Section 13(b) of the FTC Act at the Supreme Court: The Middle Ground

J. Howard Beales III, Benjamin M. Mundel, and Timothy J. Muris

Since 1981, the foundation of the Federal Trade Commission's consumer protection enforcement program has been using Section 13(b) to attack fraud in federal district court. Because courts have applied that provision to award monetary relief, the program has returned billions of dollars to consumers. Successive agency Chairs have expanded and strengthened the program, and the agency now coordinates a vast network of local, state, national, and international law enforcement agencies to prosecute the many faces of fraud. In the last decade, the agency expanded the use of 13(b) to more traditional FTC cases beyond those involving obviously dishonest business conduct, including those involving complex issues of advertising substantiation as well as disputed issues regarding the adequacy of disclosures to consumers that would have been resolved previously with, at most, an administrative cease and desist order.

In 2013, two of us warned that this unwarranted expansion of the agency's authority would jeopardize the heretofore uncontroversial fraud program itself.[1] Unfortunately, the problems we anticipated have materialized in a case now before the Supreme Court.[2] A second case raising these same issues was also before the Court, but the grant of certiorari was recently vacated.[3] Both the FTC and the defendants in the cases take extreme positions, the agency claiming that it can *always* use 13(b) to obtain monetary relief when it chooses to do so. Echoing Newton's third law of physics, the defendants advocate for the opposite, extreme position, claiming the FTC can *never* obtain monetary relief under 13(b).

We disagree with each side; both the law and sound policy reject the extremes before the Court and support a middle ground. Section 13(b) was part of a complex statutory structure that allowed monetary relief only in carefully delineated circumstances, originally considered as a whole, but enacted in two separate bills two years apart in the 1970s.

The FTC's fraud program recognized the limited availability of using 13(b) in consumer protection cases and respected the limits Congress had imposed, requiring that other parts of the FTC Act be used to obtain monetary relief in more complex cases. These changes to the FTC Act, now at issue before the Court, respected the original policy conception of the FTC that, because the statutory standard was often unclear, the appropriate first sanction was a cease and desist order.

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1 *See* J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1 (2013). Muris was Chairman of the FTC from 2001–2004, and Beales was Director of the FTC Bureau of Consumer Protection. In 1981, Muris became Director of the Bureau of Consumer Protection and Beales became an Assistant to the Director.

2 AMG Capital Mgmt., LLC v. FTC, No. 19-508 (U.S. filed Oct. 21, 2019) (Professor Beales discussed a possible consulting role with AMG, but was never retained).

3 FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019), *cert. granted*, 2020 WL 3865251 (U.S. July 9, 2020) (No. 19-825), *grant of cert. vacated*, 2020 WL 6551765 (U.S. Nov. 9, 2020) (No. 19-825).

Congress allowed the agency to obtain monetary relief only when the violation was clear, and a reasonable person would have known that the conduct was dishonest or fraudulent. The advertising disputes mentioned above, especially when they turn on disagreements among reasonable experts, are decidedly not the kind of case for which Congress contemplated monetary relief. Monetary relief in such cases is likely to chill truthful and useful information for consumers.

How We Got Here

An important part of Woodrow Wilson's campaign in 1912 was to create an expert body to provide guidance for appropriate marketplace conduct.[4] The FTC Act followed in 1914.[5] Because the statutory prohibition of "unfair" conduct[6] was deliberately vague, the only remedy initially available was a cease and desist order, with monetary relief eventually made available only for violations of that order.[7] For many practices, this approach was wise, because the line between permissible and impermissible conduct was unclear until the Commission had addressed a particular practice. The possibility of imposing monetary relief for the initial conduct could chill otherwise lawful conduct that actually benefits consumers or competition. As we discuss below, that problem exists today, for example, in the application of the Commission's advertising substantiation doctrine. It is sometimes said, incorrectly, that cease and desist orders are no penalty at all, and violators get "one free bite of the apple." In fact, legitimate businesses suffer reputational and financial penalties from FTC cease and desist orders and so they are hardly a "free pass."[8]

By the late 1960s, the agency was widely criticized, for multiple reasons, including its consumer protection focus on largely trivial issues. Two reports, the first by young students under the auspices of consumer advocate Ralph Nader,[9] and the other by a prestigious committee of the American Bar Association[10] with future FTC Chairman Miles Kirkpatrick as its head and another future Chairman Robert Pitofsky as the Commission Counsel, were scathing in their criticism of the FTC. The ABA even concluded that it should be the last of a long series of a similar reports, and recommended "drastic changes . . . to recreate the FTC in its intended image."[11]

Change followed. Because many argued that the Commission needed stronger remedial powers, by 1973 Congress began working on strengthening the Commission, considering comprehensive legislation to facilitate the Commission's ability to obtain injunctions, as well as to obtain monetary relief beyond violations of previously existing orders. As we have previously written,[12] this history has received vanishingly little attention in the case law, and as we argue below, is misused

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[4] *See generally* Sidney M. Milkis, Theodore Roosevelt, the Progressive Party, and the Transformation of American Democracy (2009).

[5] Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914).

[6] As passed in 1914, the FTC Act prohibited only "unfair methods of competition," § 5, 38 Stat. at 719; the prohibition against "unfair or deceptive acts or practices" was added in 1938, Act. of Mar. 21, 1938, ch. 49, § 5(a), 52 Stat. 111, 111–12.

[7] The Wheeler-Lea Act of 1938 first subjected violations of Commission orders to civil penalties. *See* Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111, 111.

[8] *See* Beales & Muris, *supra* note 1, at 36–37 & n.166.

[9] *See id.* at 7; *see also* Edward F. Cox et al., "The Nader Report" on the Federal Trade Commission (1969) [hereinafter Nader Report].

[10] *See* Beales & Muris, *supra* note 1, at 7; *see also* Am. Bar Ass'n, Report of the ABA Commission To Study the Federal Trade Commission (1969) [hereinafter 1969 ABA Report].

[11] 1969 ABA Report, *supra* note 10, at 3.

[12] *See* Beales & Muris, *supra* note 1, at 5.

by both parties in the current litigation. The less controversial injunction provision was removed from the comprehensive package when an opportunity to attach it to a different legislative vehicle headed for enactment arose in that same year.[13] The enacted language included the second proviso of Section 13(b), the provision now at issue before the Supreme Court: "That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."[14]

Congress continued to work on the original companion provision to expand the availability of monetary relief, rejecting broad use of monetary relief two years later and instead authorizing such relief only in specific circumstances. Section 19 permits the agency to obtain redress in federal court for practices that a reasonable person would have known were "dishonest or fraudulent," but only after an FTC administrative proceeding determined that violations had occurred.[15] Section 5(m)(1)(B) allows the Commission to obtain civil penalties against a target that commits acts or practices that it knows the Commission has previously found were unfair or deceptive in litigation against third parties.[16]

Although the ABA Commission and others had suggested that the agency act to prevent fraud,[17] it did not do so in the 1970s. Instead, the agency's principal work that decade was to attempt to become "the second most powerful legislative body in the United States"[18] by proposing numerous industry-wide rules. By the time two of the current authors arrived at the FTC's Bureau of Consumer Protection in the Fall 1981, the enterprise of crafting such rules to reshape major sectors of the economy had collapsed because of flaws in both implementation and conception.[19] The new agency leadership, in searching for a new foundation for consumer protection, turned to attacking fraud. Fraud is tantamount to theft, distorting the market and limiting the ability of consumers in making informed choices. Fraud also harms legitimate competitors, by reducing the credibility of all advertising, forcing the honest to provide more assurances of performance to overcome consumers' suspicions.

There was some reluctance within the staff and by some Commissioners to attack fraud systematically. In part, they argued that the Commission should do "more important" work, and that other agencies should solve the fraud problem. The response was that, as the nation's consumer protection agency, the FTC was best suited to coordinate a nationwide attack on fraud in all its forms. Other agencies, even if they had criminal remedies, often lacked the necessary geographic scope, staff resources, market expertise, and willingness to tackle the problem, given their many responsibilities.

A second objection was more substantial, namely that, unlike the legitimate businesses with which the Commission usually dealt, fraudsters were unlikely to obey legal rules unless forced to do so. Although the Commission lacked criminal authority, we argued that we could attack fraud

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[13] J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 Geo. Wash. L. Rev. 2157, 2175 & n.90 (2015).

[14] 15 U.S.C. § 53(b).

[15] *Id.* § 57b.

[16] *Id.* § 45(m)(1)(B).

[17] *See* 1969 ABA Report, *supra* note 10, at 50–52; Nader Report, *supra* note 9, at 163–68. A second ABA Commission, again chaired by then-former Chairman Miles Kirkpatrick, and including future Chairmen Timothy Muris and Robert Pitofsky, wrote enthusiastically about the fraud program. *See* Am. Bar Ass'n, Report of the American Bar Association Section of Antitrust Law—Special Committee To Study the Role of the Federal Trade Commission (1989), *reprinted in* 58 Antitrust L.J. 43, 77–82 (1989).

[18] Beales & Muris, *supra* note 13, at 2159 & n.6; Jean Carper, *The Backlash at the FTC*, Wash. Post, Feb. 6, 1977, at C1.

[19] *See generally* Timothy J. Muris, *Rules Without Reason: The Case of the FTC*, Reg., Sept./Oct. 1982, at 20.

by depriving its perpetrators of their ill-gotten gains along with strong injunctive relief limiting their ability to strike again elsewhere. To achieve these objectives, a statutory vehicle to obtain effective monetary relief was needed. The 1975 additions to the FTC Act would not work, because the target would hide the money immediately upon notice of the FTC's interest, long before any order to pay redress.

To attack fraud successfully, the agency needed to freeze assets pending a final judicial determination on the merits. The FTC used the second proviso of Section 13(b), asking, in a single federal district court, for an *ex parte* order freezing assets and preliminarily enjoining ongoing conduct, then disposing of the case on the merits, ordering, if appropriate, that the frozen assets be returned to consumers while issuing a permanent injunction. This approach became known as the "Section 13(b) Fraud Program."[20]

The fraud program has been enormously successful, with the agency using investigators trained to uncover fraud, trace assets, develop evidence for trial, and testify in court. These investigators in turn have trained hundreds of local, state, federal, and international criminal and civil law enforcement officials.

The fraud program has been enormously successful, with the agency using investigators trained to uncover fraud, trace assets, develop evidence for trial, and testify in court. These investigators in turn have trained hundreds of local, state, federal, and international criminal and civil law enforcement officials.[21] The agency also created Consumer Sentinel, allowing hundreds of law enforcement agencies to access a complaint database, coordinate attacks on various fraudulent schemes, spot emerging trends, identify bad actors quickly, and locate potential witnesses. The fraud program has become international, with the creation of an International Division and passage in 2006 of the SAFE WEB Act,[22] extending the Commission's authority in information sharing, investigative assistance, cross-border jurisdiction, and enforcement relationships. The agency has also extended the program to Spanish speakers, with Spanish language consumer education, cases against fraud in the Spanish language media, and outreach to law enforcement officials with large Spanish-speaking populations. Finally, recognizing that some fraudsters should be jailed, the Commission's Criminal Liaison Unit encourages and works with agencies with criminal authority that otherwise lack the time, expertise, and ability to prosecute fraud.

By early in the Obama administration, eight circuit courts of appeal had blessed the FTC's fraud program, often with broad language that, read outside of the context of the fraud case before it, appeared to approve an expansive use of Section 13(b). Emboldened by this success, the Obama administration began stretching Section 13(b) monetary remedies well beyond the fraud context of those circuit court decisions, claiming broad authority to seek monetary relief. Today, the agency argues, in effect, that it can use 13(b) whenever it chooses, relegating the 1975 Congressionally enacted remedies merely to alternative choices available, or not, at the Commission's sole discretion.

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[20] *See generally* David R. Spiegel, *Chasing the Chameleons: History and Development of the FTC's 13(b) Fraud Program*, ANTITRUST, Summer 2004, at 43.

[21] *See* Press Release, Fed. Trade Comm'n, FTC Testimony Portends Increase in Privacy Protection Efforts and Aggressive Antitrust Law Enforcement (Mar. 19, 2002), https://www.ftc.gov/news-events/press-releases/2002/03/ftc-testimony-portends-increase-privacy-protection-efforts-and.

[22] *See* Press Release, Fed. Trade Comm'n, FTC Chairman Announces New International Affairs Office (Feb. 5, 2007), http://www.ftc.gov/news-events/press-releases/2007/02/ftc-chairman-announces-new-international-affairs-office; *see also* U.S. SAFE WEB Act of 2006, Pub. L. No. 109-455, 120 Stat. 3372.

13(b) Reaches the Supreme Court

In two cases, both of which the FTC has styled essentially as fraud cases, the Ninth and Seventh Circuits have taken contradictory positions, with the latter denying that 13(b) authorizes monetary relief.

Because of the FTC's expansive claims of monetary relief powers and because the courts were addressing related issues of the Securities and Exchange Commission's powers to obtain monetary relief, the FTC's authority is now in doubt. In two cases, both of which the FTC has styled essentially as fraud cases, the Ninth and Seventh Circuits have taken contradictory positions, with the latter denying that 13(b) authorizes monetary relief.[23] Ironically, the FTC could have used our argument underlying the fraud program, namely that 13(b) was necessary to obtain money for a narrow class of cases for which the 1975 remedial provisions would not work, as we elaborate below. Instead, the Commission now defends the expansive position of the apparent universal availability of monetary relief under 13(b). We call this position "Always," as shorthand for money is always available under 13(b). The defendants argued for an equally extreme position, which we label "Never," that Section 13(b) does not permit monetary relief in any circumstances.

We argue for a middle ground to protect the FTC's ability to fight fraud that would respect the statutory structure and Congressional limits enacted in 1975. Our position is best understood by examining the flaws in the arguments of the parties before the Court. Those arguments raise issues about both the inherent meaning of the word "injunction," as well as how 13(b) fits within the statutory structure of the FTC.

Not surprisingly, the parties reach contradictory conclusions on the equitable powers implied by 13(b)'s use of "injunction." The Nevers argue that the SEC statute recently before the Court in *Liu*[24] provided a stronger basis for obtaining monetary relief than does the FTC Act, and thus contend that injunction means only that, unless Congress has explicitly authorized other remedies, as it sometimes has done for other agencies.[25] The FTC disagrees, finding historical precedent in the power of courts of equity to order restitution or disgorgement.[26]

The parties also disagree about the specific meaning of *Liu*, in which the Court held that "disgorgement" is an equitable remedy permitted by the Securities and Exchange Act.[27] The Court made clear, however, that disgorgement must be limited to its traditional use in courts of equity.[28] In so ruling, the Court cited favorably its 1946 holding in *Porter v. Warner Holding Co.*,[29] upon which much of the law underlying the fraud program has relied. Moreover, the Court appeared solicitous of protecting the SEC's powers to proceed against fraudsters,[30] which could well indicate a predisposition to reject the Never argument in the current case.

One issue on which the Never position is especially problematic is the claim that injunctions are forward looking and the award of money is necessarily backward looking. This stilted view ignores the nature of a government enforcement agency in general, and the fraud program in particular. The goal of the fraud program is to deter fraud, an inherently forward-looking task. As a consumer protection agency, returning money to consumers is an important means of doing

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[23] *See* FTC v. AMG Capital Mgmt., LLC, 910 F.3d 417, 426–27 (9th Cir. 2018), *cert. granted*, No. 19-508, 2020 WL 3865250 (U.S. July 9, 2020); FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 786 (7th Cir. 2019), *cert. granted*, 2020 WL 3865251 (U.S. July 9, 2020) (No. 19-825), *grant of cert. vacated*, 2020 WL 6551765 (U.S. Nov. 9, 2020) (No. 19-825).

[24] Liu v. SEC, 140 S. Ct. 1936 (2020).

[25] *See* Brief for Petitioners at 33–36, 45–46, AMG Capital Mgmt., LLC v. FTC, No. 19-508 (U.S. Sept. 25, 2020).

[26] *See* Brief for Respondents, at Section II A, AMG Capital Mgmt., LLC v. FTC, No. 19-508.

[27] Liu, 140 S. Ct. at 1944–46.

[28] *Id.* at 1942–43.

[29] *Id.* at 1943 (discussing Porter v. Warner Holding Co., 328 U.S. 395 (1946)).

[30] *Id.* at 1949.

so, but was hardly the sole goal. As with individuals and businesses, a government agency can pursue multiple goals at once. Of course, other parts of the FTC's enforcement agenda could also have multiple goals, and thus could support expansive use of 13(b). Our middle ground argument for limiting 13(b) does not lie in the inherent meaning of "injunction" or discussions of the historical meaning of equity, but instead relies on the FTC's statutory structure.

Our structural argument contends that the remedial aspects of the FTC must be considered as a whole, and, indeed, the crucial statutes at issue, 13(b), which passed in 1973, and Section 19, which passed two years later, began as parts of a single, comprehensive approach. If the FTC's current argument is correct, Congress would hardly have continued the difficult, controversial struggle to enact Section 19 after two additional years of detailed work if it thought passage of 13(b) made the new statute unnecessary.

It is important to add that this is not an argument based on obscure passages of legislative history of the sort that textualist scholars and judges have come to view with well-deserved suspicion.[31] Rather, it is a bedrock rule of interpretation that "laws dealing with the same subject . . . should if possible be interpreted harmoniously."[32] As we concluded previously, the circumstances underlying the adoption of these statutes provide the "inescapable inference"[33] that 13(b) did not swallow the monetary relief provisions that followed two years later.[34]

The Middle Ground Solution

Both the Always and Never positions are wrong. Among its other flaws, the Never argument would eliminate the fraud program. The Always advocates ignore the context in which the 1973 and 1975 amendments passed and read "proper case" out of Section 13(b) by asserting that all cases are proper, thus claiming statutory authority the FTC did not believe it had until decades after 13(b) passed. We discuss each position in turn.

The Never Position Ends the Fraud Program. As a threshold matter, at least some versions of the Never position would not allow injunctions to be used for any purposes related to backward-looking relief.[35] If so, then the asset freezes, upon which the fraud program relies, would be impossible.

Even if the Never advocates retreat from the implications of their logic, and assert that under the FTC's statutory structure asset freezes would be permissible in service of Section 19, this position

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[31] We discuss the entire legislative history in 16 pages of our earlier article. *See* Beales & Muris, *supra* note 1, at 6–21. The FTC's use of legislative history shows the danger in this interpretive tool. The FTC argues that "Congress has twice ratified the lower court rulings that Section 13(b) allows monetary relief." Brief for Respondents at 27, AMG Capital Mgmt., LLC v. FTC, No. 19-508. But that statutory action occurred in 1994 and 2006, before the FTC expanded its enforcement beyond fraud cases. Thus that legislative history affirmed the fraud program, nothing more.

[32] Antonin Scalia & Bryan A. Garner, Reading Law 252 (2012); *see also* Erlenbaugh v. United States, 409 U.S. 239, 244 (1972) ("The rule is but a logical extension of the principle that individual sections of a single statute should be construed together, for it necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject." (footnote and citation omitted)); United States v. Freeman, 44 U.S. (3 How.) 556, 564 (1845) ("The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law.").

[33] Beales & Muris, *supra* note 1, at 21 & n.98.

[34] Jones v. United States, 467 U.S. 574 (1983) (interpreting statutes in a way that avoids rendering provisions meaningless); Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1586 (2016) (giving effect to statutory amendments).

[35] *See* Opening Brief for Respondents Credit Bureau Center, LLC and Michael Brown at 15–18, FTC v. Credit Bureau Ctr., LLC, No. 19-825 (U.S. Sept. 25, 2020).

would almost certainly reverse the 40 years of success of the FTC's fraud program.[36] Here, we demonstrate that conclusion by explaining the complete impracticability of building a fraud program relying solely on the 1975 amendments. Because those amendments cannot reach fraud successfully, the FTC can use the equitable powers under 13(b) for that narrow class of cases. This conclusion is consistent not only with the statutory structure, but also with the Congressional determination, reflected in Section 19, that the touchstone for awarding monetary relief in individual cases was conduct that is "dishonest or fraudulent."[37]

[S]uccessfully attacking true consumer fraud requires obtaining an asset freeze pending a final judicial determination of the merits.

As already explained, successfully attacking true consumer fraud requires obtaining an asset freeze pending a final judicial determination of the merits. Under the traditional fraud program, the FTC files a single federal action under Section 13(b), seeking an *ex parte* temporary restraining order (TRO) and an asset freeze under Rule 65(b), and the district court typically appoints a receiver to secure and monitor the fraudster's frozen assets.[38] The fraudster can then contest the asset freeze at a preliminary injunction hearing, and, if the FTC prevails, the court will continue to monitor the receivership while the parties litigate the merits of the FTC's claim. Upon deciding the case on the merits, the district court will issue a permanent injunction and award consumer relief from the fraudster's still-frozen funds.[39] (In fraud cases, the FTC almost universally prevails with some variation in injunctive relief over the years.)

Under the Never procedure, the FTC's only mechanism for pursuing consumer redress against fraudsters—a mechanism we term the "Triple Hybrid" [40]—would require the agency to bring three distinct legal actions and to litigate in at least three (but sometimes four or five) separate fora. Given the necessity of first obtaining an order freezing the fraudster's assets, the first three steps from the traditional 13(b) procedure would be the start of the Triple Hybrid. But because consumer redress would be unavailable, that is only where the Triple Hybrid would begin.

While the district court monitors the receivership, the FTC would have to issue an administrative complaint under Section 5 and litigate that complaint to judgment before an Administrative Law Judge (ALJ).[41] The ALJ would then issue an initial decision, with an appeal to the Commission as a matter of course.[42] The Commission would then review the ALJ's findings and enter its own decision, which the respondent could appeal to a federal court of appeals and then the Supreme Court.[43] Finally, after the Commission's order becomes final, the FTC must file a *new* federal action, seeking consumer redress under Section 19.[44] The FTC would likewise have to litigate this case to judgment, only then concluding a process that, given the length of FTC administrative

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[36] *See id.* at 24–31.

[37] For a much fuller discussion, see generally Beales & Muris, *supra* note 1.

[38] For an overview of the typical procedure, see Dana J. Lesemann & Peter B. Zlotnick, *Receiverships and Other Shark Tales*, LITIG., FALL 2005, at 48.

[39] *See, e.g.*, FTC v. Moses, 913 F.3d 297, 309–10 (2d Cir. 2019) (reviewing district court award of disgorgement remedy).

[40] The first proviso of 13(b) itself requires a "hybrid" procedure that comprises a preliminary injunction in federal court followed by administrative proceedings before the Commission. The term "Triple Hybrid" reflects that the FTC must now prevail in three separate proceedings, each involving a separate cause of action: Section 13(b), Section 5, and Section 19. Our chart below uses colors to differentiate the three proceedings.

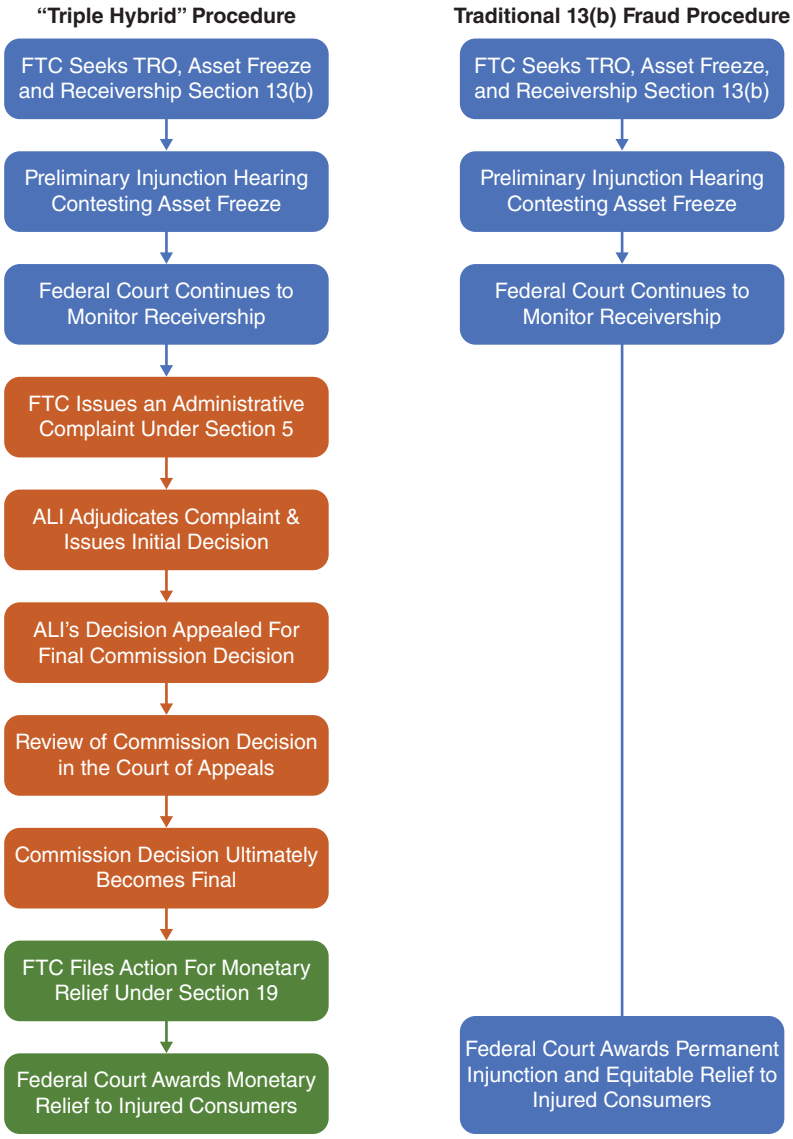
[41] 15 U.S.C. § 45(b); 16 C.F.R. §§ 3.11, 3.51.

[42] 16 C.F.R. §§ 3.51–.52.

[43] 15 U.S.C. § 45(c).

[44] *Id.* § 45(g); *id.* § 57b.

proceedings, could easily take multiple years. For the sake of clarity, the following chart compares the steps in the Triple Hybrid to the traditional 13(b) procedure.



The Triple Hybrid's inefficiency is readily apparent. It would also be utterly ineffective for redressing consumer fraud. To start, an asset freeze is an "extraordinary remedy."[45] Under the Triple Hybrid, however, a federal court would have to grant the asset freeze even though it would not control the merits determination of the underlying claim. In other words, the federal judge would have to trust that an entirely distinct adjudicative body, whose proceedings could drag on for years, would ultimately vindicate the asset freeze when it resolved the liability question. To say the least, the typical federal judge would be reticent to permit such a lengthy asset freeze and receivership, absent the jurisdiction to order final relief.[46]

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[45] Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 340 (1999) (Ginsburg, J., concurring in part and dissenting in part); *id.* at 321 (majority opinion) (explaining that even "federal equity courts have traditionally rejected [this] type of provisional relief").

[46] Although analogous cases are, unsurprisingly, hard to find, district courts have rejected such requests. *See, e.g.*, United States v. New Frontiers Real Estate Co., No. CIV. A. 89-2585, 1989 WL 49519, at *4–5 (E.D. Pa. May 8, 1989) (dissolving asset freeze where resolution of claim was "entirely speculative").

But the problem is not simply one of "trust." As noted, the Triple Hybrid requires a district court to supervise the receivership for the duration of the administrative process. But what court will want to oversee a not yet convicted fraudster's business for the multiple years when the district court cannot decide the legality of the underlying business? Practical difficulties abound. If the defendant is a true fraudster, the court must direct the receiver in shutting down operations and selling assets for the benefit of injured parties. Yet the district court could not shut down operations and sell assets of a lawful business. And doing so would almost certainly moot the FTC administrative proceeding, placing the judge in an impossible position. At the same time, no judge would want to direct a receiver to run a potentially fraudulent business for the lengthy period while the administrative proceedings run their course.[47]

Put simply, federal judges would not, and should not, accept such a process. Nor, given the "broad discretion" afforded federal courts sitting in equity[48] and the lack of clear congressional guidance, would courts be required to do so. In addition to their equitable powers, federal courts also have broad discretion "to control the disposition of the causes on [their] docket with economy of time and effort."[49] Asked to participate in the Triple Hybrid, federal courts could—and most certainly would—exercise their discretion to decline the FTC's request for the initial asset freeze in virtually every instance, thereby effectively ending the fraud program.

By contrast, the Middle Ground solution we propose preserves the fraud program—in its original, limited form—and, critically, it is also consistent with the text of 13(b) and with the overall remedial structure. Beginning with the text, 13(b)'s second proviso provides that "in proper cases" a federal court can adjudicate the merits of the FTC's action by granting a permanent injunction.[50] This contrasts with the language of 13(b)'s first proviso, which allows only for preliminary injunctive relief and requires the FTC to file an administrative complaint to preserve its injunction.[51] The contrast is significant for multiple reasons. First, it demonstrates Congress's intent that "in proper cases" the FTC need *not* file an administrative complaint and that, instead, the federal court itself could adjudicate the merits of the underlying claim.[52] Thus, in those "proper cases," the Triple Hybrid runs contrary to the operation of the second proviso. And as *Liu*'s discussion of *Porter* suggests,[53] the second proviso's grant of equitable authority to adjudicate the merits fully—i.e., issue a *permanent* injunction—carries with it the authority to award other equitable remedies, but only consistent with the statutory scheme.

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[47] While it is true the preliminary injunction could be considered a merits determination capable of assisting the district court in supervising the receiver, that would still be insufficient in practice. The judge would still be in the impossible position of managing a business the legality of which will ultimately be determined in other fora.

[48] United States v. Morgan, 307 U.S. 183, 193–94 (1939).

[49] Landis v. N. Am. Co., 299 U.S. 248, 254 (1936).

[50] *See* 15 U.S.C. § 53(b).

[51] *See id.*

[52] *See* Russello v. United States, 464 U.S. 16, 23 (1983) ("[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of statutory language) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))). Legislative history also confirms that the second proviso was intended to allow federal court to adjudicate the merits in cases where awaiting an administrative proceeding before the Commission was impracticable. *See, e.g.*, Beales & Muris, *supra* note 1, at 12–13.

[53] *See Liu*, 140 S. Ct. at 1946–47 (quoting *Porter* for the proposition that "[u]nless otherwise provided by statute, all . . . inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction (alteration and omissions in original)).

The Fatal Flaws of the Always Position. Just because the text of 13(b), read against the backdrop of cases like *Porter*[54] and *Mitchell*,[55] protects fraud cases, mooting the hybrid approach, the Always position is not necessarily correct. This position, too, overlooks 13(b)'s text and the overarching remedial structure, both of which provide clear limits on federal courts' equitable authority under 13(b).

As for the text, 13(b)'s second proviso grants federal courts authority to adjudicate the merits only "in proper cases." As we have argued at length elsewhere, the term "proper cases" for unfair or deceptive acts or practices cannot be read out of the statute. Our Middle Ground position, unlike the Always position, respects this textual language. We argue that it is best to limit federal courts' authority to award monetary relief to cases where a reasonable person would have known that the conduct was dishonest or fraudulent.[56] The proper case phrase acknowledges the court's discretion to grant or withhold equitable relief. The Supreme Court supervises the lower courts, and thus can determine the contexts in which district courts should or should not grant particular forms of equitable relief.

Our Middle Ground position also is completely consistent with the broader statutory structure. Specifically, both Section 5(m)(1)(B) and Section 19 confirm that Congress saw monetary penalties—or consumer relief—as appropriate only when defendants should have known they were engaged in egregious activities.[57] It would violate basic principles of statutory interpretation to allow, in all cases, remedial authority under 13(b) when Congress had worked so carefully to cabin that authority in these related provisions.[58] As discussed above and as we have written,[59] when Congress passed 13(b) in 1973, it was working on comprehensive changes to the FTC Act, some not enacted until 1975. Under the FTC's current position, there simply would be no need for Section 19, and Congress, had it understood that interpretation of Section 13(b), would certainly have avoided the difficult work of producing Section 19.

Rather than confront this conundrum directly, the Commission attempts to reconcile Sections 19 and 13(b)[60] by claiming they are "mutually exclusive"[61] pathways to the same end, one using the administrative process, the other using the equitable powers of district courts. The two provisions certainly are mutually exclusive; since *Figgie*,[62] the Section 19 pathway essentially remains unused, and our table above makes the reason clear. This nonuse is hardly consistent with the view that Congress created coequal alternative paths for the Commission to choose.

The Commission's argument further ignores the fact that Congress limited redress in the administrative process to cases of "dishonest or fraudulent" conduct but did not so limit cases initiated

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[54] *Porter*, 328 U.S. at 398.

[55] Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 299 (1960).

[56] *See* Beales & Muris, *supra* note 1, at 31–33.

[57] *See* 15 U.S.C. § 45(m)(1)(B); *id.* § 57b.

[58] Scalia & Garner, *supra* note 32, at 252.

[59] *See* Beales & Muris, *supra* note 1.

[60] *See* Brief for Respondents, at Section II A, at 39, AMG Capital Mgmt., LLC v. FTC, No. 19-508.

[61] *Id.* at 43.

[62] Figgie Int'l, Inc., 107 F.T.C. 313 (1986), *aff'd*, 817 F.2d 102 (4th Cir. 1987) (Administrative case); FTC v. Figgie Int'l Inc., 994 F.2d 595 (9th Cir. 1993) (Section 19 case). Tellingly, *Figgie* was initiated when two of the authors, who were then at the FTC, did not accept the Always position and who also initiated the administrative litigation in *Telebrands*, which led to one of the few other uses of Section 19. FTC v. Telebrands Corp., 2:07-cv-3525 (D.N.J. 2008). It is also worth noting that cases pursued against legitimate businesses almost always settle, and those involving dishonest or fraudulent conduct could settle just as easily under the administrative/Section 19 process as under 13(b).

in district court. A principled district court/administrative distinction would work the other way, with administrative cases used to resolve complex issues suited for the FTC's "expertise," and more obvious violations of Section 5 reserved to federal courts.[63] That the Commission's interpretation ignores its own expertise is yet another flaw in its attempt to avoid the context in which Sections 13(b) and 19 passed.

Nor does the savings clause in Section 19 help the Commission. Obviously, the clause refers to whatever pre-existing authority existed at the time Section 19 passed, and for decades the Commission correctly believed Section 19 limited 13(b)'s ability to obtain monetary relief, outside of the fraud program, for which Section 19 manifestly would not work. At best, the agency's use of the savings clause relies on strained literalism, devoid of context or appropriate textual analysis.

Only the Middle Ground solution both respects the statutory structure and preserves the FTC's ability to remedy cases of consumer fraud.

The Always Solution Is Bad Policy, Not Just Bad Law

Just as with the original FTC statute in 1914, sound policy supported the Congressional action in the 1970s. Because of the inherent uncertainty in determining whether certain practices are "unfair or deceptive" within the meaning of the FTC Act, the original vision of those who created the FTC that remedies should be prospective only retained relevance, at least regarding acts or practices about which there were reasonable arguments on both sides. Nevertheless, by the mid1970s, the agency had existed for 60 years, and in some areas the law was quite clear. The FTC fraud program, for example, involves business conduct about which there is typically no legal uncertainty, and thus little risk of excessive caution. The 1975 amendments recognized the distinction between clear and unclear violations, which has a sound policy basis in protecting consumers. Aggressive penalties applied ex ante to practices not previously considered unlawful or to areas of law that often require careful consideration of evidence about which reasonable people can and do differ will likely lead to excessive caution from those subject to the law.

Today, the FTC's advertising substantiation program, based on consumer expectations that objective claims are based on evidence, perhaps best illustrates this phenomenon. Thus, an objective claim is really two claims, one that the claim is true, and the other that the claim is supported by evidence—a "reasonable basis." Without such evidence, the claim of support is deceptive. The typical substantiation case involves a reputable business making claims about the features of an existing product. Even after long litigation, there will be money available at the end, unlike the typical fraudster. Substantively, these cases often turn on disagreements among scientific experts about whether there is adequate evidence to support a particular claim.

As former FTC Chairman Robert Pitofsky wrote, the FTC's advertising enforcement should be "a practical enterprise to ensure the existence of reliable data," not "a broad, theoretical effort to achieve Truth."[64] Pitofsky's last major consumer protection article, joined by two of the current authors,[65] supported the agency's traditional substantiation approach because it recognized both the risks of mistakenly allowing false claims and the risks of mistakenly suppressing true ones. The latter mistake, of course, harms consumers, and the article warned that increasing the evidence

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[63] In fact, in interpreting 13(b), some federal courts have limited the statute's reach to such ordinary or obvious cases. *See* Beales & Muris, *supra* note 1, at 30–31.

[64] Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 671 (1977).

[65] J. Howard Beales III, 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 Campbell Cooper ed., 2013).

required would inevitably increase the risk of suppressing truthful claims. Just as advertisers who need increased scientific evidence will make fewer claims, if the consequences of being found to lack substantiation increase, they will be more cautious, potentially denying truthful and useful information to consumers. When reasonable experts disagree, it is difficult for even the most honest company to predict Commission decisions. Again, the higher the cost of telling the truth, the less will be the supply of truthful claims.

It is no answer to say that the FTC can use prosecutorial discretion to avoid chilling truthful speech.[66] The record of the last 12 years already demonstrates multiple efforts to expand the FTC's reach, seemingly on the belief that ever-tougher remedies, even in close, complex cases, are in the consumer's interest.[67] If the agency can always obtain monetary penalties, the default rule will inevitably be that all violators must pay. Prudent businesses, recognizing both the increased financial and reputational penalties from government action, cannot rely on prosecutorial discretion in the name of protecting truthful speech.

The concern about chilling truthful claims is not merely theoretical. Consider, for example, the history of claims about the relationship between diet and health, which were illegal on food labels in 1984.[68] Then Kellogg, with the blessing of the National Cancer Institute, began a campaign for All Bran cereal promoting the NCI's recommendation that diets higher in fiber could reduce the risk of cancer. The FDA threatened to seize the product, but the FTC argued the claim benefited consumers, and the FDA instead decided to reassess its policy. The NCI recommendation remains, but in the absence of definitive clinical trials, some scientific uncertainty exists. If such claims are wrong, consumers may give up a better tasting cereal or spend a few pennies more for breakfast. Mistakenly prohibiting such claims or deterring them because of the risk of severe financial penalties, would deprive consumers of information that may help save lives.

It is true that some fraudsters advertise miracle cures, claiming scientific support. In fact, the scientific evidence offered in these cases usually does not even plausibly support the claims made. Even if the claims cite sound science, that science is not related to the claims. Often the evidence is at best pseudo-science, not findings about which reasonable experts might disagree. In general, these fraud cases do not involve disputes among reputable experts, debates about the appropriate testing methodology, or appropriate interpretation of a complex body of scientific evidence.[69]

Conclusion

If hard cases can make bad law, so too can the failure of the parties' arguments before the Court. The Never position ignores both the Supreme Court's signals in *Liu* and the forward-looking nature of certain government law enforcement, while offering no practical way for the FTC to continue to fight fraud. Whatever the utility of Section 19 and the FTC's other remedial tools, they will not sustain the fraud program. The Always position ignores the statutory structure, threatens to chill truthful speech, and fundamentally changes an agency often regarded as one of the world's premier competition and consumer protection agencies.

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[66] *See* J. Howard Beales III & Timothy J. Muris, *The Obama FTC Departed from Its Predecessors to the Detriment of Consumers*, Antitrust, Summer 2017, at 66.

[67] *See id.*

[68] *See id.* (discussing the Kellogg incident and its effects).

[69] Beales & Muris, *supra* note 1, at 35–36.

Our middle ground position maintains the FTC's central role against fraud, including the growing threats to American consumers from outside America's borders. Following Justice Holmes's maxim, experience matters.[70] The FTC has 40 years of successful experience prosecuting fraud, coordinating agencies large and small, not only throughout the United States, but increasingly around the world. The fraud program has done so, respecting the statutory structure that Congress established in the 1970s. The fraud program represents an important, practical solution to one of the major problems that consumers face, and should not be disrupted without clear evidence, lacking here, that the program exceeds the Commission's authority.

Finally, for decades, well before the expanded use of 13(b), the FTC has been a leader, in both its competition and consumer protection missions, in encouraging the provision of truthful information to consumers. The ability always to seek monetary relief will inevitably increase caution among those who play an important role in providing such information. ●

[70] "The life of the law has not been logic: it has been experience." Oliver Wendell Holmes, Jr., The Common Law 1 (1881).