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Proportionality and Due Process: Sensible Ways to Consider the FTC's Remedial Authority

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Executive Summary

The Federal Trade Commission (FTC) enforces a broad range of laws designed to protect consumers and competition. To enforce these laws, the FTC has an array of tools at its disposal, from holding hearings and issuing white papers to seeking injunctive relief and monetary penalties. Recently, the scope of the FTC's remedial authority has come under significant scrutiny from both the courts and Congress. In early 2021, rejecting years of agency practice, the Supreme Court unanimously held that the FTC lacked the statutory authority to seek monetary penalties for certain violations of consumer protection laws, without first going through deliberative internal administrative processes.

In response, the FTC has sought to expand its authority to impose monetary penalties on alleged wrongdoers. This has touched off a wave of proposals that would grant the FTC the authority to seek disgorgement or restitution directly in federal court, while others would allow the FTC to seek civil fines for alleged violations of both consumer protection and antitrust laws.

As Congress considers these ideas, it should create a framework that balances the need to protect consumers with the principles of fair notice, due process, and proportionality. On one hand, the FTC should have the authority, and efficient available processes, to obtain remedial relief to compensate consumers who are harmed by genuine misconduct. Disgorgement and restitution are examples of equitable relief that can make consumers whole for actual injuries. On the other hand, Congress must ensure that any additional penalties, such as civil fines, are limited to clear instances of misconduct where defendants have had fair notice that their conduct could incur stiffer penalties—in other words, where a defendant violated an established rule, an existing court order, or an order from the FTC.

The FTC should not have the authority to seek civil fines for conduct that arguably results in consumers retaining much of the value from the product or services sold or from instances where there is a close call between anticompetitive harms and procompetitive justification for conduct in question. These instances clearly fall into a gray area. The use of punitive monetary penalties in these instances is likely to discourage innovation and do more harm than good to competition in the market and ultimately harm consumers.

Moreover, any additional penalties, beyond those necessary to compensate consumers, should bear some relation actual consumer harm, sufficient to deter misconduct but still proportional to the damage to consumers. By keeping in mind these principles, Congress should carefully evaluate and propose changes to the FTC's monetary toolkit to protect both consumers and preserve a healthy competitive landscape.

Key Takeaways

Congress intended the FTC to have broad authority to determine on a case by case basis when a company is in violation of Section 5 of the FTC Act. Given the vagueness of the legal standard of what constitutes an unfair or deceptive practice or an unfair method of competition the Congress severely limited the FTC's ability to seek disgorgement and restitution. It also does not allow the FTC to punish first time violators of Section 5 with civil fines.

- Congress has only granted the FTC its ability to seek restitution and disgorgement following an administrative proceeding that determines a violation was "dishonest and fraudulent" and a federal court agrees that a reasonable person should have known they were in violation of the law.

- Beyond this limited circumstance, all other authority for monetary relief is granted by Congress in other statutes the FTC enforces or as part of the FTC's civil penalty authority for violations of FTC rules or orders.

- Regardless of the statutory basis, the FTC has a questionable history of trying to seek restitution and disgorgement based on total revenue of the company alleged to be in violation of Section 5. The FTC has not calibrated its claimed monetary remedies to actual harm to consumers.

- However, when litigated, the courts have routinely rejected the FTC's outsized claims and award far less, including at times no monetary award.

- The FTC's over reliance on total revenue is especially unfair to small businesses that may not have the resources to push back against the full weight of the FTC and therefore opt to settle out of court.

- Congress should:
  - Avoid granting the FTC civil penalty authority for first time violations of the FTC Section 5 Act. This includes prohibiting the practice of the FTC sending blanket warning letters to industry that are not limited to specific, concrete, and established violations of Section 5. Warning letters that amount to little more than pointing to Section 5 for a particular subject of claims circumvent the FTC's Magnusson-Moss rulemaking authority in an attempt to unlock civil penalty authority that is reserved for clear, well-defined violations of the law.
  - Ensure that any expansion of restitution and disgorgement authority for first time violations of Section 5 should require the FTC to calculate monetary relief based on consumer harm and prohibit the FTC from reflexively targeting total revenue.

Introduction

In *AMG Capital Management LLC v. FTC*,[1] issued in April 2021, the Supreme Court unanimously held that the FTC lacks statutory authority to seek equitable monetary relief in federal court under Section 13(b) of the FTC Act. Section 13(b)'s text expressly allowed the Commission to seek injunctive relief but said nothing about equitable monetary relief. Instead, the Act's other sections outlined ways in which the FTC could seek monetary relief, but those avenues necessitated time-consuming internal procedures. Nevertheless, for years, lower courts had agreed with the agency that Section 13(b) allowed it to collect monetary penalties, including disgorgement and restitution, on behalf of consumers and this is what the Supreme Court sought to address.

Unsurprisingly, given the central role that 13(b) had taken in the FTC's consumer protection practice, the Commission took a hard line against the Court's decision—and promptly sought a legislative fix. In a written statement, the FTC's then-Acting Chair wrote that the Supreme Court "ruled in favor of scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior."[2] The Acting Chair, largely with the support of the other commissioners, stated that the FTC would seek new statutory authority: "With this ruling, the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most. We urge Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole."[3]

With that backdrop, Congress is currently considering numerous proposals that would increase the FTC's statutory authority to use monetary remedies to redress consumer harm.

Among the proposals, Congress is considering H.R. 2668, the Consumer Protection and Recovery Act, which passed the House and which would expand the FTC's remedial authority. H.R. 4447, the 21st Century FTC Act, which has only been introduced, would give the FTC civil penalty authority for first time offenses. Similarly, there are also several antitrust bills that insert significant civil fining authority for first time violations of subjective determinations.

While the debate in Congress continues over how to best equip the FTC monetary toolkit, the FTC recently decided to take matters into its own hands by aggressively moving forward in an effort to use its existing civil penalty authority through its recent issuance of three sets of letters sent to more than 1,770 businesses.[4] The letters warn against practices that the FTC claims have been found to be deceptive or unfair. For example, in letters to businesses pitching money-making opportunities, the FTC warns targeted businesses that using "false money-making claims," false promises about "job and earnings prospects," or "endorsements to deceive consumers" could result in civil fines.[5]

The blanket use of a general warning letter is intended to suggest that, because these companies have been warned about a widely ranging set of practices that are not very well specified, the FTC now has the

[1] https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf

[2] See https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us

[3] See https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us; https://truthonthemarket.com/2021/04/22/the-future-of-ftc-equitable-monetary-relief-after-amg-capital-management/ .

[4] Over, 1,100 for money-making claims, see https://www.ftc.gov/news-events/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead; over 700 for fake reviews, see https://www.ftc.gov/news-events/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other ; over 70 for for-profit college claims, see https://www.ftc.gov/news-events/press-releases/2021/10/ftc-targets-false-claims-profit-colleges.

[5] See https://www.ftc.gov/news-events/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead.

ability to unlock its statutorily granted civil penalty authority even though no specific related enforcement action had been previously taken against any of the firms targeted. Such a questionable practice by the FTC is presumably intended to be a back doorway to invoke civil penalty authority for first time violations. Such an abuse is not the focus of this paper, but it appears to be another aggressive tactic to impose penalties, and therefore deserves a mention.

As Congress considers these proposals, it should bear in mind the larger question of how to create a sensible remedial framework that protects all interests. Such a framework would strike an appropriate balance that protects consumers and deters misconduct but still maintains due process, provides fair notice, and imposes remedies that are proportionate to the underlying harm, and thus limit the negative spill-over effects on competition, innovation. and consumers. This paper discusses ways in which Congress might strike an appropriate balance and implement a sensible remedial framework.

The Existing FTC Legal Authorities

Statutory Backdrop

In protecting consumers, the FTC enforces a long list of specific trade rules and statutes as well as a general prohibition against "unfair or deceptive acts or practices."[6] These authorities range from requiring that clothing have a label with a method of care,[7] to requirements about accuracy and notification of consumer credit records,[8] to requiring that children's data be collected and used only with parental assent and notification,[9] to many other requirements. In addition to a general authority to seek injunctive relief—where the Commission can order companies to avoid certain practices,[10] the Commission has authority to seek monetary remedies under a variety of conditions.[11] The Commission can seek civil penalties up to $43,792 per violation (under conditions discussed below) for injunctive orders, rules and statutes where Congress specifies that they fall under that authority.[12] Aside from the capped amount per violation (for which there is no explicit definition given), there is no explicit guidance tying civil penalties to any particular amount, e.g., injury or ill-gotten gains.[13]

The Commission can also seek "such relief as the court finds necessary to redress injury" for rule and order violations, which is further defined (in terms of monetary remedy) in the statute as including "the refund of money" or "the payment of damages."[14] The statute specifically disallows "exemplary or punitive damages" for this authority.[15] The Commission does not have the authority to seek monetary remedies for general violations of Section 5 of the FTC Act, often referenced as its unfair and deceptive practices authorities (consumer protection) or its unfair methods of competition authorities (antitrust). However, prior to *AMG*,[16] the Commission regularly invoked Section 13(b) of the FTC Act as giving it authority to seek equitable relief for "any provision of law enforced by the Federal Trade Commission."[17]

The term "equitable relief" does not appear in the FTC Act, and Congress has not generally defined the term.

[6] 15 U.S.C. § 45(a)(1)

[7] Care Labeling Rule

[8] FCRA

[9] COPPA

[10] 15 U.S.C. § 45(a)(2)

[11] For a more thorough review of the specifics and history, see Beales, Howard, Benjamin Mundel, and Timothy J. Muris. "Section 13 (b) of the FTC Act at the Supreme Court: The Middle Ground." The Antitrust Source, December (2020): 20-34 and Beales III, J. Howard, and Timothy J. Muris. "Striking the Proper Balance: Redress Under Section 13 (b) of the FTC Act." Antitrust LJ 79 (2013): 1. Also Chopra, Rohit and Levine, Samuel A.A., The Case for Resurrecting the FTC Act's Penalty Offense Authority (October 29, 2020). University of Pennsylvania Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3721256 or http://dx.doi.org/10.2139/ssrn.3721256.

[12] 15 U.S.C. § 45(l) and (m). The statute specifies a cap of $10,000 per violation, which has been adjusted for inflation to the current cap. Certain other statues have different specified caps. For example, FCRA penalties are currently capped at $4,111 per violation. See 86 FR 2539 Jan. 13 2021, pp 2539-2541.

[13] 15 U.S.C. § 45(m). The statute does give some qualitative guidance: "In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require."

[14] 15 U.S.C. § 57b(b)

[15] ibid

[16] AMG Capital Management, LLC v. Federal Trade Commission, 593 U.S. (2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf

[17] 15 U.S.C. § 53(b)(1)

"Equitable relief" typically refers to disgorgement of ill-gotten profits or restitution for redress of harms. From the Supreme Court decisions in *AMG* and *Liu* respectively: "restitution typically offers retrospective relief to redress past harm" and restitution is "the relief that 'measures the remedy by the defendant's gain and seeks to force disgorgement of that gain.'"[18]

This paper is focused narrowly on considering the role equitable relief should play as it relates to Section 5 enforcement, not where Congress has clearly granted penalty authority in response to violations of clear rules or additional statutory authorities beyond the FTC Act. Further, this paper is focused on violations of Section 5 under the unfair and deceptive practices standard, even as the same argument would apply under the antitrust violations under the FTC's unfair methods of competition standard.

Monetary Toolkit: Equitable Relief or Penalty?

For this paper, the important dimensions of existing authorities are:

Whether monetary remedies are characterized as *equitable* (disgorgement and redress, which are roughly limited by direct gains or losses between parties) or *penalty* (with more flexible and varied limits);

Whether practices have been previously specified and *known to be violative* (such as in rules and orders) or whether they are undefined ex ante, *are fact-specific, and determined to be* so by the Commission itself *ex post*.

For violations that are not specifically defined ahead of time by a governmental deliberation—rulemaking or litigation—and are not facially dishonest or fraudulent, the Commission cannot currently seek any monetary remedy. Prior to the spring of 2021, the Commission had commonly sought equitable remedies in de novo Section 5 cases—its standard authority against deceptive and unfair practices. However, as noted previously, the Supreme Court blocked that practice through its ruling in *AMG v. FTC*.[19] This means that, under the FTC Act, where the Commission has the most discretion to define violations, and companies have the most uncertainty about which practices will be found violative, the Commission has no discretion to impose a monetary remedy.

It should be noted that this does not mean that alleged wrongdoers are not subject to any penalties. Responding to Commission interrogatories, adapting to fencing in and injunctive relief in any order, and dealing with follow-on reputational effects will all impose costs on the company. In addition, the Commission can often introduce a monetary remedy even in de novo cases by partnering with states or identifying technical rule violations.

The Commission may directly seek equitable monetary remedies, in the form of restitution or disgorgement, for rule or order violations where practices are known to be "dishonest or fraudulent." That is, where violative practices have been previously described and validated by government deliberation, and the specific practices in question correspond closely enough to what has been described to be "known," the Commission can impose remedies that are designed to return victims or wrongdoers (or both) to their pre-violation state. As is the case when no monetary remedies are available, a company that is assessed an equitable remedy typically also bears significant additional costs from the investigation and resolution of the case. When the monetary remedy is at least equal to ill-gotten gains—whether styled as disgorgement or restitution—this means that the company is necessarily penalized.

As a general matter, the FTC has not routinely sought this type of equitable monetary relief when it enforces against unfair methods of competition in antitrust cases.[20] Antitrust violations, of course, already offer the prospect of treble damages, and other than naked price-fixing, antitrust cases typically are more complex than consumer protection violations involving fraud or dishonesty, and therefore are less amenable to equitable relief. However, there are a handful of cases where companies agreed as part of voluntary settlements to be disgorged.

Finally, civil penalties are available to the Commission only through the additional requirement of a separate enforcement authority, the Attorney General of the United States.[21] That is, when the violative practices have been articulated in orders, trade regulation rules,

[18] See AMG v. FTC and Liu v. SEC, 140 S. Ct. 1936 (2020) both quoting 1 D. Dobbs, Law of Remedies §4.1(1) (2d ed. 1993). The SEC decision further limits equitable remedies to "a disgorgement award that does not exceed a wrongdoer's net profits."

[19] AMG v. FTC, 593 U. S. ___ (2021).

[20] See https://truthonthemarket.com/2021/04/22/the-future-of-ftc-equitable-monetary-relief-after-amg-capital-management/.

[21] 15 U.S.C. § 45 (m).

or statutes and where violators had (or should have had) knowledge that the practice would be in violation, the Commission may ask the Attorney General to seek civil penalties for those violations. Together, these requirements mean that civil penalties are only authorized when the practices in question are well-defined, well known and subject to an outside review.[22] Civil penalties available to the FTC are defined primarily by a per violation cap. For example, violations of the Children's Online Privacy and Protection Act are subject to an inflation indexed cap of about $43,000 per violation. Statutory guidance on civil penalties does not limit how the Commission can calculate penalties, although they suggest that penalties should not necessarily be ruinous to the company.[23] The guidance does not point to either ill-gotten gains or consumer harm as a basis for civil penalties. This again shows that as the limits on the size of the monetary remedy that the Commission can seek are relaxed, the discretion on when to apply those remedies is reduced.

This sets out three categories of practices with respect to monetary remedy authority: a) those well-defined and vetted by process that allow punishment (rows 4 and 5 in Table 1); b) those that have been previously defined and are generally understood to be harmful that allow seeking more limited equitable remedies (row 3 of Table 1); and c) violations that are not eligible for either because they are unique and complex enough to be determined violative only through the Commission's investigation of specific (rows 1 and 2 in Table 1) deceptive and unfair practices.

	Monetary Remedy Authority	
FTC Act Violations	**Restitution/Disgorgement (Equitable Relief) or Redress**	**Civil Penalty**
Unfair and deceptive practices (Consumer Protection)	Not Available	Not Available
Unfair methods of competition (Antitrust)[24]	Not Available	Not Available
Unfair and deceptive practices known to be dishonest or fraudulent (Consumer Protection)	15 U.S.C. § 57b(a)(2), 15 U.S.C. § 57b(b)	Not Available
Order Violations (Consumer Protection or Antitrust)	15 U.S.C. § 45(l)	15 U.S.C. § 45(l)
Rules, knowing violation (e.g. Children's Online Privacy Protection Act)	15 U.S.C. § 57b(a)(1), 15 U.S.C. § 57b(b)	15 U.S.C. § 45(m)

Table 1: FTC Act Violations and Monetary Remedies

[22] Several legislative proposals in Congress, including those that would change the monetary relief toolkit available to the agency would also grant the agency independent litigating authority. This would result in the FTC no longer having to work with the Attorney General.

[23] 15 U.S.C. § 45(m)(1)(C). "In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require." See also "Statement of Commissioner Noah Joshua Phillips, FTC v. HyperBeard, Inc., et al Matter No. 1923109" June 4, 2020, citing U.S. v. Dish Network, L.L.C., No. 17-3111, slip op. at 16 (7th Cir. Mar. 26, 2020). See also US v. Reader's Digest Ass'n Inc, 494 F. Supp. 770 (D. Del 1980).

[24] There is no clear authority in statute for any monetary remedy in relationship to de novo antitrust enforcement even as the FTC has upon rare occasion sought disgorgement as part of a settlement. Antitrust violations are further subject to potential treble damages through private litigation.

These three categories of remedy illustrate the existing relationship between increasing discretion and uncertainty about what is violative and decreasing discretion on the severity of monetary remedy in current law. As discussed below, that relationship aligns with the relationship between increasing uncertainty about what is violative and increasing risk of spill-over costs on legitimate market activity and consumers. These costs can accrue to otherwise unaffected consumers and markets both when punitive penalties affect an otherwise legitimate firm's ability to operate and when companies face uncertainty as to what practices are at risk of being found violative, and thus subject to some monetary remedy. When penalties are punitive *and* what is violative is not clearly defined those costs are likely amplified.

Monetary remedies should be matched to the intended purpose to ensure the most benefit to consumers

The current framework of monetary remedies balances restorative and deterrent goals against the need for flexible, uncertain standards for Section 5 violation. In this section, the paper lays out the relationship between goals for a monetary remedy and the welfare effects of the alleged wrongdoing. Using that framework, the paper examines how increasingly severe, punitive monetary remedies affect legitimate businesses and consumers in the context of the necessarily flexible standards for determining whether a practice is unfair or deceptive.

The intended purpose of a monetary remedy will influence which remedy should be applied and how that remedy should be calculated. Disgorgement is by definition *restorative*, meaning that if it is appropriately calculated it should restore the wrongdoer to some non-violative, but-for outcome. Similarly, properly calculated restitution should restore victims to an alternative outcome where they were not subject to the violative practices. As noted below, in simple cases of clear fraud, the amount gained by wrongdoers is the same as the amount lost by victims. However, in more complex cases involving real products and services, and especially in privacy cases where consumers may not have paid directly for those products, gains and injury can be very different.[25] Civil penalties, at least in the context of the FTC's authorities, are often debated with respect to their *deterrent* properties and are typically also *punitive.* The benchmark for analysis in this section is for violations defined in rules, where violative practices are generally well-defined and known, so that there is relatively little uncertainty and cost associated with complying with the law.

Policymakers may intend monetary remedies to *deter* future violative practices by reducing the benefit that a firm could expect to get from those practices. Deterrence against particular practices is created by visibly confiscating a significant amount of money from a company because it had used those practices. For example, companies that observe the large penalties imposed on YouTube or Musical.ly for Children's Online Privacy and Protection Act violations would be likely to take greater care to avoid similar practices and risk a similarly significant fine.[26]

Alternatively, or in addition, policymakers may focus monetary remedies on achieving certain outcomes for the current wrongdoer or victims. As is specifically the case with equitable remedies, they may intend to *restore* a reasonable approximation of some non-violative outcome by compensating consumers for injury or confiscating ill-gotten gains from firms. More severe monetary remedies may *punish* wrongdoers—make them worse off—regardless of any other effect.[27] These effects are not exclusive in part because punishment and restoration are both defined relative to the *current* wrongdoer's or victims' *outcomes*—are they better/worse/the same as the benchmark state? Deterrence, by contrast, is defined relative to *future, potential* wrongdoer's *incentives*.

Both restoration and deterrence have potentially beneficial effects on the market and for consumers. As noted, deterrence may help reduce future harmful market distortions by companies. Restoration corrects current distortions and has similar future effects to deterrence. For example, providing restitution to consumers that were promised a product, but

[25] See, for example, Stivers, Andrew. "Monetary Remedies for Zero-Price Privacy Regulatory: An Economic Perspective," Antitrust Chronicle, September 2021–II. Available at https://www.competitionpolicyinternational.com/monetary-remedies-for-zero-price-privacy-regulation-an-economic-perspective/.

[26] See https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations and https://www.ftc.gov/news-events/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc.

[27] The analogue for victims, i.e. making them better off for having been subject to violative practices, is not available to the Commission, and is not generally in use in consumer protection. This disfavor for providing windfalls to victims likely stems from the fact that in some cases victims can more easily increase their changes of being defrauded than decrease them.

provided nothing, allows them to purchase the legitimate products that they would otherwise have purchased. Both they, and the companies they patronize are made whole. To the extent that other consumers observe that restitution, they may have more confidence to participate in the market without fear of loss.

However, punishment by itself, in the absence of a restorative or deterrent purpose, does not provide any analogous market benefits to consumers (although it may for competitors). In the context of purely fraudulent behavior, where the company has no legitimate activity, pure punishment may also have few spill-over costs for consumers. Cost spillovers to consumers from punitive penalties will likely exist when a company with legitimately valuable products has also been found to have violative practices. Leaving a company worse off financially than if it had not engaged in those practices is likely to affect its legitimate businesses. Investments in operations and quality will likely be somewhat curtailed, either directly, or because reduced profits reduce access to new capital.

As an extreme example, suppose that a regulator required liquidation, and disgorgement, of all assets of a consumer electronics company that deceptively marketed a smart phone as Made in the USA, but also sold a variety of other products and services that were truthfully marketed. Imposing a penalty equal to the value of the firm's assets would obviously send a strong deterrent signal to potential violators. However, a remedy so severe that it also effectively removes a legitimate competitor for those other products would both force those consumers to choose a less valued alternative, and potentially decrease competitive pressure. As noted above, the available guidance on civil penalties seem to reflect this concern by raising the issue of ability to pay, and business continuity.

The fact of those costs does not imply that some amount of punishment cannot be a net benefit to consumers. Punishment of current violators typically needs to be built-in to penalties that are intended to deter future violations because not all violations are detected, prosecuted and successfully penalized. Deterrence of future, potential violations occurs to the extent that market actors expect the profits from those violations to be offset by some penalty. If an enforcement agency could successfully levy a monetary remedy against every wrongdoer, then simply disgorging any gains associated with the violative practices will remove the incentive to use them in the first place (especially when combined with the other costs of investigations and settlement).[28] However, for a given dollar amount of an expected penalty, a lower probability of actually imposing that penalty on any future wrongdoer means a smaller effective penalty. This means that deterrent penalties may need to be increased in inverse proportion to the probability of assessing them to induce appropriate deterrence, and therefore may impose significant punishment on the company that pays them.[29]

Because of the practical difficulties in calculating all the costs and benefits that would go into an ideal remedy, discussions of deterrent remedies usually focus on whether the penalty should be proportionate to either ill-gotten gains or consumer harm. These are somewhat misleadingly referred to as, respectively, "complete" (or absolute) deterrence and "efficient" deterrence.

Efficient deterrence is so called because a penalty that increases as the potential harm to consumers increases may focus a firm's attention on minimizing harm to consumers, generally under the presumption that the harms associated with the violative practices are greater than the gains to the firm. By attempting to internalize to the company's decision making any negative effects that its actions might have on consumers, the threat of a harm-based penalty is more likely to invoke "efficient" outcomes. Tying penalty to injury provides some proportionality to the negative effects of the practices. That is, greater injury from the practices will be more likely to offset any spill-over effects.

Complete deterrence, on the other hand, is focused directly on the gain to the company that is associated with the violative practices. The idea is that an expected penalty that is at least as large as those gains will zero out any expectation of profit, and so cause companies to completely avoid those practices, without regard to how harmful companies' practices are to consumers. Tying the penalty to gains provides some proportionality to how much spill-

[28] The issuance of a complaint itself may already have significant deterrent effect because states or private litigants sometimes also pursue further monetary damages/penalties, regardless of whether the company has already compensated consumers through the FTC.

[29] For example, if a fraudulent seller is tempted to steal $100 from consumers, and believes that only 1 out of 10 sellers like them are forced to return the money, they might simply weigh an expected penalty of $10 (probability of fine equal to 0.1, multiplied by the penalty if caught of $100) against the $100, leaving an expected profit of $90. A penalty of $1000, would be required to offset the seller's belief about their probability of prosecution. That is, any company that was caught, and forced to pay the penalty would be punished with a net loss of $900.

over there would be to a firm's legitimate business and customers. That is, it helps control for spill-over effects by scaling penalties to actual gains.

As a general matter, there is no necessary relationship between the magnitude of an efficiently deterrent, and completely deterrent penalty because there is no necessary relationship between the harm associated with consumer protection violations and the gain. In a very simple case of fraud—a seller essentially steals from a consumer—these would be essentially the same, but for many of the complex privacy and advertising cases addressed by the Commission, the link between injury and gain is less clear.[30] The most important advantage of efficient deterrence increases as that complexity, and thus the ambiguity of what is, and is not, violative increases. That is, when a company is searching for the best way to comply with an uncertain standard, a penalty that is based on the amount of injury that they impose on consumers when they get it wrong would incentivize them to choose practices that are both likely non-violative *and* minimize the harm to consumers.

Punitive monetary remedies in the context of Section 5 create uncertainty about violative practices and spillover costs for legitimate businesses and consumers

The above discussion of the purposes of monetary remedies presumed that the determination that a practice is violative is relatively easy and clear for both the enforcement agency and for the firm. This presumption typically holds for facially fraudulent and dishonest behavior. For more complex matters, well specified orders, rules and statutes can ease that determination by identifying, through various deliberative processes, specific practices as, in balance, more harmful than beneficial. However, an important source of the power and reach of the Commission comes through its flexible Section 5 authority to address practices that it determines, based on the specific facts and practices, to be unfair or deceptive. These cases often involve practices that are complex and closely intermingled or adjacent to legitimate practices. These may not be easily distilled into a rule (otherwise one might expect such a rule to exist), and often require significant fact based discretion on the part of the agency in deciding which practices should be prosecuted.

On a company's side, such complexity also suggests more difficult and uncertain judgements by firms as to what practices would be deemed acceptable by the Commission. This is especially true in the still developing area of privacy and data security, where it is well established that pro-competitive, pro-user experience, and pro-data security/privacy goals are in tension, and there is little guidance on how to balance those issues beyond the accretion of FTC orders from settlements. In more traditional spheres of consumer protection practice, firm choices about which information to highlight to consumers, and how to use our highly flexible language in order to legitimately compete for scarce consumer attention also creates opportunities both for missteps by firms that could harm consumers, and mistaken belief in harm by enforcers.

With certainty, spill-over costs are limited by the company against which the penalty is actually assessed. As the standard for determining violations is more discretionary and uncertain, and thus conduct deemed violative becomes more likely, a prudent firm that has not violated and has no intention of violating will both avoid innovating and impose costs on itself and consumers through more cumbersome legalistic protections to avoid putting themselves at risk of a punitive remedy. This means that the effects of severe penalty are not limited to firms that violate, but also extend to firms that operate in similar circumstances, with practices that could mistakenly become, or be mistaken for, violative ones. The spill-over costs of punishment are then likely to significantly larger—market wide—under standards that are not well-defined and subject to significant review. For example, potential competitors may prefer not to enter—and existing firms may choose not to invest—in a risky market with uncertain standards of compliance and severe penalties for getting it wrong.

Finally, if it were the case that increasingly punitive penalties had clear and consistent increasingly deterrent effects, then the spill-over costs associated with those penalties could be more easily dismissed as likely to be small relative to the market wide benefits of more constrained, consumer-friendly behavior by firms. However, the limited available evidence suggests caution in presuming that deterrence necessarily works as expected. For example, a study examining the deterrent effects of punitive damages in environmental and safety torts found little difference across a variety of outcomes between states that had punitive

[30] See Stivers, Andrew "Monetary Remedies for Zero-Price Privacy Regulation: An Economic Perspective" Antitrust Chronicle 1(2), Fall 2021.

damages and those that did not.[31] Uncertainty around both the benefits and the costs of deterrent penalties does not mean that they should not be used, but it does suggest that careful conditions on when they can be imposed, including using harm as a basis for calculation, can help ensure that consumers will ultimately benefit from them.

The framework that the Congress created, balancing increased specificity of violation with increased severity of monetary remedy, is sound.

The principles that Congress has established should inform the situations in which the FTC can seek civil penalties—and the extent to which Congress should grant the FTC that authority—because imposing severe, punitive penalties on alleged wrongdoers in the context of Section 5 flexibility and uncertainty will hurt consumers.

Where the bounds of violative conduct are understood to be well defined, and are observable at relatively low cost, deterrent, and punitive, civil penalties can be used with relative confidence that the costs of such punishment is likely to be limited to the violative firm and any legitimate customers it may have. Well-specified rules and orders can provide these clear lines for what is violative, meaning that rules and orders are most likely to provide the conditions for beneficial application of appropriately deterrent civil penalties, especially when focused on consumer harm, rather than company gain.

When violations are less well defined or more difficult to separate from legitimate business practices, mistakes by companies in application or by the enforcement agency in accusation are more likely. The increased risk of punitive penalties even on well-intentioned firms means that spill-over costs of punitive penalties are more likely to spread throughout the relevant industry. Depending on the practices at risk, all firms may be forced to incur significant costs on their legitimate business in order to avoid mistakenly crossing a subjective and potentially variable line. These can include both direct costs—i.e. for firms in the market facing more risk or engaging in costly risk mitigation procedures that may not benefit consumers—and indirect costs—i.e. firms that fail to enter or invest in the market. Those costs are likely to be felt by more consumers in those markets. These greater costs of punishment suggest stronger ties of monetary remedy to gains or injury when standards are less certain. Finally, monetary remedies may not be beneficial in all cases. Particularly where an enforcement agency is exploring new practices where harmful effects are suspected, but unclear, blanket authority to impose penalties unrelated to injury could stifle innovations or otherwise impose significant costs before clear consensus emerged about the harm of those practices.

For all these reasons Congress has avoided granting penalty authority for FTC Section 5 violations, leaving such penalty authority for violations of clearly defined rules or repeat offenders for those found to continue to violate FTC orders.

The relationship between monetary remedy and injury

As laid out above an ideal monetary remedy takes injury as its basis. While gain can be a useful proxy for injury in some cases, it is an increasingly poor one in the context of complex matters. In addition, minimizing spill-over effects on consumers and legitimate business practices requires maintaining or strengthening a framework for remedy where less well-defined violative practices means allowed confiscations that are more tightly bound to injury and restoration. Even where the line between what is, and is not, violative is clear, consistent, and transparent proportionality with injury provides the best incentives for firms to avoid practices that harm consumers.

It is important to think through the basic framework for evaluating injury and discuss some practical methods for estimating it. Because deterrent penalties may need to be larger and more punitive than restorative ones, this part includes a discussion of penalties. We provide three examples of litigated cases where restorative remedies were at issue. Unfortunately, settled cases typically provide little detail as to how remedies were calculated. However, the recent case against Resident Home for deceptive Made in the USA claims provides a rare view of how the Commission thinks about remedy and is also discussed below.

[31] Viscusi, W. Kip. "The social costs of punitive damages against corporations in environmental and safety torts." Geo. LJ 87 (1998): 285.

FTC's Reliance on Total Revenue as a Proxy for Harm means that, in practice, equitable remedies (restitution and disgorgement) can be unfair attempts to punish

Gains and injury can be estimated using a variety of generally accepted economic methods depending on the facts of the case and the available data. All those methods aim to answer some version of the question: "How much more well off/worse off is the relevant party because of the practices in question?" That is, *what is the change in welfare caused by the practices?*

For some cases this is a straightforward calculation. A firm offers a product, receives payment, and delivers nothing plausibly of value to its consumers. Ill-gotten gain equals injury equals revenue. But as discussed earlier in the paper, complex cases where violative and legitimate practices coexist present a more difficult problem. Products that are valued, but "over sold" on some attribute may result in some mix of purchasers ranging from "would have bought anyway" to "not at any price." Because products and services are often sold in partnerships, or where firms act as intermediaries between other market players, determining which company received, and should be liable for, what amount may not be easy to define. In addition, neither gains nor injury are necessarily limited to the amount of money exchanged between the consumer and the company. For example, the consumer may have experienced travel costs in pursuit of a non-existent deal, or the company may charge no money for its service to the consumer, but then gain by selling access to that consumer by a third party advertiser.

Finally, because of the flexibility given to the Commission to examine new practices as potentially harmful, cases can be put forward under relatively low standards for evidence of realized harm. The Commission may issue complaints where it has "reason to believe" that practices are harming consumers, and the Commission's policy statements on deception and unfairness make clear that practices must have been "likely" to mislead or harm. Presuming redressable harm through statutory damages or other penalties in this flexible and uncertain context is more likely to impose costs on consumers without improving market safety and information as discussed early in this paper.

When applying its presumed Section 13(b) authority in the face of this uncertainty, rather than attempting to estimate harm the Commission typically has sought *all revenue* potentially associated with deceptive or unfair practices as part of equitable remedy. In a settlement context the onus was on the accused company to disprove that presumption.

Despite this unfair reliance on total revenue, the actual magnitude of harm can be credibly, if sometimes roughly, estimated in many cases using survey and market data to show the effect of a contested practice on prices and purchasing decisions. For many goods there are mature markets with varied products and available price and purchase data that allows grounded and validated methods for estimating such effects, as is standard for anticompetitive practices cases. Similarly, for many goods and attributes, consumers have well developed preferences and willingness to pay calculations that can be revealed through careful survey work.

However, the practice of defaulting to demand all revenue, even when theoretically rebuttable, tends to bias monetary remedies to be greater than actual harm or gain, as companies may have to weigh the costs of litigating that question against simply settling. In addition, this presumption disproportionately penalizes smaller firms that may not have the resources for sophisticated representation or analyses of harm. Thankfully, only when litigated, court awarded monetary remedies are often significantly moderated relative to total revenue from a company.

Examples of FTC Overreliance on Total Revenue

Figgie International

Briefly, Figgie International sold heat detectors—largely through affiliates—but marketed them as state of the art, stand-alone fire detection systems. The FTC alleged deceptive practices, obtained a finalized order through its administrative process, and filed for consumer redress in federal court under Section 19 of the FTC Act.[32] Section 19 allows the Commission to seek redress for consumers through the federal courts.[33]

The district court held Figgie liable for covering up to all the roughly $50 million in consumer expenditures on about 294,000 units—i.e., revenue—and established a minimum redress figure of $7.6 million. The $7.6 million was tied to revenue from the sale of the heat detectors

[32] https://www.ftc.gov/news-events/press-releases/1995/06/figgie-international-inc

[33] 15 U.S.C. § 57b(b)

that Figgie itself received, with the remainder taken in by affiliates and distributors. Any money not claimed by consumers from that minimum payment would pay for corrective advertising and be donated to fire-safety non-profits. Redress would occur through refunds for returned detectors.[34] That is, rather than attempting to find an estimate of consumer injury in the context of a product that *might* have been purchased independently of the deceptive claims, the court relied on consumers to reveal whether they were injured, and to determine the size of the monetary remedy.

This suggests that in some cases, where a good can be returned—and is costly enough to be worth the effort—return and refund can be a practical restorative remedy and can avoid putting the costs of estimating injury and identifying injured consumers on the Commission. The judgement in Figgie also at least partially accounted for the consumer effort required by mandating corrective advertising and notice to consumers as part of the remedy. However, it did not explicitly account for consumer time and shipping costs, as would be ideal.

Commerce Planet

Commerce Planet was an apparently legitimate web services company. However, they introduced a "free" information package that served as a deceptive way to sign consumers up for a negative option on those web services. FTC brought a case alleging deceptive practices. In its arguments to the district court, the FTC requested all revenue, net of refunds as a maximum remedy—$36.4 million—or at least half that amount. That is, all consumers of Commerce Planet's web services had zero value of those service. The court did not accept the FTC's representation of injury: "…although the FTC need not show that all consumers were misled, not all consumers were in fact deceived by [the company's] webpages."[35]

In the absence of either party offering an alternative to the FTC's representation, the court plucked a representation by the copy expert that "most" consumers would have been deceived by the firm's website. In response to the court's questions, the FTC represented in its closing brief that injury was at least 50% of its first representation, based on the idea that "most" was more than half. The court found this to be a reasonable approximation of injury and awarded it.

Direct TV

Finally, in a case against DirecTV the FTC alleged that the company had mislead consumers about the price of its contract, largely by deceptively implying that a first year introductory price was the fixed price. The FTC argued that unjust gains (and by implication injury) were $3.95 billion. According to their expert, this amount was simply the difference between the advertised first year price and the actual second year price, summed across all consumers. That is, unjust gain was equal to difference between the revenue actually received, and the revenue that would have been received if prices did not change in the second year.

This framing of injury as a price premium glosses over the important question of what DirecTV and consumers would have done absent the allegedly deceptive practices. As a theory of injury or gain, it presumes that, but for the allegedly deceptive advertisements, DirecTV would have offered its service for a flat rate over both years of the contract. Furthermore, it presumes that offering such a contract would not increase sales relative to what did happen (as one would expect if the price was significantly less than it was in actuality). The Commission's theory then both assumed that every actual or potential DirectTV consumer believed the price to be the same in both years, and that enough of them would refuse to pay more than the first year price that DirectTV would have been forced to offer that price for both years. That is, in the absence of deception DirectTV would neither have kept the actual second year prices—where it would have been likely to lose some fraction of consumers to the extent that some had been deceived—nor would it have marginally lowered them in the second year—as one might expect if fewer non-deceived consumers would actually have bought the service.

The FTC had rejected a settlement, but in the end the extreme and seemingly ungrounded representation of gain, along with a number of other issues, seemed to create enough skepticism with the court for it to reject any monetary remedy.

[34] Figgie Intern. Inc. v. F.T.C. 817 F 2D 102 (4th Cir. 1987).

[35] See https://www.ftc.gov/enforcement/cases-proceedings/072-3129/commerce-planet-inc-corporation-et-al. Also FTC v. Commerce Planet, Inc., 878 F. Supp. 2d 1048 (C.D. Cal. 2012).

Resident Home

Finally, as noted above, the Commission recently finalized a settlement with Resident Home over the charge that it deceived consumers with respect to Made in the USA (MUSA) claims.[36] The claims were made prior to the Commission's recent adoption of a rule covering such claims, so the single Section 5 count in the complaint would ordinarily—post-AMG—not be eligible for any monetary remedy. The complaint details an existing order and facts that may be consistent with an order violation. However, the complaint does not plead such a violation and the Commissioner statements lay competing arguments as to why, or why not the authority for equitable remedies under Section 19 applies in this case.[37]

All Commissioners seem to agree that the monetary remedy against Resident Home is intended to be punitive. But as with the penalties cited above, the Commission gives no information about how to interpret the penalty beyond that judgement. Commissioners Wilson and Phillips note that the remedy "might plausibly be consistent with a penalty or with the disgorgement of ill-gotten gains…" They also explicitly write that "the figure obtained far exceeds any injury suffered by those consumers who saw the deceptive statement and purchased a DreamCloud mattress or any reasonable estimate of damages."[38]

Unlike in a pure fraud case, we cannot determine whether this figure also exceeds gains to the firm. Presumably, since it is not mentioned in the complaint, consumers otherwise received a serviceable mattress that met their needs. Some consumers may have relied on the deceptive statements in choosing to purchase from this seller, rather than another, but we have no information on whether any did, or how many. Because we do not know if the Commissioners credited any value to the mattresses, it may be the case that the remedy also far exceeds gains, or it may be that the remedy is a fraction of the sales that were conditioned on the MUSA claim. The former seems more likely, given the rhetoric in the statements.[39]

Conclusion

These cases show that even when ostensibly limited to equitable remedies (restitution and disgorgement), the Commission has exercised considerable and questionable leeway in calculating those remedies—often simply demanding total revenue, rather than either gain or injury limited to the practices actually laid out in complaints. In contrast, when matters were litigated, the courts successfully tied awarded remedy to evidence of harm. This suggests that Commission incentives are oriented toward maximizing monetary remedies, independent of injury. The recent joint statement by the majority Commissioners in the Resident Home MUSA case emphasizes this point.[40]

Given greater latitude to impose severe, punitive penalties, it is not clear that the Commission has incentives to do more than maximize its remedies subject to whatever practical constraints the threat of political or judicial review may impose. Of course, crafting statutory guidance that provides for remedies that proportionally and consistently track injury (or gain), provides enough flexibility to apply appropriate penalties but also does not create prohibitively costly requirements for the Commission may not be achievable. As an alternative, requiring that all monetary remedies (restitution and disgorgement) be based on injury, and providing for greater constraints on those remedies where alleged violations are less well defined, reviewed, and known, would provide flexibility for appropriately deterrent remedies, while ensuring a minimum of unnecessary spill-over effects on consumers and legitimate business practices. The current authorities for monetary remedy do just that.

[36] https://www.ftc.gov/system/files/documents/cases/2023179_-_resident_home_agreement_and_order_without_signatures.pdf

[37] JOINT STATEMENT OF CHAIR LINA KHAN, COMMISSIONER ROHIT CHOPRA, AND COMMISSIONER REBECCA KELLY SLAUGHTER In the Matter of Resident Home LLC Commission File No. 202 3179 October 8, 2021. STATEMENT OF COMMISSIONER ROHIT CHOPRA In the Matter of Resident Home LLC Commission File No. 2023179, October 8, 2021. Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson In the Matter of Resident Home LLC. Commission File No. 2023179, October 7, 2021.

[38] Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson In the Matter of Resident Home LLC. Commission File No. 2023179, October 7, 2021.

[39] It is also unclear where this money will go. Typically, money sent to consumers is publicized, and there appears to be no such statement in this case.

[40] JOINT STATEMENT OF CHAIR LINA KHAN, COMMISSIONER ROHIT CHOPRA, AND COMMISSIONER REBECCA KELLY SLAUGHTER, In the Matter of Resident Home LLC, Commission File No. 202 3179. October 8,2021. https://www.ftc.gov/system/files/documents/public_statements/1597282/2023179khanslaughterchopraresidenthomestatement.pdf



U.S. Chamber of Commerce