

## **THE GENESIS OF CONSUMER PROTECTION REMEDIES UNDER SECTION 13(b) OF THE FTC ACT**

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### **Introduction**

When I arrived at the Federal Trade Commission in 1976, no one imagined that Section 13(b) of the Federal Trade Commission Act<sup>2</sup> would become an important part of the Commission's consumer protection program. Section 13(b) had been on the books for three years, but had been used only once in a competition case, and not at all in the consumer protection arena. Moreover, it did not appear to have great promise as a consumer protection remedy. It gave the Commission authority to seek preliminary injunctions in aid of Commission administrative proceedings, but the Commission had had similar authority for many years in cases involving false advertising of food, cosmetics, drugs or medical devices, and had rarely used it. Section 13(b) also included a brief proviso authorizing the Commission to seek a permanent injunction "in proper cases," but it was generally assumed that in most cases the Commission would prefer to issue its own cease and desist order rather than seek a permanent injunction from a court.

By the time I left the Commission in 1990, however, Section 13(b) – and in particular the permanent injunction proviso – had become a significant weapon in the Commission's fight against consumer fraud. It was well-established by then that Section 13(b) authorized the Commission to seek not only preliminary and permanent injunctions

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<sup>2</sup> 15 U.S.C. § 13(b).

to halt deceptive practices, but also asset freezes, appointment of receivers, restitution and other relief to redress injury resulting from consumer frauds. As a federal appeals court explained in a 2002 decision, “The court’s authority [under Section 13(b)] to order restitution to the victims [of a fraudulent scheme] and as an incident thereto to place the frozen assets in trust for them is not and cannot be questioned.”<sup>3</sup>

Today Section 13(b) is a mainstay of the Commission’s consumer protection program. As of June 30, 2004, the Commission had 86 cases pending in federal district courts in which the Commission was seeking permanent injunctions and consumer redress under Section 13(b), with another 11 cases pending in federal courts of appeals.<sup>4</sup> In contrast, the Commission had fewer than a dozen administrative cases pending before its Administrative Law Judges, most of which involved allegations of anticompetitive practices, rather than consumer deception.<sup>5</sup>

Below I offer a brief history tracing the development of the Commission’s Section 13(b) authority during the period 1976 to 1990, from the perspective of one who litigated several of the early cases and later helped develop the Bureau of Consumer Protection’s Section 13(b) program.

## **I. Background**

To appreciate the development of Section 13(b) during this period, one must understand the Commission’s enforcement authority as it stood in 1976. When it was

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<sup>3</sup> *FTC v. Think Achievement Corp.*, 312 F.2d 259, 262 (7th Cir. 2002).

<sup>4</sup> Quarterly Federal Court Litigation Status Report, <http://www.ftc.gov/ogc/status/status.pdf>. Section 13(b) cases represented 72% of the Commission’s total court litigation docket, which also included two petitions for review of Commission cease and desist orders, 17 civil penalty cases, seven suits to enjoin Commission action or other defensive litigation, and 11 cases in which the Commission had filed amicus curiae briefs.

<sup>5</sup> Information concerning pending administrative proceedings may be found at <http://www.ftc.gov/os/adjpro/index.htm>.

enacted 90 years ago, in 1914, Section 5 of the Federal Trade Commission Act prohibited “unfair methods of competition.”<sup>6</sup> In 1938, the Wheeler-Lea Act added the prohibition against “unfair or deceptive acts or practices” to Section 5, confirming the Commission’s consumer protection mission.<sup>7</sup>

The Commission’s principal tool for enforcing Section 5 was administrative proceedings leading to cease and desist orders. Penalties could be imposed only on those who violated cease and desist orders issued against them. This “one free bite” approach was deemed appropriate because the broad language of Section 5(a) was thought to give businesses little notice of the standards to which they would be held until the Commission applied Section 5 to specific conduct through a cease and desist order.

Many of the Commission’s consumer protection cases, however, concerned consumer frauds accomplished through misrepresentations and deceptive omissions that clearly violated Section 5. In those types of cases the cease and desist order remedy had two serious shortcomings.

#### **A. Preliminary Relief**

First, the administrative process leading to a final cease and desist order, including a trial before an Administrative Law Judge (ALJ), Commission review of the ALJ’s decision, and a court of appeals’ review of the Commission’s decision, was protracted, often taking several years. In the meantime, the respondent remained free to employ the deceptive practices, causing continuing harm to the public.

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<sup>6</sup> Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914).

<sup>7</sup> Wheeler-Lea Act, ch. 49, § 3, 52 Stat. 111 (1938). Section 5, as amended, is codified at 15 U.S.C. § 45.

Congress began to address this problem in the Wheeler-Lea Act. The Act added Section 12 to the FTC Act, making it unlawful to disseminate any “false advertisement ... for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, services, or cosmetics,”<sup>8</sup> and gave the Commission authority to institute administrative cease and desist order proceedings against persons who were disseminating advertisements that the Commission had reason to believe violated Section 12. But Wheeler-Lea also added Section 13(a) to the FTC Act, which authorized the Commission to file an action in federal court to obtain a preliminary injunction to prevent the respondent from disseminating the challenged advertisements pending resolution of the Commission’s administrative proceeding. As a result, for the first time the Commission could take immediate action to protect the public from ongoing deception.<sup>9</sup> In cases that did not involve food, drugs, devices or cosmetics, however, the Commission still had no authority to seek preliminary relief.

In 1973, Congress addressed the problem comprehensively through Section 13(b). Section 13(b) was originally part of broader proposed legislation to augment the Commission’s enforcement authority, but it was dropped from that bill and inserted in the Trans-Alaska Pipeline Act,<sup>10</sup> because of concern that the Commission needed immediate

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<sup>8</sup> 15 U.S.C. § 52.

<sup>9</sup> 15 U.S.C. § 53(a). *See, e.g., FTC v. Thompson-King & Co.*, 109 F.2d 516 (7th Cir. 1940). The Commission’s *Statutes and Court Decisions* volume covering the period 1938 to 1940 includes many Section 13(a) injunctive orders, not otherwise reported, that the Commission obtained to halt false advertising of quack drugs, remedies and devices pending the completion of administrative proceedings. After 1940, however, the Commission used Section 13(a) rarely, although it brought two notable cases in the 1970’s, *FTC v. National Com’n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975) (respondent preliminarily enjoined from making certain representations concerning the state of scientific evidence linking the consumption of eggs with heart disease) and *FTC v. Simeon Management Corp.*, 532 F.2d 708 (9th Cir. 1976) (preliminary injunction prohibiting claims relating to the safety and efficacy of a weight loss plan employing a drug not approved for that purpose by the Food and Drug Administration denied).

<sup>10</sup> Trans-Alaska Pipeline Act, P.L. 93-153, § 408, 87 Stat. 592 (1973).

authority to seek preliminary relief to prevent the consummation of anticompetitive mergers, particularly among energy companies.<sup>11</sup> As enacted, however, Section 13(b) was by no means limited to merger cases. It provided:

Whenever the Commission has reason to believe (1) that any person, partnership or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission thereon has become final, would be in the interest of the public the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, that if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect; Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. ...

This language tracked Section 13(a) closely, with two notable exceptions. First, unlike Section 13(a), it applied to “any provision of law” enforced by the Commission; second, it authorized “a permanent injunction” in “proper cases.”

## **B. Consumer Redress**

Second, ordering a respondent to cease and desist from using deceptive practices might protect the public from future harm, but it did not remedy the injury to the public caused by the respondent's past deceptions, or deprive the respondent of the gains it had

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<sup>11</sup> By 1973, it was well-recognized that, once a merger was consummated, if the Commission later found the merger unlawful, it was very difficult to fashion a remedy that restored the balance of competition as it had existed before the merger. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 607 (1966) (“experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture”). With the nation in the midst of an energy crisis and gasoline prices increasing rapidly, maintaining competition in the energy industry was a pressing concern.

realized by employing them. In 1973, the Commission attempted to address this shortcoming through a creative application of Section 5. The Commission held that it was an unfair practice, in violation of Section 5, for a respondent to retain funds that it had received from consumers for a worthless product or service sold through deceptive or fraudulent practices. To remedy this “continuing violation” of Section 5, the Commission ordered that the funds be returned to the consumers – *i.e.*, restitution.<sup>12</sup>

On review, however, in *Heater v. FTC*, the Ninth Circuit set aside that portion of the order. Although the court acknowledged the Commission’s broad authority to craft cease and desist remedies, it found that ordering restitution was “inconsistent and at variance with the over-all purpose and design of the [FTC Act]. In particular, it would permit the Commission to order private relief for harm caused by acts which occurred before the Commission had declared a statutory violation, and thus before giving notice that the prior conduct was within the statutory purview.”<sup>13</sup>

In response, the Commission asked Congress to give it authority to order restitution. Instead, in 1975 Congress added Section 19 to the FTC Act, authorizing the Commission to seek consumer redress in federal district court for either (1) violations of FTC trade regulation rules, or (2) acts or practices as to which the Commission had issued a final cease and desist order, if the Commission “satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent...” Section 19

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<sup>12</sup> *Universal Credit Acceptance Corp.*, 82 F.T.C. 570 (1973).

<sup>13</sup> 503 F.2d 321, 323 (9th Cir. 1974).

expressly authorizes the court to award such relief as rescission or reformation of contracts, the refund of money or the return of property, or the payment of damages.<sup>14</sup>

## **II. Early Development of the Commission's Section 13(b) Authority**

When I arrived at the Commission in June 1976, the principal remedy employed by the Commission was still the cease and desist order. Although Section 13(b) had been enacted three years earlier, the Commission had made little use of it.

Certainly the Commission wanted to use Section 13(b) to seek preliminary injunctions to prevent the consummation of mergers pending the completion of Commission administrative proceedings, as Congress had envisioned. Unfortunately, a practical difficulty quickly emerged. To use Section 13(b) for that purpose, the Commission needed enough advance notice of a planned merger to gather and analyze relevant data, decide whether to challenge the merger, file the Section 13(b) case and make a “proper showing” to the court to justify a preliminary injunction – all before the merger was consummated. The Hart-Scott-Rodino Antitrust Improvements Act of 1976<sup>15</sup> addressed this problem by requiring parties planning a merger to provide advance notice to the Commission and the Justice Department, but when I arrived that Act had not yet taken effect. As a result, the Commission had brought only one Section 13(b) case, in which, without any reported opinion, the district court granted a limited “hold-separate”

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<sup>14</sup> Magnuson Moss Warranty – Federal Trade Commission Improvements Act, P.L. 93-637, § 206(a), 88 Stat. 2201 (1975) (codified at 15 U.S.C. § 57b).

<sup>15</sup> Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, § 201, 90 Stat. 1390 (1976) (codified, as amended, at 15 U.S.C. § 18a).

preliminary injunction after the acquiring firm had already purchased a 35% share of the acquired firm's stock.<sup>16</sup>

Shortly after I arrived, however, the Commission received enough advance warning of a planned merger of two regional supermarket chains to file its first Section 13(b) action to block a merger. In *FTC v. Food Town Stores, Inc.*, after the district court denied the Commission's request for a temporary restraining order, the Commission sought and obtained an injunction pending appeal from the Fourth Circuit. Judge Winter, sitting as a single circuit judge for purposes of the emergency motion, issued a decision emphatically supporting the Commission's right to obtain preliminary relief. In particular, quoting the legislative history, he emphasized the preeminent importance of the public interest in "weighing the equities," as the court is required to do in deciding whether to order relief under Section 13(b).<sup>17</sup> After Judge Winter granted an injunction pending appeal, the parties abandoned their planned merger, confirming the power of the Commission's Section 13(b) authority in the merger context.<sup>18</sup>

After the decision in *Food Town Stores*, Hart-Scott-Rodino came into effect. With notice of proposed mergers and a favorable opinion, the Commission began to use Section 13(b) aggressively, and, in many cases, successfully, and it quickly became an important part of the Commission's competition program. The Commission's success

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<sup>16</sup> *FTC v. British Oxygen Co.*, No. 74-31 (D. Del.) (unreported). See *FTC v. British Oxygen Co.*, 529 F.2d 196 (3d Cir. 1976) (*en banc*) (vacating a provision of the order because the district court's findings were inadequate). Ultimately, the cease and desist order entered by the Commission in the underlying administrative proceeding was set aside on review, leading the district court to dissolve the hold-separate preliminary injunction. *FTC v. British Oxygen Co.*, 437 F. Supp. 79 (D. Del. 1977).

<sup>17</sup> 539 F.2d 1339 (4th Cir. 1976).

<sup>18</sup> See *FTC v. Food Town Stores, Inc.*, 547 F.2d 247 (4th Cir. 1977) (vacating the district court's order denying the Commission's motion for a temporary restraining order, and remanding with instructions to dismiss the case as moot, in light of the defendants' abandonment of the planned merger).

using Section 13(b) in competition cases led some Commission staff to consider how it might be used to advance the Commission's consumer protection mission, as well.

During the 1970's the Commission's consumer protection efforts were focused on trade regulation rulemaking proceedings, rather than case-by-case adjudication.<sup>19</sup> These rulemaking proceedings, which would have significantly affected many areas of the economy if the proposed rules had ever become effective (few did), consumed most of the attention of the Commission's Bureau of Consumer Protection (BCP) policymakers and most of the Commission's BCP resources, but the Commission still brought some administrative consumer protection cases during this period. The question was whether and how the Commission could use Section 13(b) effectively in those cases.

#### **A. Preliminary Relief**

On its face, Section 13(b) authorizes the Commission to seek preliminary injunctions to stop on-going deceptive practices pending the completion of the Commission's administrative process. Deceptive practices, however, are transitory. Often, by the time the Commission had completed its investigation and initiated its administrative proceeding, the respondent had abandoned the practices that the Commission intended to challenge. It made little sense to seek a preliminary injunction to halt practices that the respondent was no longer employing.<sup>20</sup>

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<sup>19</sup> In the 1960's, the Commission began using its rulemaking authority under Section 6(g) of the FTC Act, 15 U.S.C. § 46(g), to define specific acts and practices that it considered to violate Section 5. In 1975, the Magnuson Moss Warranty – Federal Trade Commission Improvements Act, P.L. 93-637, § 202(a), 88 Stat. 2201, added Section 18 to the FTC Act (codified, as amended, at 15 U.S.C. § 57a), confirming the Commission's authority to issue such trade regulation rules. *See United States v. JS&A Group, Inc.*, 716 F.2d 451 (7th Cir. 1983) (reviewing the history of Commission trade regulation rulemaking under Section 6(g) and the enactment of Section 18).

<sup>20</sup> *See FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087-88 (9th Cir. 1985) (holding that the Commission cannot obtain an injunction under Section 13(b) against conduct that the defendant has ceased, absent evidence that the conduct is likely to recur).

In 1977, the Commission found an opportunity to use Section 13(b) in a more effective and creative manner when it filed suit against Australian Land Title, Ltd. (ALT) and its parent companies. The Commission alleged that ALT had sold interests in land in Australia to American consumers under long term sales contracts through deceptive sales practices, including misrepresentations and omission of critical information.<sup>21</sup> By the time the Commission completed its investigation and was prepared to file an administrative complaint, the sales had ended. The Commission was concerned, however, that the purchasers would continue to pay on their long term purchase contracts while the administrative proceedings were pending. In addition, the Commission believed that a Section 19 consumer redress case might be appropriate after the administrative proceeding concluded, but was concerned that by that time ALT might have dissipated the funds it had collected, making redress unfeasible.

In the Section 13(b) case, the Commission asked the district court to issue a preliminary injunction prohibiting ALT from continuing to collect payments under the contracts, or, alternatively, requiring ALT to deposit the payments in an escrow account, to ensure that the funds would be available for relief under Section 19. Before the court ruled, the parties reached a settlement under which the payments were placed in escrow, and ALT and its parent companies agreed to a Commission consent order that required them to forgo future payments under the contracts and to pay redress to consumers.<sup>22</sup>

In 1979, the Commission used the same approach in a similar case. The Commission issued an administrative complaint against Southwest Sunsites, Inc. and two related companies, alleging that they had employed a variety of misrepresentations and

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<sup>21</sup> *FTC v. Australian Land Title, Ltd.*, No. 77-0199 (D. Hawaii).

<sup>22</sup> *Australian Land Title, Ltd.*, 92 F.T.C. 362 (1978).

deceptive omissions in the sale of land in Texas under long-term sales contracts. As in *Australian Land Title*, the Commission also filed a Section 13(b) case in which it asked the district court to issue a preliminary injunction requiring, among other things, that the defendants escrow all funds paid by the purchasers to ensure that the funds would be available for relief under Section 19. In this case, however, there was no settlement and the district court held that Section 13(b) did not authorize it to “freeze” the respondents’ assets as the Commission requested.

In January 1982, the Fifth Circuit reversed, holding that “a grant of jurisdiction such as that contained in Section 13(b) carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it.” More specifically, the court held that a district court had authority under Section 13(b) to “order temporary, ancillary relief preventing the dissipation of assets or funds that may constitute part of the relief eventually ordered in the case.” The court reasoned that, although consumer redress would require a separate Section 19 case after the conclusion of the administrative proceeding, “[s]imply because the complete resolution of a matter will require a two-step process does not relieve a court of the task of determining how to preserve a state of affairs such that a meaningful decision can be rendered after full consideration of the merits.”<sup>23</sup>

Although *Southwest Sunsites* adopted a favorable interpretation of Section 13(b), the process envisioned in that case was inefficient and protracted. To obtain complete final relief, the Commission would need to litigate and win three separate actions: (1) a Section 13(b) preliminary injunction proceeding to obtain a preliminary asset freeze; (2)

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<sup>23</sup> *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 717-18 (5th Cir.), *cert. denied*, 479 U.S. 828 (1982).

an administrative proceeding leading to a final cease and desist order; and (3) a district court action to obtain consumer redress under Section 19. Even before the *Southwest Sunsites* decision was issued, the Commission had begun to explore the possibility of using the permanent injunction proviso of Section 13(b) as a shortcut.

## **B. Permanent Injunctions and Consumer Redress**

Although most of the text of Section 13(b) concerns its use as an ancillary remedy in aid of administrative cease and desist proceedings, Section 13(b) also provides that “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” The legislative history suggests that this was intended to “allow the Commission to seek a permanent injunction when a court is reluctant to grant a temporary injunction because it cannot be assured of a[n] early hearing on the merits [in the administrative proceeding].” In addition, it was intended to give the Commission “the ability, in the routine fraud case, to merely seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease and desist order. Commission resources will be better utilized, and cases can be disposed of more efficiently.”<sup>24</sup>

In 1979, the Commission filed its first Section 13(b) permanent injunction suit, *FTC v. Virginia Homes Manufacturing Corp.*,<sup>25</sup> alleging that two mobile home manufacturers had issued written warranties to mobile homes purchasers that, on their face, misrepresented the purchasers’ warranty rights under the Magnuson Moss Warranty

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<sup>24</sup> S. Rep. No. 93-151, at 30-31 (1973).

<sup>25</sup> 509 F. Supp 51 (D. Md.), *aff’d mem.*, 661 F.2d 920 (4th Cir. 1981).

Act.<sup>26</sup> The Warranty Act provides that a violation of any of its provisions is also a violation of Section 5 of the FTC Act,<sup>27</sup> so the Commission could have employed its traditional administrative process, but it was concerned that the purchasers' warranty rights would expire, or they would forgo warranty claims based on the misrepresentations, before the Commission could issue a final cease and desist order. And, in light of *Heater*, it was not clear whether the Commission would have authority to require the respondents to notify the past purchasers of their true warranty rights.

Instead of issuing an administrative complaint, the Commission filed in court under the permanent injunction proviso of Section 13(b), seeking an order requiring the defendants to notify their past purchasers of their correct warranty rights. The court granted the Commission's motion for summary judgment. It held that this was a "proper case" for permanent injunctive relief under Section 13(b), noting that the Warranty Act was a provision of law enforced by the Commission and that the Commission's decision to file the case "was a legitimate exercise of prosecutorial discretion." Furthermore, the court found that it had authority to order notification to past customers even though such relief was not expressly authorized by Section 13(b), because "the powers of a court of equity to issue appropriate orders are, if anything, more expansive than the powers of the independent agencies. ... For these reasons, this Court finds that compulsory notice is implicitly authorized by § 13(b) so long as such notice would be essential to the effective discharge of the Court's responsibilities."<sup>28</sup>

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<sup>26</sup> Magnuson-Moss Warranty – Federal Trade Commission Improvements Act, P.L. 93-637, Title I, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301 *et seq.*).

<sup>27</sup> 15 U.S.C. § 2310(b).

<sup>28</sup> 509 F. Supp. at 55.

The Commission's next step was a bit bolder. In 1979, shortly after filing *Virginia Homes*, the Commission filed *FTC v. Kazdin*, precisely the sort of "routine fraud" case described in the legislative history of Section 13(b). The Commission alleged that an individual and two companies he controlled had marketed a "hair implant" process to more than 2,000 consumers through a variety of misrepresentations and deceptive omissions regarding the safety and efficacy of the process. The Commission sought not only a permanent injunction prohibiting the defendants from employing such practices in the future, but also "ancillary relief," including restitution to the injured consumers, a freeze of the defendants' assets pending payment of restitution, imposition of a constructive trust on certain real estate, and the appointment of a receiver to sell the property. After the court denied their motion to dismiss the Complaint, the defendants defaulted and the court entered judgment awarding the Commission the requested relief.<sup>29</sup>

In 1980, the Commission continued this approach in *FTC v. H.N. Singer, Inc.* The Commission alleged that the defendants had violated the Commission's Franchise Rule<sup>30</sup> and employed deceptive practices in the sale of business opportunities. As in *Kazdin*, the Commission sought both a permanent injunction and ancillary relief, including restitution for injured consumers, and the Commission requested a preliminary order freezing the defendants' assets to ensure they would be available for redress. The district court issued the requested preliminary injunction and the defendants appealed.

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<sup>29</sup> No. C 79-1857 (N.D. Ohio June 26, 1980).

<sup>30</sup> "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 C.F.R. Part 436.

The Ninth Circuit affirmed, holding that the district court had authority to order the preliminary relief under both Section 13(b) and Section 19.<sup>31</sup> With respect to Section 13(b), the court upheld the Commission’s authority to seek permanent injunctions in “routine fraud” cases, such as the one at bar, and the district court’s authority in such cases “to grant whatever preliminary injunctions are justified by the usual equitable standards ....” Most significantly, the court held:

Congress, when it gave the district court authority to grant a permanent injunction against violations of any provisions of law enforced by the Commission, also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power expressly or by necessary and inescapable inference. In particular, Congress thereby gave the district court power to order rescission of contracts. Hence §13(b) provides a basis for an order freezing assets.<sup>32</sup>

The *Singer* opinion became the foundation of the Commission’s Section 13(b) program in the consumer protection arena. Many other courts have followed *Singer*, holding that Section 13(b) gives the district courts broad remedial discretion, even though neither Section 13(b) itself nor its legislative history mentions any remedy other than injunctions; no court has disagreed.

The legal analysis that the Commission urged and the courts adopted is straightforward and well-established. It rests on the Supreme Court’s 1946 decision in *Porter v. Warner Holding Co.* There the Court held that in an enforcement proceeding under the Emergency Price Control Act of 1942,<sup>33</sup> the district court had authority to order restitution of rent collected in violation of the Act even though the Act expressly

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<sup>31</sup> *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982).

<sup>32</sup> *Id.* at 1111-13.

<sup>33</sup> 56 Stat. 23, 33.

authorized only “a permanent or temporary injunction, restraining order, or other order.”

The Court explained that when Congress grants the district courts equitable jurisdiction to enjoin unlawful acts and practices,

[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. ...

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. “The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.”<sup>34</sup>

The Supreme Court and the lower federal courts have applied this reasoning in many subsequent cases, upholding the district courts’ authority to employ a broad range of equitable remedies in enforcement proceedings brought by an array of administrative agencies under statutes that, like Section 13(b), expressly authorize only injunctive relief.<sup>35</sup> The language of many of these statutory injunctive provisions is quite similar to the language of Section 13(b).<sup>36</sup>

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<sup>34</sup> 328 U.S. 395, 398 (1946).

<sup>35</sup> See, e.g., *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960) (reimbursement for lost wages); *ICC v. B&T Transp. Co.*, 613 F.2d 1182, 1186 (1st Cir. 1980) (restitution); *CFTC v. Hunt*, 591 F.2d 1211, 1222 (7th Cir.), cert. denied, 442 U.S. 921 (1979) (disgorgement); *University of S. Cal. v. Cost of Living Council*, 472 F.2d 1065, 1070 (Em. Ct. App. 1972), cert. denied, 410 U.S. 928 (1973) (restitution); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1103-04 (2d Cir. 1972) (restitution and appointment of a receiver); *CAB v. Scottish-American Ass’n*, 411 F. Supp. 883, 888 (E.D.N.Y. 1976) (refunds).

<sup>36</sup> See, e.g., 15 U.S.C. § 78u(d)(1), giving the SEC authority to seek permanent or temporary injunctive relief against any person who is engaged in or is about to engage in acts or practices in violation of the Exchange Act.

Critics, and defendants in Section 13(b) cases, have argued that Section 13(b) should be distinguished from the statutory provisions at issue in the *Porter* line of cases.<sup>37</sup> They point out that Congress squarely addressed the issue of consumer redress in Section 19, authorizing the district courts to award redress in specified circumstances.<sup>38</sup> They argue that, under the reasoning of *Porter*, this supports a “necessary and inescapable inference” that Congress intended to limit the equitable authority of the district courts under the permanent injunction proviso of Section 13(b) to injunctive relief.

The courts, however, have uniformly rejected these arguments, citing Section 19(e), a “savings clause” that provides: “Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.”<sup>39</sup> The courts have reasoned that this provision forestalls any “inescapable” inference that Congress intended to limit the equitable authority of the courts under Section 13(b).<sup>40</sup> Therefore, they conclude, *Porter* applies, and the full range of equitable remedies is available under Section 13(b).

The Commission’s success under Section 13(b), however, involved more than just articulating a well-supported legal theory. At the outset, the Commission presented those

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<sup>37</sup> See Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 Am. U. L. Rev. 1139 (Summer, 1992).

<sup>38</sup> Under Section 19, the Commission may obtain redress for consumers only if (1) the defendant’s actions either violated a Commission trade regulation rule, or were the subject of a final cease and desist order and involved conduct that “a reasonable man would have known under the circumstances was dishonest or fraudulent,” and (2) the Commission commences the redress action within certain time periods specified in Section 19(d).

<sup>39</sup> 15 U.S.C. § 57b(e).

<sup>40</sup> See, e.g., *Singer*, 668 F.2d at 1113. Note, however, that under *Porter* the issue is whether Congress intended to restrict the remedial authority of the *courts*, while Section 19(e) addresses the authority of the *Commission*.

arguments in cases involving compelling facts. The Commission's argument was appealing because it gave the courts discretion to award the relief called for by the facts, "securing complete justice," in the words of *Porter*. It is, therefore, not really surprising that, in *Singer*, the same court that in *Heater* had concluded it would be "inconsistent and at variance with the over-all purpose and design" of the FTC Act for the *Commission* to order restitution found no similar limitation on the implied power of the *district courts* to order the same relief under the permanent injunction proviso of Section 13(b).

### **III. Development of the Section 13(b) Program**

The early cases established that Section 13(b) had the potential to become an important element of the Commission's consumer protection program. Within the Commission, however, Section 13(b) consumer protection cases were still largely viewed as curiosities, while the consumer protection mission focused on rulemaking.

That changed in the early 1980's, after a new administration took control of the Commission. The new FTC leaders were philosophically opposed to the sweeping rulemaking efforts that had dominated the Commission's consumer protection program in the 1970's. Instead, they wanted the Commission to pursue its consumer protection mission primarily through case-by-case adjudication, and they believed the Commission could serve the public by taking aggressive action against consumer frauds.

Experience had shown, however, that traditional administrative adjudication leading to a cease and desist order was not effective in combating fraud, because the respondent might continue to employ fraudulent practices while the administrative proceeding was pending, and could retain the gains earned through those practices even after the Commission issued its cease and desist order. The Commission might have

attempted to overcome these weaknesses by seeking preliminary relief under Section 13(b), as it had in *Southwest Sunsites*, coupled with a Section 19 consumer redress action after it issued a final cease and desist order, but such a three-part process would have been lengthy and cumbersome. The permanent injunction proviso of Section 13(b), as interpreted in *Singer*, offered a much more effective and efficient weapon against fraud, if the Commission could persuade other courts to follow *Singer*.

The Commission, therefore, embarked on an ambitious program to identify and pursue fraudulent schemes in federal district court, under the permanent injunction proviso of Section 13(b). *Singer* provided the legal framework to support this effort, but for the program to be successful, the Commission needed to realign the BCP staff's efforts from rulemaking and administrative adjudication to an entirely different enforcement approach under Section 13(b).

As part of this effort, BCP created a new litigation office to encourage, evaluate and coordinate cases under Section 13(b). BCP attorneys, whose responsibilities had previously been limited to administrative litigation and rulemaking, had to develop new skills to litigate Section 13(b) cases successfully in federal court. To accomplish this, BCP's litigation office devised and conducted training programs in-house, as well as through outside organizations such as the National Institute for Trial Advocacy (NITA), helping BCP attorneys hone their litigation skills. BCP also developed and implemented consistent litigation strategies and tactics for Section 13(b) cases.

To pursue consumer frauds effectively, BCP also had to improve its ability to identify and investigate fraudulent schemes quickly. Recognizing this, BCP staff established working relationships with other state and federal law enforcement agencies,

as well as non-governmental organizations, to help target widespread frauds as early as possible. Then BCP staff employed innovative investigatory techniques, such as posing as potential customers and tape-recording misleading sales presentations, to obtain the evidence needed to support persuasive Section 13(b) cases. In some cases, BCP staff cooperated with other law enforcement agencies on joint investigations.

In this way, the Commission successfully developed and presented compelling cases, winning wide-spread acceptance of the principles first articulated in *Singer*. Over the next several years, it became settled that the district courts have authority under Section 13(b) to grant whatever preliminary or permanent equitable relief they deem necessary to secure complete justice under the particular circumstances presented.<sup>41</sup> Preliminary relief may include temporary restraining orders (with or without notice) and preliminary injunctions that freeze the defendants' assets, appoint receivers to take control of their businesses, and require them to make an accounting. Final relief may include not only permanent injunctions, but rescission of contracts, restitution, disgorgement, or the imposition of constructive trusts and appointment trustees, as needed to redress injury to consumers.<sup>42</sup> As a result, Section 13(b) has become an important component of the Commission's consumer protection program, allowing the

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<sup>41</sup> See, e.g., *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431 (11th Cir. 1984); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988); *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir.), cert. denied, 493 U.S. 954 (1989); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991).

<sup>42</sup> See, e.g., *FTC v. Kitco of Nev., Inc.*, 612 F. Supp. 1282 (D. Minn. 1985) (restitution); *FTC v. Wilcox*, 926 F. Supp. 1091 (S.D. Fla. 1995) (asset freeze, appointment of receiver, consumer redress); *FTC v. Atlantex Assocs.*, 882 F.2d 966 (11th Cir. 1989) (asset freeze, consumer redress); *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344 (9th Cir. 1989) (asset freeze, receiver); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466 (11th Cir. 1996) (restitution, disgorgement); *FTC v. Febre*, 128 F.3d 530 (7th Cir. 1997) ("damages," disgorgement); *In re National Credit Mgmt. Group, L.L.C.*, 21 F. Supp. 2d 424 (D. N.J. 1998) (asset freeze, receiver); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263 (S.D. Fla. 1999) (consumer redress, performance bond); *FTC v. Capital City Mortgage Corp.*, 2004 U.S. Dist. LEXIS 9184 (D.D.C. May 6, 2004) (constructive trust); *FTC v. Direct Marketing Concepts, Inc.*, 2004 U.S. Dist. LEXIS 11628 (D. Mass. June 23, 2004) (accounting).

Commission to address fraudulent practices much more effectively than was ever possible through the administrative process.

#### **IV. Final Observations**

Looking back may be nostalgic for those of us who were involved, but others may ask whether the development of the Commission's Section 13(b) authority offers any lessons for the future. On that topic, I offer a few closing thoughts:

- *Tend to the core mission.* Every successful organization focuses on achieving its core mission before extending outward. The development of Section 13(b) as an effective remedy allowed the Commission to improve significantly its ability to accomplish its core consumer protection mission. This benefited not only consumers, but the Commission itself, by advancing the public's perception of the Commission as an important and effective consumer protection agency, a perception that had been largely lost by the end of the 1970's.
- *Be sure you are making full and effective use of existing authority.* Section 13(b) was added to the FTC Act in 1973, but the Commission did not begin to explore its use in the consumer protection arena for several years, and did not employ it effectively until the 1980's. In the meantime, the Commission was asking Congress to give it additional authority, arguing that it lacked the tools it needed to protect consumers effectively.
- *Step cautiously when proceeding boldly.* In exploring its Section 13(b) authority, the Commission moved warily, selecting cases with compelling facts that established clear violations of well-established legal standards, and advancing well-supported legal arguments to support limited and clearly justified equitable

relief. Through this carefully considered, step-by-step approach, the Commission established its basic Section 13(b) analyses and arguments, and obtained favorable decisions endorsing them, before pursuing a more ambitious agenda.

- *Don't overlook the value of basic research.* Neither the text of Section 13(b) nor its legislative history disclosed a basis to argue for broad equitable relief. Instead of stopping there, however, research into the case law interpreting statutes conferring similar injunctive authority on other agencies led to the *Porter* line of cases, providing critical support for a broad interpretation of Section 13(b).
- *Being out of the spotlight can be an advantage.* In the early years, the effort to employ Section 13(b) in the consumer protection arena received relatively little attention from those who were not directly involved, and even the Commission's litigation successes were not viewed as particularly significant developments for the consumer protection program. For those of us who saw the development of Section 13(b) as important, however, that was liberating, rather than frustrating, because it allowed us to pursue our efforts with little interference.
- *Don't let naysayers discourage pursuit of a promising theory or approach.* When the early cases were proposed, many people within the Commission predicted they would be unsuccessful, because Section 13(b) authorized only injunctive relief. If the doubters had stopped the Commission from filing the cases, the Commission might never have established the full range of remedies available to it under Section 13(b). Without those remedies, the Commission could not have become the aggressive and successful foe of consumer fraud that it is today.