyond the fraud program is both wrong as a matter of law and troubling as a matter of policy. Specifically, we argue that the FTC and the courts should give meaning to the text of Section 13(b), which provides that the FTC may seek injunctive relief only in "proper cases." Perhaps because the FTC has historically limited its use of Section 13(b) to obviously "bad actors," most courts have simply ignored this statutory requirement, and those that have acknowledged it have

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[15] The second proviso of Section 13(b) states, "Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 45 U.S.C. § 53. Section 19 authorizes "such relief as the court finds necessary to redress injury" (45 U.S.C. § 57(b)) against any party subject to a final cease and desist order "[i]f the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent. . . ." 45 U.S.C. § 57b(a)(2). Section 5(m)(1)(B) authorizes civil penalties against any party engaged in a practice that the Commission has found unfair or deceptive in a litigated proceeding "with actual knowledge that such act or practice is unfair or deceptive and is unlawful . . . ." U.S.C. § 45(m)(1)(B)(2).

[16] *See infra* Part III.C.

offered little explanation of what it means. Without proposing a "one size fits all" definition of that concept here, we suggest that the touchstone for defining a "proper case" is found in the language of Section 19, limiting monetary relief to cases involving practices that a reasonable person would have known were dishonest or fraudulent. We also suggest one class of cases clearly improper for awarding redress under Section 13(b): traditional substantiation cases, which typically involve established businesses selling products with substantial value beyond the claims at issue and disputes over scientific details with well-regarded experts on both sides of the issue. In such cases, the defendant would not have known ex ante that its conduct was "dishonest or fraudulent." Limiting the availability of consumer redress under Section 13(b) to cases consistent with the Section 19 standard strikes the balance Congress thought necessary and ensures that the FTC's actions benefit those that it is their mission to protect: the general public.

I. THE LOST LEGISLATIVE HISTORY

Although various courts have attempted to determine the proper scope of Section 13(b),[17] their discussion of the provision's legislative history is, at best, cursory. Rather than comprehensively examining the extended history of debate and deliberation that led to the enactment of Sections 13(b), 19, and 5(m)(1)(B), these courts have, at most, simply extracted isolated comments from House and Senate reports. These isolated statements do a disservice to the rich and nuanced debate that produced the 1970s amendments to the FTC Act. We seek to address that deficit here by exploring the legislative history of Sections 13(b), 19, and 5(m)(1)(B) in detail. Upon examination, it is clear that this history is inconsistent with the FTC's current attempts to expand the reach of Section 13(b). We discuss the history comprehensively and chronologically, beginning with the FTC's desire for expanded injunctive authority and expanded ability to obtain monetary relief in legislation introduced in 1971. The FTC achieved expanded injunctive authority in 1973 through Section 13. Neither the FTC nor Congress thought that the changes to Section 13 solved the FTC's need for greater remedial authority, which led to the passage of Sections 19 and 5(m)(1)(B) in 1975.

A. In the Beginning

The FTC exists to serve the consuming public, guarding against "unfair or deceptive acts or practices." But, as originally created, the FTC had big goals and incomplete tools to address fraudulent practices. The FTC could issue cease-and-desist orders, but actual penalties could be imposed only on those persons and companies that actually violated a cease-and-desist order. As

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[17] *See infra* Parts II.B., III.A.–B.

David Fitzgerald has explained, "This 'one free bite' approach was deemed appropriate because the broad language of Section 5(a) was thought to give businesses little notice of the standards to which they would be held until the Commission applied Section 5 to specific conduct through a cease and desist order."[18]

But there were "two serious shortcomings" with this approach when applied to fraudulent practices.[19] As Fitzgerald noted, the administrative process was not a short one and, in some cases, could take "several years."[20] As a result, "the respondent remained free to employ the deceptive practices, causing continuing harm to the public."[21] Second, although a cease-and-desist order could help prevent "future harm," it did nothing to "remedy the injury to the public caused by the respondent's past deceptions, or deprive the respondent of the gains it had realized by employing them."[22]

In the late 1960s, the FTC came under considerable criticism. Two reports, one from three "Nader's Raiders" and the other from the American Bar Association responding to a request from President Nixon, excoriated the Commission.[23] The ABA Report concluded that without change, the Commission should be abolished. The ABA recommended, inter alia, that the FTC be much more aggressive in its consumer protection responsibilities.[24] Many critics, both within and without the FTC, felt that the agency needed more remedial authority,[25] and Congress began considering whether to grant the FTC new remedial powers.

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[18] Fitzgerald, *supra* note 9, at 3.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at 5–6.

[23] 6 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES: PART I, at 5028 (Earl W. Kintner ed., 1983) [hereinafter LEGISLATIVE HISTORY] ("Rising consumer consciousness and activism in the 1960s, coupled with indications that the Commission had possibly reached its nadir in public esteem and confidence, led President Nixon, in April 1969, to seek from the American Bar Association an objective study of the FTC's efforts in the field of consumer protection.").

[24] *See generally* ABA, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969).

[25] *See, e.g.*, David O. Bickart, *Civil Penalties Under Section 5(m) of the Federal Trade Commission Act*, 44 U. CHI. L. REV. 761, 762–63 (1976) ("During the sixty years following the passage of the [FTC Act] in 1914, it was frequently observed that the Commission's remedial authority was inadequate to deter unscrupulous businesses from engaging in deceptive practices. . . . [T]he late 1960s and the general dissatisfaction with the existing level of FTC consumer protection activity fostered a demand for increased federal intervention in preventing deceptive practices.").

B. The Lead-Up to Section 13

1. *S. 986 (1971)*

Although bills to address gaps in the FTC's remedial authority had been under consideration in Congress since at least the late 1960s, we begin our story in July 1971, when the Senate Interstate Commerce Committee reported S. 986, a bill empowering the FTC to seek both injunctive relief and consumer redress.[26] The injunctive relief provision would have authorized the FTC to bring suit in district court to seek temporary restraining orders or preliminary injunctions when it had "reason to believe . . . that any person . . . is engaged in, or is about to be engaged in, any act or practice which is unfair or deceptive to a consumer" and that enjoining such practice would be in "the interest of the public."[27]

Section 203, the consumer redress provision, would have empowered the FTC, upon issuance of a cease-and-desist order,

> [to] institute civil actions in the district courts of the United States to obtain such relief as the court shall find necessary to redress injury to consumers, . . . including but not limited to, recission or reformation of contracts, the refund of money or return of property, public notification of the violation, and the payment of damages.[28]

The bill would also have authorized the FTC to seek civil penalties under specified circumstances.[29]

The Committee's Report on S. 986 explained the need for the new FTC powers:

> In 1938 the Wheeler-Lea Trade Commission Act expanded the powers of the [FTC] to cover 'unfair or deceptive acts or practices in commerce.' . . .

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[26] S. 986, 92d Cong. (1971).

[27] *Id.* § 210.

[28] *Id.* § 203. The provision's requirement that the FTC issue a cease-and-desist order before seeking consumer redress was deliberate. An earlier bill would have allowed the FTC to seek consumer redress without first issuing a final cease-and-desist order, but the provision was "narrowed," presumably to address the concerns of some Senators. *See* 117 Cong. Rec. 39,821 (1971) (Sen. Moss) ("[S]ection 203 has been narrowed to allow the [FTC] to bring action only after a final cease and desist order has been issued. Section 103 of S. 3201 did not so limit the Commission's authority to seek specific consumer redress."). In addition, another earlier bill would have allowed the Commission itself to "enter an ancillary remedial order requiring such further action as it may find to be reasonable and appropriate to remedy the injury to consumers caused by such acts or practices including, but not limited to, recission or reformation of contracts, the refund of money or return of property, and the public notification of the violation." S. Rep. No. 92-268, at 59 (1971). At least one Senator strongly objected to the provision, viewing it as "inadvisable to give to the Commission the authority to decide what redress of injury was reasonable to remedy a violation of the Act. Such authority was never intended for the Commission and should properly reside in the courts." S. Rep. No. 92-269, at 59 (1971).

[29] S. Rep. No. 92-269, at 37–38 (1971).

> Congress, however, did not accompany this broad grant of authority with a concomitant expansion of the Commission's powers of enforcement, except in [one limited arena]. Thus the sole enforcement weapon available to the FTC to police the vast majority of consumer frauds and cheats has been the cease-and-desist order.[30]

On the Senate floor, Senator Magnuson echoed the Committee Report's comments, explaining that "[e]ven in 1938, a minority of the House committee reporting the Wheeler-Lea Act recognized and decried the inadequacy of such a limited enforcement power [as provided by the cease-and-desist order]."[31] These committee members feared that there could be no deterrence unless there was the possibility of criminal or civil penalties (and not just cease-and-desist orders),[32] and according to Senator Magnuson, these fears proved well-founded: "Each subsequent decade has brought forth indictments of the FTC's incapacity to enforce Section 5(a)(1) of the [FTCA], the original act."[33]

Although there was considerable support for granting the FTC more power, not everyone agreed. Even a redress bill requiring an initial cease-and-desist order was not without its detractors. Senators concerned about such a dramatic expansion in the FTC's remedial powers made these objections known. Senator Hruska, for example, criticized the bill for "seek[ing] to vastly and drastically increase and broaden the powers and the duties of the [FTC]."[34] While much of the criticism had to do with a separate provision that would have authorized the FTC to engage in rulemaking, the redress provision also came under attack on several fronts. First, some Senators were concerned that it would subject businesses to monetary liability, even in cases when they did not know they were violating the law.[35] Some of these Senators mocked the

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[30] *Id.* at 3–4; *see also id.* at 24 ("[The consumer redress provision] would enable the Commission to more adequately protect consumers by affording them specific redress. At the present time cease-and-desist orders have prospective application only and afford no specific consumer redress to consumers already injured.").

[31] *See* 117 CONG. REC. 39,609 (1971).

[32] *Id.*

[33] *Id.*; *see also id.* ("Commissioner Philip Elman . . . explained how the FTC's regulatory anemia was related to its dependence upon the cease-and-desist order.").

[34] *Id.* at 39,616 (Sen. Hruska); *see also id.* ("It seeks a comprehensive and far-reaching restructuring of that body's method of functioning, its mission, its procedures, as well as its jurisdiction.").

[35] *See id.* at 39,626 (Sen. Dole) ("I believe section 203 would create many more problems than it would solve. It is language that is extremely vague and does not define those acts or practices upon which recovery may be had."); *id.* at 39,849 (Sen. Hruska) ("The second aspect is the consumer class action [i.e., the redress provision]. The dealer can be as honest as the day is long, plus an hour, and yet if he gets caught or is sued in a class action, he has no means of getting out except buying his way out or trying the case to the last remedy that is available to him, and there are problems within that area, with the lack of safeguards in it, which are much greater than any civil damage or any fine could be. So it is not a matter of the honest dealer and the honest manufacturer not being affected, and that he should not fear. He should fear, Mr. President. He

fact that the bill limited the availability of civil penalties to cases of *knowing* violations of Section 5 given that the consumer redress provision contained no similar limitation.[36]

Senator Cook discussed this concern at length, noting that "the FTC frequently breaks very new ground in these proceedings and finds that conduct is 'unfair or deceptive' when the conduct had previously been widely regarded as proper."[37] As a result, the proposed consumer redress provision threatened to impose "ruinous retroactive liability."[38] He acknowledged that when individuals or companies knowingly engaged in conduct that is unfair or deceptive imposition of liability might be appropriate, but he said that could be accomplished without Section 203.[39]

Second, and related, some Senators saw this provision as fundamentally subverting the proper role of the FTC, converting the "Commission from a body whose orders are designed to operate prospectively into an instrument whose decisions are designed to redress injury and, in effect to punish."[40] Third, some Senators expressed concern that the provision would keep individual consumers from bringing their own claims or might result in double

should fear more mightily because this will be a very, very unfair bill for him. He will be affected.").

[36] *See id.* at 39,620 (Sen. Hruska) ("The possibility of damage windfalls without proof of specific injury also suggests that section 203 may constitute the most extensive penalty provision ever devised. . . . [I]t is a mystery why the committee ever bothered to include in title II a special provision . . . authorizing the Commission to seek civil penalties for 'knowing' violations of section 5 of the act and why any effort was made . . . to raise . . . the civil penalty for violation of an outstanding cease-and-desist order."); *id.* at 39,849 (Sen. Cook) ("I suggest that under section 203, there is no such language as 'knowingly,' and no limitation on the damages that can be assessed."); *id.* at 39,855 (Sen. Cook) ("To be noted is the fact that the civil penalty provided under that section is limited to $10,000. Liability under this section whereby action may be brought even though the defendant has not knowingly engaged in an unfair or deceptive act or practice is limited only by the size of class of consumers which the Commission may allege to have been adversely affected and the value of the product.").

[37] *Id.* at 39,854 ("This has been one of the primary missions of the FTC—to give specific meaning to a very general statutory term and in doing so it could be far reaching in its decisions because the cease-and-desist order only operated to bar such conduct in the future.").

[38] *Id.* at 39,855.

[39] *Id.* at 39,854–55; *see also id.* at 39,854 ("Under section[s] 202 and 203 of the proposed amendments to the [FTCA], the Commission would, for the first time, be authorized to go into court and seek civil penalties, damages, or other relief on behalf of consumers aggrieved, based on the conduct which may have been declared unlawful for the first time by entry of the Commission's final cease-and-desist order. These amendments, I believe, will raise more problems than they will solve. . . . Is the term 'unfair or deceptive act or practice' sufficiently well defined to make exercise of the authority contained in section 203 by the FTC constitutional and, even if it is constitutional, is it wise? I think not.").

[40] *See id.* at 39,855–56 (Sen. Cook) (noting that Assistant Attorney General McLaren said that "[s]ection 203 would substantially alter the framework of the FTC Act"); *cf. id.* at 39,839 (Sen. Cotton) ("I am concerned over the new authority which section 203 would seek to vest in the [FTC] to assume the role of 'consumer advocate' and to seek redress in the courts on the behalf of consumers.").

liability for businesses.[41] Fourth, at least one Senator expressed concern that this power would make courts "less inclined to sustain orders breaking new ground in the area of defining unfair or deceptive practice," which would be "a most undesirable result from every point of view."[42]

Two other points from the debate are particularly noteworthy. First, a few Senators explicitly distinguished the provision addressing injunctive relief from the provision addressing consumer redress. While the former was viewed as "reasonable" and "noncontroversial," the latter was not.[43] Second, proponents of the measure attempted to address concerns about the dramatic expansion of FTC power by arguing that consumer redress "would be an infrequently used authority of the FTC" and would only be employed "where there is a flagrant deception of consumers, and only in areas where rules and practices have been well established by the FTC."[44] Even though they maintained that its use would be infrequent, they argued that it would nonetheless be significant: "It will serve . . . to lend credibility to the FTC's enforcement actions. We will no longer have businesses calculating as a risk of their operation that some clearly deceptive or fraudulent practice might be discontinued as a result of an FTC order, but discontinued only."[45] They also stressed the fact that the provision required the FTC to go to court to seek the monetary relief.[46]

Despite the bill's critics, it passed the Senate in November 1971 by a vote of 76-2.[47] It was sent to the House, where it ultimately died in committee.

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[41] *See id.* at 39,621; *see also id.* at 39,862 (Sen. Ervin) (expressing concern about the ability of private individuals to sue).

[42] *Id.* at 39,855 (Sen. Cook).

[43] *Id.* at 39,845–46 (Sen. Buckley) (indicating the provision that "would authorize the Commission to seek temporary injunctions in cases involving unfair practices" is "reasonable," but expressing concern about section 203 because "[w]hile few would object to legislation empowering the Commission to seek court redress for consumers injured by established 'deceptive practices' for the purpose of making them whole, there is little justification under the [FTCA] for fashioning types of legal recovery which transcend this objective. Particularly where the act for which recovery is sought may not previously have been known to be unlawful. Redress, in short, should be limited to compensating consumers for injury actually suffered as the result of known unfair practice."); *id.* at 39,848 (Sen. Magnuson) (contrasting the "noncontroversial" provision providing the "authority to issue preliminary injunctions" with the "controversial features" of the bill); *id.* at 39,853 (Sen. Cook) (including the amendment that would authorize the FTC to seek preliminary injunctions in a list of the bill's "sweeping" amendments, but noting that that provision was among those "desirable and necessary").

[44] *Id.* at 39,860 (Sen. Spong).

[45] *Id.*

[46] *Id.* (Sen. Moss) ("It says that the [FTC] having found that there is a deceptive or fraudulent practice of some sort and having issued a cease-and-desist order may go into court—not decide on its own—to establish that the damage has occurred by that action to a number of consumers and that, therefore, they will be able to receive a recovery.").

[47] *Id.* at 39,876.

2. *S. 356 (1973)*

Over a year would pass before there was more sustained debate in the Senate over the FTC's remedial authorities. In January 1973, Senators Magnuson and Moss introduced a new bill, which again contained both preliminary injunction and consumer redress provisions.[48]

The consumer redress provision was similar to the one in S. 986, except that it addressed a number of the objections that had been made to that provision: (1) it made clear that exemplary and punitive damages were not authorized; (2) it provided for notice to consumers; (3) it established a statute of limitations; and (4) it allowed for the consolidation of similar actions. The new bill also differed from S.986 in that, by the time the bill was reported out of the Commerce Committee in May, a provision allowing for the FTC to request permanent injunctive relief had been added.[49]

The Commerce Committee Report clearly regarded the provisions that ultimately would become Section 13(b) and Section 19 as authorizing different actions. The Report explained:

> Title II of the bill improves the [FTC's] ability to deal with unfair consumer acts and practices "affecting" interstate commerce by granting the Commission the power to: (1) seek preliminary or permanent injunctions, (2) initiate actions in district courts seeking specific redress for consumers injured by unfair or deceptive acts or practices, and (3) secure civil penalties for knowing violations of the [FTCA].[50]

Regarding the consumer redress provision, it said: "This provision would enable the Commission to more adequately protect consumers by affording them specific redress for their injuries. At the present time, cease-and-desist orders have prospective application only and afford no specific consumer redress to consumers who have been injured."[51] Regarding the injunctive relief provision:

> This section would permit the Commission to obtain either a preliminary or permanent injunction through court procedures initiated by its own attorneys against any act or practice which is unfair or deceptive to a consumer, and thus prohibited by section 5 of the [FTCA]. The purpose of [this section] is to permit the Commission to bring an immediate halt to unfair or deceptive

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[48] S. 356, 93d Cong. (1973).

[49] Although there are a few lines about the permanent injunction provision in the Senate Committee Report (see *infra* notes 50, 52), there is not, so far as we are aware, any other explanation in the legislative history regarding why this provision was added.

[50] S. REP. NO. 93-151, at 2 (1973); *see also id.* at 3 ("Title II would authorize the [FTC] to seek either a preliminary or permanent injunction against parties committing acts or practices which are unfair or deceptive to consumers. . . . In order to redress consumer injury resulting from violations of the [FTCA], the Commission is authorized to initiate civil actions in United States district court seeking reasonable and appropriate consumer redress.").

[51] *Id.* at 28.

> acts or practices when to do so would be in the public interest. At the present time such practices might continue for several years until agency action is completed. Victimization of American consumers should not be so shielded.[52]

The Report also made this somewhat elliptical statement about permanent injunctions:

> Provision is also made . . . for the Commission to seek and, after a hearing, for a court to grant a permanent injunction. This will allow the Commission to seek a permanent injunction when a court is reluctant to grant a temporary injunction because it cannot be assured of a[n] early hearing on the merits. Since a permanent injunction could only be granted after such a hearing, this will assure the court of the ability to set a definite hearing date. Furthermore, the Commission will have the ability, in the routine fraud case, to merely seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order. Commission resources will be better utilized, and cases can be disposed of more efficiently.[53]

During debate on the Senate floor, Senator Magnuson lauded the bill because the preliminary injunction provision would enable "the whistle [to] be blown at the moment a violation of the [FTCA] is detected—before consumers are damaged. By allowing the FTC to stop immediately an alleged unfair act or practice, it can do a much better job of protecting consumers."[54] He also applauded the bill for "allow[ing] the Commission to order specific redress for injured consumers."[55] Senator Magnuson expressed relief that the FTC would "no longer . . . have to rely merely upon a slap of the violator's wrist to maintain fair play in the marketplace," and that consumers could finally have their injuries "made whole."[56] The bill passed the Senate on September 12, 1973.

3. *S. 2074 (1973)*

While the Congress was considering these bills focused on the FTC's remedial authority, the Senate was investigating the petroleum industry. In response to a question from the Senate Committee on Interior and Insular

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[52] *Id.* at 30–31. The FTC Chairman applauded Congress's decision to grant the FTC this authority, *id.* at 54 ("The supplementation of its enforcement tools by the acquisition of authority to seek preliminary injunctions has long been a prime target in the Commission's program to streamline its procedures. The denial of consumer relief during the pendency of cease-and-desist proceedings, which average more than a year, and frequently require from three to five years, would be averted by use of injunctions in cases where this delay causes unusual harm."), but requested a more lenient standard for establishing entitlement to that relief. *Id.* at 54–56.

[53] *Id.* at 30–31.

[54] 119 CONG. REC. 29,480 (1973).

[55] *Id.*

[56] *Id.*; *see also id.* ("A mere cease-and-desist order has frequently let a wrongdoer keep his ill-gotten gains.").

Affairs about the adequacy of its discovery powers, on June 15, 1973, the FTC General Counsel explained that the agency's investigative powers were sufficient, but its enforcement powers were not; he suggested that the FTC be permitted to seek injunctions, when appropriate, in all cases.[57]

On June 26, 1973, Senator Jackson introduced S. 2074, a bill that contained the language that we now know as Section 13(b). In general, this bill was analogous to earlier Senate proposals to increase the FTC's authority, but the earlier bills granted the FTC injunctive authority only in cases involving acts or practices unfair or deceptive to consumers, whereas the new bill would have extended the new enforcement powers to all cases within the FTC's jurisdiction.

Senator Jackson explained that this bill would "give to the [FTC] major new statutory authority which is designed to enable the Commission to carry out its mandate to protect the public interest through prompt and aggressive enforcement of the laws it administers."[58] He also produced his correspondence with the FTC's General Counsel. The General Counsel had explained that "[t]he shortcomings of the Commission's present power are . . . in its inability to obtain preliminary relief once the problem has been fully discovered."[59] He further noted that "[t]he Commission has sought for a long time to have . . . statutory authority to seek directly in the federal district courts preliminary injunctions."[60] This bill was referred to the Senate Committee on Commerce.[61]

In July, Senator Jackson reintroduced the provisions of S. 2074 verbatim, but this time as an amendment to the Trans-Alaska pipeline bill; the amendment passed, and the bill subsequently passed the Senate on July 17, 1973. On August 2, 1973, the House passed a pipeline bill, but without a provision addressing FTC authority. The FTC provisions were added back into the bill during conference, and under the House rules at the time a floor vote to strike the individual provisions of the compromise bill was not procedurally permissible.[62]

In August, two members of the House led an effort to recommit, focusing largely on questions of congressional procedure; the motion failed, and the conference report was passed in November 1973. What little debate there was evinces no indication that *anyone* understood the FTC provision to do anything other than confer on the agency the authority to seek injunctive relief to

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[57] LEGISLATIVE HISTORY, *supra* note 23, at 4951.
[58] 119 CONG. REC. 21,443 (1973).
[59] *Id.*
[60] *Id.*
[61] *Id.* at 21,435.
[62] *See id.* at 36,616.

end practices while administrative proceedings were on-going. As one congressman explained, "The disaster that befell the independent gasoline marketers this past spring is dramatic [sic] of why the FTC needs additional powers to enable it to act quickly."[63]

Indeed, it is not at all clear that the grant of authority to seek *permanent* injunctive relief received much attention at all. In a letter discussing the bill, FTC Chairman Engman noted that one of the major provisions of the bill would "authorize the Commission to go into federal court to seek temporary injunctions to prevent the continuation of particularly aggravated violations of the laws under its jurisdiction, pending the completion of the lengthy administrative proceedings and appeals which lead to a final cease-and-desist order."[64] He said nothing at all about the permanent injunction provision. Likewise, in a House Report issued in June 1974, the description of the authority granted by section 408 of the Alaska Pipeline Act does not even mention permanent injunctive relief:

> Both the Nader and ABA reports recommended that the FTC be empowered to obtain preliminary injunctions against unfair or deceptive acts or practices which are unfair or deceptive to consumers. This authority was granted by Section 408 of the Alaska Pipeline Act, which authorized the FTC to obtain temporary restraining orders and preliminary injunctions of violations or threatened violations of any provision of law administered by the Commission.[65]

There was even less debate in the Senate than in the House. Senator Fannin noted that the provisions received little attention when they were initially ad-

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[63] *See id.* at 36,597 (Rep. Melcher); *see also id.* ("In fact, it was this event that gave a new sense of urgency to the effort to give the Commission the power to seek injunctions."); *id.* at 36,608–09 (Rep. Smith) ("A provision in this bill would permit the FTC to secure injunctions on their own as necessary. By the time the FTC goes through the procedure of the cease-and-desist order and obtains a final court order to that effect, these small businessmen are sometimes long since gone and they are out of business for 2 or 3 years. . . . The [FTC] is charged by its statute with assuring fair, free, and honest competition in the marketplace, but their ability to do so has been limited. The primary tool they have been authorized to use is the cease-and-desist order. As a practical matter, a determined and aggressive corporate giant can postpone the final date of such an order for years after the first complaint is issued. During this period millions of consumers may be misled by its false advertising and honest competing businessmen are unlikely to survive unless they are possessed of resources of extraordinary size. . . . Without injunctive powers the [FTC] frequently is left with having to impose remedies that are conspicuously inadequate. Even in instances where the anticompetitive nature of the conduct is obvious, the FTC lacks the power to provide the sort of immediate remedy needed to insure the survival of small business. . . . There are innumerable areas where the Commission, with the aid of these powers, could halt anticompetitive practices at an early stage. . . . The possibility of injunction should give serious second thoughts to those who plan a quick 'killing' and withdrawal before retribution occurs.").

[64] *Id.* at 36,610.

[65] H.R. REP. NO. 93-1107, at 34 (1974).

ded to the bill.[66] Senator Bartlett expressed concern about the burden the provisions would place on small businessmen,[67] but nonetheless supported the bill, explaining that the "importance of the Alaskan pipeline overshadow[ed] [his] apprehensions toward the uncalled-for FTC provisions."[68] The Senate passed the conference report on November 13, 1973, and President Nixon signed the bill on November 16, 1973.[69]

If Congress had viewed Section 13(b) as a broad grant of authority to the FTC to seek consumer redress and other monetary relief, one would have expected the debates that began before enactment of the Trans-Alaska Pipeline bill to have ended. Those who had been seeking to expand the FTC's authority to give it the power to seek injunctive relief and consumer redress would have gotten everything they wanted—and then some. After all, the provisions being considered in the Senate in the early 1970s would have allowed the FTC to seek consumer redress, but only after first issuing a cease-and-desist order.[70] Section 13(b), if understood to be a consumer redress provision, would have allowed the FTC to seek that redress without having to go through the administrative process in the first place. Tellingly, the debate over redress did not stop. Instead, Congress continued to believe there was a need for the FTC to be able to seek monetary relief and accordingly enacted what are now Sections 19 and 5(m)(1)(B).

C. SECTIONS 19 AND 5(m)(1)(B)

1. *The Relevance of Section 19*

Just two years after the enactment of Section 13(b), Congress enacted two new provisions that authorized the FTC to seek monetary relief—but only under specified circumstances. As noted above, Section 19 authorized consumer redress following issuance of a cease-and-desist order when a reasonable man would have known the conduct was "dishonest or fraudulent," and Section 5(m)(1)(B) authorized issuance of civil penalties following a litigated Commission determination that a practice was unfair or deceptive if the defendant had "actual knowledge" of that finding.[71] The enactment of these pro-

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[66] 119 CONG. REC. 36,816 (1973).

[67] *Id.* (noting that "[t]he ensuing holocaust of inquiries and paperwork always places an undue burden on the smaller businessmen").

[68] *Id.*

[69] 9 Weekly Compilation Presidential Doc. 1339 (Nov. 19, 1973). In signing the legislation, President Nixon commented (apparently in reference to the FTC provisions) on the "couple of clinkers in it . . . that [he] would very much like to see removed." LEGISLATIVE HISTORY, *supra* note 23, at 4992.

[70] *See supra* notes 26, 28, and accompanying text.

[71] *See supra* notes 5, 6, and accompanying text. The Commission has never made extensive use of Section 5(m)(1)(B).

visions by those in Congress responsible for FTC oversight—again, just two years after the enactment of Section 13(b)—is illuminating because it suggests that no one at the time understood Section 13(b) to authorize an award of consumer redress in all cases.[72]

The FTC has argued that the enactment of Section 19 is "irrelevant" in attempting to understand the meaning of Section 13(b) because it applies to "the targets of Commission *administrative* litigation."[73] But, in fact, Section 19 (like Section 13(b)) requires an independent action in court. Section 19—like some of the proposals the Senate was considering before Section 13(b) was enacted—simply requires an administrative proceeding *first*.[74] The FTC has not explained why Section 19 would have been necessary if Section 13(b) were understood to provide for consumer redress at the time it was enacted. After all, if Section 13(b) allowed the FTC to go into court to seek consumer redress routinely, the FTC could have used Section 13(b) with or without the issuance of a cease-and-desist order.[75] Thus, we think any complete understanding of Section 13(b) and the FTC's remedial powers requires careful

[72] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000) (internal citation omitted) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The 'classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.' This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.").

[73] *See, e.g.*, Final Brief of FTC at 19–20, FTC v. Bronson Partners, LLC, No. 10-878 (2d Cir. 2010) [hereinafter Final Brief of FTC].

[74] It could be suggested that Section 13(b) is preferable to Section 19 as an enforcement tool because district court judges make decisions independently, rather than with deference to the Commission's administrative determinations as would occur under Section 19. We are sympathetic to this point, but it has no relevance to the circumstances under which Section 13(b) permits equitable relief. Moreover, the key issue in ordering redress under Section 19—whether the practice is dishonest or fraudulent—is ultimately a question of law, and therefore courts will not simply rubber stamp the Commission's determinations. *See* FTC v. Figgie Int'l, Inc., 994 F.2d 595, 601, 603 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) (noting that "Section 19 liability must not be a rubber stamp of Section 5 liability"). That is especially important because any findings of knowledge have no particular relevance in a Section 5 administrative action, which is based on strict liability.

[75] In its final brief in *Bronson*, the FTC argued that "[w]ith respect to those who violate Commission rules, Section 19(a)(1) enhances the Commission's enforcement authority beyond what it would be if the Commission were limited to its enforcement authority under Section 13(b) because it allows the Commission to seek not just injunctive relief and monetary equitable relief, but also damages." Final Brief of FTC, *supra* note 73, at 20. But Section 19 does more than grant the FTC the authority to seek damages; it also spells out in detail the various types of equitable relief the FTC can seek. And the FTC does not explain why it would have been necessary for Section 19 to do that if such relief were already available under Section 13(b). *See* 15 U.S.C. § 57b(b). Thus, even if the FTC's interpretation of Section 13(b) would not render *all* of Section 19 "superfluous," it would render much of it so.

consideration of the legislative debates that surrounded the enactment of Section 19.[76]

2. *Section 19's Legislative History*

In June 1974, the House Interstate and Foreign Commerce Committee reported favorably H.R. 7917 with amendments. In a statement of separate views, a number of members of Congress explained why they successfully "supported a motion to strike" in the full committee a consumer redress provision that was in the bill as reported by the Subcommittee on Commerce and Finance.[77] According to the provision's opponents, it "represented an attempt to provide the Commission with *new* authority to seek judicial redress for consumers injured by acts or practices that were found to be in violation of final Commission orders."[78] The provision's opponents expressed concern that this Section would permit the FTC to seek redress against persons in the absence of notice or a hearing to determine that they were engaging in illegal conduct, which would have "the effect of making a cease and desist order tantamount to a substantive rule without providing to those affected the procedural safeguards required in rulemaking proceedings."[79] The provision's opponents also noted that the FTC, while "not oppose[d] [to] the basic concept of consumer redress contained in [the] provision," could not "'endorse the

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[76] We focus on the history of Section 19 in large part because Section 5(m)(1)(B) appears to have been less controversial, at least in part because it explicitly applied only to those who knowingly acted in violation of the law. *See, e.g.*, 117 CONG. REC. 39,610 (1971) (Sen. Magnuson) ("[T]he Commission is authorized in Title II to act through its own attorneys to seek civil penalties against persons knowingly—and I underline the word 'knowingly'—violating the [FTCA] or against those persons failing to comply with an order of the Commission."); *id.* at 39,855 (Sen. Cook) ("To be noted is the fact that the civil penalty provided . . . is limited to $10,000. Liability under this section whereby action may be brought even though the defendant has not knowingly engaged in an unfair or deceptive act or practice is limited only by the size of class of consumers which the Commission may allege to have been adversely affected and the value of the product."); *see also* Bickart, *supra* note 25, at 765 (noting that, at least in one bill, "[t]he civil penalty section, like the largely uncontroversial provisions on jurisdiction, injunctions, and enforcement of process, received little attention"). *See generally* Bickart, *supra* note 25 (providing a comprehensive discussion of the history of Section 5(m)(1)(B)).

[77] H.R. REP. NO. 93-1107, at 87–88 (1974). There is no record of exactly what language was struck in the full committee. As introduced, the bill included a provision that, in principal part, provided that "[a]fter an order of the Commission to cease and desist from engaging in acts or practices which are unfair or deceptive to consumers and proscribed by section 5(a)(1) of this Act has become final . . . the Commission may institute civil actions to obtain such relief as the court shall find necessary to redress injury to consumers caused by the specific acts or practices which were the subject of the proceeding . . . and the resulting cease-and-desist order, including, but not limited to, rescission or reformation of contracts, the refund of money or return of property, public notification of the violation, and the payment of damages, except that nothing in this paragraph is intended to authorize the imposition of any exemplary or punitive damages." H.R. 7917, 93d Cong. (1973).

[78] *Id.* (emphasis added).

[79] *Id.*

legislation in its present form.' "[80] Instead, the FTC felt it would be "wise to have additional hearings and study on the matter so that the deficiencies and inequities of the provision as drafted could be corrected."[81]

In debates on the House floor that September, at least some members suggested that the struck provision would have granted new authority to the FTC.[82] Representative Eckhardt explained that it was precisely because the FTC lacked this authority that it was so necessary. In his view, "Consumer fraud continues to be profitable and not subject to full redress unless the [FTC] has the authority . . . to act," and therefore the FTC needed to be able "to return to the injured party that which was fraudulently taken away from him."[83]

There were two major criticisms of the provision. First, Representative Broyhill expressed concern about the FTC's "past practice" of "expand[ing] on its own rules by its own interpretation."[84] He provided a specific example: "recently General Motors was charged by the FTC with violating the Federal Trade Act because they were quoting an automobile magazine's evaluation of the Vega automobile. In other words, the FTC said that General Motors had violated the Federal Trade Act because General Motors itself had not substantiated the identified testimonial."[85] He explained that it might well be appropriate for the FTC to "have this authority to prospectively prohibit reliance on testimonial," but that it would be "unfair to institute redress actions against General Motors for failing to anticipate this expanded interpretation of a [FTC] rule just because they were relying on the testimony and the experience of some other party."[86]

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[80] *Id.*

[81] *Id.*

[82] *See* 120 CONG. REC. 31,316 (1974) (Rep. Broyhill) ("Section 207, as stricken, would have provided the FTC with new authority to seek judicial redress for consumers injured by acts or practices that were found in violation of final FTC orders."); *see also id.* at 31,735 (Rep. Eckhardt) (explaining that "[the FTC] cannot proceed at all in this area because there is no such thing as a rule enforceable by the FTC's obtaining consumer redress").

[83] *Id.* at 31,735; *see also id.* (Rep. Moss) ("The amendment would, under limited circumstances, authorize the [FTC] to obtain redress for consumers injured by a violation of a [FTC] rule. The Commission could obtain such redress only by establishing to the satisfaction of a Federal district court that such a remedy was warranted. . . . It is only fair and right that consumers who have been injured by violations of the law have a right to redress. Without this amendment, the [FTC's] only power would be to issue a cease and desist order barring further violations. Such a remedy is clearly inadequate where consumers have been injured based on a violation of an FTC rule."); *id.* (Rep. Broyhill) (suggesting that they should "go back and hold hearings on this to see what, if any, authority should be given to the FTC to seek redress for injuries to consumers").

[84] *Id.*

[85] *Id.*

[86] *Id.*

Second, Representative Young argued that the amendment would make a "radical change with respect to the concept of the role of Government agencies in protecting the public."[87] He explained that "public agencies have traditionally [tried] to protect the public by injunction action based on the public interest and not individual private interests."[88] Government should not, he argued, "act as a collection agency for particular people or particular private interests."[89] Ultimately, consumer redress was not part of the House bill.

During the Senate-House conference later that year, a consumer redress provision was added back. The Conference Report explained that the provision is "based on the Senate provision authorizing actions by the Commission to redress injury, with certain modifications."[90] The modifications limited the situations in which such actions could be initiated. First, "the Commission may commence an action for redress for persons injured by such a violation" "[i]f any person, partnership, or corporation violates a rule of the Commission respecting unfair or deceptive acts or practices."[91] Second,

> [i]f any person, partnership, or corporation engages in an unfair or deceptive act or practice resulting in the issuance of a cease and desist order by the Commission against such respondent, the Commission may commence an action for redress of the injuries caused by such respondent's act or practice. If in addition the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant redress.[92]

During debate in both the Senate and the House, the members of Congress who spoke on the floor again seemed to be of the view that Section 19 was giving the FTC significant, new authority.[93] Indeed, if 13(b) already gave the FTC broad redress authority, members of Congress were ignorant of that fact. Representative Broyhill, for example, noted that "[t]he rulemaking authority's 'bite' in this new legislation derives from the consumer redress and civil penalties provisions,"[94] and that "[t]he consumer redress provision, as a whole, is

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[87] *Id.* at 31,736.

[88] *Id.*

[89] *Id.*; *see also id.* ("It would put the [FTC] in the business of acting as a collection agency, as a lawyer, for individual private interests. I repeat, the approach that the law has taken heretofore is, for example, the [SEC] and the [FTC], to appropriately enjoin practices which are unlawful, leaving it to the individual to pursue his own remedy. Do not put the Government in the position of trying to adjudicate between two different private interests.").

[90] H.R. Rep. No. 93-1606, at 41 (1974).

[91] *Id.*

[92] *Id.*

[93] 120 Cong. Rec. 40,712 (1974) (Sen. Moss) (noting that the legislation "important new authority to the Commission"); *id.* at 41,406 (Rep. Moss) (describing the provision as "quite significant").

[94] *Id.* at 41,407.

a significant advance in consumer protection," in part because it would address the problem of class actions.[95]

Both houses ultimately voted for the bill in December 1974, and President Ford signed it into law in early 1975.[96]

D. What the History Teaches

There are several important conclusions one should draw from this history. First, what little debate there was about Section 13(b) focused almost exclusively on the provision for preliminary injunctive relief, suggesting that Congress thought there was little significance to the permanent injunction proviso. Had Congress understood that provision to be effecting a major change in the FTC's remedial authority, it surely would have occasioned more debate and commentary. Indeed, the consumer redress provision that eventually became Section 19 was the subject of considerable controversy in Congress. Second, there was one bill that contained both a consumer redress provision *and* an injunctive relief provision. No one suggested that those provisions were duplicative or would have accomplished the same objective. Third, the several failed attempts to add a redress provision to the FTC Act reveal Congress's reluctance to give the FTC broad authority to seek consumer redress. Fourth, the debate over Section 19 that occurred after the enactment of Section 13(b) suggests that Congress did not think Section 13(b) had granted the FTC expansive new authority. Thus, the legislative history of Sections 13(b), 19, and 5(m)(1)(B) does not suggest that Section 13(b), at the time it was enacted, provided the FTC with authority to seek consumer redress in all cases.[97] The FTC and its supporters desired both greater injunctive authority and the ability to obtain monetary relief. Both authorities were granted, although not in the same statute or at the same time. Nevertheless, viewed in its entirety, the legislative history provides the "inescapable inference"[98] that Congress did not intend the injunctive relief provision to swallow the monetary relief provision.

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[95] *Id.* Representative Broyhill noted that "[i]n part because of [his] objections, a similar consumer redress provision was defeated on the floor of the House" when Representative Eckhardt attempted to amend H.R. 7917 to add such a provision. *Id.*; *see also id.* at 31,737 (voting down the amendment to add a consumer redress provision by a vote of 209 to 180). Representative Broyhill explained that he ultimately "acceded to the provision finally adopted because it seeks to provide protections against unfairness and is aimed at making whole those consumers who actually show injury from a rule violation or knowingly dishonest and fraudulent cases." *Id.* at 41,407.

[96] Legislative History, *supra* note 23, at 5048.

[97] *See* Fitzgerald, *supra* note 9, at 1 ("When I arrived at the Federal Trade Commission in 1976, no one imagined that Section 13(b) of the Federal Trade Commission Act would become an important part of the Commission's consumer protection program." (internal footnote omitted)).

[98] Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); *see* discussion *infra* Part II.B.

II. THE SECTION 13(b) FRAUD PROGRAM

Although there is a strong argument that Section 13(b) may not have been enacted to provide the FTC with authority to seek consumer redress, the agency used it in that way in the early 1980s to address gaps that remained in the FTC's enforcement authority, even after enactment of Sections 19 and 5(m)(1)(B). Although an aggressive interpretation of Section 13(b), the FTC limited Section 13(b) to a class of cases that ensured that the exercise of this power did not raise the same concerns that motivated Congress when it was enacting Section 19. The courts have repeatedly supported the FTC's careful exercise of this power. In this Part, we discuss the origins of this use of Section 13(b), its scope, and its reception by the courts. Consistent with the limitations in Section 19, the agency used Section 13(b) for a narrow class of cases involving fraud, near fraud, or worthless products. The courts blessed this limited expansion of FTC authority. Because Section 19 was not an effective tool against these targets,[99] the courts were not confronted with an effective argument, as discussed more fully in the next section, for limiting the use of Section 13(b).

A. The Origins

Although Congress clearly intended the new provisions it enacted in the mid-1970s to address the deficiencies in the FTC's enforcement authority that had been identified in the 1960s, the new powers remained insufficient in some cases. As discussed in the introduction to this article, with fraudulent practices, the FTC could seek a cease-and-desist order, but the money would usually be gone before the administrative process was complete.[100] It was therefore necessary to seek an asset freeze under Section 13(b). Because the FTC was already using Section 13(b) actions in the district court to freeze the defendant's assets, the agency sought consumer redress under that provision, rather than Section 19. To be sure, the FTC could have gone into district court to get an asset freeze, returned to the administrative forum to secure a cease-and-desist order, and then returned again, years later, to district court to seek consumer redress,[101] but there seemed no reason to employ such a clunky, multi-step process when it was clear that the company had engaged in fraud.

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[99] As discussed above, only Section 13(b) allowed the asset freeze that was necessary for the Commission to obtain monetary relief against these targets. *See supra* text accompanying notes 4–10.

[100] *See* FTC v. Bronson Partners, LLC, No. 10-0878-cv, 2011 WL 36298718, at *12 (2d Cir. Aug. 19, 2011) (noting that "[b]ecause, under Section 19, the Commission may bring suit only where the defendant has been the subject of a prior order entered in the wake of a lengthy administrative process, that provision has the disadvantages of creating substantial opportunities for delay as well as allowing merchants who knowingly engage in fraud at least one free shot at violating the Act").

[101] *See supra* note 9 and accompanying text.

Although this "Section 13(b) Fraud Program," as it came to be called, was an important new tool, the Commission used this new power sparingly and carefully, limiting it to those cases involving fraud, near fraud, or worthless products. Further, although it did not impose a formal scienter requirement, the staff used the standard contained in Section 19 as a practical benchmark. Thus, the FTC's actions did not subvert Congress's general intent when it enacted Sections 13(b) and 19, because it heeded the delicate remedial balance Congress intended to strike when it expanded the FTC's remedial authority.

In enacting those provisions, Congress clearly wanted the FTC to have the authority to seek monetary relief in some cases, but it wanted such relief to be available only when the defendant likely would have known that it was engaging in unlawful activity. Congress's simultaneous enactment of the rulemaking provision ("Section 18") reflects the same concern; Congress authorized the FTC to prescribe "rules which define *with specificity* acts or practices which are unfair or deceptive" because it wanted businesses and individuals to have fair warning before they were subjected to liability.[102] By carefully selecting the cases in which it was seeking consumer redress under Section 13(b), the FTC ensured that the Section 13(b) Fraud Program did not raise the concerns over notice that so motivated the contours of the 1975 amendments to the FTC Act. When Congress expanded the venue provision of Section 13(b) it essentially recognized as much, noting in a Senate Report in 1993 that the FTC can, pursuant to Section 13(b), "go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress."[103]

B. IN THE COURTS

Unsurprisingly, this use of Section 13(b) was challenged by those who were subjected to it. Most defendants challenged it on the ground that consumer redress was *never* available because Section 13(b), by its terms, grants the FTC the authority only to seek "permanent injunction[s]." It was not a frivolous argument—as we note below, it may even be right[104]—but it is an argument that the courts have almost universally rejected.

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[102] *See* 15 U.S.C. § 57a(a)(1)(B) (emphasis added).

[103] S. REP. NO. 103-130, at 15–16 (1993). Thus, the Commission cannot argue that the 1994 changes approved the extension of consumer redress that the Commission now seeks. Not only are ex parte asset freezes unavailable in non-fraud cases, the Congress also explicitly recognized that "the FTC has used its Section 13(b) injunction authority to counteract consumer fraud . . . ." *Id.* Ex parte asset freezes are available only under extraordinary conditions not normally applicable to legitimate businesses. *See, e.g.*, Johnson v. Couturier, 572 F.3d 1067, 1085 (9th Cir. 2009) ("A party seeking an asset freeze must show a likelihood of dissipation of the claimed assets, or other inability to recover monetary damages, if relief is not granted.").

[104] *See infra* notes 115–121 and accompanying text.

In 1982, the Ninth Circuit became the first to do so. In *FTC v. H.N. Singer, Inc.*,[105] the court addressed whether Section 13(b)'s second proviso authorized preliminary injunctive relief even though it mentions only permanent injunctive relief.[106] Although the court was not considering the availability of consumer redress, its analysis suggested that the relief authorized by the second proviso of Section 13(b) is not limited, as its terms would suggest, to permanent injunctive relief. The court held that "[i]t is clear that, because the district court has the power to issue a permanent injunction to enjoin acts or practices that violate the law enforced by the Commission, it also has authority to grant whatever preliminary injunctions are justified by the usual equitable standards and are sought in accordance with Rule 65(a)."[107] Over the years, every other court of appeals to have considered whether Section 13(b)'s second proviso authorizes relief beyond permanent injunctions has followed the Ninth Circuit's lead,[108] with these courts generally citing the Supreme Court's decision in *Porter v. Warner Holding Co.*[109]

In *Porter*, the Court held that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. . . . [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."[110]

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105 668 F.2d 1107 (9th Cir. 1982).

106 The Commission presumably sought the relief under the second proviso, rather than the first, because it did not want to have to file an administrative complaint. *See id.* at 1110 ("The Commission argues that the second proviso gives it the power to seek an injunction in the district court in proper cases without also initiating administrative proceedings. The appellants disagree. They read the clause as granting the Commission the power to seek permanent injunctions only under the conditions laid down earlier in the section for the issuance of preliminary injunctions. We agree with the Commission. The proviso in question does not on its face condition the issuance of a permanent injunction upon the initiation of administrative proceedings."). Moreover, Singer involved alleged violations of an FTC rule, and Section 19(a)(1) permits the Commission to proceed directly to federal court. *See* 45 U.S.C. § 57b.

107 668 F.2d at 1111.

108 *See, e.g.*, FTC v. Bronson Partners, LLC, 654 F. 3d 359 (2d Cir. 2011) ("While the provision's express text refers only to injunctive relief, courts have consistently held that 'the unqualified grant of statutory authority to issue an injunction under [S]ection 13(b) carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits." (internal citation omitted)); FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); FTC v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312, 1314–15 (8th Cir. 1991); FTC v. Gem Merch. Corp., 87 F.3d 466, 468 (11th Cir. 1996) (concluding that "the unqualified grant of statutory authority to issue an injunction under Section 13(b) carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits"); FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1026 (7th Cir. 1988).

109 328 U.S. 395 (1946).

110 *Id.* at 398.

In applying this approach, *Porter* itself was an easy case. The statute in question, the Emergency Price Control Act of 1942, authorized the district court, on a proper showing, to grant "a permanent or temporary injunction, restraining order, or other order."[111] Citing an earlier Supreme Court case,[112] the Court found that "the term 'other order' contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion."[113] Moreover, the Court relied on the statute's legislative history, citing the Senate Report that district courts "are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case."[114]

Of course, neither the text of Section 13(b), nor its legislative history, contain the phrase "other orders" or a discussion of the district court's broad flexibility in framing appropriate relief. Nevertheless, to justify broad use of Section 13(b), the FTC today relies on *Porter* to argue that a Congressional grant of equitable jurisdiction encompasses all the inherent equitable powers of the court. But the Court made clear that Congress need not grant the courts full equitable jurisdiction if doing so would be inconsistent with Congress's intended statutory scheme. To be sure, courts require clear evidence that Congress did not intend to grant the courts their full equitable powers—"[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied"[115]—but the point remains to discern Congress's intent. Thus, courts have limited the availability of injunctive relief when the legislative history of the statute indicated that that was what Congress intended.[116]

Although courts considering the proper scope of Section 13(b) have concluded that that provision does not provide the "necessary and inescapable inference" that Congress intended to limit the courts' equitable jurisdiction,[117] those courts have not considered the legislative history of Section 13(b) and

[111] *Porter*, 328 U.S. at 399; Emergency Price Control Act, Pub. L. No. 421, § 205(a), 56 Stat. 23 (1942).

[112] Hecht Co. v. Bowles, 321 U.S. 321 (1944).

[113] *Porter*, 328 U.S. at 399.

[114] S. REP. NO. 931, 77th Cong., 2d Sess., at 10.

[115] *Porter*, 328 U.S. at 399*; see also id.* ("*Unless otherwise provided by statute*, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.") (emphasis added).

[116] *E.g.*, Cell Assocs. v. Nat'l Inst. of Health, 579 F.2d 1155, 1160 (9th Cir. 1978) ("Our examination of the legislative history of the Privacy Act confirms our view that Congress did not intend to authorize the issuance of injunctions prohibiting the disclosure of protected materials.").

[117] *See, e.g.*, FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982) ("[T]here is no necessary or inescapable inference, or, indeed, any inference, that Congress intended to restrict the broad equitable jurisdiction apparently granted to the district court by § 13(b).").

the 1975 amendments to the FTC Act. As discussed above, the targets of the fraud program could not argue that Section 19 provided effective remedies for their practices.[118] Moreover, the legislative history supports a strong argument that Congress never intended to grant the FTC broad authority to seek consumer redress under Section 13(b).

The Eighth Circuit's 1991 decision in *FTC v. Security Rare Coin & Bullion Corp.*[119] is representative of many courts' summary application of *Porter*. Although *Security Rare Coin* does conclude that Congress intended district courts to have full equitable jurisdiction under 13(b), the only "legislative history" the court consults is the existence of section 19 and whether giving district courts full equitable jurisdiction under 13(b) would render Section 19 superfluous. They conclude that it does not, relying primarily on the savings clause in Section 19(e).

Section 19(e) provides that "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law," and "[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law."[120] But that provision says only that Section 19 does not limit pre-existing authority; it tells us nothing about *what* pre-existing authority existed. That is the question we address here: whether Section 13(b) was understood to grant the FTC broad authority to seek consumer redress when it was enacted. Section 19 is relevant to that question not because it might be understood to *limit* the FTC's authority routinely to seek consumer redress under Section 13(b), but rather because its enactment suggests that no such authority was ever granted.[121] As discussed above, a full exploration of the legislative history—an exploration not contained in cases like *Security Rare Coin*—supports this conclusion.

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[118] *See supra* text accompanying notes 5–11.

[119] 931 F.2d 1312 (8th Cir. 1991).

[120] 15 U.S.C. § 57b(e).

[121] The suggestion that the existence of a "savings clause" always precludes the restriction of a pre-existing authority is, in any event, misplaced. In *Pennsylvania Railroad Co. v. Sonman Shaft Coal Co.*, the Supreme Court considered the effect of a savings clause that provided that "[n]othing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." 242 U.S. 120, 123 (1916). The Court explained that "a manifest purpose of the provision . . . is to make it plain that such 'appropriate common law and statutory remedies' *as can be enforced consistently with the scheme and purpose of the act are not abrogated or displaced*" and that the provision is intended "to preserve all existing rights *not inconsistent* with those which the act creates." *Id.* at 124 (emphasis added) (internal citation omitted); *see also* Fulfillment Servs. v. UPS, 528 F.3d 614, 621–22 (9th Cir. 2008) (citing *Pennsylvania Railroad* in support of the proposition that a savings clause "merely preserves the causes of action and remedies that already existed and do not conflict" with other provisions of the statute). Here, for Section 13(b) to confer the authority to grant consumer redress in all cases would be plainly inconsistent with Section 19 and the other FTC Act amendments Congress enacted in 1975.

In any event, decisions such as *Security Rare Coin* are wholly unsurprising given the careful manner in which the Commission was using its Section 13(b) power and the lack of evidence that Congress would have frowned upon this use of Section 13(b) in the particular category of cases at issue. Indeed, because these cases involved practices that a reasonable person would know were dishonest or fraudulent, the courts have had little opportunity to consider whether Section 13(b) redress should be available in *all* cases.

The Appendix to this article catalogs the many circuit cases that have awarded consumer redress. As the table there details, each case involves fraud, near fraud, or worthless products, and they usually involve extensive preliminary relief, such as freezing assets. Although some of the defendants challenged the Commission's authority to obtain redress under Section 13(b), none argued that Section 13(b)'s application should be limited to "proper cases," that is, those involving the particularly egregious practices for which Section 19 permits redress. The reason is simple: limiting proper cases to such conduct would not have helped the defendants under the facts at issue.

The point is an important one because expanding the program beyond its historical scope would be in tension with Congress's intent to limit monetary relief to a narrowly defined category of cases. Sections 19 and 5(m)(1)(B) make this point clear: Congress did not intend that monetary relief be available against those defendants that did not know their conduct would be deemed unlawful. Limiting Section 13(b) redress to fraud honors this Congressional intent. Again, the FTC has taken the position that Section 19 is different because it involves an administrative proceeding, but the FTC has failed to explain *why* this difference matters—in other words, it has failed to explain why Congress would want to limit redress to cases of "dishonest or fraudulent" conduct when initiated administratively, but not to cases initiated in the district court.

It is important to emphasize that Sections 19 and 5(m)(1)(b) would not work against fraudsters. Under either section, the investigative target would be able to hide the money well before it could be ordered to pay redress. Moreover, as discussed above,[122] the ability of the FTC to freeze assets rested on a strong foundation. Having successfully frozen assets through a preliminary injunction in district court, it would have made no sense, as the legislative history recognized,[123] to force the Commission into three separate legal proceedings—a 13(b) preliminary injunction proceeding, an administrative proceeding, and a district court action to obtain redress under Section 19—

[122] See *supra* text accompanying notes 4–11.

[123] *See supra* note 53 and accompanying text.

when the original district court could consolidate all three steps into a single proceeding.

III. DEFINING "PROPER CASES"

If consumer redress under Section 13(b) should not be available routinely, the question remains: In what cases should it be available? What is the limiting principle? In trying to answer that question, we begin with the text of the statute.[124] As we noted at the outset, Section 13(b) provides that "*in proper cases* the Commission may seek, and after proper proof, the court may issue, a permanent injunction."[125] Thus, by its terms, the statute limits the availability of injunctive relief to "proper cases." Despite this clear limitation in the text of the statute, the courts have paid virtually no attention to what it means.

The reason for this is simple. In the past, there was little need: the FTC was seeking consumer redress in only a narrow category of cases that clearly fell on the "proper" side of the line. But now that the FTC is expanding the use of its Section 13(b) authority, the courts should now examine this clear limitation in the statute itself. The very inclusion of the phrase "in proper cases" suggests that there are some *improper cases* in which the FTC should not be seeking a permanent injunction in the courts. The FTC enjoys some discretion to define the meaning of the term "proper," but that discretion is not without limits. Rather, the FTC's interpretation must be consistent with the underlying statutory scheme.[126]

In this Part, we begin by discussing the little case law that does address the term "proper cases" and then offer some tentative views on how to draw the line between "proper" and "improper."[127] We conclude by discussing briefly the dangers posed by a more expansive interpretation of Section 13(b) that ignores this distinction.

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[124] *See, e.g.*, Haw. v. Office of Hawaiian Affairs, 129 S. Ct. 1436, 1443 (2009) ("We begin, as always, with the text of the statute." (internal citation omitted)).

[125] 15 U.S.C. § 53(b) (emphasis added).

[126] *See, e.g.*, MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 229 (1994) (noting that an "agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear") (citation omitted).

[127] We do not address here whether this limitation means that the FTC's ability to seek *all* permanent injunctive relief, including a basic permanent injunction, is limited to those cases that are "proper," but we think that is the most likely reading of the statute. Accordingly, the case itself and any relief awarded thereunder, must be "proper." In any event, even assuming that to be the case, preliminary injunctive relief would remain available under Section 13(b) whenever there is a likely violation of Section 5. *See supra* note 7.

A. IN THE CASE LAW

Unlike the question of whether consumer redress is ever available under Section 13(b),[128] only two courts of appeals have considered what makes a case "proper" within the meaning of Section 13(b), and neither issued a holding on this point. The Ninth Circuit, in dicta, rejected the argument that "proper cases" are only those involving " 'routine fraud' or violations of previously established FTC rules."[129] And although the Seventh Circuit observed that a "substantial argument can be made" that Section 13(b) applies to "any violation of a statute administered by the FTC," it declined to decide the question.[130] Instead, it noted that it "is quite clear that Congress at least expected that the FTC could rely on this proviso when it sought to halt a straightforward violation of Section 5 that required no application of the FTC's expertise to a novel regulatory issue through administrative proceedings."[131]

Although various district courts have suggested that a "proper case" is *any* case involving a violation of the FTC Act, these cases offer virtually no analysis in support of this position. The district court's treatment of the issue in *FTC v. Ameridebt Inc.* is typical.[132] In that case, the FTC argued "that a 'proper case' under Section 13(b) is simply one that involves a violation 'of any provision of law enforced by the Commission.' "[133] Presumably this view derives from the language earlier in Section 13(b), which provides, in pertinent part, that the Commission "may bring suit in a district court of the United States to enjoin any such act or practice" "[w]henever the Commission has reason to believe . . . that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission."[134] Without analysis, the court accepted the FTC's position.[135]

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[128] *See supra* notes 105–110 and accompanying text.

[129] FTC v. Evans Prods. Co., 775 F.2d 1084 (9th Cir. 1985). This portion of the Ninth Circuit's opinion was dicta because the Court ultimately concluded that the requested injunctive relief was unavailable for the independent reason that a "proper case" "does not encompass violations that completely ceased before the FTC brought suit and have not been shown likely to recur." *Id.* at 1087–88.

[130] FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1028 (7th Cir. 1988).

[131] *Id.*

[132] *See* FTC v. Ameridebt, Inc., 373 F. Supp. 2d 558 (D. Md. 2005).

[133] *Id.* at 562.

[134] 15 U.S.C. § 53(b).

[135] *See also* FTC v. 1st Guar. Mortg. Corp., No. 09-cv-61840, 2011 WL 1233207, at *19 n.158 (S.D. Fla. 2011) ("The phrase 'proper case' . . . refers to a case involving a violation of law enforced by the FTC."); FTC v. 1263523 Ontario, Inc., 205 F. Supp. 2d 205, 221 (S.D.N.Y. 2002) ("Violation of Section 5 of the FTC Act . . . constitutes a 'proper' case for the imposition of a permanent injunction." (internal citation omitted)); FTC v. Think Achievement Corp., 144 F. Supp. 2d 1013, 1016 (N.D. Ind. 2000) ("A violation of Section 5 of the FTC Act has been found to be such a proper case."), *aff'd*, 312 F.3d 259 (7th Cir. 2002) (no discussion of the proper case issue); FTC v. Minuteman Press, 53 F. Supp. 2d 248, 260 (E.D.N.Y. 1998) ("The Courts have

But that reading of the statute simply ignores the "proper" language in the second proviso.[136]

Moreover, a few courts have rejected the view that "proper" somehow means "any" and have offered a more nuanced approach. For example, in an early case, the Ninth Circuit held that a "routine fraud case is a proper case."[137] In *FTC v. International Diamond Corp.*, a magistrate judge concluded that "'[t]he legislative history . . . supports the defendants' contention that Congress intended Section 13(b) to be limited to garden variety fraudulent acts and practices" and that "[t]he other section of the Act which concerns consumer redress, Section [19], supports this conclusion."[138] The court also explained that because "the redress sought by the FTC under Section 13 parallels the remedies specifically authorized by Congress in Section [19], the fraud standard adopted by the court in *Turner* [a case which defined Section 19's "fraudulent or dishonest" standard by analogizing to the mail fraud statute] is an appropriate measure of a 'proper case' for consumer redress under Section 13(b)."[139]

At least one court has emphasized the role of the FTC's expertise in the remedial scheme and deemed a case "proper" when that expertise was unnecessary to resolve the case. In *FTC v. Abbott Laboratories*,[140] the court explained that "[s]urely a per se price fixing conspiracy such as that alleged has long been recognized as anti-competitive conduct affecting consumers and no further exercise of the Commission's expertise is required. . . . The precise scope of the 13(b) proviso has been considered in varying, murkier contexts.

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construed the term 'proper cases' to encompass 'any violation' of a statute administered by the FTC.").

136 Even when the courts have provided somewhat more discussion of this conclusion, the analysis remains cursory. *See* FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 36 (D.D.C. 1999) ("Although the permanent injunction proviso speaks of 'proper cases,' there is nothing in the statute, regulations or case law restricting the statutory term 'proper cases' to *per se* violations of the antitrust laws. . . . [T]his Court finds that the permanent injunction proviso may be used to enjoin violations of 'any provision of law' enforced by the FTC."). Moreover, *Mylan Laboratories* relied on the *Abbott Laboratories* decision, which took a more nuanced view of the issue. *See infra* text accompanying notes 140, 141. In any event, both *Mylan* and *Abbott* involved unfair methods of competition, not unfair or deceptive acts or practices. *See infra* note 140.

137 *See* FTC v. H.N. Singer, Inc., 668 F.2d 668, 1111 (9th Cir. 1982). Of course, the Ninth Circuit did not say that the "proper cases" category was *limited* to cases of "routine fraud," as the Ninth Circuit later noted in suggesting, in dicta, that a "proper case" is any case in which there is a violation of Section 5. *See supra* text accompanying notes 105–109.

138 No. C-82-0878 WAI (JSB), 1983 WL 1911, at *2–3 (N.D. Cal. Nov. 8, 1983) (magistrate).

139 *Id.*; *see also* Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1195 (1992) ("A proper case and proper proof is established, for purposes of granting restitutionary relief, when the FTC satisfies the requirements of section 19."); *id.* at 1196 ("This should not cause the FTC undue hardship because the actions that it tends to file for section 13(b) permanent relief typically involve hard-core dishonesty or fraud.").

140 No. 92-1364, 1992 WL 335442, at *2 (D.D.C. Oct. 13, 1992) (mem.).

Federal courts have shied away from accepting direct court actions by the Commission, such as this, if the offending conduct interjects the court into areas of Commission expertise involving the creation and monitoring of new concepts of unfair competitive trade practice."[141] The court then invoked the Seventh Circuit's statement in *FTC v. World Travel Vacation Brokers*, quoted above,[142] that "it is quite clear that Congress at least expected that the FTC could rely on this proviso when it sought to halt a straightforward violation of Section 5 that required no application of the FTC's expertise to a novel regulatory issue through administrative proceedings" and described it as "provid[ing] sound guidance."[143]

Thus, given these disparate approaches and the lack of any holdings on this issue in the courts of appeals, the case law does not answer the question what is a "proper case." Again, the fact that courts may have awarded broad equitable relief without addressing whether the case was "proper" within the meaning of Section 13(b) is not dispositive. Those courts were not asked to address the question and thus did not do so. Indeed, those were generally cases that would have fallen on the "proper" side of the line and thus those defendants simply launched an all-or-nothing challenge to the availability of consumer redress. Accordingly, the slate is largely a clean one.

B. A Proper Definition

The fact that the slate is mostly clean does not mean that the task of defining the term "proper cases" is easy. The term "proper" simply means "suitab[le],"[144] and does not tell us whether a case is one that is suitable for an award of consumer redress. Moreover, the legislative history of Section 13(b) in particular and monetary relief in general does not specifically address this point. The one relevant point we can discern from the legislative history is the one we have already discussed: Congress wanted monetary relief to be available only in cases when the defendant knew that it was engaging in egregious activity. To achieve this goal, Section 19 limited redress to cases in which a reasonable person would know that the conduct was dishonest or fraudulent.[145] This principle should guide any effort to discern the meaning of the term "proper cases."

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[141] *Id.*

[142] *See supra* note 131 and accompanying text.

[143] *Id.*; *see* FTC v. World Travel Vacation Brokers, 861 F.2d 1020 (7th Cir. 1988).

[144] *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1817 (1993) (defining proper to mean "marked by suitability, fitness, accord, or compatibility"). Unfortunately, case law from other statutes is not relevant. Although "proper case(s)" appears eight times in the U.S. Code, only Section 13(b) uses the phrase in the context of injunctions.

[145] *See* S. REP. NO. 93-151, at 30–31 (1973).

Based on our examination of the legislative history, redress under Section 13(b) should not be obtained in cases in which it would not be available under Section 19. Moreover, respect for the legislative history requires that Section 19 have some independent utility. We suggest two possible lines for defining "proper cases" under Section 13(b). The more restrictive line is that monetary relief under Section 13(b) is available only when there is a solvency problem with the target of the investigation. Unless there is a need to preserve assets, the process set out in Section 19 is workable.

A considerably more expansive line would allow Section 13(b) to be used for most cases involving dishonest or fraudulent conduct. One way to determine whether a case qualifies under this standard might be to consider, as did the courts in *Abbott* and *World Travel Vacation Brokers* discussed above, whether the case presents a straightforward violation of Section 5 such that the FTC's expertise is not necessary.[146] This more expansive line would reserve Section 19 for cases in which the Commission seeks to advance or clarify the law, such as the *Telebrands* case,[147] or the first litigated information security case (if there ever is one).[148] We are not arrogant enough to believe that we can draw a precise line between "proper" and other cases *ex ante* that would cover all possible situations. We would leave that development to the

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[146] The Commission's 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases, which emphasizes the need for "clear violations," takes a similar approach. *See* Fed. Trade Comm'n, Policy Statement on Monetary Equitable Remedies in Competition Cases (2003), *available at* http://www.ftc.gov/os/2003/07/disgorgementfrn.shtm. A divided Commission repealed this policy statement in July 2012. *See* Fed. Trade Comm'n, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases (2012), *available at* http://www.ftc.gov/os/2012/07/120731commissionstatement.pdf.; *see generally* Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 125 (2009) ("Because of the explosion of federal law, it has become impossible for generalist judges sitting on federal district and circuit courts to develop specific expertise with respect to many of the subjects that come before them.").

[147] Complaint, Telebrands Corp., FTC Docket No. 9313 (Sept. 30, 2003), *available at* http://www.ftc.gov/os/2003/10/telebrandcomp.pdf. The case challenged a follow-on electronic abs belt offered as a weight loss aid. Rather than explicitly describing the alleged benefits, however, the advertising referred to "those abs belts you've seen on TV" and offered the product for less money. The Commission issued an administrative complaint in 2003, followed by a Commission opinion in 2005. The Fourth Circuit upheld the Commission's order in 2006. In 2007, the Commission filed a district court complaint seeking consumer redress. Complaint, FTC v. Telebrands Corp., No. 2:07-cv-3525-JAG-MCA (D.N.J. Aug. 2, 2007). The matter was settled in 2008, with Telebrands agreeing to pay $7 million. Stipulation of Settlement and Final Order at 4, FTC v. Telebrands Corp. (D.N.J. Dec. 31, 2008).

[148] The Commission has settled a series of cases involving failure to take reasonable steps to protect sensitive personal information. To date, the cases appear to have involved negligence, but in a particularly egregious case the Commission might wish to use the Section 19 process to obtain redress. Although we do not know enough about the facts for a full assessment of whether redress was appropriate, in *ChoicePoint* the Commission's settlement included $5 million in redress, in addition to $10 million in civil penalties for violations of the Fair Credit Reporting Act. Stipulated Final Judgment and Order, United States v. ChoicePoint Inc., No. 1-06-cv-0198 (N.D. Ga. Feb. 15, 2006).

common law process, under which FTC concepts have developed over the decades.[149] In any event, the reasonableness of the FTC's definition must be consistent with the underlying statute.[150]

It is important to note that the Commission need not always use administrative litigation when it seeks financial remedies outside of Section 13(b). After all, wherever the line between "proper" and "improper" cases is drawn, most Commission cases will be resolved through settlements. Our concern is that the Commission must use a sensible standard for determining when monetary relief is appropriate. As we have explained, a sensible standard would allow for monetary relief when the practices at issue are dishonest or fraudulent.[151]

Defining the term "proper cases" more broadly than we suggest—to include cases involving disputed scientific substantiation for advertising claims, for example[152]—would run the risk of subjecting to monetary relief those that Congress sought to exempt under the 1975 statute. Thus, the FTC's advertising substantiation program, which involves cases in which established businesses are selling products of considerable value independent of the claims at issue, falls outside any reasonable definition of proper. We turn to this issue next.

C. Dangers of Defining Scientific Substantiation Cases as "Proper"

As discussed above, the FTC has begun to seek consumer redress against legitimate companies for claims made in national advertising campaigns that lack scientific substantiation.[153] Such cases are not only without statutory

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[149] For the development of the FTC's enforcement standards, see generally Muris & Pitofsky, *supra* note 3.

[150] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[151] *Rexall Sundown* may be a case in which monetary relief is appropriate, even against a solvent defendant, regardless of whether the case is proper under Section 13(b). The product at issue was a dietary supplement promoted to "eliminate" cellulite. The Commission's opposition to Rexall's motion to dismiss argued that the studies offered as substantiation had no placebo control and that the researchers never actually examined the patients to determine whether cellulite was reduced, flaws that should have been apparent from the experimental design. Plaintiff's Opposition to Defendant's Motion to Dismiss, FTC v. Rexall Sundown, Inc., No. 00-cv-7016-JEM (S.D. Fla. Sept. 14, 2000). The Commission ultimately obtained a settlement providing $12 million in redress. Stipulated Final Order, Rexall Sundown (S.D. Fla. Mar. 31, 2003).

[152] *See infra* Part III.C.; *see generally* Pfizer Inc., 81 F.T.C. 23 (1972) (requiring that an advertiser making an objective claim have a "reasonable basis" for making it); J. Howard Beales, Timothy J. Muris & Robert Pitofsky, *In Defense of the* Pfizer *Factors*, *in* THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION 83 (James C. Cooper ed., 2013) (providing a comprehensive discussion of *Pfizer*).

[153] *See supra* note 14 and accompanying text.

foundation, but may ultimately deter companies from providing useful information.

The Commission has long held that when an advertiser makes an objective claim, consumers expect the claim to be based on evidence. Thus, when there is no evidence to support the claim, it is deceptive whether or not the FTC proves that the objective claim is itself misleading. For example, an advertisement that "our windows reduce your energy costs by up to 20 percent" makes two claims: (1) that the windows reduce energy costs by up to 20 percent; and (2) that there is a "reasonable basis" for that estimate. The Commission frequently attacks advertising solely because the advertiser lacks a reasonable basis for the objective claim.[154]

The traditional substantiation case involves a reputable national advertiser making claims about the features of its product or services. (There is little risk that such a company will go into bankruptcy during an investigation or administrative litigation.) Although such claims may highlight a new feature or new benefit of the product, the product will often have been on the market for many years based on other claims about what it can do. For example, the Commission's recent cases against Kellogg involved claims of increased attention in class for children who eat Frosted Mini Wheats for breakfast,[155] and claims that Rice Krispies will help "support your child's immunity."[156] Even if the claims about the effects of these cereals on enhanced attention or immunity are completely unsupported, such claims generally are not the sole (or even primary) reason that most consumers purchase the products.[157]

Further, in our experience, in most of these substantiation cases the advertiser has evidence that provides some support for the claim.[158] The Commis-

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[154] For background on the substantiation doctrine and its application, see FTC Policy Statement Regarding Advertising Substantiation, *appended to* Thompson Med. Co., 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); Beales et al., *supra* note 152; *Dietary Supplements: An Advertising Guide for Industry*, FTC.GOV, http://business.ftc.gov/documents/substantiation-science-compliance; Lesley Fair, Fed. Trade Comm'n, *Federal Trade Commission Advertising Enforcement* (revised Mar. 1, 2008), *available at* http://www.ftc.gov/oia/assistance/consumerprotection/advertising/enforcement.pdf.

[155] Complaint, Kellogg Co., FTC File No. 082 3145 (July 31, 2009).

[156] Press Release, Fed. Trade Comm'n, Order Modifying Order, Kellogg Co. (June 3, 2010) (modifying order to cover additional claims), *available at* http://www.ftc.gov/opa/2010/06/kellogg.shtm.

[157] Thus, Frosted Mini Wheats have been successfully marketed nationally since 1970, apparently without the need to mention any effects on attentiveness. *See Kellogg in the 1970s*, http://www.kellogghistory.com/timeline.html. Rice Krispies have been on the market much longer, first appearing in 1928. *See Kellogg in the 1920s*, http://www.kellogghistory.com/timeline.html.

[158] When there is literally no support for the claim, depending upon the totality of the evidence, the advertisement is likely to be dishonest or fraudulent and therefore meet the standard of Section 19. (Because the Commission may equate inadequate evidence with no support, actual cases are often more complex than the conclusion "no support" implies.) Even if permanent injunctive relief is unavailable, the Commission could obtain a preliminary injunction when it is likely to

sion, however, may find that evidence inadequate either because it believes the advertiser has made a stronger claim than the evidence will support[159] or because it believes there are deficiencies in the supporting evidence that render it not sufficiently reliable to constitute a reasonable basis. Often, substantiation cases turn on debate among scientific experts about the proper methodologies to support a particular claim and whether the level of evidence provided is enough to substantiate the claim.[160] A crucial question in such substantiation cases is often how much evidence is necessary to constitute a "reasonable basis."[161]

Of course, judicial language in fraud cases can appear facially similar to the language in more complex scientific substantiation cases. Fraudsters often claim to rely on science, citing various studies, as part of their effort to look like a legitimate business. But these fraud claims are different because the scientific evidence offered in such cases is usually not even facially supportive of the claims made. In some cases, the scientific evidence cited may be sound, but it is not relevant to the claims. For example, in one case, the defendant advertised that certain calcium dietary supplements could cure cancer. Although there is evidence that calcium supplements may increase bone density, there is no evidence they can cure cancer.[162] Similarly, companies selling bogus weight loss products have sometimes combed the literature for ingredients that have a beneficial effect in some contexts, and combined numerous ingredients of that kind without regard for such crucial details as the effective dosage or route of administration.[163] In other cases, the evidence is at best pseudo-science, as when companies rely on testimonials or experts in completely different fields for substantiation.[164] At bottom, unlike the typical scientific substantiation cases involving legitimate businesses, these fraud cases do not involve disputes among reputable experts, debates about which of several recognized testing methodologies is most appropriate for a particular claim, or different interpretations of a complex body of scientific evidence.

The typical substantiation case thus has at least three characteristics that sharply distinguish it from the typical fraud case. First, the cases often involve

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prevail on the merits. In such cases, the Commission will have stopped the deceptive practice and can use administrative actions to prevent and deter future violations.

[159] In some substantiation cases, the dispute is really about the claim, not the evidence supporting it. An advertiser may disagree with the Commission that its messages make a claim about a certain product characteristic. Because the advertiser did not believe the claim was made, it may have no evidence to support the claim, even though it was well aware of the need to substantiate the claim if it were made.

[160] *See* Beales et al., *supra* note 152.

[161] *Id.*

[162] *E.g.*, FTC v. Direct Mktg. Concepts, 624 F.3d 1 (1st Cir. 2010).

[163] *E.g.*, FTC v. SlimAmerica, Inc., 77 F. Supp. 2d 1263 (S.D. Fla. 1999).

[164] *E.g.*, FTC v. QT, Inc., 512 F.3d 858 (7th Cir. 2008).

disputes over scientific details, and may involve well-regarded experts on both sides of the question. Second, the respondents are established businesses with little risk of disappearing. Third, the product has substantial value for other reasons. Accordingly, none of the rationales that support permitting the award of consumer redress under Section 13(b) in cases of "dishonest or fraudulent" conduct supports permitting the award of such redress in traditional substantiation cases. There is no solvency problem with the target of the investigation. Moreover, in cases of this kind, even if the FTC ultimately concludes that some of the defendant's claims lack sufficient substantiation, the defendant will generally have had some basis for making them and believed them to be true. These are precisely the kinds of cases in which honest firms will not know they are violating the law. Instead, they are typically cases in which reasonable people disagree about the meaning of an advertisement, or in which reasonable scientists disagree about the amount and types of evidence necessary to support a particular claim. Unlike Section 19, where consumer redress is available only if the individual engaged in conduct that an objective person would know was "dishonest or fraudulent," or Section 5(m)(1)(B) where penalties are only available if the person acted with "actual knowledge" that the conduct was unlawful, legitimate companies could make claims about their products without knowing that the FTC will ultimately determine that their claims lack sufficient substantiation.[165]

Moreover, when the case involves a legitimate company that is simply unable to substantiate fully every claim it has made in an advertisement, there is no reason to think that the administrative enforcement approach will be inadequate to achieve compliance. Both FTC researchers and independent academics have found that companies subject to a cease-and-desist order for deceptive advertising suffer a significant reduction in stock prices.[166] In addition, the expansion of both state enforcement and private class actions under state consumer protection statutes provides an alternative method of seeking financial relief when necessary. Although the Commission's Policy Statement

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[165] *Cf.* Bickart, *supra* note 26, at 769 ("It would be unfair to permit the courts, at the Commission's behest, to impose penalties upon a defendant whose conduct had previously not been considered illegal."). These cases may involve occasional claims of falsity, but such claims do not, by themselves, support finding that the conduct was dishonest or fraudulent. Falsity under the FTC Act is a strict liability offense; no finding of scienter is required. A claim can be false without the advertiser knowing it was so.

[166] Sam Peltzman, *The Effects of FTC Advertising Regulation*, 24 J.L. & ECON. 403, 418 (1981) ("The story the stock market appears to be telling is that an FTC complaint implies essentially a wiping out of the brand's advertising capital."); ALAN MATHIOS & MARK PLUMMER, FTC BUREAU OF ECONOMICS STAFF REPORT, REGULATION OF ADVERTISING: CAPITAL MARKETS EFFECTS (1988). For an explanation of the event study methodology, see S.P. Kothari & Jerold B. Warner, *Economics of Event Studies*, *in* 1 HANDBOOK OF CORPORATE FINANCE (B. Espen Eckbo ed., 2007); A. Craig MacKinlay, *Event Studies in Economics and Finance*, 35 J. ECON. LITERATURE 13 (1997).

on Monetary Equitable Remedies in Competition Cases reserves the ability to seek monetary relief even when there are private actions,[167] it clearly regards the existence of such actions as sufficient in most cases.

The award of monetary relief is particularly problematic when the FTC is changing the rules, as it is with the current substantiation program. The Commission has historically said that (unless explicitly stated in the advertisement) the amount of evidence required depends on balancing the potential benefits of truthful claims that might be suppressed by requiring too much evidence against the potential costs of false claims that might occur if evidentiary requirements are too low.[168] For claims about drugs, for example, the potential costs of false claims are high because of the potential risks of side effects. When good alternative drugs are already on the market, the potential benefits of new drugs, although real, are smaller. This is the basis for stringent FDA regulation.[169]

In contrast, consider health claims for foods, such as the 1984 Kellogg claim that diets high in fiber could reduce the risk of cancer, a claim that the FTC and National Cancer Institute blessed over the FDA's objection. If this claim is true, prohibiting the claim by requiring too much evidence would deny consumers potentially important information and health benefits. If the claim is false, consumers may choose the wrong cereal for breakfast, and may pay a little more, but there are otherwise no significant adverse consequences. It seems clear that the more important risk to avoid here is the risk of mistakenly prohibiting truthful claims.[170] Moreover, because such cases often depend on complicated scientific issues, the risk of mistakenly prohibiting truthful

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[167] *See supra* note 146.

[168] These are crucial elements in the *Pfizer* factors, the case originating the substantiation doctrine. *See generally* Beales et al., *supra* note 152.

[169] Nevertheless, many have argued, with considerable justification, that the FDA pays too little attention to the potential benefits of new drugs. *See id.* at 10–11. *See, e.g.*, Kip Viscusi, *Regulatory Reform and Liability for Pharmaceuticals and Medical Devices*, *in* ADVANCING MEDICAL INNOVATION: HEALTH, SAFETY AND THE ROLE OF GOVERNMENT IN THE 21ST CENTURY, THE PROGRESS AND FREEDOM FOUNDATION 79, 90 (1996) ("There is a widespread consensus in the literature that the current FDA drug approval process establishes safety incentives that are excessive. . . . This imbalance in the emphasis for these two types of errors has led to excessive deterrence of new risks that may be created by pharmaceutical products and inadequate weight on reducing existing risks that patients now experience.").

[170] The FTC's own studies reveal that the Kellogg campaign had substantial benefits. New brands entered with higher fiber content, and consumption of breakfast cereals with higher fiber content increased significantly, particularly among disadvantaged groups. Importantly, consumers did not substitute other "bad" nutrients: there was no significant change in the fat or sodium content of cereals. *See* PAULINE IPPOLITO & ALAN MATHIOS, FTC BUREAU OF ECONOMICS STAFF REPORT, HEALTH CLAIMS IN ADVERTISING AND LABELING: A STUDY OF THE CEREAL MARKET (1989), *available at* http://www.ftc.gov/be/econrpt/232187.pdf; Pauline Ippolito & Alan Mathios, *Information, Advertising, and Health Choices: A Study of the Cereal Market*, 21 RAND J. ECON. 459 (1990).

claims is relatively high. Thus, there is the potentially serious cost of chilling truthful speech.[171]

In recent consent agreements, the Commission replaced the flexible reasonable basis standard with a requirement for the same kinds of evidence that the FDA has traditionally required to approve new drugs. These orders require two well-controlled clinical trials to substantiate certain claims, including weight loss,[172] the duration of diarrhea and children's absence from school,[173] and reducing temporary irregularity or improving intestinal transit time,[174] regardless of what experts in the relevant field regard as reliable. Moreover, some orders require prior FDA approval of certain claims,[175] which the press releases specifically designate as a "fencing in" provision to facilitate compliance and enforcement, rather than a requirement of Section 5 of the FTC Act. In such circumstances, it is difficult for companies to know the substantiation standards that will apply to their claims, which was precisely the kind of legal uncertainty that motivated Congress to limit Section 19 relief to conduct that was dishonest or fraudulent.[176]

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[171] *See* Beales et al., *supra* note 152, at 90–91 (discussing examples in which it would be a more serious error to mistakenly prohibit truthful claims than to mistakenly allow false ones).

[172] Stipulated Final Judgment and Order, FTC v. Iovate Health Scis. USA, Inc., No. 10-cv-587 (W.D.N.Y. July 29, 2010) (Beales consulted with Iovate on a separate matter); Agreement Containing Consent Order, Beiersdorf, Inc., FTC File No. 092-3194 (June 29, 2011).

[173] Agreement Containing Consent Order, Nestle HealthCare Nutrition, Inc., FTC File No. 092 3087 (July 14, 2010).

[174] The Dannon Co., FTC File No. 082 3158 (Dec. 15, 2010).

[175] Nestle HealthCare Nutrition, Inc., FTC File No. 092 3087 (July 14, 2010) (claims of preventing or reducing the risk of upper respiratory tract infections); The Dannon Co., FTC File No. 0823158 (Dec. 15, 2010) (claims that covered products reduce the likelihood of getting a cold or the flu). These recent cases are inconsistent with the Commission's 1983 decision to modify an order prohibition to allow claims that a household disinfectant could reduce the incidence and spread of colds if supported by competent and reliable scientific evidence. *See* Sterling Drug, Inc., 101 F.T.C. 375 (1983). They are also difficult to square with the Commission's recognition "that there may be certain limited instances in which carefully qualified health claims may be permitted under Section 5 although not yet authorized by the FDA, if the claims are expressly qualified to convey clearly and fully the extent of the scientific support." *See* Fed. Trade Comm'n, Enforcement Policy Statement on Food Advertising (1994), *available at* http://www.ftc.gov/bcp/policystmt/ad-food.shtm. Interestingly, claims that a vacuum cleaner or an air cleaner reduces the chances of getting the flu are subject to the traditional "competent and reliable scientific evidence" standard. *See* Agreement Containing Consent Order, Oreck Corp., FTC File No. 102-3033, at 3–4 [(Apr. 7, 2011). Another order has an even broader scope of claims that require prior FDA approval. Stipulated Final Judgment and Order, FTC v. Iovate Health Scis. USA, Inc., No. 10-cv-587 (W.D.N.Y. July 29, 2010) (claims that a product "is effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease") (Beales consulted with Iovate on a separate matter). The notice order in the Commission's administrative complaint against POM Wonderful sought unsuccessfully a similar preapproval requirement. Administrative Complaint, POM Wonderful LLC, FTC File No. 082-3122 (Sept. 27, 2010).

[176] Although in its recent POM decision, *POM Wonderful LLC*, FTC Docket No. 9344, *available at* http://www.ftc.gov/os/adjpro/d9344/130116pomopinion.pdf, *appeal docketed*, POM Wonderful LLC v. FTC, No. 13-0160 (D.C. Cir. Mar. 8, 2013), the Commission asserted fealty to the traditional standard, at least three reasons cast doubt on that assertion. First, the Commission's

The knowledge that the FTC might seek consumer redress in such circumstances could chill these companies from providing consumers with information that they would want to have about the products they are using.[177] Recently, the Supreme Court made clear that "[a] 'consumer's concern for the free flow of commercial speech may often be far keener than his concern for urgent political dialogue.' "[178]

Balancing the risk of mistakenly suppressing truthful claims against the risks of mistakenly allowing false ones does not mean that an advertiser can simply fabricate claims on the theory that *if* true they would be valuable to consumers. There must be evidence that supports the claim before the balancing of risks of mistakes even arises. Thus, substantiation theories frequently are part of complaints that the Commission pursues as part of the fraud program under Section 13(b). In many cases, respondents have no credible evidence to support their claims. Because the requirement to have a reasonable basis for objective claims is clear and well established, the Commission would have little difficulty in arguing that a reasonable person would have known that making the claims based on facially inadequate evidence was dishonest or fraudulent.[179]

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insistence on randomized clinical trials is inconsistent with the Commission's position regarding Kellogg, discussed in the text at note 165 above. The Kellogg claim was based on the recommendations of the National Cancer Institute, which in turn were based on epidemiological evidence. Clinical tests of claims to reduce cancer risk are exceedingly costly and difficult. Second, the Commission again requires two clinical studies to substantiate claims. The Commission's rationale, that a second study might yield different results, would always be true. Third, contrary to the longstanding trend within the Commission, the Commission uses its own expertise to dismiss the Administrative Law Judge's conclusion rejecting many of the alleged claims.

[177] Even with the "right" substantiation standard, uncertainty will exist about how it will be applied in a particular case. With monetary penalties, the increased risk, in combination with the uncertainty, will encourage greater caution about making truthful claims. One might argue that the chilling effect is limited because damages will be less than the full amount of sales that is typical in fraud cases. As we discuss below, however, the need to explore more limited measures of damages is itself a threat to the Commission's fraud program.

[178] *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2664 (2011) (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977)); Beales et al., *supra* note 152, at 86 ("When more accurate information is available to consumers, competition operates more effectively to guide producers to the types of products that consumers most prefer.").

[179] Although we do not address the issue in this article, the Commission might be able to use Section 13(b) to obtain a permanent injunction, without redress, in an advertising substantiation case. *See supra* note 127. In *FTC v. Brown & Williamson*, 778 F.2d 35 (D.C. Cir. 1985), the Commission had previously determined, in a public notice and comment proceeding regarding the FTC testing methodology for the tar content of cigarettes, that tar claims for Barclay were misleading. When Brown and Williamson continued advertising contrary to the Commission's conclusion, the Commission sought and obtained a permanent injunction barring the claims. It did not seek monetary relief. To the extent that such cases are "proper," district court judges are fully capable of analyzing the factual disputes underlying a traditional national advertising substantiation case.

Finally, the FTC's overly aggressive interpretation of Section 13(b) threatens to compromise the fraud program itself and thus jeopardize the FTC's ability to go after true fraudsters who impose significant harms on the consuming public. As noted above, we conclude there is a strong argument that Congress never intended to give the FTC the authority to seek consumer redress when it enacted Section 13(b). Those courts that have concluded otherwise have relied on the Supreme Court's decision in *Porter*, but as discussed above,[180] *Porter* does not help the FTC, especially in non-fraud cases. Porter requires agencies and courts to respect the overall statutory scheme, which in turn requires discerning Congress's intent. In fraud cases, the Commission can argue persuasively that the 1975 amendments are ineffective; no such argument appears available in non-fraud cases.

If the FTC pushes the Section 13(b) program beyond fraud-like cases, it runs the risk that the courts will be forced to confront the complexities of the program's legal authority. Moreover, courts may be less willing to bless the historical use of Section 13(b) if the FTC starts attempting to use it to obtain redress in contexts that lack support in the legislative history of the statutory changes in the 1970s.[181]

An additional risk to the Commission's fraud program from an expanded use of Section 13(b) lies in the way courts determine the appropriate amount of monetary relief. Although courts have been imprecise about whether equitable awards should be analyzed as "restitution" (which would be based on what consumers paid for the product) or "disgorgement" (which would be based on amounts received by the defendant),[182] the baseline for redress awards has generally been either consumer loss or the defendant's unjust gain. Because these measures usually coincide, under either measure the defendant can be required to pay amounts well in excess of profits.[183] Indeed, even if the

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[180] *See supra* Part II.B.

[181] Because Section 19 applies to redress only for unfair or deceptive acts or practices, the Commission's reading of *Porter* has more relevance for both injunctions and unfair methods of competition cases.

[182] *See, e.g.*, FTC v. Wolf, No. 94-8119-CIV-FERGUSON, 1996 WL 812940, at *9 (S.D. Fla. Jan. 31, 1996) (restitution); FTC v. SlimAmerica, Inc., 77 F. Supp. 2d 1263 (S.D. Fla. 1999) (providing "consumer redress"); FTC v. Verity Int'l, Ltd., 443 F.3d 48 (restitution); FTC v. Stefanchik, 559 F.3d 924 (9th Cir. 2009) ("equitable monetary relief"); FTC v. Bronson Partners, 674 F. Supp. 2d 373 (D. Conn. 2009) (restitution); FTC v. Direct Mktg. Concepts, Inc., 648 F. Supp. 2d 202 (D. Mass. 2009) (disgorgement).

[183] *See*, *e.g.*, FTC v. Nat'l Urological Group, Inc., 645 F. Supp. 2d 1167, 1213 (N.D. Ga. 2008) (noting that "[r]estitution is intended to return the injured party to the status quo and is measured by the amount of loss suffered by the victim" and awarding total product sales over the relevant period); *see also* FTC v. Febre, 128 F.3d 530, 536 (7th Cir. 1997) ("A major purpose of the Federal Trade Commission Act is to protect consumers from economic injuries. Courts have regularly awarded, as equitable ancillary relief, the full amount lost by consumers.").

defendant's gain is the measure, permissible offsets are generally limited.[184] That is a reasonable approach for a "Chinese Diet Tea"[185] promoted as a weight loss product, when few, if any, consumers likely purchased the product because of its inherent value as a beverage. It is not a workable approach for a product like Rice Krispies; an unsubstantiated claim may increase sales somewhat, but is not responsible for the vast majority of the sales that occur. Thus, courts may change their measure of calculating damages, and those changes could complicate the determination of redress in fraud cases, as well.

Even if the FTC is successful in using Section 13(b) to obtain redress in traditional scientific substantiation cases, rethinking the approach to damages may reduce the amount of monetary relief available in the fraud program. If courts recognize, as they likely will, that total revenue is not the appropriate measure of restitution for mere unsubstantiated claims because the purchasers will generally still have received some value from the product, they may also decide that it is not appropriate in fraud cases when the same might be true (for example, at least some consumers may have purchased Chinese Diet Tea in part because of its value as a beverage). Thus, expansion of Section 13(b) to legitimate products will likely complicate Section 13(b)'s application to true fraud.

Seeking monetary relief in traditional substantiation cases poses yet another problem for Commission enforcement: delay in obtaining the prospective relief that has always been the hallmark of FTC enforcement against legitimate companies. FTC orders not only constrain the conduct of the named respon-

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[184] Redress is generally not reduced by the amount of actual operating costs, such as those for manufacturing the product, advertising, processing costs, or taxes. *Bronson Partners*, 674 F. Supp. 2d at 382 (restitution); *SlimAmerica*, 77 F. Supp. 2d at 1276 ("Costs incurred by the defendants in the creation and perpetration of the fraudulent scheme will not be passed on to the victims."); *see generally Verity Int'l*, 443 F.3d at 68 (noting that in most cases there is no difference between measuring redress according to consumer loss and the defendant's unjust gain). By contrast, in the cases reflecting the Commission's new expansion of Section 13(b) (*supra* note 14), the Commission has sought and obtained redress far less than the total sales of the product. For example, in *Skechers*, the Commission obtained $40 million, which was considerably less than 10% of *Skechers*' sales in the peak year of the toning shoe fad alone. FTC v. Skechers U.S.A., Inc., No. 1:12-CV-01214 (N.D. Ohio May 16, 2012; Christopher C. Williams, *After a Tough Stretch Adidas' Run Resumes*, BARRON'S, Aug. 16, 2010, at 17 (sales of toning shoes expected to hit $1.5 billion in 2010, and Skechers held a 67% market share). Although the Commission's complaint included a falsity claim regarding alleged serious problems with one study, it apparently rejected other studies supporting similar fitness benefits of rocker bottom shoes. Scott C. Landry, Benno M. Nigg & Karelia E. Tecante, *Standing in an Unstable Shoe Increases Postural Sway and Muscle Activity of Selected Smaller Extrinsic Foot Muscles*, GAIT & POSTURE, June 2010, at 215 (reporting findings that even when standing, muscle activation is higher in rocker bottom footwear than conventional shoes). Moreover, unlike Section 19, both falsity and lack of substantiation are strict liability offenses; the defendant's knowledge is irrelevant.

[185] Chinese Diet Tea was the product at issue in *FTC v. Bronson Partners, LLC*, 654 F. 3d 359 (2d Cir. 2011).

dents, they also provide important information to other advertisers about how the Commission approaches claims in a particular product category. Because the prospect of monetary relief increases the stakes, companies will fight harder and longer to avoid these costs, with delay being the inevitable result.

For all of these reasons, it is time for the FTC and the courts to give meaning to *all* of the language in Section 13(b), including its limitation to "proper cases." By recognizing that relief is only available in "proper cases," courts and the FTC alike can respect the remedial balance Congress struck when it enacted Sections 13(b), 19, and 5(m)(1)(B).

IV. CONCLUSION

The FTC's consumer protection mission is to prevent unfair or deceptive acts or practices. In giving the FTC the tools to accomplish that mission, Congress struck a delicate balance. It recognized that the FTC must prevent harm to the public and ensure that those who cause the harm are punished; at the same time, it recognized that the FTC could go too far. Imposing monetary penalties on those who did not know their conduct was unlawful could chill the provision of beneficial information and thus hurt members of the public more than it helps them. As we noted above, if companies are afraid that they will be subjected to monetary liability for claims about their products that the FTC ultimately concludes cannot be substantiated, they may not make the claims at all. As a result, consumers could be deprived of valuable information.

In trying to strike this delicate balance in its 1970s amendments to the FTC Act, Congress gave the FTC considerable new enforcement tools, but carefully limited those tools so that they could only be used against defendants who reasonably should have known they were engaged in egregious activities. Today, the FTC threatens to disrupt that balance by seeking consumer redress under Section 13(b) in cases in which the defendants were not engaged in egregious activities. Section 13(b) has not historically been used to seek consumer redress in such cases, and this aggressive policy threatens to harm the public and undermine the use of Section 13(b) to obtain consumer redress in those cases of fraud where its use is truly beneficial.

The FTC and the courts should ensure that there are meaningful limits on the use of Section 13(b) to obtain consumer redress, and there is a simple way to do that—look to the language of the statute. Section 13(b), by its terms, authorizes the FTC to seek a "permanent injunction" only in "proper cases." We have suggested that the touchstone for determining a "proper case" is whether a reasonable person would have known that the conduct was dishonest or fraudulent. Only by giving meaning to the term "proper cases" can the courts and the FTC ensure that FTC enforcement is striking the proper balance that Congress intended.

APPENDIX

CIRCUIT COURT REDRESS CASES[186]

CASE	PRACTICES	PRELIMINARY RELIEF
FTC v. Sw. Sunsites, Inc., 665 F.2d 711, 715 (5th Cir. 1982)	Sold subdivided land in arid region with "no economically feasible commercial application . . . and . . . no resale value," while deceptively claiming the land was suitable for residential or commercial uses.	Preliminary injunction; asset freeze denied in district court but reversed on appeal.
FTC v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982)	Franchise rule violations that the court characterized as "routine fraud."	Preliminary injunction, asset freeze.
FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431 (11th Cir. 1984)	Telemarketing of investments in entering oil and gas lease lotteries that grossly misrepresented likelihood of winning a lease and the extent of competition for leases.	Preliminary injunction, asset freeze.
FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1026 (7th Cir. 1988)	Promoted $29 certificate for air transportation to Hawaii when a consumer booked a hotel stay through the company, but actual airfare was added on to hotel bill without consumer knowledge.	Preliminary injunction, asset freeze.
FTC v. Amy Travel Serv. Inc., 875 F.2d 564 (7th Cir. 1989)	Telemarketing of "vacation passports," which failed to disclose true airfare costs and sometimes promoted the $300–$350 voucher price as the total cost of a vacation that actually cost over $1900.	Temporary restraining order, asset freeze.
FTC v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991)	"Fraudulent" misrepresentations of market value of coins, misrepresented buyback policy, misrepresented investment value of modern date coins.	Preliminary injunction (referenced in 8th Circuit opinion).
FTC v. Pantron I Corp., 33 F.3d 1088 (9th Cir. 1994)	False claims that a hair loss treatment was effective against baldness.	Preliminary injunction.

[186] The table includes cases in which the Commission ultimately obtained redress; such redress may not have been awarded in the opinions cited, but in later stages of the proceedings and in settlements.

CASE	PRACTICES	PRELIMINARY RELIEF
FTC v. Gem Merch. Corp., 87 F.3d 466 (11th Cir. 1996)	Misrepresented the value of vacation prizes and the likelihood of winning; failed to disclose costs and conditions of receiving the prize.	Preliminary injunction (consent), asset freezes as to some defendants.
FTC v. Febre, 128 F.3d 530 (7th Cir. 1997)	Marketed work-at-home opportunities without revealing significant additional costs.	Preliminary injunction, asset freeze.
FTC v. Kuykendall, 371 F.3d 745 (10th Cir. 2004)	Telemarketing of magazine subscriptions that misrepresented cost and duration of subscriptions, charged consumers' accounts without authorization (contempt action).	Preliminary injunction, asset freeze as to corporate defendants.
FTC v. Verity Int'l, Ltd., 443 F.3d 48 (2d Cir. 2006)	Unauthorized billing for access to online entertainment via phone accounts (rather than taking and processing user credit cards).	Preliminary injunction, asset freeze.
FTC v. QT, Inc., 512 F.3d 858 (7th Cir. 2008)	Marketed bracelets with claims that wearing them would result in immediate, significant, or complete pain relief.	Temporary restraining order, preliminary injunction.
FTC v. Nat'l Urological Group, Inc., 356 F. App'x 358 (11th Cir. 2009)	Deceptive claims of rapid and substantial weight loss from use of a dietary supplement.	None. (Asset freeze entered after summary judgment and permanent injunction.)
FTC v. Direct Mktg. Concepts, 624 F.3d 1 (1st Cir. 2010)	Dietary supplement coral calcium marketed to prevent or treat diseases like lupus, cancer, MS, Parkinson's, and joint pain, all allegedly caused by "acidosis."	Injunction prohibiting claims as well as against "directly or indirectly selling, liquidating, assigning, transferring, converting, loaning, encumbering, pleading, concealing, dissipating, spending, withdrawing, or otherwise disposing of any funds" other than transfers "for actual and necessary business operations and expenses."[187]
FTC v. Bronson Partners, LLC, 654 F. 3d 359 (2d Cir. 2011)	False claims of rapid and substantial weight loss for Chinese Diet Tea and Bio-Slim Patch.	Preliminary injunction.

[187] FTC v. Direct Mktg. Concepts, Inc., No. Civ.A.04-11136-GAO, 2004 WL 1399185, at *13 (D. Mass. June 23, 2004).