

STRIKING THE PROPER BALANCE:
REDRESS UNDER SECTION 13(b) OF THE FTC ACT

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Since 1981, the FTC has attacked fraud systematically, successfully using the authority under Section 13(b) to obtain a permanent injunction “in proper cases” to freeze assets *ex parte* and to force disgorgement of ill-gotten gains. More recently, the Commission has asserted the authority to obtain redress routinely, including cases in which established national firms allegedly lack substantiation for their advertising claims. FTC efforts to obtain redress under 13(b) must confront other legislation passed in the 1970s, in particular, Section 19, which limits monetary relief to conduct a reasonable person would know is dishonest or fraudulent. Both injunction and redress authority were included as separate provisions in a bill that passed the Senate in 1971. Although an amended Section 13 was enacted in 1973, and Section 19 was enacted two years later, the inescapable inference from their common origin and the entire legislative history is that Congress did not intend to give the Commission blanket authority to obtain redress. Nevertheless, we argue that the use of 13(b) against fraud respects the carefully constructed congressional grant of authority to the Commission in part because fraud meets the knowledge test of Section 19. Moreover, using Section 19 alone would require three separate actions to attack a fraud successfully—a preliminary injunction to freeze assets, an administrative action to determine liability, and then another, independent district court action to seek redress. As Congress itself recognized, district courts may be reluctant to grant preliminary relief when they cannot assure an expeditious resolution of the matter. Accordingly, we argue that fraud cases are “proper” under Section 13(b), but routine use of Section 13(b) to seek redress would read “proper” out of the statute.