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RESTITUTION FOR CONSUMER FRAUD UNDER SECTION FIVE OF THE FEDERAL TRADE COMMISSION ACT

INTRODUCTION

The Federal Trade Commission was created by Congress in 1914 to protect individuals and businesses from monopolies and the unfair practices and methods of competition by which monopolies grow.¹ Almost from the outset, however, the agency has policed against deceptive practices which affect consumers,² even though such "deceptive practices" were not expressly proscribed by § 5 of the Federal Trade Commission Act (FTCA) until 1938.³ In recent years, the consumer movement and severe criticism from

1. 51 CONG. REC. 11109, 11597 (1914) (remarks of Senator Newlands); 51 CONG. REC. 11455 (1914) (remarks of Senator Cummins); 51 CONG. REC. 12372 (1914) (remarks of Senator Hollis); 51 CONG. REC. 14936 (1914) (remarks of Representative Stevens).

2. See *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304 (1934) (sale of inferior quality candy to children through lottery sales marketing scheme); *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922) (deceptive labelling as to fabric of underwear and other knit goods).

3. Under § 5 as enacted in 1914, "unfair methods of competition in commerce are . . . declared unlawful." 38 Stat. 717 (1914), *as amended*, 15 U.S.C. § 45(a) (1970).

This proscription was expanded in 1938 to include "unfair or deceptive acts or practices" as well as "unfair methods of competition." 52 Stat. 111 (1938), *amending* 15 U.S.C. § 45(a) (1970).

Finally, Congress altered the Commission's jurisdiction in 1975 in order to bring acts or practices "in or affecting commerce" within its scope. 88 Stat. 2183, 2193 (1975), *amending* 15 U.S.C. § 45(a) (1970).

Presently, § 5, in pertinent part, reads as follows:

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(b) * * * If upon [a] hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited . . . , it shall . . . issue . . . an order requiring such person . . . to cease and desist from using such method of competition or such act or practice.

its leaders have forced the Commission to invigorate consumer protection efforts.⁴

Today the FTC is imaginatively using its broad power to define unfair and deceptive practices to rid the market of heretofore untouched unfair acts.⁵ One example of a newly defined unfair practice is the undisclosed use of "mock-ups" for filming television commercials. It has been declared unlawful to imply that a sand and gel mixture on plexiglass is analogous to a lathered beard for the purpose of advertising a shaving cream's moisturizing qualities.⁶

The FTC's broad authority to prevent unfair and deceptive practices is undergoing even more striking changes.⁷ Empowered by Congress to order violators of § 5 to cease and desist from engaging in disclosed unfair practices,⁸ the Commission has been afforded wide latitude to fashion remedies suited to prevent particular unfair practices.⁹ In the past, however, this remedial authority has generally appeared only in the form of cease and desist orders. An order of this type, though requiring the violator to discontinue his unfair practice, permitted him to retain any proceeds therefrom. Thus, a cease and desist order failed to remove the incentive for a violator to develop another profitable and illegal practice.

4. See Cox, Fellmeth and Schulz, *The Consumer and the Federal Trade Commission* (1969) ("The Nader Report").

A reply to the Nader Report by Commissioner Paul Rand Dixon may be found at 115 CONG. REC. 3345-47 (1969).

5. See, e.g., *Benrus Watch Co. v. FTC*, 352 F.2d 313 (8th Cir. 1965) (pre-ticketing and advertising of products at manufacturer's list price when retailers customarily sell at lower prices); William D. Campbell, Jr., 3 CCH TRADE REG. REP. ¶ 20,663 (FTC 1974) (bait and switch tactics); Pastime Industries, Inc., 3 CCH TRADE REG. REP. ¶ 20,615 (FTC 1974) (deceptive packaging of toy, gift, and hobby products); Auslander Decorator Furniture, Inc., 3 CCH TRADE REG. REP. ¶ 20,435 (FTC 1973) (failure to meet delivery dates, delivery of damages and defective goods, and unsatisfactory repair of goods); Pfizer, Inc., 3 CCH TRADE REG. REP. ¶ 20,056 (FTC 1972) (advertiser making affirmative claims for a product without a reasonable basis for making such claims).

6. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

7. See Bower, *New Developments in FTC Remedies*, 41 ANTITRUST L.J. 465 (1972); Note, *Consumer Protection—Remedies of the Federal Trade Commission—Expansion to Include Limitations of Contracts*, 47 TUL. L. REV. 436 (1973); Note, *The Limits of FTC Power to Issue Consumer Protection Orders*, 40 GEO. WASH. L. REV. 496 (1972); Note, "Corrective Advertising" *Orders of the FTC*, 85 HARV. L. REV. 477 (1971).

8. 15 U.S.C. § 45(b) (1970).

9. See *infra* and accompanying text.

To remove the incentive to violate § 5, the FTC has been developing new orders which either limit the unscrupulous operator's "take" or completely deprive him of it. The new remedies which have already received court approval include: affirmative advertising, which requires a false advertiser to disclose the true nature or efficiency of a product;¹⁰ requiring a person under a cease and desist order to give refunds to all customers injured after the effective date of the order by re-use of proscribed practices;¹¹ limiting the amount of contractual indebtedness which providers of certain consumer services, such as dancing lessons, can cause a consumer to incur;¹² antitrust divestiture;¹³ and mandatory licensing of pat-

10. *J.B. Williams, Inc. v. FTC*, 381 F.2d 884 (6th Cir. 1967) (manufacturer required to disclose that its non-prescription drug will not affect tiredness in the great majority of people because most people's tiredness is caused by something other than the deficiency which the drug remedies); *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir. 1960) (baldness treatment must disclose that it cannot cure male pattern baldness, the source of 90-95% of all male baldness); *Bantum Books, Inc. v. FTC*, 275 F.2d 680 (2d Cir. 1960) (abridged or retitled books must be clearly so labeled); *Keele Hair & Scalp Specialists v. FTC*, 275 F.2d 18 (4th Cir. 1960) (a similar baldness treatment case); *Erickson v. FTC*, 272 F.2d 318 (7th Cir. 1959) (another treatment for baldness); *Mary Muffet, Inc. v. FTC*, 194 F.2d 504 (2d Cir. 1952) (rayon or silk content of fabric must be disclosed); *L. Heller & Son v. FTC*, 191 F.2d 954 (7th Cir. 1951) (imported imitation pearl necklaces must disclose their foreign origin); *In re Hillman Periodicals, Inc. v. FTC*, 44 FTC 832 (1948), *aff'd per curiam*, 174 F.2d 122 (2d Cir. 1949) (abridged books must be so labeled clearly and conspicuously); *Haskelyte Mfg. Corp. v. FTC*, 127 F.2d 765 (7th Cir. 1942) (wooden trays with paper surfaces must be so labeled and cannot be advertised simply as "wood" trays); *Shaklee Corp.*, 3 CCH TRADE REG. REP. ¶ 20,695 (FTC 1974) (purchasers of a food supplement in age groups to whom the supplement may be dangerous and at whom an advertising campaign was aimed must be warned of the supplement's detrimental effects); *Forever Young, Inc.*, 3 CCH TRADE REG. REP. ¶ 20,649 (FTC 1974) (manufacturer of chemical, facial wrinkle and blemish remover required to disclose inherent dangers and limitations of product); *Union Carbide Corp.*, 3 CCH TRADE REG. REP. ¶ 20,584 (FTC 1974) (agricultural insecticide manufacturer required to disclose danger of chemicals subsequent to advertising campaign describing insecticide as non-toxic and hazard-free to man and his environment).

11. *Windsor Distributing Co. v. FTC*, 437 F.2d 443 (3d Cir. 1971).

12. *Arthur Murray Studio of Washington, Inc.*, 458 F.2d 622 (5th Cir. 1972); *Overseas Alaska Personnel Ass'n*, 3 CCH TRADE REG. REP. ¶ 20,433 (FTC 1973).

13. *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973); *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971); *In re Ekco Products Co.*, 65 FTC 1163, 1212-17 (1964). *Cf. Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963).

ents.¹⁴ Many additional orders have also been fashioned by the FTC, although they have not to date received specific judicial sanction.¹⁵

14. *Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969); *American Cynamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966).

15. Corrective advertising has been considered and ordered on several occasions. Such an order requires an advertiser to spend a percentage of a prior false advertising campaign's cost or to allocate a percentage of advertising space in future advertising campaigns in order to correct any misconceptions engendered by former misrepresentations. *See, e.g.*, *Warner-Lambert Co.*, 3 CCH TRADE REG. REP. ¶ — (FTC 1975); *Ocean Spray Cranberries, Inc.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 20,051 (FTC 1972); *Matsushita Electric of Hawaii, Inc.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,430 (FTC 1971); *Bristol-Myers Co.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 20,263 (FTC 1973) (complaint issued). For examples of cases where the FTC initially considered ordering corrective advertising, but subsequently determined that the order was not warranted, *see The Firestone Tire & Rubber Co.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 20,112 (FTC 1972) (wherein the FTC fully sets forth its legal analysis of corrective advertising); *ITT Continental Baking Co., Inc.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,539 (FTC 1971) (proposed complaint); *American Home Products Corp.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,673 (FTC 1971) (proposed complaint).

The Commission frequently orders "cooling-off" periods during which consumers may rescind sales contracts with full right of refund. *See, e.g.*, *Consolidated Chemical Corp., Inc.*, 3 CCH TRADE REG. REP. ¶ 20,631 (FTC 1974) (10 day); *Lincoln Upholstry Co.*, 3 CCH TRADE REG. REP. ¶ 20,586 (FTC 1974) (3 day); *Household Sewing Machine Co., Inc.* (1967-1970 Transfer Binder) CCH TRADE REG. REP. ¶ 18,882 (FTC 1969) (leading case); *Circulation Builders, Inc.*, 3 CCH TRADE REG. REP. ¶ 20,724 (FTC 1974) (proposed complaint).

The Commission has also ordered violators to send informational mailings to previous customers when necessary to fully effectuate the terms of the order against them. *See, e.g.*, *Tax Corp. of America (Maryland)*, 3 CCH TRADE REG. REP. ¶ 20,753 (FTC 1974); *GAC Finance, Inc.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 20,057 (FTC 1972).

On occasion the FTC has required that the violator's employees be provided with copies of the order against the employer; that the employees read the order; and, that the employer insure the employees' adherence to the order. *See, e.g.*, *Publishers Continental Sales Corp.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,886 (FTC 1971); *Mather Hearing Aid Distributors, Inc.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,627 (FTC 1971); *Crown Chinchilla Associates*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,467 (FTC 1971).

The Commission has even ordered reinstatement of employees or distributors who were fired pursuant to a policy later forbidden by the cease and desist order. *See, e.g.*, *Fashion Two Twenty, Inc.*, 3 CCH TRADE REG. REP. ¶ 20,432 (FTC 1973); *Erie Foundary Co.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,683 (FTC 1971).

The most innovative and perhaps the most sweeping and effective order which the FTC has recently fashioned in cases of patent consumer fraud is restitution.¹⁶ Restitution, which is not specifically sanctioned by § 5, is justified by the Commission under the agency's broad remedial power and its authority to define un-

16. Although consumer refunds were ordered in three cases in the 1940's, this authority was not again asserted on a regular basis until the 1970's. *Interstate Home Equipment Co.*, 62 FTC 260 (1945); *In re Cookware Associates*, 40 FTC 260 (1945); *Success Portrait Co.*, 35 FTC 227 (1942).

Now the FTC is using restitution to prevent many types of consumer fraud. Deceptive recruitment of franchisees and members for phony business schemes has been a recurring type. *See* *Holiday Magic, Inc.*, 3 CCH TRADE REG. REP. ¶ 20,757 (FTC 1974), *modified*, 3 CCH TRADE REG. REP. ¶ 20,819 (FTC 1975) (pyramid sales scheme); *Universal Credit Acceptance Corp.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 20,240 (FTC 1973), *rev'd sub nom.*, *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974); *Soundarama Marketing Co., Inc.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 20,041 (FTC 1972); *Koscott Interplanetary, Inc.*, 3 CCH TRADE REG. REP. ¶ 20,902 (FTC 1975) (initial decision) (pyramid sales scheme); *Universal Electronics, Corp.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,479 (FTC 1971), *appeal dismissed*, No. 71-1187 (8th Cir. Aug. 19, 1971).

Mail order companies which solicit orders by false advertisements have been ordered to restore consumers' money when the goods are never sent, or are sent only after excessive delay. *See* *Alaska Sleeping Bag Co.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,982 (FTC 1972); *Defa Electronics Corp.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,743 (FTC 1971).

Price discriminations resulting from promotional campaigns have also drawn restitution orders. *See* *Kroger Co.*, 3 CCH TRADE REG. REP. ¶ 20,396 (FTC 1973); *Buy Rite*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 20,051 (FTC 1972).

Career training schools which have attracted students by grossly misrepresenting the value of the offered training and the effectiveness of their placement services have repeatedly been subject to restitution proceedings. *See* *Lear Seigler, Inc.*, 3 CCH TRADE REG. REP. ¶ 20,938 (FTC 1975); *Maralco Enterprises, Inc.*, 3 CCH TRADE REG. REP. ¶ 20,890 (FTC 1975); *Weaver Airline Personnel School, Inc.*, 3 CCH TRADE REG. REP. ¶ 20,756 (FTC 1974); *Fuque Industries, Inc.*, 3 CCH TRADE REG. REP. ¶ 20,755 (FTC 1974); *United Systems, Inc.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 20,049 (FTC 1972); *Soundtract Chevell Industries, Inc.*, 3 CCH TRADE REG. REP. ¶ 20,771 (FTC 1974) (complaint); *Lafayette United Corp.*, 3 CCH TRADE REG. REP. ¶ 20,499 (FTC 1974) (proposed complaint); *Control Data Corp.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,980 (FTC 1972) (proposed complaint).

The FTC is also using its § 5 restitution power to remedy violations of the Consumer Credit Protection Act. 15 U.S.C. §§ 1601 *et seq.* (1970). *See* *Carter Hawley Hale Stores, Inc., et al.*, 3 CCH TRADE REG. REP. ¶ 20,859 (FTC 1975) (unused credits in revolving charge accounts lost if not used within several years); *Credit Arrangers*, (1970-1973 Transfer Binder) CCH

fair acts and practices.¹⁷ The retention of purchase money by one who has deceptively sold utterly worthless goods or services to a consumer is defined as an unfair practice under the FTCA. This unfair practice is deemed to continue until the purchase money is returned. By ordering the seller to cease and desist the unfair retention, the seller is, in fact, ordered to restore the purchase money to the consumer. By so exercising its defining authority, the Commission effectively orders restitution. In addition and as an aspect of the Commission's broad remedial powers, restitution is defended as the only order adequate to prevent the violator from engaging in further consumer fraud. Restitution, like divestiture, restores the pre-violation status quo and deprives the violator of his ill-gotten gains. In the area of consumer fraud, restitution is particularly necessary because only an order which removes the incentive to engage in such conduct can deter future violations of the FTCA. The traditional cease and desist order is inadequate because of its failure to reach the operator's profits and to go beyond denying him the use of former lucrative schemes.

Unlike the other new definitions and orders whose validity have been contested and approved in the courts, the power of the FTC

TRADE REG. REP. ¶19,871 (FTC 1971) (debt adjusting agency took money from clients but, instead of paying bills, kept the money).

Restitution has been ordered for land development frauds. See GAC Finance, Inc., 3 CCH TRADE REG. REP. ¶20,554 (FTC 1974) (swamp land sold as ready to build on); Great Northern Development Co., (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶20,046 (FTC 1972) (proposed complaint).

In addition, restitution has been ordered to prevent a variety of other consumer frauds. See Payless Drug Stores Northwest, Inc., (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶20,302 (FTC 1973) (purchasers of "world's safest" motorcycle helmet allowed to get their money back); Circulation Builders, Inc., 3 CCH TRADE REG. REP. ¶20,724 (FTC 1974) (proposed complaint) (door-to-door magazine sales company which kept subscribers' money without ordering subscriptions); Coca-Cola Co., (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶19,633 (FTC 1971) (hearing examiner refusing to dismiss complaint) (promotional scheme did not give out all the prizes that a reasonable person would have expected).

17. The FTC has explained this unfair method of competition and its remedy in two opinions. Universal Credit Acceptance Corp., (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶20,240 (FTC 1973), *rev'd sub nom.*, Heater v. FTC, 503 F.2d 321 (9th Cir. 1974); and Curtis Publishing Co., (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶19,719 (FTC 1971).

The arguments against the interpretation of the FTCA asserted by the Commission in *Universal* and *Curtis* may be found in the Initial Decision of *Curtis*, 3 CCH TRADE REG. REP. ¶19,376, 78 FTC 1472, 1497-507 (FTC 1970).

to order restitution has been denied. *Heater v. Federal Trade Commission*,¹⁸ which, as of this writing, is the sole judicial determination of the issue, held that the FTC exceeds its statutory authority when it orders restitution.

This note will demonstrate, by a thorough examination of the legislative history of the FTCA and judicial utterances in cases other than *Heater*, that the FTC, by itself *does* have the authority to order restitution. In particular, it will be argued that such authority stems from the Commission's broad powers both to define and to prevent unfair acts and practices. Further, it will be shown that certain limitations upon FTC orders which have been traditionally imposed by courts are not violated by a restitution order. The note will conclude with a discussion of the recently enacted Magnuson-Moss Warranty—Federal Trade Commission Improvement Act¹⁹ which empowers the FTC to seek consumer redress in either federal or state courts, and with an examination of the propriety of FTC ordered restitution from a policy standpoint. Familiarity with a factual setting in which the FTC decreed restitution will facilitate an understanding of the legal grounds for the FTC's jurisdiction to order restitution. *Heater* provides such a setting.

HEATER V. FEDERAL TRADE COMMISSION

John Clifford Heater organized, directed and owned a series of corporations which operated "Honor All Credit Cards" programs in California between the years 1953 and 1972.²⁰ Under these programs, small retail merchants were enabled to accept charges on any of the major oil and bank credit cards as payment for goods or services. After accepting a sale on a credit card, the charges were sent to one of the Heater corporations for payment and collection. Corporate income was to be realized from the sale of exclusive territorial sales rights to sales representatives, who in turn sold memberships to retailers. Sales representatives invested on the average about \$7,000, while the individual member-merchants were obligated to pay a moderate initial sum, monthly dues and a small percentage of each sale made under the program ("discount fees").

18. 503 F.2d 321 (9th Cir. 1974).

19. 88 Stat. 2183, *amending* 15 U.S.C. §§ 41 *et seq.* (1970).

20. The facts set forth in this section are recounted in the FTC's opinion for *Universal Credit Acceptance Corp.*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶20,240, 82 FTC 570, 642-68 (1973), and in the Initial Decision of *Universal*, (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶19,938, 82 FTC 570, 582-642 (1972).

The benefits of both the territorial sales rights and the memberships were grossly misrepresented by the companies. Few of the promised benefits ever came to fruition. The program was promoted as non-recourseable, financially sound, nationally accepted, and "guaranteed to increase the retailer's profits." In reality, the Heater programs were fully recourseable local operations which ran on much tighter budgets than advertised. Instead of reaping greater profits, many members suffered losses. Despite having purchased a two year term, most members stopped using Mr. Heater's questionable service after eight months.

The exclusive sales representatives fared no better. These representatives were induced by inflated profit-projection sheets and the promise of receiving unworked or previously profitable territories in which to market the "easy to sell" program. Yet only three percent (3%) of the sales representatives recouped their initial investment; the average representative losing about eighty-one percent (81%) of it.

Upon complaint to investigate the Heater operation and subsequent to an evidentiary hearing, the FTC ordered restitution against the corporations. Not only was the worthless nature of Mr. Heater's service apparent from the members' and sales representatives' financial records, but, more damaging was evidence which clearly indicated that Mr. Heater and his associates were aware all along of the high rate of failure.²¹ The administrative law judge concluded,

the record establishes that these respondents perpetrated a scheme fraught with misrepresentations from which they try to insulate themselves by using devious contractual language, not intended or likely to be read and not clearly understandable, even if actually read. Respondents have clearly calculated the program to enrich only themselves at the expense of innocent small businessmen lured into it as members and franchisees.²²

All franchise fees, membership fees, dues and discount fees received by Mr. Heater's corporations between January 1, 1967 and February 16, 1973 were to be restored. Furthermore, since Mr. Heater was found to be the *alter ego* of the bankrupt corporations, the restitution order also ran against him personally.

21. 82 FTC 570, 627-31 (1972).

22. *Id.* at 584.

On appeal, however, the restitution provision was reversed.²³ Without reaching the *alter ego* issue, the Ninth Circuit Court of Appeals held that in decreeing restitution the FTC exceeded its authority both to define unfair acts or practices and to prevent violations of this type. The restrictive view of the Commission's authority taken in *Heater* strikes directly at the doctrinal underpinning of the new FTC consumer protection orders—that the FTC has the inherent power of a court of equity.²⁴ In so doing, use and development of consumer protection orders based on the equitable principle are threatened. Thus, *Heater* stands as an obstacle to an agency which its creators had hoped to be able to prevent unfairness in the market.

SOURCES OF THE FTC'S AUTHORITY TO ORDER RESTITUTION

Congress' avowed purpose for creating the FTC in 1914 was to protect society from the unrestrained effects of selfishness which appear in the form of unfair methods of competition.²⁵ Section 5(a) of the original FTCA declares "unfair methods of competition" to be "unlawful."²⁶ Further, it states that "the Commission is empowered and directed to *prevent*" the use of such methods in commerce.²⁷ In order to enforce a fairness standard, § 5(b) grants the FTC the power to order a violator to "cease and desist" from engaging in the unfair conduct.²⁸

Congress clarified the purpose of the FTC in 1938 by enacting the Wheeler-Lea Amendment.²⁹ Although the FTC had from its inception endeavored to protect individuals as well as businesses,³⁰ a restrictive United States Supreme Court decision made it necessary to specify that the FTC could properly seek the protection of consumers, even in cases where no injury to competition is in-

23. *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974).

24. *Hearings on the Nomination of Paul Rand Dixon, for Reappointment to the Federal Trade Commission Before the Senate Committee on Commerce*, 93d Cong., 2d Sess., ser. 93-116, at 185, 189-90 (1974) (remarks of Commissioner Dixon).

25. 51 CONG. REC. 12742 (1914) (remarks of Senator Cummins). See 51 CONG. REC. 11106, 11385, 12733 (1914) (remarks of Senator Cummins); 51 CONG. REC. 11109, 11597 (1914) (remarks of Senator Newlands).

26. FTCA, 15 U.S.C. § 45(a) (1934), as amended, 15 U.S.C. § 45(a) (1970).

27. FTCA, 15 U.S.C. § 45(b) (1970).

28. *Id.*

29. 15 U.S.C. §§ 41-46 and 47-58, amending 15 U.S.C. §§ 41 *et seq.* (1934).

30. See note 2 *supra* and accompanying text.

volved.³¹ The Wheeler-Lea Amendment illuminated the FTC's mission by declaring unlawful any "unfair or deceptive acts or practices."³² Statements by the Amendment's supporters and the committee reports made it clear that the FTC was to be as concerned with the interests of consumers as it was with those of businessmen.³³ Today, Congress still demands that the FTC play an active role in consumer protection.³⁴

So that the Commission might accomplish its purpose, both Congress and courts have afforded the agency broad powers to define unfair methods of competition and unfair practices and to fashion orders adequate to prevent their recurrence. It is from these powers that the FTC argues that restitution authority properly derives. Examination of congressional debates and judicial utterances support this contention.

Wrongful Retention as an Unfair Practice

The first ground upon which the FTC bases its authority to order restitution is that the fraudulent operator acts unfairly within the purview of § 5 by retaining the money which was acquired from the deceptive sale of a worthless good or service.³⁵ Independent from the deceptive sales practices, the seller's refusal to terminate his unjust enrichment under a cloak of legality is itself defined as an unfair act. The violation continues until the purchase price is returned to the cheated consumer because it is "unfair" to retain such money. By defining the failure of the fraudulent seller to return the swindled consumer's money as a continuing unfair practice, the FTC can accomplish restitution with its traditional remedial device—a cease and desist order. As with any other violation, the unfair act or practice is ended by ordering the actor to cease and

31. *FTC v. Raladim Co.*, 283 U.S. 643 (1931).

32. Wheeler-Lea Act, 15 U.S.C. § 45(a) (1970), *amending* FTCA, 15 U.S.C. § 45(a) (1934).

33. 83 CONG. REC. 391-92 (1938) (remarks of Representative Lea); 83 CONG. REC. 3255 (1938) (remarks of Senator Wheeler); H.R. REP. NO. 1613, 75th Cong., 1st Sess. 3 (1937). *See* S. REP. NO. 1705, 74th Cong., 2d Sess. 2-3 (1936).

34. On February 5, 1973, Senator Stevens commanded Commissioner Engman that "[t]he direction that Congress has mandated for the FTC to take is to become the most active consumer advocate of the federal government." *Hearings on the Nomination of Lewis A. Engman, to be a Commissioner, Federal Trade Commission, Before the Senate Committee on Commerce*, 93d Cong., 2d Sess., ser. 93-15, at 30 (1973). *See* note 53 *infra* and accompanying text.

35. *See* note 17 *supra* and accompanying text.

desist. Yet, in this case, by ordering the fraudulent seller to cease holding the consumer's money, the seller's unjust enrichment is ended and the money is restored to the consumer.³⁶

Although conceding that defining the sellers unjust enrichment as an independent unfair practice "reflects a not implausible construction of the Act," the *Heater* court rejected the Commission's understanding of its power to so define unfair acts or practices.³⁷ Based upon its reading of the legislative history, the court classified the seller's retention of the spoils as a "secondary effect" of an unfair practice, rather than as a separate unfair practice.³⁸ Reasoning that the FTC does not have the power to remedy the secondary effects of unfair acts or practices but only to prevent the unfair practices themselves, the court held wrongful retention to be beyond the FTC's jurisdiction.³⁹ In contrast to the *Heater* court's reasoning stand the legislative history of the FTCA and prior judicial utterances concerning the FTC.

The FTC, by its very nature and intended purpose, must be accorded broad judicial deference in the defining of unfair acts or practices. In 1914 Congress felt that the courts were too ill-equipped to act with the speed and effectiveness necessary to prevent unfair methods of competition.⁴⁰ A non-partisan administra-

36. *Id.*

37. 503 F.2d 321, 323 (9th Cir. 1974).

38. *Id.* at 322.

39. *Id.* at 323-24.

40. 51 CONG. REC. 11109 (1914) (remarks of Senator Newlands); 51 CONG. REC. 11235 (1914) (remarks of Senator Pomerene); 51 CONG. REC. 11593 (1914) (remarks of Senator Saulsbury); 51 CONG. REC. 14933-34 (1914) (remarks of Representative Stevens).

When referring to the 1914 congressional debates, the words "unfair competition" and "unfair methods of competition" are used interchangeably. As originally proposed and debated, § 5 outlawed the former. *See* 51 CONG. REC. 14923 (1914). Although the conference committee on the FTCA substituted the latter phrase, members of that committee, in debate, explained that there is no difference in meaning between the two. 51 CONG. REC. 14768 (1914) (remarks of Senator Cummins). *See* 51 CONG. REC. 14769 (1914) (remarks of Senator Pomerene).

Although technically there *might* be a distinction between the type of activity included in "unfair methods of competition" and "unfair acts or practices," [see *FTC v. Raladim*, 283 U.S. 643 (1931); *but see* *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304 (1934); *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922)], the definitions and attributes which the 1914 Congress gave to the unfairness standard itself and to the agency generally are applicable equally to both proscriptions. Had the Congress which passed the Wheeler-Lea Act intended otherwise, it certainly would have chosen a standard different from that of the original § 5. In any event, neither has

tive tribunal, composed of economic and legal experts, was therefore created to perform the task.⁴¹ The FTC, employing its accumulated expertise, was to determine in the first instance whether a particular method was unfair.⁴² Although the unfairness of a practice was ultimately to be a question for the courts,⁴³ the FTC's findings of fact were to be subject to only limited review and its determinations of unfairness were to be given great weight.⁴⁴

The necessity that a reviewing court treat the FTC's determinations with deference derives also from the open-textured nature of the unfairness standard.⁴⁵ By choosing this broad standard, Congress rejected the approach of listing specific prohibited unfair methods of competition. The flexible unfairness standard, rather than a laundry list type statute, was chosen to prevent circumvention by ingenious businessmen always able to devise unfair practices different from those proscribed.⁴⁶ Proponents of the Act

the Supreme Court nor the court in *Heater* questioned the applicability of the 1914 legislative history to the definition of the Wheeler-Lea Act's standard. See *FTC v. Sperry & Hutchison Co.*, 405 U.S. 233, 239-44 (1972); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-85 (1965); *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974). Cf. *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 314 (1934).

41. 51 CONG. REC. 11092 (1914) (remarks of Senator Newlands); 51 CONG. REC. 14924 (1914) (conference committee report to House). See 51 CONG. REC. 14927 (1914) (remarks of Representative Covington).

42. 51 CONG. REC. 10376 (1914) (remarks of Senator Newlands); 51 CONG. REC. 14928 (1914) (remarks of Representative Green).

43. FTCA, 15 U.S.C. § 45(c) (1970), *as amended*.

44. *Id.* See 51 CONG. REC. 11104 (1914) (remarks of Senator Cummins); 51 CONG. REC. 11103-04 (1914) (remarks of Senators Works and Cummins).

45. Handler, *The Jurisdiction of the FTC over False Advertising*, 31 COLUM. L. REV. 527, 532, 534 (1931).

46. The reports of the Senate Interstate Commerce Committee, the committee which drafted the original version of § 5, and the conference committees make clear Congress' preference for a broad and flexible concept. The Interstate Commerce Committee's report states:

The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the Commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

S. REP. No. 597, 63d Cong., 2d Sess. 13 (1914). See H.R. REP. No. 1142, 63d Cong., 2d Sess. 18-19 (1914).

also expressed the hope that the standard would grow and evolve to meet society's changing needs.⁴⁷ A common concern to many senators was the prevention of business acts which contravened good public morals.⁴⁸ Thus, many of the definitions given for "unfair competition" included any act recognized as *unjust* by courts of law or *equity*.⁴⁹ For example, Senator Newlands, the chairman of the Committee on Commerce, the committee which wrote the FCTA, and the floor leader during the Senate debates, concluded:

This tribunal is simply for the purpose of economically giving to each individual, at the lowest cost of effort and money, the power of asserting his right which exists at law or in equity.⁵⁰

Agreeing with Senator Newlands, Senator Robinson, another member of the Commerce Committee, defined unfair competition as "every practice which may be held by a court to be unjust, inequitable, or dishonest. . . ."⁵¹ For Senator Colt, an opponent of

47. The remarks of both senators and representatives indicate that § 5 was to have an evolutionary character. Senator Cummins declared that: "The trade commission becomes bound to declare what is . . . unfair competition according . . . to the improving and developing sense of the country" 51 CONG. REC. 11104 (1914). Senator Newlands, describing § 5, stated: "Legal terms are elastic. The common law would not be what it is if it had not adapted itself to new conditions and circumstances." 51 CONG. REC. 12211 (1914). Senator Cummins most clearly described the evolutionary nature of § 5: "the words 'unfair competition' can grow and broaden and mold themselves to meet the circumstances as they arise . . . in order to meet the necessities of the American people." 51 CONG. REC. 12871 (1914). Representative Covington also noted that:

[W]e could not take away from the courts, the power to expand the law in respect to "unfair competition" . . . and to make "unfair competition" a vital elastic principle of the law, which is the only thing that makes the developing process of the common law worth having in this country.

51 CONG. REC. 14928 (1914). Similar statements may be found at: 51 CONG. REC. 11179 (1914) (remarks of Senators Hollis and Sutherland); 51 CONG. REC. 11107, 11108 (1914) (remarks of Senator Newlands); 51 CONG. REC. 13048 (1914) (remarks of Senator Cummins).

48. 51 CONG. REC. 11379 (1914) (remarks of Senator Cummins); 51 CONG. REC. 11109, 12939, 12980, 13116 (1914) (remarks of Senator Newlands); 51 CONG. REC. 8854 (1914) (remarks of Representative Morgan).

49. 51 CONG. REC. 12939 (1914) (remarks of Senator Newlands); 51 CONG. REC. 12028 (1914) (remarks of Senator Saulsbury).

50. 51 CONG. REC. 11109 (1914). See 51 CONG. REC. 11597 (1914) (remarks of Senator Newlands).

51. 51 CONG. REC. 11107 (1914). See 51 CONG. REC. 11228 (1914) (remarks of Senator Robinson).

the FCTA, unfair competition meant "transactions in a way colored by fraud."⁵²

Summarizing, the *Heater* court's refusal to recognize the fraudulent operator's retention of money as an unfair practice stands in conflict with legislative descriptions of the equitable and flexible nature of the FTC's power to define unfair competition and unfair practices. Given the Commission's power to prevent practices recognized as unfair by courts of law or equity, clearly a practice which constitutes unjust enrichment should fall within the scope of the FTC's authority. In addition, the § 5 standard was to grow to meet society's changing needs. That Congress recognized the necessity of protecting consumers is apparent from the passage of the Wheeler-Lea Amendment and other consumer legislation, the enforcement of which is entrusted to the FTC.⁵³ It is untenable to argue that Congress intended to allow fraudulent operators to profit unfairly at the expense of consumers in the face of the fact that an expert agency was created expressly to prevent unfairness of this type. This is particularly true where the type of unfairness with which the FTC was to deal was cast in such broad terms.

Moreover, the restrictive *Heater* decision is also inconsistent with prior judicial determinations recognizing the flexibility and broadness of the unfairness standard. The courts have accorded the FTC wide discretion to define unfair practices.⁵⁴ This judicial deference is exemplified by the United States Supreme Court's ac-

52. 51 CONG. REC. 12653 (1914).

53. Wheeler-Lea Act, 15 U.S.C. § 52 (1970) (false advertising of food, drugs, devices and cosmetics); Wool Products Labelling Act, 15 U.S.C. § 68(a) (1970); Fur Products Labelling Act, 15 U.S.C. § 69(a) (1970); Textile Fiber Identification Act, 15 U.S.C. § 70(a) (1970); Lanham Trade-Mark Act, 15 U.S.C. § 1064 (1970); Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 (1970); Public Health Cigarette Smoking Act, 15 U.S.C. § 1331 (1970); Fair Packaging and Labelling Act, 15 U.S.C. §§ 1451-61 (1970); Consumer Credit Protection Act, Title I (Truth-in-Lending Act), 15 U.S.C. §§ 1601-07 (1970); Consumer Credit Protection Act, Title VI (Fair Credit Reporting Act), 15 U.S.C. § 1681 (1970); National Environmental Policy Act, 42 U.S.C. § 4321 (1970).

54. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320 (1966) (the FTC has broad powers to declare trade practices unfair); *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367 (1965); *FTC v. Cement Institute*, 333 U.S. 683, 720 (1948); *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304 (1934); *Luria Bros. Co. v. FTC*, 389 F.2d 847, 860 (3d Cir. 1968); *American Cynamid Co. v. FTC*, 363 F.2d 757, 769 (6th Cir. 1966). See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-96 (1953).

ceptance of several innovative FTC definitions of unfairness. Prior to Congress' express outlawing of deceptive practices in the Wheeler-Lea Amendment, the Court had affirmed a FTC order requiring a clothing manufacturer to cease deceptively labeling its products.⁵⁵ Similarly, the Court agreed that the gambling-marketing scheme used by a manufacturer to sell inferior quality candy to children was unfair, even though only a moral injury resulted.⁵⁶ More recently, the Supreme Court has continued to recognize the FTC's broad power to define unfair practices.⁵⁷ The receptiveness to innovation which has characterized the United States Supreme Court in the above mentioned opinions certainly was not shared by the *Heater* court.

In the Supreme Court's most recent review of the unfairness standard, the Court, like the Congresses of 1914 and 1937-38,⁵⁸ opted for a broad interpretation. The Court in *FTC v. Sperry & Hutchinson Co.*,⁵⁹ was convinced by,

legislative and judicial authority alike . . . that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.⁶⁰

In a footnote to the preceding quotation, the Court quoted with approval the FTC's expansive definition of unfairness:

55. *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922).

56. *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304 (1934). The Court's words illustrate the moral injury involved.

A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed.

Id. at 313.

57. See *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965) (oppressive use of bargaining position by major oil company to force gasoline retailers to sell Goodyear auto accessories); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965) (deceptive television advertisement mock-up). Cf. *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963) (monopoly of commercial air and land transportation).

58. See notes 40-53 *supra* and accompanying text.

59. 405 U.S. 233 (1972).

The Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:

"(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or to competitors or other businessmen)."⁶¹

It is contended that the retention of a consumer's money from the sale of a worthless good or service is an unfair practice within the above quoted passages from *Sperry & Hutchinson*. The FTC is specifically exhorted by the Court to include within the concept of unfairness those acts which a court of equity considers unfair. As in the legislative definition, unjust enrichment must, therefore, be considered an unfair practice within the meaning of § 5. Applying the factors enumerated in the Court's footnote yields the same result. The public policy of preventing consumer fraud is inhibited by allowing the seller to retain the proceeds of a fraudulent sale. The common law actions for deceit, general assumpsit, and the equitable suit for restitution, which works a rescission of contract, all attest to the existence of such a policy. It is submitted that such retention is indisputably, using the words of *Sperry & Hutchinson*, "immoral, unethical, oppressive, or unscrupulous." In addition, consumers and competitors can suffer substantial injury, depending upon the amount of money acquired by the fraudulent operator.

In sum, both legislative history and judicial utterances support the contention that the fraudulent operator's retention of consumer money is an unfair trade practice within § 5 of the FTCA. In contrast to the *Heater* court's characterization of the unfair retention as a mere "secondary effort," stands the flexible nature of the unfairness standard and the equitable scope of the FTC's jurisdiction. Restitution, in addition to being justified as an ad-

61. *Id.* at 244-45 n.5, quoting from *Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 FED. REG. 8355 (1964).

junct to the FTC's broad power to define unfair practices, can also be shown to be within the FTC's authority to fashion whatever remedies are necessary to effectuate the purposes of the FTCA.

The Prevention of Consumer Fraud

The second ground supporting the Commission's authority to order restitution is the agency's broad authority to fashion orders adequate for preventing unfair acts and practices. Legislative history reveals that the FTC was created to protect individual consumers and businessmen from being injured by unfair methods of competition.⁶² Consumer fraud harms consumers and honest competitors in both direct and indirect ways. Consumers suffer a direct loss when they pay for a worthless good or service and cannot obtain a refund. Likewise, the injury to an honest businessman is direct when consumer dollars are diverted from his products to those of deceptive vendors. Indirectly, both the consumer and the honest businessman are injured by the increased capital which is at the disposal of the fraudulent operator. With that capital, he may increase the heist and thereby strengthen his relative competitive position vis-à-vis honest competitors. Alternatively he may branch out into new fraudulent schemes, thereby injuring the same or other businessmen. Whatever is done with the capital, the consumer ultimately suffers.

Moreover, restitution is the only remedy which is adequate to prevent future recurrences of consumer fraud. In contrast, a cease and desist order, which forbids the fraudulent operator from again employing a particular practice, does not make other schemes for bilking the public less attractive. One who, for example, sells swamp land as suitable for homesites,⁶³ is hardly the kind of person to be deterred from developing a new fraudulent scheme when the FTC issues an order which allows him to keep the profit from the last one.⁶⁴ Restitution, like antitrust divestiture and af-

62. 51 CONG. REC. 11106, 11385, 12733, 12742 (1914) (remarks of Senator Cummins); 51 CONG. REC. 11109, 11597 (1914) (remarks of Senator Newlands).

63. GAC Corp., 3 CCH TRADE REG. REP. ¶20,554 (FTC 1974).

64. An example of the type of fraudulent operator who is not deterred by a cease and desist order is the late William Penn Patrick. Mr. Patrick was the developer and prime mover of Holiday Magic, Inc. Holiday Magic was a pyramidal sales chain whereby Mr. Patrick and his associates were enriched at the expense of those who bought into the operation, yet who had little chance of success. When one of his associates, Mr. Ben Gay, a past president of Holiday Magic, suggested that the corporation "compromise" with the FTC, Mr. Patrick replied:

firmative advertising, orders which are within the Commission's authority, restores the parties to their pre-violation positions and thereby eliminates the incentive to engage in consumer fraud.⁶⁵ The fraudulent operator is forced to return the money to consumers who then can spend it according to a fair product selection. Concurrently, any ill-acquired capital advantage over honest competitors is relinquished. This result cannot be accomplished by a non-restitutionary cease and desist order. So long as consumer fraud is profitable, future injury to consumers and honest businessmen is certain. Only an order which reaches the fraudulent operator's gains, and thereby removes the incentive to defraud, can adequately prevent future consumer fraud. Restitution is well designed to accomplish this end. Whether the FTC can issue such an eminently useful order, depends on the breadth of the FTC's remedial powers.

Generally courts tend to imply the existence of those powers which are necessary for the accomplishment of an administrative agency's purpose.⁶⁶ In *Pan American World Airways v. United*

Let's get something straight. I can steal more money in the next two years than you can make building an organization [in twenty years]. It is going to take the Federal Trade Commission two years to get us and we will proceed on that line.

Holiday Magic, Inc., 3 CCH TRADE REG. REP. ¶20,757 n.12 (FTC 1974).

65. See *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110 (1948). In *Schine*, the Court ordered divestiture where enforcement of the pertinent Act would otherwise be "futile," even though the Act did not authorize divestiture as a means of enforcement. Underlying the Court's action was its analogy of divestiture to restitution.

Like restitution [divestiture] merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project.

Id. at 128.

With restitution, the FTC is laboring under the same considerations as the Court in *Schine*—the futility of enforcement with presently approved remedies. The only difference between the Commission and the *Schine* Court is that the Commission has the authority to order divestiture from the outset and must have the authority to order restitution subsequently implied, rather than *vice versa*.

66. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968); *American Trucking Ass'n v. United States*, 387 U.S. 397, 406-13 (1967); *FTC v. Dean Foods Co.*, 384 U.S. 597, 607 (1966); *FTC v. Sun Oil Co.*, 371 U.S. 505, 518 (1963); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 311-12 (1963); *United States v. du Pont & Co.*, 353 U.S. 586, 590 (1957); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *National Petroleum Refiner's Ass'n v. FTC*, 482 F.2d 672, 686 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 815 (1974); *L. Heller & Son v. FTC*, 191 F.2d 954 (7th

States,⁶⁷ the United States Supreme Court apparently indicated its criterion for recognizing implied agency authority: "Where the problem lies within the purview of the Board, . . . Congress must have intended to give it authority that was ample to deal with the evil at hand."⁶⁸ In *Pan Am*, the Court passed on the remedial authority of the Civil Aeronautics Board (CAB) under § 411 of the Federal Aviation Act of 1958.⁶⁹ Noting that § 411 is modeled after § 5 of the FTCA, interpretation of the former was consciously influenced by previous construction of the latter.⁷⁰ The CAB's cease and desist power was found to be broad enough to include the ordering of divestiture.⁷¹ Apparently acknowledging the equitable authority of the CAB and the FTC, the Supreme Court "analogized the power of administrative agencies to fashion appropriate relief to the power of the courts * * * to frame injunctive decrees. . . ."⁷²

The various provisions of the FTCA have not been denied their share of generous judicial constructions. Without specific statutory authority, the FTC has been allowed to seek preliminary injunctions to protect the integrity of its proceedings;⁷³ to enforce § 7 of the Clayton Act⁷⁴ against *vertical* as well as horizontal monopolies;⁷⁵ to require compliance reports from certain violators;⁷⁶ to make substantive rules;⁷⁷ and to require affirmative action to remedy § 5 violations,⁷⁸ such as in antitrust divestiture⁷⁹ and

Cir. 1951). *But see* Textile and Apparel Group, Am. Importers Ass'n v. FTC, 410 F.2d 1052, 1055 (D.C. Cir.), *cert. denied*, 396 U.S. 910 (1969); FMC v. Anglo-Canadian Shipping Co., 335 F.2d 255, 258-61 (9th Cir. 1964).

67. 371 U.S. 296 (1963).

68. *Id.* at 312.

69. The Federal Aviation Act of 1958, 49 U.S.C. §§ 1301 *et seq.* (1970).

70. 371 U.S. 296, 306-08 (1963).

71. *Id.*

72. *Id.* at 312 n.17.

73. FTC v. Dean Foods Co., 384 U.S. 597 (1966) (The result was reached despite unsuccessful appeals to and attempts in Congress to empower the FTC to seek preliminary injunctions.).

74. Clayton Act § 7, 38 Stat. 631 (1914), *as amended* 15 U.S.C. § 18 (1970).

75. United States v. du Pont & Co., 353 U.S. 586 (1957) (The Court reached its result despite prior FTC statements to the contrary and unsuccessful attempts to expressly acquire the authority from Congress prior to initiation of this litigation.).

76. United States v. Morton Salt Co., 338 U.S. 632 (1950).

77. National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

78. Luria Bros. & Co. v. FTC, 389 F.2d 847 (3d Cir. 1968).

79. See note 13 *supra* and accompanying text.

affirmative advertising disclosure orders.⁸⁰ Thus it is plain that the courts tend to read liberally an agency's authorizing statute in order to ratify a power which is necessary for the agency to accomplish its purpose. The FTCA is not excepted, nor does anything in the legislative history of the FTCA bar the finding of an implied power to order restitution.

Little can be gleaned from either the FTCA or the 1914 and 1937-38 debates⁸¹ on the question of restitution, other than the fact that the agency was intended to have broad powers. Nowhere in the FTCA is restitution for § 5 violations expressly prescribed. Nor did the subject arise in the debates.⁸² It is true that Congress

80. See note 10 *supra* and accompanying text.

81. The 1914 congressional debates can be found at 51 CONG. REC. 6648, 6714, 7598, 8840-65, 8973-97, 9045-68, 9909-10, 9929, 10376-78, 11038, 11081-116, 11173-89, 11224-25, 11228-37, 11298-307, 11378-89, 11447-58, 11528-43, 11591-604, 11622-23, 11685, 11862, 11870, 11876, 12022-32, 12141-56, 12168, 12208-22, 12272-82, 12355-421, 12482-84, 12538-51, 12601-02, 12617-55, 12724-47, 12786-817, 12853-75, 12910-40, 12978-13007, 13044-67, 13100-22, 13143-66, 13206-19, 13222-35, 13297-319, 13438-39, 13450, 14714, 14764-72, 14784-802, 14918-43, 14934, 15019, 15044, 15190, 16317 (1914).

The committee reports may be found at H.R. REP. No. 533, 63d Cong., 2d Sess. (1914); S. REP. No. 597, 63d Cong., 2d Sess. (1914); H.R. REP. No. 1142, 63d Cong., 2d Sess. (1914).

The Wheeler-Lea Act debates of 1937-38 can be found at 81 CONG. REC. 337, 2419, 2614, 2740, 2805, 2807, 2931, 9411 (1937); 83 CONG. REC. 391-424, 445, 1895, 3287-93 (1938).

The Wheeler-Lea Act committee reports are located at S. REP. No. 221, 75th Cong., 1st Sess. (1937); H.R. REP. No. 1613, 75th Cong., 1st Sess. (1937); H.R. REP. No. 1774, 75th Cong., 3d Sess. (1938). The Senate report for an earlier but similar bill is: S. REP. No. 1705, 74th Cong., 2d Sess. (1936).

82. Only two subjects occurring during the debates even vaguely approach the question of restitution. The remarks made concerning them, however, can have no effect on whether the Commission has the implied authority to order restitution. The first is that of damages. On one occasion Senator Cummins declared:

This is not a statute intended to afford remedies in damages to those who may be injured by wrongdoings of trusts and monopolies. . . . 51 CONG. REC. 13050 (1914). The cases discussed below, however, clearly show that administrative-ordered restitution is not an award of money damages. See notes 111-35 *infra* and accompanying text.

The second issue is that of confiscation. On several occasions, Senators Cummins and Newlands stated that an FTC order could not be "confiscatory of property." 51 CONG. REC. 11108, 12217, 12220, 13007 (1914) (remarks of Senator Newlands); 51 CONG. REC. 12988, 13007 (1914) (remarks of Senator Cummins). Confiscation usually implies the taking of private property for public use without fair compensation. Such a taking is unconstitutional as a denial of due process. *Zescherling v. Miller*, 389 U.S. 429 (1968); *United*

specifically rejected language which would have imposed criminal penalties⁸³ and treble damage liability for violations of § 5.⁸⁴ However, omission of such penalties from the final bill should not bar the FTC's use of restitution for three reasons. First, the scope of a restitution order depends upon each individual fraud; the wrongdoer's liability never exceeds the benefit he received. Treble damages and criminal fines, on the other hand, usually impose liability beyond the benefit received by the wrongdoer. Second, courts are reluctant to infer congressional intent from defeated bills and amendments.⁸⁵ Such reluctance should be par-

States v. Cors, 337 U.S. 325 (1949). *Cf. Ware v. Hylton*, 3 U.S. 164, 178 (1796). That this concern for due process is at the heart of the statements of Senators Cummins and Newlands is apparent from one verbal exchange:

Senator Cummins. I do not think the inquiry into confiscation will often arise under the unfair competition section.

Senator Newlands. I do.

Senator Cummins. This is the question that will arise: Does the order of the commission take the property of the complainant without due process of law . . . ?

51 CONG. REC. 13007 (1914).

This prohibition, however, cannot act as a bar to restitution. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and the cases which allow administrative ordered restitution while distinguishing it from damages, see notes 111 to 135 *infra* and accompanying text, though not directly addressed to the issue, of necessity hold that an administrative restitution order is not a confiscation. The same must be true of the Interstate Commerce Commission's orders. Since 1887 it has decreed reparations to parties injured by violations of the Interstate Commerce Act. 49 U.S.C. § 9 (1970). In addition, the agency has, since 1910, ordered refunds for overcharges. 49 U.S.C. § 15(7) (1970). Thus, since the one statement regarding damages and the several concerning confiscation are the closest that Congress came to a discussion of restitution, the legislative record is free both of direct or of any implied prohibitions and of any direct affirmations of restitutionary authority.

83. Senator Newlands made it clear that in his opinion criminal penalties were ineffective against unfair methods of competition. 51 CONG. REC. 12031 (1914).

A criminal penalty provision was expressly rejected by the Committee on Interstate and Foreign Commerce of the House of Representatives. This rejection is apparent in both the committee report, H.R. REP. NO. 1613, 75th Cong., 1st Sess. (1937), and in statements of congressmen during the debates. *See* 83 CONG. REC. 394 (1938) (remarks of Representative Keeney); 83 CONG. REC. 398 (1938) (remarks of Representative Reece); 83 CONG. REC. 395-96 (1938) (remarks of Representative Wolverton).

84. 51 CONG. REC. 13113-22, 13143-50 (1914) (treble damage amendment proposed, debated and defeated: 18 yeas, 41 nays, 37 not voting).

85. *See United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *FTC v. Dean Foods*, 384 U.S. 597, 610 (1966); *United States v. du Pont & Co.*, 358 U.S. 586 (1958); *United States v. National Petroleum Refiners Ass'n v. FTC*, 438 U.S. 612 (1978).

ticularly strong where the specific power in question was never expressly considered by the draftsmen and where the power is one which furthers the agency's mandated purpose.⁸⁶ Finally, the courts have held that administrative ordered restitution is not a "penalty."⁸⁷ At the least, Congress has indicated by creating an expert agency to enforce an exceptionally broad standard and by subjecting that agency to only limited review,⁸⁸ that the courts are to approach the remedies fashioned by the FTC with the same flexibility which is accorded the FTC's definitions of unfairness.⁸⁹

Judicial authorities are not so equivocal on the question of whether the remedial power of the FTC is broad enough to include restitution. It is well settled that the FTC has wide discretion in fashioning a remedy adequate to prevent an unfair practice and that a reviewing court will not disturb an FTC order so long as it is "reasonably related" to the prevention of the disclosed unfair trade practice.⁹⁰ Indeed, the Commission's order can be broader

482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). *Cf. American Trucking Ass'ns v. United States*, 387 U.S. 397, 406-13 (1967); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45-48 (1950).

86. See notes 66-85 *supra* and accompanying text.

87. See notes 156-65 *infra* and accompanying text.

88. Section 5(c) of the FTCA provides for review of a final Commission cease and desist order as follows:

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to the public or to competitors *pendente lite*. *The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.*

FTCA, 15 U.S.C. § 45(c) (1970) (emphasis added). See note 44 *supra* and accompanying text.

89. See notes 54-61 *supra* and accompanying text.

90. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *FTC v. Henry Brock & Co.*, 368 U.S. 360, 364 (1962); *FTC v. National Lead Co.*, 352

than particularities of the violator's unfair practice.⁹¹ Thus, the Supreme Court declared:

If the Commission is to obtain the objectives Congress envisioned, it cannot be required to confine its roadblock to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.⁹²

As noted by one court, when the FTC forms an order it may properly consider both "the nature and the character of the unfair practice."⁹³ It is even allowable to repress "those in utter disregard of law . . . by sterner measures than where the [violator's conduct] could reasonably have been thought permissible."⁹⁴

The FTC's wide remedial discretion includes the power to require an affirmative undertaking when necessary to prevent the recurrence of an unfair practice.⁹⁵ Accordingly, the courts have affirmed orders under § 5 requiring antitrust divestiture,⁹⁶ affirmative advertising disclosures,⁹⁷ mandatory licensing of patents,⁹⁸ and refunds to future victims of cease and desist order violations.⁹⁹

These affirmative undertakings, like restitution, restore the status quo and eliminate the incentive for future violations. Ordering a corporation which has nearly monopolized an industry to cease and desist from further acquisitions hardly prevents the

U.S. 419, 428-30 (1957); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 395-96 (1953); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *FTC v. Cement Institute*, 333 U.S. 633, 726-27 (1948); *Jacob Seigel Co. v. FTC*, 327 U.S. 608, 611-13 (1946); *Guziak v. FTC*, 361 F.2d 700, 705 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967); *Benrus Watch Co. v. FTC*, 352 F.2d 313, 324 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *National Bakers Services, Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *Regina Corp. v. FTC*, 322 F.2d 765, 769 (3d Cir. 1963). *See FTC v. Universal Rundle Corp.*, 387 U.S. 244, 250-51 (1967); *Moog Industries, Inc. v. FTC*, 238 F.2d 43 (8th Cir. 1956), *aff'd per curiam*, 355 U.S. 411 (1958); *Feitler v. FTC*, 201 F.2d 790 (9th Cir.), *cert. denied*, 346 U.S. 814 (1953).

91. *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952).

92. *Id.* at 473.

93. *Erickson v. FTC*, 272 F.2d 318, 322 (7th Cir. 1959), *cert denied*, 362 U.S. 940 (1960).

94. *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957), *quoting from United States v. United States Gypsum Co.*, 340 U.S. 76, 89-90 (1950).

95. *See Luria Bros. Co. v. FTC*, 389 F.2d 847 (3d Cir. 1968).

96. *See note 13 supra.*

97. *See note 10 supra.*

98. *See note 14 supra.*

99. *Windsor Distributing Co. v. FTC*, 437 F.2d 443 (3d Cir. 1971).

continuing injury to competition which the monopolistic situation causes. Nor does such an order make unfair acquisition less attractive to other businesses. Thus, divestiture, though not specifically granted to the FTC in the FTCA, is a proper remedial order.¹⁰⁰ It should be noted that the Supreme Court has, in fact, analogized divestiture to restitution, stating that:

Like restitution it merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project.¹⁰¹

For the same reasons an order which merely requires the false advertiser to cease a deceptive promotion is inadequate. Unless he is forced to disclose the truth about his product, both injury to competitors and the incentive to advertise falsely in the future continue. The incentive and the injury remain because the public continues to compare his product with others on the basis of the previous false claims. Again, while not specifically permitted by the FTCA, an order requiring affirmative disclosure has been held to be within the FTC's authority.¹⁰²

The foregoing examination of the FTC's remedial power would appear to place a restitution order clearly within the authority of the Commission. Patent consumer fraud is a vicious matter. In fashioning an order adequate to prevent the recurrence of an unfair trade practice of this type, the FTC may properly consider the severity of the violation. The FTC may even require an affirmative undertaking to restore the status quo when the restoration of the status quo is necessary to prevent the unfair acts or practice. As shown above, only restitution is adequate to prevent the recurrence of consumer fraud. Thus, because restitution is "reasonably related" to the prevention of the unfair practice and because its effects are similar to those of divestiture and affirmative advertising, both of which have been judicially approved, the FTC's remedial power should embrace restitution.

In summary, two valid arguments support the contention that the FTC has the power to order restitution. The first, based on the Commission's wide latitude in defining § 5 unfair practices, shows

100. See note 13 *supra*.

101. *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 128 (1948). See note 65 *supra*.

102. See note 110 *supra*.

that the fraudulent operator's unjust enrichment is itself an unfair practice—one which is distinct from the original fraudulent misrepresentation. The second relies upon the broad remedial power of the FTC. This latter argument demonstrates that a restitution order is within the Commission's remedial power because only such an order is sufficient to prevent future violations. The discussion would end here, were it not for the fact that the courts have insisted upon certain additional requirements which must be met for an FTC order to be held valid and enforceable.

RESTITUTION AND THE THREE REQUIREMENTS WHICH HAVE TRADITIONALLY LIMITED THE COMMISSION'S ORDERS

Almost from the beginning of the FTC's existence, the courts have required that the Commission's orders, to be valid, must be non-compensatory, wholly prospective in effect, and non-punitive.¹⁰³ Underlying these limitations are the judicial desires to ensure that the Commission will be able to accomplish its purpose and to protect the good faith violator.¹⁰⁴ If the FTC had been given the power to penalize violators under the broad fairness standard, reviewing courts probably would have hesitated to give the Commission the wide discretion necessary for defining and preventing new methods of unfair competition, especially where the actor had in good faith felt that he had acted legally. Also underpinning these judicial tests is the fear which led the framers to adopt the § 5(b) prescription that FTC proceedings be initiated in the public rather than private interest.¹⁰⁵ That fear is that the Commission may otherwise "becom[e] a clearing house to settle the everyday quarrels of competitors free from detriment to the

103. Mr. Justice Brandeis' opinion in *FTC v. Gratz*, is an early illustration of this view:

[I]t is necessary to bear in mind the nature of the [FTC's] proceeding. The proceeding is not punitive. The complaint is not made with a view to subjecting the respondents to any form of punishment. It is not remedial. The complaint is not filed with a view to affording compensation for any injury alleged to have resulted from the matter charged, nor with a view to protecting individuals from any such injury in the future. The proceeding is strictly a preventative measure taken in the interest of the general public.

FTC v. Gratz, 253 U.S. 421, 432 (1919) (Brandeis, J., dissenting).

104. *Id.*

105. The pertinent part of § 5(b) reads as follows:

(b) . . . if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public . . .

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public, which should be adjusted through the ordinary processes of the courts."¹⁰⁶ Because of these concerns, courts have repeatedly stated that it is beyond the FTC's power to penalize a violator or to order, involving private rights and liabilities, which, unlike an anti-trust determination that the conduct was an unfair practice.¹⁰⁷

Viewing the FTC's power to define and to prevent unfair trade practices in light of the non-compensatory, wholly prospective and non-punitive limitations, the *Heater* court struck down the Commission's order. The court admitted that defining a fraudulent operator's unjust enrichment as unfair "reflects a not implausible construction of the Act."¹⁰⁸ The broad remedial authority of the Commission and the similarity in effect between divestiture and restitution likewise were conceded by the court.¹⁰⁹ Nevertheless, the court distinguished restitution on the ground that it is an order involving private rights and liabilities which, unlike an anti-trust divestiture, requires the violator to *compensate victims* who were injured by an activity *prior* to a Commission determination that the activity was unfair.¹¹⁰

Non-compensatory

Provided that the court in *Heater* was mistaken in assuming that Congress felt § 5 was too vague for all but prospective application, the fact that consumers receive money back should not bar the FTC from ordering restitution. It is well settled that the Commission cannot fix liability or exact compensation for past injury.¹¹¹ But restitution, in the administrative law setting, serves a different purpose than does an award of compensatory damages. An agency restitution order, like an injunction, is an equitable remedy designed to prevent violations of law. The benefit to individuals is in-

106. 51 CONG. REC. 14930 (1914) (remarks of Representative Covington).

107. See notes 111, 141, 156 *infra* and accompanying text.

108. 503 F.2d 321, 323 (9th Cir. 1974).

109. *Id.* at 324-25 n.13.

110. *Id.* (emphasis added).

111. *FTC v. Ruberoid*, 343 U.S. 470, 473 (1952); *Doyle v. FTC*, 356 F.2d 381, 383 (5th Cir. 1966); *Ford Motor Co. v. FTC*, 120 F.2d 175, 182 (6th Cir.), *cert. denied*, 314 U.S. 618 (1941); *Royal Baking Powder Co. v. FTC*, 281 F. 744, 745 (2d Cir. 1922); *National Harness Mfrs. Ass'n v. FTC*, 268 F. 705, 712 (6th Cir. 1920). See *FTC v. Klesner*, 280 U.S. 19, 25 (1929). *Cf. Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 306, 311 (1963).

cidental only. Compensatory damages, however, are intended to give the injured party the benefit of his bargain.

Many courts have recognized that an administrative agency ordering restitution in the public interest is not giving an award for compensatory damages. When an order which returns to injured individuals the money paid to the violator is the only adequate means for preventing the recurrence of violations, courts have upheld the order even though it incidentally compensates. As stated by the Sixth Circuit Court of Appeals in *Bowles v. Skaggs*:¹¹²

An order of restitution is not a judgment for damages or for penalties. It compels compliance and is restoration of the status quo which falls within the recognized power of a court of equity. * * * The Administrator acts in the public interest—the purchaser in his own. The remedies are not irreconcilable. There are undoubtedly many instances where the relationship of buyer and seller is such that the buyer is deterred from vindicating his own and therefore also the public right. To deny to the Administrator power to act in cases where, as here, restitution rather than a prohibitory injunction is the only practical remedy, would be to subvert the purposes of this Act.¹¹³

In *Bowles*, the Administrator of the Office of Price Administration (OPA) had sued in federal district court under his statutory authority to seek “a permanent or temporary injunction or other order.”¹¹⁴ To prevent sellers from overcharging for used goods, the court granted restitution as requested by the Administrator.

The United States Supreme Court also has distinguished a restitution order which is designed to eliminate the incentive to violate the law from an award of damages. In *Porter v. Warner Holding Co.*,¹¹⁵ another OPA case, the Court declared that:

Restitution, which lies within th[e] equitable jurisdiction [of a federal district court], is consistent with and differs greatly from the damages and penalties which may be awarded under § 205(e). . . . When the Administrator seeks restitution under § 205(a) he does not request the court to award statutory damages to the purchaser . . . or to pay such person part of the penalties which go

112. 151 F.2d 817 (6th Cir. 1945).

113. *Id.* at 821

114. *Id.* at 819.

115. 328 U.S. 395 (1946).

to the United States Treasury in a suit by the Administrator under § 205 (e). Rather, he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.¹¹⁶

Thus, an administrative agency, at least one which enforces its orders in a court of full equity jurisdiction, acts in the public interest and does not contravene the non-compensatory limitation by issuing a preventative restitution order. It is worthy of note that the Supreme Court has declared that an FTC order which incidentally benefits private individuals is valid and meets the public interest requirement so long as the Commission's purpose for proceeding was to protect the public.¹¹⁷

116. *Id.* at 402.

117. *FTC v. Klesner*, 280 U.S. 19, 27 (1929).

The public interest requirement is not directly dealt with in the body of this note for two reasons. First, the *Heater* court chose to address the non-compensatory, non-punitive and prospective questions. In the interest of clarity, the issues are framed as they were in the *Heater* opinion. Second, courts have so loosely construed the public interest requirement that an order for restitution, like almost every other Commission order, can pass the prescription's strictures.

A brief survey of the development and present status of the public interest requirement reveals that there is a substantial public interest in decreeing restitution for patent consumer fraud. In *Klesner*, the United States Supreme Court, affirming a lower court decision, but for another reason, reversed an FTC cease and desist order. The basis of the decision was that "Section 5 of the FTCA does not provide private persons with an administrative remedy for private wrongs." *Id.* at 25. Accordingly, there was no substantial public interest in proceeding against a store owner who "largely out of hatred and malice," *id.* at 28, set up a similar shop with a very similar name and in the same place as that of a former tenant who, in violation of his agreement with the store owner, had moved out of the store. On the way to its decision, however, the Court intimated that Commission action is justified even if private parties are benefitted so long as the "purpose [is the] protection of the public." In such a case, "[t]he protection afforded to private persons is the incident." *Id.* at 27.

Klesner also provides a few tests for "specific and substantial" public interest.

To justify filing a complaint the public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. Sometimes, because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because, although the aggregate loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct,

Subsequent to *Bowles* and *Porter*, the United States Supreme Court has implicitly rejected the restitution-divestiture distinction used by the *Heater* court as a reason for refusing to grant a request for restitution when made by an agency having the authority to petition a federal district court to "restrain" violations. In *Mitchell v. DeMario Jewelry, Inc.*,¹¹⁸ the Court allowed the Secretary of Labor to seek restitution for violations of the Fair Labor Standards Act of 1938 (FLSA).¹¹⁹ Under the FLSA, the Secretary could ask a federal district court to "restrain" violations.¹²⁰ The Fifth Circuit Court of Appeals held that a restitution order exceeded the Sec-

since the loss to each of the individuals affected is too small to warrant it.

Id. at 28.

Subsequent to *Klesner*, the view of what constitutes a public interest worthy of protection has been amply expanded by the Supreme Court. See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934); *FTC v. Royal Milling Co.*, 288 U.S. 212, 216-17 (1933). In particular, substantial public interest has been found in ridding an industry of a competitor's deceptive practice which forces honest business to choose between employing the practice or suffering economically. *Algoma, supra* at 78-79; *FTC v. Winsted Hosiery Co.*, 258 U.S. 484 (1922); *National Candy Co. v. FTC*, 104 F.2d 999, 1006 (7th Cir.), *cert. denied*, 308 U.S. 610 (1939). There is also substantial public interest in depriving a business of any competitive advantage acquired by deceptive practices. See *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973) (divestiture); *American Cynamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966) (mandatory licensing of patents). *Cf. Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963) (divestiture). Finally, the FTC has been given wide discretion to determine whether a proceeding brought by it is in the public interest and it has been stated that each case must be determined on its own facts. *Guziak v. FTC*, 361 F.2d 700, 704 (8th Cir. 1966); *FTC v. Rhodes Pharmacal Co.*, 191 F.2d 744, 747 (7th Cir. 1951); *Ford Motor Co. v. FTC*, 120 F.2d 175, 182 (6th Cir. 1941).

A restitution order against a fraudulent operator who has affected a substantial portion of the public passes these tests. As held by *Bowles* and *Porter*, administrative ordered restitution is a vindication of public rights and only incidentally of private rights. In addition, such an order often aids consumers to combat widespread use of oppressive practices which cause a large aggregate loss, but only small individual losses. Finally, a restitution order preserves and protects fair competition in two ways. First, the honest competitor is freed from choosing between adopting his dishonest competitor's methods or losing business. Second, any unfairly obtained competitive advantage is dissipated. Thus, a restitution order which attacks a patent consumer fraud involving a significant portion of the public is in the "specific and substantial" public interest.

118. 361 U.S. 288 (1960).

119. Fair Labor Standards Act § 17, 52 Stat. 1069 (1938), *as amended*, 29 U.S.C. § 217 (1970).

120. *Id.*

retary's statutory authority.¹²¹ Relying on *United States v. Parkinson*,¹²² the appellate court reasoned that the power to sue for restitution must be authorized either expressly or by strong implication.¹²³ Central to *Parkinson*, a case in which the Department of Health, Education and Welfare was denied the power to sue for restitution, was the distinction between divestiture and restitution. *Parkinson* had distinguished restitution on the ground that a party ordered to divest himself of property *sells* the property, receiving compensation for it while a party under a restitution order must *give* the property away.¹²⁴ Noting that "the court below" decided the case on "the principle that . . . the jurisdiction here contested 'must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment,'" the Supreme Court reversed, declaring: "In this the court was mistaken."¹²⁵ Although it did not expressly discuss the point, the Court necessarily rejected the validity of the *Parkinson* divestiture-restitution distinction.

Even though the FTC is obviously not a court of equity, and is not required, unlike the OPA and the Secretary of Labor, to invoke the equitable jurisdiction of a federal court in order to enforce an order, the reasoning of *Bowles*, *Porter* and *Mitchell* is applicable in the FTC setting. In the first place, as will be demonstrated in the next subsection, Congress did *not* feel that the unfairness standard was too vague for retrospective liability.¹²⁶ The type of fraudulent operator who is subject to a FTC restitution order typically should know that he has acted unlawfully, as did the employer in *Mitchell* who fired an employee for filing a grievance, or the landlord in *Porter* who overcharged a tenant. Moreover, the pertinent remedial language of the FTCA and the FLSA bear a close resemblance. Both Acts provide for some kind of injunctive relief. The Secretary of Labor can sue to "restrain" violations¹²⁷ and the FTC can order a violator to "cease and desist."¹²⁸ A restitution order in the FTC setting is akin to an injunction inasmuch as both seek to prevent violations of the law: restitution by being the only remedy adequate

121. 260 F.2d 929 (5th Cir. 1958).

122. 240 F.2d 918 (9th Cir. 1956).

123. *Mitchell v. De Mario Jewelry, Inc.*, 260 F.2d 929, 933 (5th Cir. 1958), *rev'd*, 361 U.S. 288 (1960).

124. 240 F.2d 918, 919 (9th Cir. 1956).

125. 361 U.S. 288, 290 (1960).

126. See notes 139-55 *infra* and accompanying text.

127. Fair Labor Standards Act § 17, 52 Stat. 1069 (1938), *as amended*, 29 U.S.C. § 217 (1970).

128. FTCA, 15 U.S.C. § 45(b) (1970).

to prevent blatant consumer fraud; and an injunction which is adequate to prevent many other types of unlawfulness. Finally, and most importantly, though it does not operate in conjunction with a court having equitable powers, the FTC has been exhorted to carry out its defining and remedial roles in the same manner as would a court of equity. In *FTC v. Sperry & Hutchinson Co.*,¹²⁹ the Court compared the Commission's defining activity with the work of a court of equity.¹³⁰ In addition, the Court while passing on the remedial powers of the CAB under § 411 of the Federal Aviation Act, which is modeled after § 5 of the FTCA, held that the agency's cease and desist power was broad enough to include divestiture.¹³¹ One of the bases of this decision was the Court's analogizing the power of administrative agencies to fashion appropriate relief to the power of the judiciary in framing an injunctive decree.¹³² Since both the CAB and the FTC enforce an "unfairness" standard, and have identical cease and desist powers, there is little room to argue that the FTC does not have the same equitable power to fashion orders adequate to prevent violations of the FTCA that the CAB possesses to prevent violations of the Federal Aviation Act. Additionally, all FTC decisions are appealable to federal circuit courts of appeals,¹³³ which are, of course, courts of full equity jurisdiction.¹³⁴ Thus, the FTC with its equitable powers should, like the Secretary of Labor and the OPA, not be barred from ordering restitution either on the ground that a restitution order compensates injured victims, or on the ground that restitution is distinguishable from divestiture because, in the words of the *Heater* court, "private rights and liabilities are involved."¹³⁵

Prospective Only

Along with the benefit to injured consumers which incidentally results from a restitution order, the *Heater* court also objected to the retroactive nature of the liability imposed by such an order.¹³⁶ Citing the legislative history of the FTCA and the purely prospective effect of the FTC's cease and desist power, the court concluded that the power to order restitution varied so greatly with the

129. 405 U.S. 233 (1972).

130. *Id.* at 244.

131. *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963).

132. *Id.* at 312 n.17.

133. FTCA, 15 U.S.C. § 45(c). See note 88 *supra*.

134. See *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939).

135. 503 F.2d 321, 324-25 n.13 (9th Cir. 1974).

136. *Id.*

"educational" purpose of the FTC that only a clear indication of legislative intent could validate the existence of the power.¹³⁷ Such reluctance to imply so necessary a power is unwarranted in the light of *Pan Am* and other cases noted in the discussion of the Commission's remedial power.¹³⁸ The court's hesitancy is especially unjustified in view of the 1914 debates on the FTCA.

Underlying the conclusion in *Heater* that Congress intended the Commission's orders to be prospective only are several items taken from the legislative history. On the ground that "Congress rejected an amendment which provided a *private damage suit* based on a Commission finding of a violation of the Act," the court argued that Congress had,

withheld from the Commission the power to make a determination which would expose the businessman to liability for acts occurring before the Commission gave the general definition specific meaning in a factual context.¹³⁹

Secondly, the *Heater* court contended that "out of reasonable fair notice considerations," Congress chose to provide the FTC with sanctions having only prospective effect.¹⁴⁰ This conclusion was reached from statements of senators who, in the court's view, were concerned that,

a businessman would be unable to determine whether a particular practice was made unlawful until the Commission and courts gave the general language specific substance.¹⁴¹

137. *Id.* at 323-24.

138. See notes 66-102 *supra* and accompanying text.

139. 503 F.2d 321, 324 (9th Cir. 1974) (emphasis added).

140. *Id.* at 321, 324-25 n.13.

141. *Id.* at 324, citing 51 CONG. REC. 13114 (1914) (remarks of Senator McCumber).

For prior decisions which state that the FTC's order relates to the future and is not to fasten liability on respondents for past conduct, see *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *FTC v. Cement Institute*, 333 U.S. 683, 706 (1948); *Doyle v. FTC*, 356 F.2d 381, 383 (5th Cir. 1966); *Benrus Watch Co. v. FTC*, 352 F.2d 313, 322 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Regina Corp. v. FTC*, 322 F.2d 765 (3d Cir. 1963); *Erickson v. FTC*, 272 F.2d 318, 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 940 (1960); *Drath v. FTC*, 239 F.2d 452, 454 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 917 (1957); *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950); *American Chain & Cable Co. v. FTC*, 142 F.2d 909, 911 (4th Cir. 1944); *Standard Container Mfrs. Ass'n v. FTC*, 119 F.2d 262, 265 (5th Cir. 1941); *United Corp. v. FTC*, 110 F.2d 473, 475-76 (4th Cir. 1940).

But a careful reading of the entire 1914 debates refutes the court's assumption that Congress considered the § 5 unfairness standard to be too vague for all but prospective relief. The private damage suit which Congress rejected was one for treble damages.¹⁴² Senator Newlands opposed the treble damage amendment on the ground that the highly punitive nature of threefold liability too greatly varied from the Commission's purpose.¹⁴³ Senator Newlands did, however, favor an amendment to the treble damage provision which struck "treble" and inserted "actual."¹⁴⁴ The actual damage amendment was proposed by Senator McCumber,¹⁴⁵ the Senator cited in *Heater* for having misgivings about the broadness of the standard which the Commission was to enforce. Contrary to the *Heater* court's assertion, the actual damage amendment was not "rejected" by Congress. Rather, it was never voted on because Senator McCumber withdrew his amendment.¹⁴⁶ The probable reason for the withdrawal and for the failure to repropose it after the treble damage amendment had been voted on was that many senators, including Senator McCumber, felt that such an amendment was superfluous.¹⁴⁷ The amendment was considered unnecessary because many senators were,

certain that [without the amendment] an action would lie [for violation of the Act] immediately by any person aggrieved in a civil action to recover simple damages for whatever injury he had sustained through the unlawful acts of a competitor.¹⁴⁸

It is worth noting that Senator McCumber ultimately voted for a treble damage amendment which would have allowed a treble damage action on practices which the Commission had previously

142. See note 84 *supra*.

143. See 51 CONG. REC. 13149 (1914).

144. 51 CONG. REC. 13113-14 (1914).

145. 51 CONG. REC. 13117 (1914) (Senator McCumber proposed actual damage amendment to treble damage amendment).

146. 51 CONG. REC. 13148 (1914).

147. See 51 CONG. REC. 13145 (1914) (remarks of Senator Clapp); 51 CONG. REC. 13104 (1914) (remarks of Senator Brandegee); 51 CONG. REC. 13145 (1914) (remarks of Senator Clarke); 51 CONG. REC. 13054, 13147 (1914) (remarks of Senator Cummins); 51 CONG. REC. 13158 (1914) (remarks of Senator Kenyon); 51 CONG. REC. 13148 (1914) (remarks of Senator McCumber); 51 CONG. REC. 11602, 13054 (1914) (remarks of Senator Newlands); 51 CONG. REC. 13146, 13058 (1914) (remarks of Senator Shields); 51 CONG. REC. 13117, 13120 (1914) (remarks of Senator Walsh).

148. 51 CONG. REC. 13148 (1914) (remarks of Senator McCumber).

determined to be unfair.¹⁴⁹ Although an opponent of the FTCA,¹⁵⁰ he apparently felt that § 5, at least under these circumstances, was not too broad even for the retroactive imposition of a penalty such as treble damages.¹⁵¹

Further support for the contention that Congress considered the § 5 standard to be sufficiently well defined to serve as a ground for the recovery of damages, is provided by the conference committee's deletion of a proviso in the Senate's version of the FTCA. The unapproved sentence would have prohibited the use of any,

order or finding of the court or commission in the enforcement of [§ 5 as] evidence in any suit, civil or criminal, brought under the antitrust acts.¹⁵²

Immediately prior to the Senate's passage of the pre-conference version of the FTCA, Senator Reed had attacked the proponents of § 5 for including this proviso.¹⁵³ He argued that by refusing to allow the decisions of the Commission to be *prima facie* evidence in a court case involving third parties, the Act's proponents admitted that § 5 was too vague.

In light of Congress' enactment of a law which was deemed to give rise to an action for actual damages and Congress' removal of an obstacle to such suits, it is difficult to believe that Congress considered § 5 to be too vague for retroactive application. Thus, the authority to order restitution when such an order is necessary to prevent violations of § 5 should not be denied the FTC on the ground that a restitution order imposes retroactive liability without fair notice.¹⁵⁴ In the future, however, the importance of the notice

149. 51 CONG. REC. 13150 (1914).

150. 51 CONG. REC. 14771 (1914).

151. See notes 160 and 161 *infra* and accompanying text.

152. 51 CONG. REC. 14923 (1914) (Senate's pre-conference version of the FTCA).

153. 51 CONG. REC. 13233 (1914).

154. Commissioner Dixon's *Curtis Publishing Co.* decision embodies the FTC's attack on the retrospective requirement. (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,719 (FTC 1971). Therein the Commission explains:

With respect to the . . . conclusion that any type of restitutionary relief would run afoul of the requirement that cease and desist orders must be wholly prospective in operation, it seems questionable whether the purported distinction between "prospective" and "retrospective" relief is a useful analytical construct for determining whether a particular type of provision is permissible. Every Commission order is "retrospective," in the sense that it looks to and is based upon the causes and results of the acts found to violate the

question will be minimal. Because the FTC has recently received substantive rule-making power, it can now specify beforehand those activities which will draw a restitution order.¹⁵⁵ One last hurdle, the requirement that a restitution order be non-penal, remains to be cleared.

statute, and at the same time it is "prospective" in the sense that its design, purpose, and effect is to dissipate any lingering effects of the past violations and to prevent their recurrence in the future. In reality, the "prospective/retrospective" formulation seems based upon concern that the Commission in structuring its orders might go beyond the bounds of what is reasonably necessary to eradicate the violations found to exist, and impose requirements that are in essence punitive because they are superfluous.

Id. The Ninth Circuit, based upon its reading of the congressional debates, however, was not persuaded by the Commission's argument.

A direct assault on the applicability of the prospective-retrospective distinction to FTC-ordered restitution should prove more effective than an attack on its viability. Although Commissioner Dixon's analysis is consistent with the divestiture-restitution analogy, the prospective-retrospective dichotomy has long been a part of administrative law. *See, e.g., Agwilines, Inc. v. NLRB*, 87 F.2d 146, 151 (5th Cir. 1936). Further, *Heater* seems to be correct when it concludes that considerations of fair notice underlie the prospective requirement, at least where penalties, such as treble damages, are concerned. *Heater v. FTC*, 503 F.2d 321, 324-25 n.13 (9th Cir. 1974). *See* 51 CONG. REC. 13118 (1914) (remarks of Senator Clapp); 51 CONG. REC. 13114, 13115, 13117 (1914) (remarks of Senator McCumber); 51 CONG. REC. 13118, 13119 (1914) (remarks of Senator Williams); 51 CONG. REC. 13120 (1914) (remarks of Senator Reed). Thus, the Commission's line of attack must counter both tradition and legislative history.

By contending that the dichotomy is not applicable to restitution for consumer fraud, tradition is left in tact and partial legislative history is overcome with fully reviewing the record and with considering the practicalities of FTC-ordered restitution. A complete survey of the legislative history reveals that many of those who debated the FTCA considered its standard adequate for retrospective civil liability. *See* notes 142-48 *supra* and accompanying text. If § 5 was thought to provide sufficient notice for private damage actions, it certainly must do so for restitution. In any case, the FTC's recently acquired substantive rule making power, its years of defining unfair practices, and the flagrant character of the practices which draw restitution orders combine to eliminate almost any uncertainty that could exist. This solid legislative history in conjunction with the clear unlawfulness of consumer fraud should dispose a court to not apply, or to not apply strictly the prospective requirement. Such should be the result even where the court is not ready to discard completely the prospective-retrospective dichotomy.

155. 88 Stat. 2183, 2193 (1975), amending 15 U.S.C. § 57(a) (1970); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). *See* note 167 *infra* and accompanying text.

Non-punitive

The courts have made it clear that an order which imposes a penalty lies beyond the authority of the Commission.¹⁵⁶ A FTC order cannot be punitive because the Commission's purpose is to protect the public by preventing violations of the Act, not to punish the wrongdoer for his past acts.¹⁵⁷ Noting that the Heater corporations were insolvent or nearly so, and that the money retained by them was only "constructively" retained, the *Heater* court asserted that "[t]he impact of the refund order in the present case illustrates the reason Congress did not give the Commission the power it seeks to exercise."¹⁵⁸ The legislative history of the FTCA and court decisions, however, indicate that a restitution order should not be considered a forbidden "penalty."

Although Congress never discussed restitution in the 1914 and 1937-38 debates,¹⁵⁹ the statements of the Act's proponents and opponents reveal that by "penalty" was meant a harsher order than one which seeks to prevent future violations by eliminating the incentive to act unfairly. When the framers spoke of a penalty they referred to a fine or imprisonment.¹⁶⁰ A person who violated the Sherman Antitrust Act, or a court's injunction, or who was subjected to liability beyond actual damages in a treble damage action, was "penalized."¹⁶¹ But restitution is distinguishable from these decrees. Criminal punishment entails the exaction of a monetary

156. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *FTC v. Cement Institute*, 333 U.S. 683, 706 (1948); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 24 (7th Cir. 1971); *Doyle v. FTC*, 356 F.2d 381, 383 (5th Cir. 1966); *Benrus Watch Co. v. FTC*, 352 F.2d 313, 322 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963); *United Corp. v. FTC*, 110 F.2d 473, 476 (4th Cir. 1950); *Gimbel Bros. v. FTC*, 116 F.2d 578, 579 (2d Cir. 1941); *California Lumberman's Council v. FTC*, 115 F.2d 178, 184 (9th Cir. 1940), *cert. denied*, 312 U.S. 709 (1941).

157. See note 156 *supra*.

158. 503 F.2d 321, 325 (9th Cir. 1974).

159. See notes 81 and 82 *supra*.

160. See 51 CONG. REC. 11186, 11597, 11598 (1914) (remarks of Senator Borah); 51 CONG. REC. 11533-34 (1914) (remarks of Senator Cummins); 51 CONG. REC. 13001 (1914) (remarks of Senator Hollis); 51 CONG. REC. 11112, 12027, 12217 (1914) (remarks of Senator Newlands); 51 CONG. REC. 11235 (1914) (remarks of Senator Pomerene); 51 CONG. REC. 11533 (1914) (remarks of Senator Norris); 51 CONG. REC. 14788 (1914) (remarks of Senator Reed); 51 CONG. REC. 11591 (1914) (remarks of Senator Saulsbury); 51 CONG. REC. 12277 (1914) (remarks of Senator Works); 80 CONG. REC. 6591 (1936) (remarks of Senator Wheeler); 83 CONG. REC. 395, 396 (1938) (remarks of Representative Wolverton).

161. See note 160 *supra*.

sum which is not limited in amount to the value of the benefit received by the wrongdoer. The purpose of an FTC restitution order, on the other hand, is not to deter illegality by exacting "smart money," but to prevent future violations of § 5 by removing a positive incentive to violate. Because of this difference in nature between restitution and the criminal sentences which the framers considered to be penal, restitution should not be deemed a penalty, as that term was used by the framers of the FTCA.

The courts, too, have distinguished between an administrative restitution order and a penalty. Both *Porter* and *Bowles* held that a restitution order did not constitute a penalty.¹⁶² The United States Supreme Court has recognized that restitution is not a penalty, but, like divestiture, is an equitable remedy which seeks only to deprive the lawbreaker of the gains from his unlawful conduct.¹⁶³ Restitution orders are designed to restore the pre-violation *status quo* and to prevent further violations of the law. As long as a restitution order in this manner furthers the public interest, it is not considered a penalty.

The contention that a restitution order is not a penalty is further supported by an analogy to an award of compensatory damages. Although restitution and compensatory damages are dissimilar in their purposes and in their measures of the award, they are alike in one aspect. Under both, the award never exceeds some measure of the value of the actual injury to the aggrieved party. The fact that many courts¹⁶⁴ and the First Restatement of Conflicts¹⁶⁵ distinguish compensatory damages from a penalty strengthens the distinction between restitution and penalty. Thus, both the legislative history and judicial decisions imply that an administrative restitution order is not a penalty.

162. See notes 112-17 *supra* and accompanying text. See *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943); *Agwilines, Inc. v. NLRB*, 87 F.2d 146 (5th Cir. 1936).

163. See *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 128 (1948).

164. *O'Sullivan v. Felix*, 233 U.S. 318, 324 (1914); *Huntington v. Attrill*, 146 U.S. 657, 666-67 (1892); *United States v. Chouteau*, 102 U.S. 603, 611 (1880); *United States v. Witherspoon*, 211 F.2d 858, 860-61 (6th Cir. 1954); *American Fidelity & Cas. Co. v. G.A. Nichols Co.*, 173 F.2d 830, 833 (10th Cir. 1949); *Stevenson v. Stoufer*, 237 Iowa 513, 21 N.W.2d 287, 288 (1946); *Ryan v. Motor Credit Co.*, 130 N.J. Eq. 531, 23 A.2d 607, 613 (1941); *Forsyth v. Central Foundry Co.*, 240 Ala. 277, 198 So. 706, 709 (1940); *Roller v. Murray*, 71 W. Va. 161, 76 S.E. 172, 174 (1912); *Great Western Machine Co. v. Smith*, 87 Kan. 331, 124 P. 414, 415 (1912).

165. *Restatement (First) of Conflicts of Laws* § 611(a) (1934).

Summarizing this section, an examination of legislative and judicial authorities reveals that restitution is not prohibited by the non-compensatory, prospective-only and non-penal limitations of the FTC's remedial authority. Restitution, though it may benefit consumers incidentally, is not compensatory because the purpose of a restitution order is the vindication of the public interest. Nor can restitution be considered compensatory on the ground that it, unlike divestiture, involves personal monetary liability. Careful reading of the legislative history of the FTCA also reveals that the prospective requirement cannot bar the FTC from ordering restitution. While restitution does attach liability retroactively, the prospective-only rule poses no obstacle because the reasoning underlying the concept collapses under the weight of a careful analysis of the 1914 legislative history. In addition, the Commission's recently acquired substantive rule making power and the flagrant character of the violations which will draw a restitution order mitigate against strict application of the prospective-only rule. Finally, the preventative remedy of restitution is not a penalty either in the eyes of the FTCA's framers nor in those of the judiciary. Even though the Commission apparently has the implied power to order restitution, the uncertainty in the case law and recognition that the FTC needs stronger consumer protection devices have caused stirrings on Capitol Hill in recent years.

RECENT CONGRESSIONAL ACTIVITY REGARDING THE COMMISSION AND RESTITUTION

Enactment of Title II of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act⁶⁶ on January 4, 1975, culminated six years of effort by Congress and the Commission to improve the agency's consumer protection capability. Although the Act provides a consumer redress provision whereby the FTC brings actions in court, no restitution provision was included. On the contrary, there have been unsuccessful attempts by the Commission and some members of Congress to grant the Commission express authority to make any order, including restitution, which the FTC considers to be necessary. The years of debate have also left a conglomeration of what appears on the surface to be conflicting statements concerning the FTC's authority to order restitution. These as of yet ill-fated appeals for express congressional authorization, and the enactment of the consumer redress provision which utilizes the courts, and the seemingly contrary statements conceivably could give rise to the contention that the FTC is precluded from

asserting restitutionary power. Congress, however, in the Magnuson-Moss Act, disavowed any influence one way or the other and specifically left the question of § 5 restitution to the judicial process. In addition, any adverse implications arising from the two other grounds for a binding-construction argument, the agency's statements and the unsuccessful attempts in Congress to acquire explicit restitution authority, are silenced by compelling decisions of the United States Supreme Court.

Under the Federal Trade Commission Improvement section of the Act, the Commission receives both new powers and codification and refinement of older ones.¹⁶⁷ The most pertinent section is the

167. The new authority which the FTC Improvement Title gives the Commission, substantially improves the agency's consumer protection capability. Section 201 expands jurisdiction from "in commerce" to "in or affecting commerce." 88 Stat. 2193 (1975), *amending* 15 U.S.C. § 45 (1970). The scope of the Commission's investigative authority is also increased. Section 203 strikes "corporation," where it appears in § 6 of the FTCA, and inserts "person, partnership, or corporation." 88 Stat. 2198 (1975), *amending* 15 U.S.C. § 46(a) (1970). Furthermore, civil penalty actions for up to \$10,000 per violation may now be brought by the FTC in federal district courts against any person, partnership or corporation who knowingly use or used any act or practice which the Commission had determined to be unfair either through a rule or a final cease and desist order. 88 Stat. 2200 (1975), *amending* 15 U.S.C. § 45(a) (1970). Although actual knowledge is required where a cease and desist order to which a person is not a party has been violated, objectively tested knowledge is sufficient for liability where a rule has been transgressed. *Id.* Also new is the consumer redress provision which is discussed in note 168 *infra* and the accompanying text.

In addition to granting new authority, the Act alters the formerly held power of self-representation in court. The FTC received a limited right to be represented in court by its own attorneys in 1973. 87 Stat. 591, 592 (1973), 15 U.S.C. § 45(m) (Supp. 1973). This privilege is greatly expanded by the Magnuson-Moss Act. Now the agency has exclusive jurisdiction to represent itself in civil actions pertaining to injunctive relief, consumer redress, judicial review of rules and cease and desist orders, and enforcement of subpoenae and other authorized information gathering. 88 Stat. 2199-2200 (1975), *amending* 15 U.S.C. § 56 (1970) and *repealing* 87 Stat. 591, 592 (1973), 15 U.S.C. § 45(m) (Supp. 1973). Furthermore, such authority may be acquired in other situations, including review by the United States Supreme Court. *Id.*

The Commission's substantive rulemaking authority is also refined by the 1975 Act. In *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974), the FTC was found to possess substantive rulemaking authority. With such rules the agency could declare particular acts or practices to be unfair under § 5 without an adjudication. So long as the Administrative Procedure Act's informal rulemaking procedures were followed, these rules had the force and effect of law. 5 U.S.C. § 553 (1970). Under the Magnuson-Moss Act, the Commission is now expressly authorized to promulgate both interpretive and substantive rules. 88 Stat. 2199-2200 (1975), *amending* 15 U.S.C. § 57(a) (1970). Although the informal

consumer redress provision.¹⁶⁸ This section empowers the FTC to initiate civil actions for redressing injury to consumers and others in two situations: first, where any Commission rule declaring an activity an unfair or deceptive act or practice is violated; second, where a party has committed an act or practice which no Commission rule has proscribed, but which has been determined to be unfair or deceptive by a Commission cease and desist order applicable to the party.¹⁶⁹ In this later situation, however, the Commission must "satisf[y] 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. . . ."¹⁷⁰ To make this remedy more effective, Congress further provided, subject to two minor limitations, that the Commission's findings of material facts "with respect to any rule violation or act or practice" subject to a final cease and desist order "shall be conclusive."¹⁷¹

This type of consumer redress mechanism has been termed a "modest step" and represents a compromise between those who oppose using the FTC as a means for consumer redress and those who favor expressly granting the authority to order restitution.¹⁷² Since 1970, various bills reflecting these positions have received congressional consideration.¹⁷³ A few of the subcommittees which

rulemaking procedure is generally retained, many elements of an on-the-record hearing are required where the Commission determines that there is a disputed issue of fact. Other changes include a provision for judicial review of rules, subjecting banks to the Commission's rulemaking jurisdiction, and compensating certain persons whom fairness requires be represented in the rulemaking proceedings but otherwise could not afford to be. *Id.*

168. 88 Stat. 2201-02 (1975), *amending* 15 U.S.C. § 57(b) (1970).

169. *Id.*

170. *Id.*

171. *Id.*

172. *See* 117 CONG. REC. 39860 (1971) (remarks of Senator Spong).

173. S. 356, 93d Cong., 1st Sess. (1973) (subsequently amended and enacted as Magnuson-Moss Act) (authorized both court action and action by Commission alone); H.R. 7917, 93d Cong., 1st Sess. (1973) (subsequently amended and enacted as Magnuson-Moss Act) (neither court action nor Commission ordered redress authorized); H.R. 20, 93d Cong., 1st Sess. (1973) (neither FTC ordered restitution nor FTC court action authorized); S. 986, 92d Cong., 1st Sess. (1971) (both court action and action by Commission alone authorized); H.R. 4809, 92d Cong., 1st Sess. (1971) (identical to S. 986); S. 3201, 91st Cong., 1st Sess. (1969) (consumer class action—as reported by committee, Commission authorized to initiate actions in court only); H.R. 14585, 91st Cong., 1st Sess. (1969) (consumer class action for certain enumerated violations of § 5; no authorization either for FTC ordered restitution or for FTC court actions on behalf of injured consumers).

held the hearings may have favored allowing the FTC to act on its own.¹⁷⁴ But, the full committees,¹⁷⁵ with one exception,¹⁷⁶ and the two houses of Congress have preferred either to require the FTC to work through a court,¹⁷⁷ or else, that the agency not concern itself with remedial action at all.¹⁷⁸

During the course of the extended debate, statements were made regarding the FTC's authority to order monetary consumer redress which, at the outset, seem to conflict. The 1970 subcommittee hearings on S. 3201 and H.R. 14931 are replete with statements by Commissioners requesting the power to award damages to injured consumers, and bemoaning the inadequacy of a cease and desist order to deal with consumer fraud. The ineffectiveness of the cease and desist order is blamed on its prospective application, which renders it unable to assess money damages. Thus, on February 4, 1970, then Chairman Caspar Weinberger declared:

The Commission . . . believes that it needs stronger and more comprehensive tools to make the threat of a Commission proceeding a real deterrent to a lawbreaker. Specifically, * * * the Commission should be empowered to award damages where consumers have been injured by acts or practices found by the Commission to be in violation of the law.¹⁷⁹

Similarly, on December 17, 1969, Commissioner Philip Elman railed against the "toothless"¹⁸⁰ cease and desist order, "hav-

174. See *Hearings on S. 3201 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st & 2d Sess., serv. 91-48, pt. 1, at 118-19 (1970) (remarks of Subcommittee Chairman Moss) [hereinafter cited as *1970 Hearings on S. 3201*]; S. 986, 92d Cong., 1st Sess. § 202 (1971); H.R. 4809, 92d Cong., 1st Sess. § 202 (1971).

175. S. REP. NO. 92-269, 92d Cong., 1st Sess. (1971) (reporting S. 986); S. REP. NO. 91-1124, 91st Cong., 2d Sess. (1970) (reporting S. 3201).

176. S. REP. NO. 93-151, 93d Cong., 1st Sess. (1973) (reporting S. 356).

177. See 119 CONG. REC. 29490 (1973) (Senate passes S. 356); 117 CONG. REC. 39876 (1971) (Senate passes S. 986).

178. 120 CONG. REC. H 9404, H 9406 (daily ed. Sept. 19, 1974) (House defeating Representative Eckhardt's amendment to H.R. 7917 which would have allowed Commission to initiate actions in court to redress aggrieved consumers, and subsequently passing H.R. 7917 without such a provision).

179. *Hearings on H.R. 14931 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess., ser. 91-43, at 54-55 (1970) [hereinafter cited as *1970 Hearings on H.R. 14931*] (emphasis added). The same or a very similar statement by Chairman Weinberger appears two other times. *1970 Hearings on S. 3201*, pt. 1, at 9, pt. 2, at 242-43.

180. The Berkeley Hearing on S. 3201, note 174 *supra*, pt. 1, at 60.

ing only a prospective effect."¹⁸¹ Statements by Commissioners Dixon,¹⁸² Jones¹⁸³ and the FTC Chairman Miles W. Kirkpatrick¹⁸⁴ are to the same effect.

Congress too has asserted that, with the prospective cease and desist order as the Commission's only sanction, no specific redress can be afforded to consumers injured by unfair or deceptive practices.¹⁸⁵ In 1970, Senator Moss suggested that:

The Commission should have greatly expanded enforcement powers in order to prevent fraud and deception and to remedy injuries caused by such practices. Its powers should include . . . *the power to remedy the damage to injured consumers, by ordering rescission, restitution, or payment of damages.*¹⁸⁶

During floor debate on S. 986, a bill which, as reported by committee, would have authorized the Commission to initiate consumer actions in court, but would not have specifically authorized the FTC to, of its own, order redress, Senator Moss in 1971 stated:

the Federal Trade Commission 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 damage has occurred* by that action to a number of consumers and that, therefore, they will be able to receive a recovery.¹⁸⁷

Even as recently as 1973, Senator Magnuson, while introducing to the Senate the committee version of S. 356, which would have empowered the FTC to provide any specific remedial relief to consumers which the Commission would deem necessary, declared:

this bill would allow the Commission to order *specific redress* for injured consumers; *no longer* would it have to rely *merely* upon a *slap of the violator's wrist* to maintain

181. *Id.* at 58.

182. *Id.* at 39, 42-44.

183. *Id.* at 105.

184. *Hearings on H.R. 4809 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess., ser. 92-50, at 198 (1971) [hereinafter cited as *1971 Hearings on H.R. 4809*].

185. S. REP. NO. 91-1124, 91st Cong., 2d Sess., at 9, 24 (1970); 117 CONG. REC. 39859 (1971) (remarks of Senator Spong).

186. 1970 *Hearings on S. 3201*, note 174 *supra*, pt. 1, at 118 (emphasis added).

187. 117 CONG. REC. 39860 (1971) (emphasis added).

fair play in the marketplace, and, if the Commission pursues the matter, the consumer may have his injury made whole. A mere cease-and-desist order has frequently let a wrongdoer keep his ill-gotten gains.¹⁸⁸

Thus, both FTC Commissioners and legislators have indicated, at one time or another, that the Commission does not have the authority under § 5 to order damages or specific redress for the benefit of aggrieved consumers.

Yet other FTC actions and communications with Congress indicate that the Commission feels that it already has the authority to order restitution as part of a cease and desist order. It was in 1970 that the proposed order requiring restitution was issued in *Heater*.¹⁸⁹ That same year, a hearing examiner denied the Commission's request for a restitution order against the Curtis Publishing Company.¹⁹⁰ In 1971, the leading Commission restitution opinion appeared—*Curtis Publishing Company*¹⁹¹—written by Commissioner Dixon. With regard to its communications with Congress, a 1971 letter from Chairman Kirkpatrick to Senator Cook concerning S. 986 states:

We also believe, as previously stated, that the *explicit confirmation* of our remedial powers, such as *restitution* and *recession*, is a matter of importance. . . .¹⁹²

Similarly, a 1972 letter to Representative Moss from Charles Tobin, the FTC Secretary, regarding comparable legislation declares:

the Commission's law enforcement effort has for too long been hampered by the *strict limitations which permit remedial sanctions only in a severely limited number of cases*.¹⁹³

One explanation for this seeming conflict in opinion might be that the Commissioners distinguish between a general damage

188. 119 CONG. REC. 29480 (1973) (emphasis added).

189. Universal Credit Acceptance Corp., (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,340 (FTC 1970).

190. (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,376, 78 FTC 1472, 1475-1507 (FTC 1970).

191. Curtis Publishing Co., (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,719 (FTC 1971), 78 FTC 1472, 1507-25 (1971).

192. *Hearings on S. 986 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., ser. 92-8, at 67 (1971) (emphasis added).

193. 1971 *Hearings on H.R. 4809*, note 184 *supra*, at 386 (emphasis added). Produced by The Berkeley Electronic Press, 1975

action and the equitable remedies of restitution and rescission where needed to dissipate the effects of an unfair or deceptive act or practice. Such a distinction is clearly present in a 1970 question-and-answer exchange between Representative Keith and Commissioner Jones:

Mr. Keith. Can the Federal Trade Commission with its present authority and on its own initiative move into some of the areas that are delineated in this legislation (H.R. 14931)?

Miss Jones. Do you mean we can ask for damages for consumers? No. Can we ask for rescission of a contract? We tried it in one case. We don't know whether the courts are going to sustain it. . . .¹⁹⁴

If the Commission was, in fact, distinguishing between damages and a § 5 restitution order back in 1970 and 1971 when these statements were made, then its position at that time is not contrary to its present assertions. Should this be the case, there is little ground for arguing that the FTC has precluded itself by prior statements from now claiming restitution authority. Since the just quoted and seemingly negative congressional statements arose out of or subsequent to the hearings in which the Commissioners failed always to make the damages-restitution distinction clear, it is likely that they are subject to the same analysis to which the Commissioners' statements are.¹⁹⁵

Congress, too, has indicated that it recognizes a distinction between awards of damages to consumers and administrative restitution. The Senate Committee on Commerce eliminated from the original version of S. 986 a provision which would have explicitly authorized the FTC to order any additional relief which the Commission might deem necessary. Yet in the portion of the Committee Report commenting on the provision of S. 986 which would have empowered the Commission to initiate actions in court for aggrieved consumers, the Committee stated:

This section *would not affect whatever power the Commission may have under section 5 to fashion relief in its initial cease-and-desist order, such as corrective advertising or any other remedy, which may be appropriate to terminate effectively unfair or deceptive acts or practices.* [This section of S. 986] is applicable to those

194. 1970 Hearings on H.R. 14931, note 179 *supra*, at 93.

195. Compare notes 179-84 *supra* with notes 185-88 *supra*.

situations where the Commission acts to make specific consumers whole and *not to general actions designed to dissipate the prior effects of unfair or deceptive acts or practices.*¹⁹⁶

It is noteworthy that the statement of The National Association of Manufacturers (NAM) in the subcommittee hearings on H.R. 4809, a bill identical to S. 986, interpreted the above quotation as a recognition of Commission authority to fashion remedies like a court of equity.¹⁹⁷ The NAM, of course, denied that the Commission has such implied power.¹⁹⁸ More recently, Representative Moss, during the 1974 floor debate on H.R. 7917, declared:

I would also point out that *this amendment* [which would authorize the FTC to initiate actions in court for consumer redress] *does not deal with the Federal Trade Commission's own powers to order restitution in section 5 proceedings.* It deals only with the Commission's power to bring actions in court on behalf of defrauded customers. The question of the Commission's own powers is now before the courts and is not affected by this amendment.¹⁹⁹

Thus, both Congress and Federal Trade Commissioners have decried the prospective-only effect of the cease and desist order and the Commission's lack of authority to do more than slap violators' wrists by ordering damages or other specific redress. Yet, at other times, Commissioners and Congressmen indicate that the FTC may be empowered to order restitution as part of a cease and desist order.

Despite the apparent lack of support for expressly authorizing the FTC to order specific consumer redress, those Congressmen who acknowledge a difference between § 5 restitution and damages awards have left their mark on the Magnuson-Moss Act. In the Act, Congress expressly left the question of FTC-ordered restitution to the courts. The section which authorized the Commission to seek consumer redress in court also contains the following provision:

(e) Remedies provided in this section *are in addition to, and not in lieu of,* any other remedy or right of action

196. S. REP. NO. 92-269, 92d Cong., 1st Sess., at 25 (1971) (emphasis added).

197. 1971 *Hearings on H.R. 4809*, note 184 *supra*, at 459.

198. *Id.*

199. 120 Cong. Rec. H 9404 (daily ed. Sept. 19, 1974) (emphasis added).

provided by State or Federal law. *Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.*²⁰⁰

The conference committee report, adopted by both houses of Congress,²⁰¹ explains this provision:

The authority of the Commission to seek consumer redress encompassed by the Conference substitute deals exclusively with civil actions brought by the Commission and relief granted by the courts in those actions. The section is intended to *supplement* the ability of the Commission to redress consumer and other injury resulting from violations of its rules or of Section 5(a) of the Federal Trade Commission Act and is *not intended to modify or limit any existing power the Commission may have to itself issue orders designed to remedying violations of the law. That issue is now before the courts. It is not the intent of the Conferees to influence the outcome in any way.*²⁰²

With these words, the Conference Committee has put to rest any argument that because Congress considered the grant of restitutionary authority and rejected it in favor of actions in court for consumer redress, the Commission does not have such power. The inclusion of this disclaimer and the explanation it receives can only be accounted for as the anticipation and rejection by friends of the FTC of the argument that Congress construed § 5 as not encompassing restitution. This analysis is supported by the fact that the Conference Committee was composed of such FTC supporters as Senate Managers Magnuson, Moss, Hart and Stevens, and House Managers Moss and Eckhardt, some of whom have indicated, by previous statements, recognition of the distinction between § 5 restitution and consumer damage actions.²⁰³ By accepting the conference reports, the two houses of Congress imprinted this distinction into the record.

200. 88 Stat. 2183, 2201-02 (1975), *amending* 15 U.S.C. § 57(b) (1970).

201. 120 CONG. REC. S. 21990 (daily ed. Dec. 18, 1974) (Senate agrees to S. REP. NO. 93-1408, 93d Cong., 2d Sess. (1974), conference report on S. 356, Magnuson-Moss Act); 120 CONG. REC. H 12349 (daily ed. Dec. 19, 1974) (House agrees to H. REP. NO. 93-1606, 93d Cong., 2d Sess. (1974), conference report on Magnuson-Moss Act).

202. 120 CONG. REC. H 12052, H 12064, H 1206A (daily ed. Dec. 16, 1974), (setting forth in full the conference committee report on S. 356-H.R. 7917, H. REP. NO. 93-1606, 93d Cong., 2d Sess. (1974)).

203. See notes 196 and 199 *supra* and accompanying text.

With Congress having clearly indicated that enactment of the Magnuson-Moss Act's consumer redress provision was not to effect the outcome of the § 5 restitution question, neither the contrary statements by Congressmen and Commissioners nor the unsuccessful bids for formal authorization create an insurmountable obstacle to judicial affirmation. On several occasions, the United States Supreme Court has acknowledged novel agency authority despite prior administrative claims that such authority was not possessed. Such has been the case even where congressional authorization had been unsuccessfully sought. In *American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*,²⁰⁴ the Court recognized that public policy requires agencies be free to seek congressional action. Disposing of the contentions that the Interstate Commerce Commission's twenty-five years of contrary interpretation and two unsuccessful attempts to gain similar legislative authorization constituted dispositive administrative interpretation and congressional construction, the Court declared:

The advocacy of legislation by an administrative agency—and even the assertion of the need for it to accomplish a desired result—is an unsure and unreliable, and not a highly desirable, guide to statutory construction. The possibility of its use to prove more than it means . . . should not . . . deter administrative agencies from seeking helpful clarification of authority or a fresh and specific congressional mandate.²⁰⁵

Recognizing that "flexibility and adaptability to changing needs and patterns of [regulated activity] is an essential part of the office of a regulatory agency,"²⁰⁶ the Court held:

the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice.²⁰⁷

On other occasions the Court has followed and elaborated on the principles which it found controlling in *American Trucking*.²⁰⁸

204. 387 U.S. 397 (1967).

205. *Id.* at 418.

206. *Id.* at 416.

207. *Id.*

208. See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1967). In *Southwestern Cable*, the Federal Communications Commission's authority to regulate cable television was affirmed. This judicial approval was forthcoming despite two unsuccessful attempts at explicit Congressional authoriza-

One such case is *Wong Yang Sung v. McGrath*.²⁰⁹ *Wong Yang Sung* involved the Immigration Service petitioning Congress to exempt deportation proceedings from certain requirements of the Administrative Procedure Act. Such a bill had been proposed but not voted on in one session of Congress. Congress failed to complete the legislative process despite its awareness that the Service had construed the Act so as to exempt such proceedings. The Court, refusing to conclude either that the Service was or that it was not exempted on the ground of the legislative request and the subsequent incomplete activity, ruled:

We will not draw the inference . . . that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations.²¹⁰

From an examination of the cases it is apparent that the Supreme Court favor allowing administrative agencies to be flexible and responsive to changing societal needs and developments, as well as encouraging agencies to avoid litigation by seeking clarifying legislation. The policies will be furthered even when to do so the Court must go against prior administrative interpretations and must draw no inference from unsuccessful or incomplete attempts to acquire congressional approval of the disputed power.

The FTC, too, has benefited from the Court's reluctance to imply from contrary statements by administrators and unsuccessful or incomplete legislative action that an agency cannot assert novel but necessary authority. In *United States v. du Pont & Co.*,²¹¹ the Court found that the Commission could proceed against vertical as well as horizontal acquisitions. This decision was made in spite of thirty-five years of FTC inaction against vertical acquisitions, FTC statements that the pertinent statute did not apply to vertical acquisitions, and FTC sponsorship of a bill to include clearly such

tion: in the first, six years prior to issuance of the disputed regulation, the Commission stated that it "did not intend to regulate CATV;" the second request, coming one year after the regulation was issued, asked Congress to "confirm the [the Commission's] jurisdiction" to so regulate. *Id.* at 170, 171. Subsequently, *Southwestern Cable* was cited by the Court as authority for the proposition that "subsequent legislation usually is not entitled to much weight in construing earlier statutes. . . ." *Matz v. Arnett*, 412 U.S. 481, 505 n.25 (1972).

209. 339 U.S. 33 (1949).

210. *Id.* at 47.

211. 353 U.S. 586 (1957).

acquisitions. In arriving at its decision, the Supreme Court was guided both by legislative history which aided and supported its construction of the Act and by its "duty to reconcile administrative interpretations with the broad . . . policies laid down by Congress."²¹² Again, in *United States v. Morton Salt Co.*,²¹³ the issue of novel authority arose. Refusing to draw an adverse inference, the Court dealt with the issue in the following manner:

Respondents . . . say that the present use of the asserted power is novel and unprecedented. . . . Respondents are not without statements by the Commission or its officials, *dicta* from judicial opinions, views of text writers and facts of legislative history which give some support to this theory. *But this court never before has been called upon to deal consciously and squarely with the subject.*²¹⁴

Thus, even where the FTC has disclaimed certain authority, has not used it for many years, and has unsuccessfully petitioned Congress to grant that authority, the Court will acknowledge it where societal changes require that the Commission be given it in order to accomplish the broad policy for which the agency was created.

In light of the foregoing considerations, there exists little reason for denying the Commission the authority to order restitution under § 5. Congress has clearly stated that no adverse implications may arise from enactment of the Magnuson-Moss Act's consumer redress mechanism. Also present are the factors to which the Supreme Court has looked when disregarding unsuccessful or incomplete congressional activity and practice, assuming *arguendo* that the Commission's statements do not distinguish between restitution and damages, and thus are inconsistent with present assertion of authority. Previously discussed legislative history reveals Congress' policy of using the Commission to protect consumers from unfairness.²¹⁵ Also apparent in the legislative and judicial history is the broad and equitable scope of § 5.²¹⁶ This broad and equitable nature both aids and supports a § 5 restitution construction.²¹⁷ Underlying the development of § 5 restitution is

212. *Id.* at 590. It should be noted that the *du Pont* opinion was quoted and followed in *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966). For the *Dean Foods* holding, see note 73 *supra* and accompanying text.

213. 338 U.S. 632 (1949).

214. *Id.* at 647 (emphasis added).

215. See notes 25 to 34 and 40 to 52 *supra* and accompanying text.

216. See notes 41 to 61, 67 to 80 and 100 to 102 *supra* and accompanying text.

217. *Id.*

the growth of the consumer society and concern for consumer well-being. Restitution is a flexible and imaginative response to that modern problem—a response which the Supreme Court has never specifically addressed. Finally, to deny § 5 restitution authority on the basis of prior administrative statements and unsuccessful sponsorship of legislation would be contrary to the public policy of encouraging administrative agencies to avoid litigation by seeking confirming or clarifying legislation from Congress. Thus, the argument that a controlling administrative interpretation and congressional construction deny § 5 restitution authority to the Commission is untenable.

Summarizing, the Magnuson-Moss Act and the debate generated by it and similar bills should have little, if any, effect adverse to the Commission's position on the final judicial resolution of the § 5 restitution question. There is ample evidence that "contrary" administrative and congressional interpretations referred to damages, not restitution. In addition, the Act itself disclaims any influence one way or the other. Finally, the Supreme Court has evidenced a strong aversion to precluding administrators from asserting novel authority which, because of societal changes, is needed to further the agency's purpose. This policy of fostering administrative flexibility and responsiveness has been advanced even where similar powers were unsuccessfully sought from Congress, and where prior agency interpretation and practice are contrary to the later position. With the possibility of the courts granting the FTC the authority to order restitution, consideration must be given to the question of priorities within the agency itself and the extent to which administrative restitution should be a part of consumer protection.

THE PROPRIETY OF THE FTC HAVING RESTITUTION AUTHORITY

In order to evaluate the propriety of giving the FTC the authority to order restitution, one must recognize that the Commission has a law enforcement function as well as an educational function. By investigating, publicizing, rendering advisory opinions and making rules about unfair trade practices, the FTC teaches both businessmen and consumers about the different types of unfairness proscribed by § 5. However, the FTC is also charged with the enforcement of the FTCA itself, various antitrust acts,²¹⁸ and

218. Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13, 13(a), 13(b), 21(a), (1970); Clayton Act, 15 U.S.C. §§ 12 *et seq.* (1970).

other consumer legislation.²¹⁹ Critics of the restitution proposal fear arbitrary harassment of legitimate business by the imposition of retrospective liability,²²⁰ and for this reason wish to confine the FTC to the role of educating and prohibiting.²²¹ Proponents, viewing the FTC as a law enforcement agency operating in the public interest, do not want the Commission's purpose to be frustrated by the wrongdoer who wilfully cheats consumers.²²² Because future violations by a recalcitrant defrauder of consumers will not be prevented by a cease and desist order, the FTC needs the authority to order restitution if it is more fully to protect the public from this unfair deprivation. Thus, the issue is not whether it is desirable for the Commission to have the power to order restitution. Rather the question is how great a role the FTC should play in the overall scheme of judicial and administrative consumer protection, taking into account the advantages and disadvantages inherent in the exercise of restitutionary power by an administrative agency.

The propriety of granting the power to the FTC depends upon a balancing of several considerations. On the one hand, the Commission's and the public's need for the new power, as well as the capability of the FTC to wield it effectively, must be considered. On the other hand, the adverse impact on the FTC in carrying out other responsibilities, the detrimental effects upon the personal liberties of individual respondents, the disadvantages of the growth of government, and alternative means for preventing consumer fraud and remedying its victims, also, require attention.

Strong reasons exist for granting the FTC the power to order restitution. The public needs a swift and effective machinery to prevent consumer fraud. Because of cost, ignorance, unfavorable laws and unsympathetic prosecutors and judges, few consumers obtain relief from the courts and hence few fraudulent operators are deterred.²²³ Due to the cost and difficulty inherent in bringing a separate action in the courts subsequent to a Commission proceeding, even the new consumer redress provision of the Magnuson-Moss Act cannot provide the deterrent effect which FTC ordered restitution can. The Commission is especially well suited

219. See note 53 *supra*.

220. See, e.g., 1971 *Hearings on H.R. 4809*, note 184 *supra*, at 378-79.

221. See, e.g., *Heater v. FTC*, 503 F.2d 321, 324 (9th Cir. 1974).

222. Letter from Paul R. Dixon, Federal Trade Commissioner, to Eric L. Freise, Nov. 18, 1974, on file Valparaiso University Law School Library.

223. See Note, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 396-97 (1966).

to police large interstate operations, where problems of jurisdiction and cost would otherwise be great.²²⁴ In addition, the swift and inexpensive prevention of a type of unfairness which the courts have been unable to deal with is in the finest tradition of the FTC.²²⁵

Whether the Commission can protect the public by exercising restitutionary power without injuring the agency's ability to carry out its other responsibilities becomes a question of resources. The FTC has the expertise, the in-house counsel, the information, and can have the funds that the private citizen and the local court do not.²²⁶ It is noteworthy that Congress made a generous appropriation to the FTC in the Magnuson-Moss Act.²²⁷ Yet it is impossible for the Commission to act on more than a handful of the many consumer frauds perpetrated each year. In 1970, Senator Tydings estimated that consumers may lose more than ten billion dollars per year through consumer fraud in the sale of shoddy goods and services.²²⁸ In order to meet stricter standards of proof and to calculate and disperse judgments, a greater amount of resources will be required. FTC estimates made in 1971 indicate that the increased cost resulting from the enactment of a law which would enable the Commission to initiate suits in federal district courts would be substantial.²²⁹ If Congress does not appropriate this money, the FTC will be forced to take resources from other projects or to hold only an empty promise for consumers. One long standing complaint of Commissioner Dixon, former Chairman of the FTC, is that Congress creates new responsibilities for the Commission but then does not adequately fund them.²³⁰

224. See note 222 *supra*.

225. See notes 40-52 *supra* and accompanying text.

226. See note 223 *supra* and accompanying text.

227. 88 Stat. 2183, 2203 (1975), *amending* 15 U.S.C. § 57(c) (1970) (\$42 million for fiscal year 1975; \$46 million for fiscal 1976; and \$50 million for fiscal 1977).

228. 116 CONG. REC. 3116-17 (1970).

229. Although the estimates vary considerably, either amount is significant. In a December 20, 1971 letter to Representative Moss, Chairman Kirkpatrick anticipated an annual cost increase of \$1,056,000 resulting from Title II of H.R. 4809. 1971 *Hearings on H.R. 4809*, note 184 *supra*, at 208. However, Senator Cook revealed some other estimates from the FTC concerning Title II of S. 986, a bill indetical to H.R. 4809. According to his figures, "it will cost \$725,000 the first year, \$875,000 the second year, \$1 million the third year, \$1,250,000 the fourth year, and \$1,400,000 the fifth year." 117 CONG. REC. 39854 (1971).

230. 1970 *Hearings on S. 3201*, note 174 *supra*, at 33, 46-47; 1971 *Hearings on H.R. 4809*, note 184 *supra*, at 202; *Hearings on S. 986 Before the Con-*

The public's need for protection from consumer fraud must also be balanced against the possible injury to the violator's civil liberties. Such a consideration chiefly involves a choice of the forum. Should a violator potentially subject to restitution receive a courtroom jury trial or a summary administrative proceeding? The United States Supreme Court has held that neither due process nor trial by jury rights are denied by an administrative agency which makes an essentially equitable order pursuant to its statutory duties.²³¹ This is the case even where the common law affords a right to trial by jury. Nevertheless, both the court in *Heater*²³² and Congress²³³ have shown uneasiness with the Commission's procedure as a means of adjudicating personal monetary liability. Even FTC sympathizers have stated that the combined role of investigator, prosecutor, judge and jury "imposes intolerable strains on fairness."²³⁴ But when the Commission orders restitution, it acts as executioner too.

The alternative methods for providing consumer protection must also be considered. Merely because the courts and local law enforcement agencies have been unable to deter consumer fraud and to remedy injured consumers²³⁵ does not mean that the responsibility and the necessary power be turned over to an agency of the federal government. A better solution might be for the Commission to assist states and local governments in creating and maintaining new laws and tribunals which not only provide easy remedies for a defrauded consumer but which also make fraudulent operators amenable to prosecution and punishment. In fact, bills which would allocate \$95 million over three years to the FTC for the purpose of providing such assistance to local governments are presently before the Senate and House.²³⁶ Another bill evidencing

sumer Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess., ser. 92-98, at 36 (1971).

231. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46-48 (1937).
Accord Agwilines, Inc. v. NLRB, 87 F.2d 146, 151 (5th Cir. 1936).

232. 503 F.2d 321, 325-26 (9th Cir. 1974).

233. See notes 172-78 *supra* and accompanying text.

234. P. Elman, *The Regulatory Process—A Personal View*, appearing in *Hearings on the Nomination of Miles W. Kirkpatrick, to be Chairman of the FTC, Before the Senate Comm. on Commerce*, 91st Cong., 1st Sess., ser. 91-88, at 152 (1970) [hereinafter cited as *1970 Nomination Hearings*].

235. See Note, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 396-97 (1966).

236. S. 2928, 93d Cong., 2d Sess. (1974); H.R. 13830, 93d Cong., 2d Sess. (1974); *Jt. Hearings on S. 2928 Before the Consumer Subcomm. of the Senate Comm. on Commerce and the Subcomm. on Representation of Citizens*

this view has been introduced by Senator Moss.²³⁷ His proposal would authorize state and certain local jurisdictions to enforce orders and regulations that the FTC has issued prohibiting unfair practices. Furthermore, many developments have occurred in the area of consumer protection, including the creation of small claims courts, consumer arbitration panels, and restitution for consumers through state attorneys general.²³⁸ The successful experience under the Truth-in-Lending Act (TIL)²³⁹ argues well for the proposition that the development of local self-help methods should be encouraged. After one year of Truth-in-Lending, a FTC staff found relatively high compliance.²⁴⁰ Federal Reserve Board Governor J. L. Robertson noted that the consumer enforcement through civil suits is essential to maintaining this high compliance rate.²⁴¹ The ABA in its report on the FTC, chaired by Miles Kirkpatrick, also has indicated its belief in the efficacy of private enforcement by advocating the creation of a private consumer cause of action for § 5 violations.²⁴²

Upon examination of the factors which must be considered in evaluating the propriety of the FTC ordering restitution, it is suggested that the American consumer will receive greater protection if the FTC's remedial authority plays only a limited role in the total effort against consumer fraud. While the Commission is best suited for attacking large inter-state operations, it cannot possibly police all the fraud perpetrated throughout the country. Moreover, the administrative machinery necessary to undertake such a task would be extremely burdensome and unwieldy. Traditionally, the jury has served as a check on arbitrary governmental

Interests of the Senate Comm. on Judiciary, 93d Cong., 2d Sess., ser. 93-85 (1974); S. REP. NO. 93-1164, 93d Cong., 2d Sess. (1974).

237. 121 CONG. REC. S 1758 (daily ed. Feb. 11, 1975) (remarks of Senator Moss—introducing and placing in RECORD complete text of S. 642, 94th Cong., 1st Sess. (1975)).

238. See Jones & Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357 (1972); Wade & Kamenshine, *Restitution for Consumers: Making the Remedy Effective through Suit by Governmental Agency*, 37 GEO. WASH. L. REV. 1031 (1969); Note, *Fraudulent Advertising: The Right of a Public Attorney General to Seek Restitution*, 4 PAC. L.J. 168 (1973).

239. Truth-in-Lending Act, 15 U.S.C. §§ 1601 *et seq.* (1970).

240. *Truth in Lending Compliance Study*, FTC Division of Special Projects.

241. 118 CONG. REC. 14824-25 (1972).

242. *Report of the ABA Commission to Study the Federal Trade Commission*, at 63 (1969), appearing in 1970 *Nomination Hearings*, note 234, *supra*, at 71.

action. As long as adequate judicial methods can be developed which insure easy court access and fairness for all parties, the constitutional right to trial by jury should not be lightly relinquished. Attacking the problem with the state and local judiciary has the added advantages which come from encouraging citizens to protect themselves. If it is appropriate to draw lessons from the history of TIL and of several regulatory agencies, local self-help methods should be preferred because they will not only effectively reduce consumer fraud but will also insure that consumers' interests will not in the future be relegated to secondary importance as a consequence of the ever-changing forces operating on Capitol Hill. The Commission's expertise and information gathering ability can be a great aid to state and local governments attempting to develop and operate forums for consumer protection. Thus, the proper role would be for the Commission itself to handle the larger and more blatant consumer frauds, while assisting local government in developing and operating consumer protection procedures for the vast majority of lesser consumer frauds.

CONCLUSION

This note contends that the FTC has the authority to order restitution in cases of consumer fraud. Congressional and judicial definitions of "unfairness" reveal that the fraudulent seller's retention of consumer money is itself an unfair practice. Examination of congressional and judicial authorities also demonstrates that when the Commission orders restitution to prevent consumer fraud, the FTC not only acts within the broad remedial authority given by Congress, but concurrently accomplishes the very purpose for which Congress created it.

None of the three requirements which have traditionally limited the FTC's remedial power makes a restitution order improper as long as the order is necessary to prevent the unfair practice of consumer fraud. First, the courts have distinguished between an administrative restitution order issued in the public interest and a forbidden award of compensatory damages. Secondly, because the reasoning which underlies the prospective-only doctrine is based on a misapprehension of congressional intent, this limitation should not be used to deny the FTC the authority to order restitution. Finally, both congressional and judicial utterances indicate that an administrative restitution order should not be deemed a penalty. Thus, for the reasons that restitution is within the FTC's broad powers both to define and to remedy unfair practices, and because such authority is not barred by the three judicial limits imposed

upon FTC orders, restitution is a proper remedy for consumer fraud.

Congress' recent action indicates that it too recognizes the necessity for providing the FTC with new methods for preventing consumer fraud. Although the hesitancy of Congress to expressly grant the FTC the power to order restitution will not preclude courts from implying it, a concern with the disadvantages of investing the agency with such power is nevertheless revealed. In view of problems involving limited resources, the constitutional requirements of procedural due process and the improbability of achieving long term efficacy, it is suggested that restitution be only a minor portion of the FTC's attack on consumer fraud. The FTC should move against major consumer fraud schemes in order to develop a comprehensive enforcement policy, but at the same time, its role of assisting local governments in protecting consumers must be greatly expanded.

Heater v. FTC is the only court decision on the restitution issue. Another Commission restitution order was appealed to the Eighth Circuit Court of Appeals. However, this appeal was dismissed upon petitioner's motion.²⁴³ The question is surely bound for the United States Supreme Court. The Commissioners are determined in their position: not only did they vote to appeal *Heater* to the Supreme Court,²⁴⁴ but they have ordered restitution in several cases subsequent both to *Heater*,²⁴⁵ and to the Magnuson-Moss Act's enactment.²⁴⁶ However, passage of the Magnuson-Moss

243. Universal Electronics Corp., (1970-1973 Transfer Binder) CCH TRADE REG. REP. ¶ 19,979 (FTC 1971), *appeal dismissed*, No. 71-1187 (8th Cir. Aug. 19, 1971).

244. See note 222 *supra*. See also Holiday Magic, Inc., 3 CCH TRADE REG. REP. ¶ 20,757 n.11 (FTC 1974).

245. Holiday Magic, Inc., 3 CCH TRADE REG. REP. ¶ 20,757 (FTC 1974), *modified*, 3 CCH TRADE REG. REP. ¶ 20,819 (FTC 1975); Weaver Airline Personnel School, Inc., 3 CCH TRADE REG. REP. ¶ 20,756 (FTC 1974); Fuque Industries, Inc., 3 CCH TRADE REG. REP. ¶ 20,755 (FTC 1974); Soundtrack Chevell Industries, Inc., 3 CCH TRADE REG. REP. ¶ 20,771 (FTC 1974) (complaint docketed).

The Commission has also expressly manifested its intention to continue ordering restitution in other circuits. Letter from David H. Williams, Attorney, FTC Bureau of Consumer Protection, to Eric L. Freise, Nov. 26, 1974, on file Valparaiso University Law School Library.

246. Lear Siegler, Inc., 3 CCH TRADE REG. REP. ¶ 20,938 (FTC 1975); Maralco Enterprises, Inc., 3 CCH TRADE REG. REP. ¶ 20,890 (FTC 1975); Carter Hawley Hale Stores, 3 CCH TRADE REG. REP. ¶ 20,859 (FTC 1975); Kustom Enterprises, Inc., 3 CCH TRADE REG. REP. ¶ 20,824 (FTC 1975);

Act appears to have taken away the urgency which the Commission feels for vindicating its position.²⁴⁷ Thus, it has decided not to appeal *Heater* and consequently has vacated the restitution provision of an order against a Ninth Circuit respondent.²⁴⁸ Yet in doing so, the Commission plainly stated that it has not changed its view "regarding the correctness of the *Heater* decision." Hopefully, when the United States Supreme Court does decide the issue, the decision will stand with others which have followed the framers' intent by allowing § 5 to meet changing societal needs.

Koscot Interplanetary, Inc., 3 CCH TRADE REG. REP. ¶ 20,902 (FTC 1975) (initial decision); Soundtrack Chevell Industries, Inc., 3 CCH TRADE REG. REP. ¶ 20,880 (FTC 1975) (Commission denies administrative law judge's recommendation to withdraw case from adjudication for consent order negotiations); Genesco, Inc., 3 CCH TRADE REG. REP. ¶ 20,819 (FTC 1975) (complaint docketed).

247. See *Holiday Magic, Inc.*, 3 CCH TRADE REG. REP. ¶ 20,819 (FTC 1975).

248. *Id.*

