Equitable Monetary Relief Under the FTC Act: An Opportunity for a Marginal Improvement

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EQUITABLE MONETARY RELIEF UNDER THE FTC ACT: AN OPPORTUNITY FOR A MARGINAL IMPROVEMENT

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The Federal Trade Commission operates under a century-old statute, and the strains of age are beginning to show.[1] The FTC's authority to obtain equitable monetary relief in federal court under Section 13(b) of the Federal Trade Commission Act[2]—an authority that has been presumed by the Commission, and repeatedly affirmed by courts, for decades[3]—is under attack in three circuits.

In *FTC v. Credit Bureau Center, LLC*, the Seventh Circuit reversed its long-standing precedent and held that Section 13(b), which on its face entitles the FTC to seek "injunctions" in federal court, does not also permit courts to award the FTC equitable monetary relief, such as restitution, rescission, or

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[1] 15 U.S.C. §§ 41–58.

[2] *Id.* § 53(b). Section 13(b), added in 1973, provides, in relevant part: "Upon a proper showing that, weighing the equities and considering the [FTC'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 [by a federal court, and] . . . in proper cases the [FTC] may seek, and after proper proof, the court may issue, a permanent injunction."

[3] For a discussion of the history and development of the Commission's Section 13(b) authority, see J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 2 (2013); David M. FitzGerald, The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act, Paper from the FTC 90th Anniversary Symposium (Sept. 23, 2004), www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf.

disgorgement.[4] As the Seventh Circuit stated, "restitution isn't an injunction"—the only thing expressly authorized under Section 13(b).[5]

The Ninth Circuit has not been quite as bold as the Seventh in overturning precedent but nonetheless has raised similar questions about the FTC's Section 13(b) power. In *FTC v. AMG Capital Management, LLC*, the court relied on *stare decisis* to reaffirm the FTC's power to obtain equitable monetary relief under Section 13(b), only to have a majority of the panel concur specially to explain why this interpretation of the FTC Act "is no longer tenable."[6]

A second, but related, front involves the circumstances under which the Commission can ask a federal court for injunctive relief in the first place. In *FTC v. Shire ViroPharma, Inc.*, an antitrust case, the Third Circuit held that the "clear text" of Section 13(b) of the FTC Act limits the FTC to challenging conduct that is ongoing or imminent.[7]

One of the driving forces behind these recent challenges to the FTC's authority to seek equitable monetary relief is the Supreme Court's decision in *Kokesh v. SEC*, which held that the Securities and Exchange Commission's imposition of disgorgement was a "penalty" for purposes of the federal statute of limitations.[8] The Court in *Kokesh* expressly punted on whether the SEC had the authority to seek disgorgement, but in *Liu v. SEC*, it answered the question in the affirmative—the SEC does indeed have that power, with limitations.[9] Although animated by the distinction between legal and equitable remedies,

[4] 937 F.3d 764, 767 (7th Cir. 2019). In 2020, the Supreme Court granted certiorari in *Credit Bureau* and consolidated the case with *FTC v. AMG Capital Management, LLC*, but later vacated its grant of certiorari in *FTC v. Credit Bureau Center, LLC*, 141 S. Ct. 194 (2020) (mem.), *vacated*, No. 19-508. 2020 WL 6551765 (U.S. Nov. 9, 2020). The Supreme Court heard oral argument in *AMG Capital* earlier this year.

[5] *Credit Bureau*, 937 F.3d at 771.

[6] 910 F.3d 417, 429 (9th Cir. 2018) (O'Scannlain, J., concurring), *cert. granted*, 141 S. Ct. 194 (2020) (mem.), *argued*, No. 19-508 (U.S. Jan. 13, 2021).

[7] 917 F.3d 147, 150 (3d Cir. 2019). The FTC chose not to seek certiorari in *Shire ViroPharma*. *See also FTC v. AbbVie Inc.*, 976 F.3d 327 (3d Cir. 2020) (holding that district courts lack the power to order disgorgement under Section 13(b)). This article focuses on equitable monetary relief in deception cases and does not address the economics of antitrust remedies or the FTC's use of Section 13(b) in antitrust cases such as *Shire ViroPharma* and *AbbVie*. For an analysis of the welfare effects of reverse payments used to settle litigation involving pharmaceutical patents, see Bruce H. Kobayashi et al., Actavis *and Multiple ANDA Entrants: Beyond the Temporary Duopoly*, ANTITRUST, Spring 2015, at 89. For an analysis of remedies in price-fixing cases, see Michelle M. Burtis & Bruce H. Kobayashi, *Regarding the Optimality of Cartel Fines*, ABA ANTITRUST LAW SECTION CARTEL & CRIM. PRAC. COMM. NEWSL., Spring 2017, at 22. For a comprehensive discussion of these issues, see ABA ANTITRUST LAW SECTION, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES (3d ed. 2017).

[8] 137 S. Ct. 1635, 1642 n.3 (2017). Further, in *AMG Capital*, Judge O'Scannlain applied *Kokesh*'s reasoning to equitable monetary relief under the FTC Act and found it to be a penalty. *AMG Capital*, 910 F.3d at 429.

[9] Liu v. SEC, 140 S. Ct. 1936, 1949–50 (2020).

not economics, *Liu*'s requirements that disgorgement focus on profits rather than revenue and not include items that "have value independent of fueling a fraudulent scheme" is largely consonant with the economic framework presented in this article.[10]

Although it is far from clear how the Supreme Court will dispose of these challenges to the FTC's power in *AMG Capital*, the challenges certainly present a heightened threat to the FTC's longstanding use of Section 13(b) to obtain monetary relief in federal court without first having an administrative hearing.[11] If the FTC were to lose this power, it would severely curtail or even eliminate its ability to address pure fraud—"the consumer protection analog to price fixing in antitrust"—which has become a core part of the FTC's consumer protection work since the inception of the "Fraud Program" in the early 1980s.[12]

In our view, this existential threat to the FTC's ability to obtain equitable monetary relief in federal court is neither a cause for alarm nor a call to defend the current regime. Rather, we view it as an opportunity to reexamine the judicially-created superstructure around Section 13(b) and to erect an improved and economically coherent remedial framework. Toward that end, in this article we are agnostic about the FTC's legal authority under Section 13(b). We focus our attention on excavating the jurisprudential foundations of the current state of law, which allows the FTC to impose sanctions out of proportion to consumer harm when dealing with legitimate products—defined as those with significant positive demand absent deception. After identifying the problem, we offer some solutions grounded in the law and economics of optimal sanctions. Our suggestions to bring economic coherence to the FTC's remedial authority may have the collateral benefit of helping to preserve an important tool in the FTC's arsenal to protect consumers from the most harmful types of fraud.

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10 *Id.* at 1950.

11 *AMG Capital*, 910 F.3d 417. *See* J. Howard Beales III, Benjamin M. Mundel & Timothy J. Muris, *Section 13(b) of the FTC Act at the Supreme Court: The Middle Ground*, ANTITRUST SOURCE (Dec. 2020), www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/dec-2020/v20_i3_dec2020_beales.pdf. As discussed in more detail *infra*, the FTC Act allows the FTC to use Section 19, 15 U.S.C. § 57b, to obtain monetary remedies in federal court against certain defendants found liable in an administrative proceeding.

12 Beales & Muris, *supra* note 3, at 2. The Fraud Program arose in the early 1980s when the FTC began to use its new powers under Section 13(b) to simultaneously obtain an asset freeze and return these ill-gotten gains to consumers against defendants engaged in "fraud, near fraud, or [selling] worthless products." *Id.* at 22. Further, when using Section 13(b), the FTC tended to adhere to the limits found in Section 19, which allowed monetary relief only for conduct that a reasonable person would have known was "fraudulent or dishonest." *Id.* at 30; *see also id.* at 22–23.

Under Section 13(b), courts typically award both injunctive relief and equitable monetary remedies. Injunctive relief consists of an order requiring the defendant to cease its illegal conduct. The court also may order monitoring and reporting requirements and additional behavioral remedies designed to prevent future wrongdoing. Courts fashion equitable monetary remedies as either restitution or disgorgement. Regardless of the label, under current law, these remedies comprise some approximation of the defendant's net revenue, which is total revenue related to the deception, less refunds and chargebacks.[13]

This approach is likely to be a close approximation of consumer harm in cases involving purely fraudulent products, but in cases involving legitimate products, these equitable remedies are likely to overstate consumer harm.[14] Our examination of the case law reveals that the sources of this judicially created problem can be found in the translation of "materiality" in the liability stage of a case to "reliance" in the remedy stage. Courts have held that because "materiality" is an element of the FTC's case, once the FTC has proved liability, it enjoys a presumption at the remedy stage that *all* consumers relied on a deceptive claim when purchasing—100 percent of the revenue from consumers exposed to the deceptive claim is assumed to be the product of fraud. But a lot gets lost in the translation of materiality to reliance. First, only a "significant minority of consumers"—which courts have interpreted as being satisfied with as few as 10 percent of a firm's customers—need to take away the false claim.[15] Second, as a practical matter, the FTC, never actually proves materiality as part of its case, but rather relies on a virtually irrebuttable presumption of materiality that it enjoys for most types of claims.[16] Thus, a show-

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[13] 15 U.S.C. § 53(b). The FTC can also obtain civil monetary penalties for violations of certain rules it enforces. *Id.* § 45(m)(1)(a). Further, Section 19(a) allows the FTC to commence a civil action against a party that violates any rule when the Commission has determined that the violation constitutes an unfair or deceptive act or practice. *Id.* § 57b(a)(1).

[14] *See Liu*, 140 S. Ct. at 1945, 1950 (explaining that while "[t]he Court has carved out an exception when the 'entire profit of a business or undertaking' results from the wrongful activity," even then, a court must still ascertain whether the "expenses are legitimate or whether they are merely wrongful gains 'under another name'" (first quoting Root v. Lake Shore & Mich. S. R.R. Co., 105 U.S. 189, 203 (1881); then quoting Providence Rubber Co. v. Goodyear, 76 U.S. 788 (1869))).

[15] When we refer to a consumer as "taking away" a false claim from an advertisement, we simply mean that the consumer believes the advertisement, to make a claim which, in fact, is not true. ECM BioFilms, Inc. v. FTC, 851 F.3d 599, 611 (6th Cir. 2017) ("We have previously expressed unwillingness 'to overturn the deception findings of the Commission' where an ad misleads '15% (or 10%) of the buying public.'" (quoting Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 249 (6th Cir. 1973))).

[16] The FTC enjoys a presumption of materiality for all express claims and for implied claims that either were intended by the defendant or involve health, safety, "or other areas with which the reasonable consumer would be concerned." Fed. Trade Comm'n, FTC Policy Statement on Deception 5 (1983), www.ftc.gov/system/files/documents/public_statements/410531/831014 deceptionstmt.pdf [hereinafter Deception Policy Statement]. Courts have affirmed the presumption of materiality for these types of claims. *See, e.g.*, Kraft, Inc. v. FTC, 970 F.2d 311, 322–23

ing that a claim was likely to mislead potentially far fewer than half of the relevant consumers, paired with *no evidence* of how the false claim actually impacted the fooled consumers' purchasing decisions, translates into a presumption that *every* customer is entitled to their money back. Further, a defendant's ability to rebut this 100 percent reliance presumption is quite limited—courts are unwilling to back off the presumption that anyone exposed to the deceptive message was tricked into purchasing and instead will reduce a remedy based only on accounting inaccuracies and evidence that some class of consumers was not exposed to the deception.

This all means that remedies applied to legitimate products are based on both marginal consumers—those deceived into buying—and inframarginal consumers—those who would have purchased regardless of the deception, or those who were not deceived in the first place. In this manner, Section 13(b) remedies applied to legitimate products almost invariably will lead to a sanction greater than consumer harm.

Because equity focuses on restoring deceived consumers to the status quo ante, defendants receive no credit for the value of their product, which exacerbates this problem. The true economic harm from deception, however, is the deception induced price premium for inframarginal consumers, and the difference between the price with deception and the marginal value for marginal consumers, who purchased the product because of the deception. Remedies of sufficient size are necessary to foster incentives for firms to avoid claims that are likely to mislead reasonable consumers. But excessive remedies may deter the production and dissemination of socially beneficial information.[17]

The new framework that we suggest here would impose optimal remedies aimed at deterring only that conduct which is, on net, harmful to consumers.[18]

(7th Cir. 1992); *see also* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965). Although we are unaware of any instance in which a defendant successfully rebutted the materiality presumption, issues of materiality may impact case selection. Further, the presumptive materiality of certain implied claims may impact the FTC staff's interpretation of representations, which does not enjoy a presumption of validity for a complaint brought in federal court under 13(b).

[17] *See generally* Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491 (1981).

[18] It is important to note that from an economic perspective, the goal of a remedy is focused not on compensating deceived consumers, but rather on creating incentives for efficient behavior. Whether consumers receive redress has no impact on optimal deterrence and in some cases could cause moral hazard. In the case of pure fraud, optimal deterrence and perfect redress can be achieved simultaneously with a remedy of total revenues. For products that provide value, however, optimal deterrence and perfect redress goals can be achieved simultaneously only if there is perfect information on marginal consumers' valuations. When choosing a remedy with imperfect information about consumer valuations, there are tradeoffs between making consumers whole and creating efficient incentives. These tradeoffs are likely to be most stark in instances in which the marginal increase in demand from the deceptive claim is small relative to the product's non-deceptive demand, and the product provides substantial value beyond the deceptive claim.

It has long been known that setting an effective price for potentially harmful conduct equal to consumer harm—appropriately adjusted to account for the likelihood that harmful conduct will go undetected or unsuccessfully prosecuted[19]—will create incentives for firms to engage in only net beneficial actions.[20] In the context of deception, consumers are harmed because misleading information causes them to make a purchasing decision that they otherwise would not have made. To measure the degree of harm, one must compare consumers' utility in the actual world (with the deception) to a counterfactual world without the deception. A first step in this measurement is to determine the marginal response to the deception—that is, how many consumers would not have chosen the product tainted by the deception in the but-for world? The second step is to measure the difference between the utility gained from purchasing the product tainted by deception and the utility in the counterfactual world in which a different consumption choice would have been made but for the deception.

With these principles as a guide, our analysis suggests that any approach to remedies for deception should focus on consumer harm, measured as: (1) any price premium paid by inframarginal consumers attributable to the deceptive claim; and (2) all revenue from marginal consumers. Although this remedy will likely overstate social harm because it includes transfers from consumers to firms and provides no credit for value received by marginal consumers or marginal costs of production, the information and administrative costs associated with trying to fix these shortcomings are likely to swamp any additional benefits in terms of ameliorating overdeterrence. Further, we also suggest flexibility in adjusting this baseline up or down depending on the clarity of the legal standard at issue.

We see two possible paths toward reaching this goal. First, the roots of the FTC's current legal problems stem from the FTC Act itself, which provides no straightforward mechanism to obtain monetary remedies for first-time violations and can be fixed only by Congress.[21] Because the economic problems

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[19] Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998). Adjustments are also required for the likelihood that efficient conduct will be erroneously condemned. *See infra* Part II.C.

[20] *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 474–79 (2004) [hereinafter SHAVELL, FOUNDATIONS]; Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984). The limiting case is the application of strict liability. *See, e.g.*, Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEG. STUD. 1 (1980). Harm-based remedies are also useful in cases where the legal standard is uncertain or where enforcers or courts apply the standard with error. *See* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984).

[21] As discussed in more detail *infra*, Section 19, added in 1975, allows the FTC to proceed in federal court for monetary remedies against certain firms found liable in an administrative proceeding. *See* Beales & Muris, *supra* note 3, at 21. In addition to requiring potentially cumber-

with the FTC's remedial authority also stem from the FTC Act—the fact that it does not provide a remedy calibrated to consumer harm—Congress could solve both problems simply by amending the FTC Act either to include civil penalty authority tied to consumer harm or to explicitly permit equitable monetary relief, again tied to consumer harm.[22]

Absent congressional action, the FTC could take unilateral steps within the current statutory framework to make remedies in cases involving valuable products more closely resemble consumer harm. For example, the Commission could adopt formal public guidance or internal rules of practice that make the existence of credible evidence that the misrepresentation caused an increase in demand or price a necessary condition for seeking a monetary remedy.[23] The Commission should favor the use of administrative litigation over Section 13(b) when the legal standard is unclear or when the marginal impact of deceptive conduct is likely to be small in relation to the demand for the product absent deception. When a reasonable firm would not know with certainty that the conduct at issue violates Section 5, pursuing sanctions less than harm would ameliorate the overdeterrence that comes from uncertain standards. Sanctions less than harm would also induce more violations, and an increase in administrative litigation would produce more information about the FTC's legal standard and reduce uncertainty.[24]

Further, if the Commission opts to pursue a Section 13(b) action, rather than utilizing the presumption that the deceptive practice harmed all consumers in the market, as part of its burden to produce a "reasonable approximation" of consumer redress, FTC staff would be required to provide evidence of

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some administrative litigation, the potential scope of monetary relief may be narrower under Section 19. *Id.* at 22–23. The FTC has used this lengthy and cumbersome process only twice in the past 30 years.

[22] Civil penalty authority would be limited to actions brought in federal court, not administrative adjudication. The FTC's ability to obtain civil penalties can be more difficult than obtaining equitable monetary relief under Section 13(b). Defendants in civil penalty actions have a right to a jury trial, and the FTC must send cases seeking civil penalties to the Department of Justice. The Attorney General has 45 days following notification to bring the action; if the Attorney General declines to do so, the FTC can decide to bring the action itself. *See* 15 U.S.C. § 56(a).

[23] Although courts would not be bound by internal FTC guidance, it is doubtful that a defendant would challenge an approach to remedies that would result in a lower payment. Further, by adopting a formal policy statement, courts may be more likely to defer to such an approach to remedies under Section 13(b). *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976) (explaining that the level of deference afforded to an agency's nonformal interpretation of its statute "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control" (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))); *see also* Christensen v. Harris Cnty., 529 U.S. 576, 587–88 (2000) (noting that interpretations contained in policy statements and enforcement guidelines are "entitled to respect . . . only to the extent that those interpretations have the 'power to persuade'" (quoting *Skidmore*, 323 U.S. at 140)).

[24] *See infra* discussion accompanying notes 142–143.

the deception's impact on marginal net revenue—additional revenue attributable to price premiums and marginal consumers who would not have purchased but for the deception.[25] Similarly, the FTC could issue formal public or internal rules of practice that require staff to allow defendants to produce evidence regarding the value of product. An approach that provides an allowance for value is consistent with the same equitable principles underlying Section 13(b) remedies that attempt to avoid consumer windfalls by excluding chargebacks and refunds from redress. Restructuring the current framework in this manner may reduce the ability of the FTC to effectively challenge some harmful conduct. But this potential underdeterrence cost must be weighed against the costs associated with overdeterrence that the current status of the law is likely to cause.

I. THE FTC'S 13(b) AUTHORITY

The FTC has two paths it can use to challenge deceptive conduct under Section 5.[26] First, it can proceed administratively. If the defendant does not settle with the Commission, staff will litigate the case before an administrative law judge (ALJ), with the decision appealable to the full Commission and ultimately a federal appellate court. In administrative litigation, the FTC can obtain injunctive relief, including orders that prohibit a defendant from continuing to engage in conduct that violates the FTC Act. Those orders also can impose reporting requirements and "fencing-in" relief that prohibits the defendant from engaging in conduct that does not violate Section 5 but nonetheless may help deter future violations. The FTC can collect substantial civil penalties (over $40,000 per violation) for violations of administrative orders.[27] Further, the FTC can use Section 19 to obtain monetary relief in federal court against parties who have lost in administrative litigation, subject to the limitation that a reasonable person would have known that the conduct at issue was "dishonest or fraudulent."[28] Finally, the Commission can also sue for civil penalties in district court against a party that has "actual knowledge" that an act or practice has been determined in an administrative proceeding to be unlawful under Section 5 of the FTC Act.[29]

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[25] This approach would be consistent with recent cases that have taken a more stringent view of the FTC's burden. *See, e.g.*, FTC v. DIRECTV, Inc., No. 15-cv-01129-HSG, 2018 WL 3911196, at *23 (N.D. Cal. Aug. 16, 2018).

[26] The FTC also enforces a variety of rules, most of which allow for civil penalties. 15 U.S.C. § 45(m)(1)(A). The focus of this article is on the use of the FTC's authority for unfair and deceptive acts and practices (UDAP) under Section 5.

[27] *Id.* § 45(*l*). The FTC recently increased this amount to adjust for inflation to $43,792. *See* 16 C.F.R. § 1.98(c).

[28] 15 U.S.C. § 57b(a)(2). In such an action, the Commission can obtain "rescission or reformation of contracts, the refund of money or return of property, the payment of damages." *Id.* § 57b(b).

[29] *Id.* § 45(m)(1)(B)(2).

The FTC can also sue in federal district under Section 13(b) of the FTC Act, which on its face entitles the Commission to seek only injunctive relief.[30] In what has come to be known as the FTC's "Fraud Program," courts have interpreted this provision of the FTC Act to allow the FTC to "invoke[ ] a court's equity jurisdiction," which includes the power "to grant 'any ancillary relief necessary to accomplish complete justice,' including restitution."[31] Accordingly, in a Section 13(b) action, the Commission can obtain injunctive relief—typically a cease-and-desist order and other behavioral "fencing-in" remedies designed to deter future violations—*and* equitable monetary remedies, including disgorgement and restitution.[32]

Courts differ, however, on whether the focus of the FTC's Section 13(b) remedy should be on consumers' losses or on defendants' unjust gains.[33] For example, in *FTC v. Publishers Business Services, Inc.*, the Ninth Circuit reversed the district court's decision to focus on "the defendants' gain rather than the loss to the consumers."[34] Instead, according to the Ninth Circuit, Section 13(b) "permits awards that may even be 'greater than the defendant's unjust enrichment.'"[35] The Second Circuit in *FTC v. Verity International, Ltd.* reached a different conclusion, holding that the district court erred when it measured restitution as the "full amount lost by consumers" instead of "the

[30] *Id.* § 53(b)(2) (allowing the Commission to seek a preliminary injunction, temporary restraining order, and "in proper cases . . . and after proper proof . . . a permanent injunction").

[31] FTC v. Commerce Planet, Inc., 815 F.3d 593, 598, 602 (9th Cir. 2016) (quoting FTC v. Pantron I Corp., 33 F.3d 1088, 1102 (9th Cir. 1994)); *see also* FTC v. Verity Int'l, Ltd., 443 F.3d 48, 66 (2d Cir. 2006) ("Although this provision does not expressly provide for restitution, several courts, including the Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, have concluded that § 13(b) of the FTC Act allows restitution or other ancillary equitable relief."). The first case to bless this authority was *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982). For a history of the FTC's Fraud Program, see Beales & Muris, *supra* note 3, at 22–28; *see also* Liu v. SEC, 140 S. Ct. 1936, 1947 (2020) ("[U]nless otherwise provided by statute, all . . . inherent equitable powers . . . are available [to a district court] for the proper and complete exercise of that jurisdiction." (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946))).

[32] *See* FTC v. Publishers Bus. Servs., Inc., 540 F. App'x 555, 556 (9th Cir. 2013).

[33] For a discussion of the difference between legal and equitable restitution, see *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002).

[34] 540 F. App'x at 556.

[35] *Id.* at 557 (quoting FTC v. Stefanchik, 559 F.3d 924, 931 (9th Cir. 2009)); *see also Stefanchik*, 559 F.3d at 931 ("[B]ecause the FTC Act is designed to protect consumers from economic injuries, courts have often awarded the full amount lost by consumers rather than limiting damages to a defendant's profits."); FTC v. Figgie Int'l, Inc., 994 F.2d 595, 606–07 (9th Cir. 1993) (rejecting, in the Section 19 context, a defendant's argument that it should not have to be responsible for distributor markups, and explaining that "between the innocent purchaser and the wrongdoer who, though not a privy to the fraudulent contract, nonetheless induced the victim to make the purchase, equity requires the wrongdoer to restore the victim to the status quo" (quoting FTC v. Int'l Diamond Corp., No. 82-0878-WAI, 1983 WL 1851, at *4 (N.D. Cal. July 12, 1983))); *see also* Gordon v. Burr, 506 F.2d 1080, 1085 (2d Cir. 1974).

benefit unjustly received by the defendant."[36] In practice, these distinct approaches will arrive at similar amounts when the defendant sells directly to consumers, but the gains-to-defendant approach will arrive at lower amounts of redress when the defendant sells through intermediaries.[37]

Courts generally employ a two-step burden-shifting framework for awarding equitable monetary relief in Section 13(b) cases. First, the FTC must show that the amount it seeks "reasonably approximates the defendant's unjust gains."[38] The FTC does not have to demonstrate individual reliance on a misrepresentation. As a district court explained in an early Section 13(b) case, "Section 13 serves a public purpose by authorizing the Commission to seek redress on behalf of injured consumers . . . . [and r]equiring proof of subjective reliance by each individual consumer would thwart effective prosecution of large consumer redress actions and frustrate the statutory goals of the section."[39] Instead, the Commission enjoys a presumption that all consumers relied on the misrepresentation once it has proved the defendant made material misrepresentations that were widely disseminated, and that consumers purchased the product in question.[40] Importantly, the FTC enjoys a nearly irrebuttable presumption of materiality for all express claims, as well as for implied claims that the defendant intended to make or claims that involve "health, safety, or other areas with which the reasonable consumer would be concerned."[41]

In this manner, for purposes of obtaining equitable monetary relief, the FTC can leverage the presumption of materiality it enjoys for most claims that are the subject of an FTC suit in the liability part of the case into a presumption that all consumers relied on the misrepresentation when making their purchasing decisions. The upshot of this presumption cascade is that the FTC typically can meet its burden of production at the remedies stage simply by providing an estimate of the defendant's net revenues—gross receipts, less

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[36] 443 F.3d at 67 ("Labeling the remedy 'consumer redress' or 'disgorgement,' each a restitutionary remedy, does not alter the basic principle that restitution is measured by the defendant's gain."); *see also Commerce Planet*, 815 F.3d at 603 ("Nor are unjust gains measured by the consumers' total losses; that would amount to an award of damages, a remedy . . . precluded under § 13(b).").

[37] *See Verity*, 443 F.3d at 68 ("[I]n many cases in which the FTC seeks restitution, the defendant's gain will be equal to the consumer's loss because the consumer buys goods or services directly from the defendant. . . . But it is incorrect to generalize this shorthand and apply it as a principle in cases where the two amounts differ—for example, when some middleman, not party to the lawsuit, takes some of the consumer's money before it reaches a defendant's hands."); FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996) (explaining that Section 13(b) authorizes a district court to order "a defendant to disgorge illegally obtained funds").

[38] *See Commerce Planet*, 815 F.3d at 603; *Verity*, 443 F.3d at 67.

[39] *See* FTC v. Kitco of Nev., Inc., 612 F. Supp. 1282, 1293 (D. Minn. 1985).

[40] *See* FTC v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991).

[41] Deception Policy Statement, *supra* note 16, at 5.

refunds and chargebacks—associated with the product that was the subject of the misrepresentation.[42]

It remains to be seen how the limitations imposed by *Liu* will affect the FTC's burden. *Liu* appears to hold that disgorgement should focus on profits, rather than revenue, to preserve the equitable nature of the remedy. At the same time, the Court allowed that expenses that are "wrongful gains 'under another name'" could be part of an award and noted that some of Liu's expenses seemed to "have value independent of fueling a fraudulent scheme."[43] Although *Liu* was decided in the context of an SEC case, which is necessarily different from an FTC case involving the sale of products, the principle—that an equitable remedy for wrongful conduct should not include legitimate value—ought to apply equally. Thus, one possible application of *Liu* going forward might be that equitable remedies under the FTC Act focus on profits for legitimate products—those with "independent value"—while allowing the FTC to pursue net revenues when dealing with instances of pure fraud.[44]

Once the FTC has satisfied its burden, the defendant has the ability to rebut the FTC's estimate.[45] At this stage, the defendant cannot deduct production or other costs.[46] Further, the defendant gets no credit for the value of the product sold.[47] As the court explained in *FTC v. Figgie International, Inc.*, if a consumer is deceived into buying rhinestones that he thought were diamonds, providing him the difference between the price he paid and the market value

[42] *See, e.g.*, FTC v. Dantuma, 748 F. App'x 735, 737–38 (9th Cir. 2018) (citing FTC v. Publishers Bus. Servs., Inc., 540 F. App'x 555, 556–58 (9th Cir. 2013)) (affirming presumption that everyone "who bought PBS's products relied on PBS's deceptive tactics and representations"), *petition for cert. filed sub nom.* Publishers Bus. Servs., Inc. v. FTC, No. 19-507 (U.S. Oct. 18, 2019); *Commerce Planet*, 815 F.3d at 604 ("[A]ll consumers who purchased OnlineSupplier did so in reliance on the misrepresentations.").

[43] Liu v. SEC, 140 S. Ct. 1936, 1950 (2020) (quoting Providence Rubber Co. v. Goodyear, 76 U.S. 788, 803 (1869)).

[44] For example, the Court in *Liu* draws on principles from disgorgement in patent and copyright infringement cases. *Id.* at 1947. However, when intellectual property is wrongfully used, the plaintiff has not lost any property—information is non-rivalrous. What it has lost is the profit from the exploitation of the idea. In the FTC context, however, consumers have lost the money spent on the fraudulent product. Returning only profits necessarily leaves consumers of pure fraud worse off, unlike the case of a victim of copyright or patent infringement.

[45] *Id.*

[46] *See Commerce Planet*, 815 F.3d at 603 ("Unjust gains in a case like this one are measured by the defendant's net revenues (typically the amount consumers paid for the product or service minus refunds and chargebacks), not by the defendant's net profits." (citing FTC v. Bronson Partners, LLC, 654 F.3d 359, 374–75 (2d Cir. 2011))).

[47] *See Publishers Business Services*, 540 F. App'x at 557–58; FTC v. Kuykendall, 371 F.3d 745, 766 (10th Cir. 2004) (applying *Figgie* to remedies in the contempt context). *But see* FTC v. Lane Labs-USA, Inc., No. 2:00-cv-03174, 2014 WL 268642, at *5–6 (D.N.J. Jan. 23, 2014) (allowing the defendant in a civil contempt case credit for the value of its product by estimating consumer injury based on the difference between defendant's price and the price of competing products).

of rhinestones will not necessarily make the consumer whole. According to the court, the deception tainted the consumers' purchasing decisions:

> If they had been told the truth, perhaps they would not have bought rhinestones at all or only some. . . . The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or to refunds for each detector that is not useful to them.[48]

Similarly, in *Publishers Business Services*, a case involving the deceptive selling of a magazine-subscription program, the court would not allow the defendant Publishers Business Services to deduct revenue from consumers' original subscriptions even if the consumers had subsequently renewed their subscriptions.[49] The defendant argued that renewal was evidence that the consumers would have purchased even had they not been deceived in the first instance and thus were not harmed.[50] Rejecting this argument, the court explained, "[T]he fact that a consumer later decided to renew his or her subscription 'does not necessarily mean his or her original decision to purchase was free from the taint of PBS's deceptive sales practices.'"[51]

The defendant can challenge the accuracy of the FTC's estimate. For example, in *FTC v. Febre*, the defendant argued that the FTC's estimates were inaccurate because it used an incomplete database.[52] Further, because the FTC's ability to rely on net revenues is based on the presumption of reliance, the defendant can subtract revenue from consumers who did not rely on the deception to make their purchase decision. In practice, this means that the defendant can identify groups of consumers who were not exposed to the deception in the first instance, or in cases involving inadequate disclosures of material terms, the defendant can present evidence that some consumers were aware of the terms before they purchased. For example, in *FTC v. Commerce*

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[48] 994 F.2d 595, 606 (9th Cir. 1993). But, as discussed in more detail in Part II, this observation is flawed. The fraud in *Figgie* was in the value of the product. The inflated value is what induced the "selling." In practice, estimating this value is likely to be practically impossible with limited information. Thus, returning defrauded consumers to the status quo ante by refunding the full purchase price may be the most accurate estimate of harm. That is, the issue in crafting a remedy is not so much that the fraud "tainted the . . . purchasing decisions," but rather that imperfect information prevents us from knowing how much compensation consumers require to be indifferent between having been tricked into purchasing something they would not have chosen at prevailing prices and being returned to the pre-purchase state of the world. *Id.*

[49] 748 F. App'x 735, 738 (9th Cir. 2018), *petition for cert. filed sub nom.* Publishers Bus. Servs., Inc. v. FTC, No. 19-507 (U.S. Oct. 18, 2019).

[50] *Id.*

[51] *Id.* (alterations omitted) (quoting FTC v. Publishers Bus. Servs., Inc., No. 2:08-cv-00620-APG-GWF, 2017 WL 451953, at *4 (D. Nev. Feb. 1, 2017)); *see also id.* ("The fact that a customer was satisfied months or years after the fact does not mean that the customer did not rely on PBS's deceptive sales techniques *at the time of the original purchase*.").

[52] 128 F.3d 530, 535 (7th Cir. 1997); *see also* FTC v. Vylah Tec LLC, 378 F. Supp. 3d 1134 (M.D. Fla. 2019).

Planet, Inc., the court ultimately excluded revenue from consumers who canceled their subscriptions during the trial period under the assumption that the consumers must have understood the cancellation terms in order to do so, and thus were not deceived.[53]

It is unclear how much work the FTC must do to establish that revenues are a "reasonable approximation" of a defendant's gains. For example, in *FTC v. Vylah Tec LLC*, the court held that the FTC failed to meet its burden of making a reasonable estimation because it did not adequately attempt to separate consumer receipts from business receipts.[54] Further, it is unclear whether the FTC must account for consumers who did not rely on the misrepresentation as part of its burden to show a "reasonable approximation" of the redress amount or, instead, if the FTC's "reliance presumption" means that this burden falls entirely on the defendant. Although most courts have been satisfied with the FTC merely showing net revenues to satisfy its burden of production,[55] others have chided the FTC for failing to subtract revenue from consumers who were not deceived. In *Verity*, for example, the court explained that the district court's decision to include all revenue collected through the defendant's billing system was in error:

> Here, because some fraction of consumers who paid the bills incurred through the defendants-appellants' billing system actually used or authorized others to use the service at issue, the amount of the defendants-appellants' *unjust* gains is only a fraction of the amount of their overall gains from the billing system. A reasonable approximation of the defendants-appellants' unjust gains must take this into account.[56]

The court conceded that "the reasonableness of an approximation varies with the degree of precision possible," but noted that the "FTC's investigatory

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[53] 815 F.3d 593, 604–05 (9th Cir. 2016). The Ninth Circuit also suggested that in circumstances in which the consumer is likely to learn the true price or quality of a product after they purchase, the defendant can present evidence of repeat purchases to suggest that the consumer suffered no damages. *See, e.g.*, FTC v. Publishers Bus. Servs., Inc., 540 F. App'x 555, 558 (9th Cir. 2013) (noting that on remand it is proper for the district court to consider defendant's arguments that a customer who renewed subscriptions or added a subscription order "necessarily knew the actual terms of the transaction"). This approach is akin to identifying consumers who are inframarginal in the sense that they placed a sufficiently high value on the product to purchase it, even absent deception. Although perhaps these consumers were deceived when they made their first purchase, repeat purchases demonstrate that they place a value on the product at least as high as the purchase price, and thus suffered no injury under an endowment benchmark. In the case of *Publishers Business Services*, however, on remand, the district court was unwilling to entertain this theory, finding that although revenues from renewals should be excluded from a remedy, the fact of renewal does not rebut the fact that the first purchase was "tainted" by deception; and the Ninth Circuit upheld this decision. *Publishers Business Services*, 2017 WL 451953, at *2, *aff'd*, FTC v. Dantuma, 748 F. App'x 735, 737–38 (9th Cir. 2018), *petition for cert. filed sub nom.* Publishers Bus. Servs., Inc. v. FTC, No. 19-507 (U.S. Oct. 18, 2019).

[54] 378 F. Supp. 3d at 1140.

[55] *See, e.g.*, *Commerce Planet*, 815 F.3d at 604.

[56] FTC v. Verity Int'l, Ltd., 443 F.3d 48, 69 (2d Cir. 2006).

power gives it the capacity to estimate with some degree of precision" the defendants' revenue attributable to fraud.[57]

Similarly, in *FTC v. DIRECTV, Inc.*, the court expressed skepticism over the assumption used by the FTC's expert when calculating a reasonable approximation of the defendant's unjust gains, that *all* DIRECTV subscribers were misled into believing that they would pay the introductory price for two years.[58] While acknowledging that the Ninth Circuit's holding in *Commerce Planet* entitles the FTC to a presumption of reliance once it has proved that the defendant "made widely-disseminated material misrepresentations," the court questioned the "breadth of the FTC's interpretation of the 'presumption of reliance' " and appeared to require that the FTC determine with some precision what consumers expected to pay in the second year of their contract.[59] As the court concluded, there was "a significant possibility that at the close of the evidence the FTC [would] be unable to establish a reasonable approximation of damages, or that its [reasonable] approximation [would] be . . . rebutted by the Defendant."[60]

The FTC's remedial authority under Section 13(b) has come under serious attack from three fronts in recent years. First, the Supreme Court decision in *Kokesh v. SEC* cast some doubt on whether the type of remedies the FTC routinely receives are actually allowed under Section 5[61]—although last year in *Liu v. SEC*, the Court clarified that a disgorgement remedy focused on profits rather than revenue, and that does not include items that "have value independent of fueling a fraudulent scheme," was permissible.[62] Second, in an antitrust case, *FTC v. Shire ViroPharma, Inc.*, the Third Circuit held that Section 13(b) does not allow the FTC to obtain injunctive (or other equitable) relief unless the conduct at issue is ongoing or imminent.[63]

Third, and most directly, the Seventh Circuit in *FTC v. Credit Bureau Center, LLC*, held that Section 13(b) does not allow the Commission to seek equitable monetary relief in federal court for first-time violations of the FTC

[57] *Id.*

[58] No. 15-cv-01129-HSG, 2018 WL 3911196, at *23 (N.D. Cal. Aug. 16, 2018).

[59] *Id.* The court's willingness to require the FTC to make a more detailed showing of damages may have been related to the fact that the FTC was seeking a nearly $4 billion remedy. The case ultimately settled.

[60] *Id.* In *Commerce Planet*, the FTC excluded from its redress estimate consumers who canceled within the trial period because they likely were aware of the negative option. 815 F.3d at 604. Further, the court reduced the redress by half based on testimony that Commerce Planet's misrepresentations deceived "most" consumers. *Id.*

[61] Kokesh v. SEC, 137 S. Ct. 1635, 1644–45 (2017).

[62] Liu v. SEC, 140 S. Ct. 1936, 1940 (2020).

[63] 917 F.3d 147, 160–61 (3d Cir. 2019); *see also* FTC v. Hornbeam Special Situations, LLC, No. 1:17-cv-3094-TCB, 2018 WL 6254580, at *5–6 (N.D. Ga. Oct. 15, 2018).

Act.[64] Its decision to reverse longstanding Seventh Circuit precedent relied on a reading of more recent Supreme Court cases that requires courts to "consider whether an implied equitable remedy is compatible with a statute's express remedial scheme."[65] The court concluded that it could not reconcile the FTC Act's "elaborate enforcement provisions" with a congressional grant of authority to obtain equitable monetary remedies under Section 13(b).[66] Relatedly, although resting on *stare decisis* to uphold a monetary remedy under Section 13(b), a concurrence by two of the three judges on the panel in *AMG Capital* called for en banc review of Ninth Circuit precedent interpreting Section 13(b) to authorize monetary relief (which was denied), arguing that Section 19 was the FTC's sole vehicle to obtain monetary relief under Section 5.[67] Most recently, the Third Circuit in another antitrust case—*FTC v. AbbVie*—followed the reasoning in *Credit Bureau Center, LLC* (and the concurrence in *AMG Capital*) to hold that the district court lacked the power to order disgorgement under Section 13(b)).[68]

The Supreme Court soon will be weighing in on the proper remedial scope of Section 13(b); on the last day of its 2019 Term, the Court granted certiorari in *AMG Capital* and heard oral arguments in the case earlier this year.[69]

II. THE ECONOMICS OF DECEPTION[70]

In this Part, we use basic partial-equilibrium analysis to explore the consumer harm and welfare losses from deception. We examine the different benchmarks for measuring harm and explore cases involving deception about product qualities in the cases of pure fraud and legitimate products. We also examine the case of deception involving the price of the product.

A. THE APPROPRIATE BENCHMARK

Deception is harmful because it diverts consumers away from their preferred choice. That is, but for false information about a product, consumers would have done something different with their time and money. To measure the harm from deception, therefore, one must measure the difference between

[64] 937 F.3d 764, 767 (7th Cir. 2019).

[65] *Id.* (citing Meghrig v. KFC W., Inc., 516 U.S. 479, 487–88 (1996)).

[66] *Id.* at 785.

[67] FTC v. AMG Capital Mgmt., LLC, 910 F.3d 417, 431–32 (9th Cir. 2018), *cert. granted*, 141 S. Ct. 194 (2020). The case was argued on Jan. 13, 2021. *See also* Beales & Muris, *supra* note 3, at 6.

[68] 976 F.3d 327, 374–79 (3d Cir. 2020).

[69] *AMG Capital*, 141 S. Ct. 194.

[70] This Part draws on Janis K. Pappalardo, *Economics of Consumer Protection: Contributions and Challenges in Estimating Consumer Injury and Evaluating Consumer Protection Policy*, J. CONSUMER POL'Y (forthcoming), and discussions with Andrew Stivers.

a consumer's utility in the actual (deceptive) world and utility in the world that would have existed but for the deception. Thus, as a threshold matter, to measure consumer injury, we need to establish the appropriate benchmark. There are at least three possible choices: expectations, opportunity, and endowment. Expectation damages are the normal damage award in contract law and are designed to put the consumers in the same position they would have been in had the transaction not been tainted by deception. Opportunity damages compensate consumers for the value of forgone opportunities associated with choosing to rely on the deceptive promise, thus putting them in the same position they would have been in had they purchased their second choice. Finally, damages based on the endowment benchmark returns consumers to the status quo ante. In this manner, expectation and opportunity damages focus on hypothetical counterfactuals: a world in which the deceptive claims were true, and a world in which consumers pursued their second-best option, respectively. Endowment damages, on the other hand, turn the clock back and focus on the world that actually existed before the deceptive transaction took place.

Consider the following example to illustrate how applying various benchmarks can result in different remedies. Suppose that a firm makes deceptive claims about a product that is otherwise worthless to consumers (e.g., a diet pill made of sugar). The product sells for $50, and if it had worked as promised, those consumers who purchased the pill would have valued it at $100. Assume also that the consumer's second choice was to purchase a competing product that works as advertised, which sold for $50, and would have provided $60 in value. A remedy based on consumer expectations would require the firm to pay $100—return the $50 paid and provide the consumer $50 in surplus that they were expecting, which will leave them as well off as they would have been had the product worked as promised. An opportunity-based remedy would require the firm to pay $60—return the $50 paid and provide the consumer the value of the option they lost due to reliance on the deception, $10. Finally, an endowment-based remedy would require the firm only to return the $50 purchase price to the consumer, returning them to the state that existed prior to the fraudulent transaction.

Under competitive conditions, these three benchmarks are approximately equal. If there are many substitutes for the fraudulent product at similar prices, most consumers essentially are indifferent between the promised attributes of the fraudulent product and its next best alternative and therefore can expect to receive little, if any, additional surplus from purchasing the fraudulent product.[71] In this case, if a remedy returns only the purchase price to the defrauded

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[71] The elasticity of demand for the fraudulent product is endogenous, as it depends on the extent to which the misrepresentation differentiates the product from its competitors.

consumer, they can purchase one of the readily available substitute products at the same price and still achieve approximately the same level of utility as they would had if the fraudulent product worked as promised. Put differently, if the fraud did not deprive the consumer of a chance to obtain the same level of utility promised by subsequently purchasing a readily available close substitute, restoring the status quo with an endowment-based remedy will make the consumer just as well off as an expectation- or opportunity-based remedy. Under these conditions, such a remedy also restores any harm to producers of substitute products that resulted from the diversion of sales to the seller of the fraudulent product.

In some cases, however, returning consumers to the status quo ante will not restore the utility of the but-for world. For example, consumers may be worse off because a forgone opportunity is unavailable. Consider a useless but safe supplement that falsely promises to prevent Alzheimer's disease, and assume that no such preventative treatment exists. An endowment-based remedy would leave the consumer worse off than an expectation-based remedy, as there are no substitute products available. Further, if the consumer decided to forgo other options that would have provided a legitimate reduction in the odds of developing dementia, such as quitting smoking or increasing exercise, an endowment-based remedy would also leave the consumer worse off than one that is opportunity-based.

B. Pure Fraud

Figure 1 illustrates these concepts in a partial equilibrium context for a firm's product that has no demand without fraudulent claims about its quality. In this case, D_T—demand for the firm's valueless product in the true state of the world—is equal to zero in both panels of Figure 1. D_{FC} and D_{FN} are linear demand curves with fraud for products with and without close substitutes, respectively, and P_{FC} and P_{FN} are the respective optimal prices of the fraudulent product. The objectively measurable harm to consumers is area $R = T + Z$, which is equal to the revenue paid to the firm selling the worthless product and would be the measure of endowment-based damages.

Consumers also suffer subjective expectation harm in the form of lost consumer surplus from the fraudulent product, which is equal to the area U. An expectation-based damages measure additionally would return these amounts to consumers. As drawn with linear cost and demand, the area U is one-half the size of T, and the ratio of expectation-based measures of consumer harm H_X to endowment-based measures of consumer harm, H_0, equals

$$\lambda = \frac{H_X}{H_0} = \frac{R+U}{R} = 1.5 - \frac{c}{a+c}$$

where *a* is the highest perceived marginal-use value and *c* is the marginal cost of producing for the fraudulently marketed product.

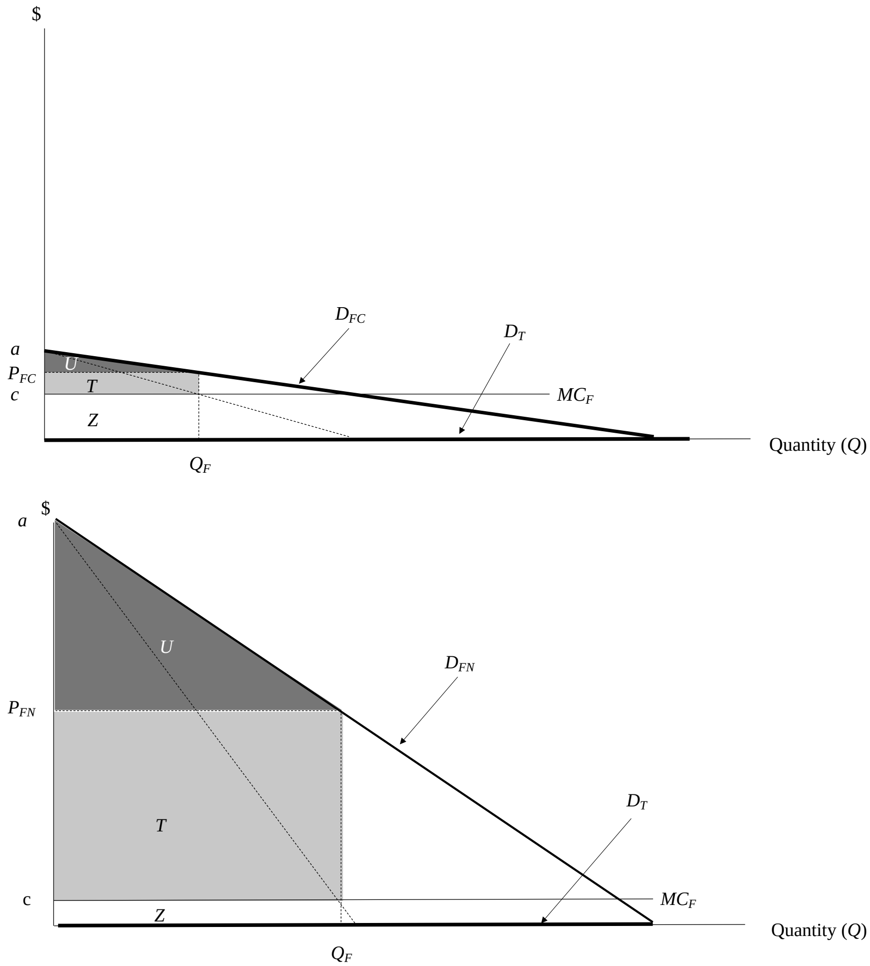

FIGURE 1:
DECEPTION WITH VALUELESS PRODUCT

When the marginal cost of producing the valueless product *c* approaches zero, λ will approach 1.5. Under these conditions, expectation damages $H_X = \lambda R$ will approach an upper bound of 150 percent of revenues. More generally, when the valueless product has a positive marginal cost, *λ* will be less than 1.5. The bottom panel of Figure 1 depicts a firm that faces a demand for its fraudulent product that allows it to raise price significantly above cost. In this case, when *a* is large relative to *c*, *λ* also approaches 1.5. However, when *a* is close to *c*, *λ* will approach one and expectation and endowment damages will be approximated by the firm's revenues R. This would be the case illustrated in the top panel of Figure 1, where the firm faces competition from close substitutes. As a result, even with deception, the firm faces a highly elastic demand for its fraudulent product and can price at a level that produces only small margins.

Figure 1 also illustrates why fraud is socially wasteful. First, consumer harm clearly is greater than gain to the deceptive firm: consumers suffer harm equal to revenue, $R = T + Z$ plus lost consumer surplus (U), whereas the deceptive firm gains T (revenue equal to $T + Z$ minus the cost associated with producing Q_F units Z). Second, and perhaps more importantly, we can see that T is merely a transfer from consumers to fraudsters, which implies that the marginal costs of producing the worthless product along with any investment in committing fraud by sellers and avoiding fraud by potential victims is purely dissipative.[72] Finally, it could be that harm is greater than $T + Z + U$. For example, a fraudulent weight-loss product may contain harmful chemicals, or a product that promises to cure cancer may induce consumers to skip actual beneficial treatment that would have prolonged their lives but can no longer be used because of the progression of the disease.

Thus, in cases of pure fraud, a remedy that approximates the firm's revenues is an appropriate lower-bound measure of consumer harm. With additional assumptions, the appropriate measure of consumer harm under an expectation measure of harm would exceed revenues and can be bounded above by 150 percent of revenues.[73]

C. Deception Involving Quality of a Legitimate Product

Next, consider the more challenging case in which the firm provides a legitimate product—which we define as a product for which demand without the deceptive claim is positive—but engages in a misrepresentation that increases its demand.[74] In the top panel of Figure 2, D_T is demand with truthful disclosure. In the world without deception, the firm charges P_T, sells Q_T, and earns revenues equal to the area of rectangle, A. The bottom panel of Figure 2 illus-

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[72] *See, e.g.*, Burtis & Kobayashi, *supra* note 7; Fred S. McChesney, *Boxed In: Economists and Benefits from Crime*, 13 INT'L REV. L. & ECON. 225 (1993); Thomas S. Ulen, *The Economics of Corporate Criminal Liability*, 17 MANAGERIAL & DECISION ECON. 351 (1996).

[73] *See* Cooter, *supra* note 20, at 1546–47.

[74] Recent examples include the following cases filed by the FTC: FTC v. Univ. of Phoenix, Inc., No. 2:19-cv-5772-ESW (D. Ariz. filed Dec. 10, 2019) (employer relationship and job prospect claims); FTC v. Avant, LLC, No. 1:19-cv-02517 (N.D. Ill. filed Apr. 15, 2019) (failure to disclose fees); Soc. Fin., Inc., FTC Docket No. C-4673 (filed Feb. 22, 2019) (failure to disclose fees); FTC v. Sketchers USA, Inc., No. 1:12-cv-01214-JG (N.D. Ohio filed May 16, 2012) (health claims); FTC v. Reebok Int'l Ltd., No. 1:11-cv-02046-DCN (N.D. Ohio filed Sept. 28, 2011) (health claims); POM Wonderful LLC, FTC Docket No. 9344 (filed Sept. 24, 2010) (disease claims).

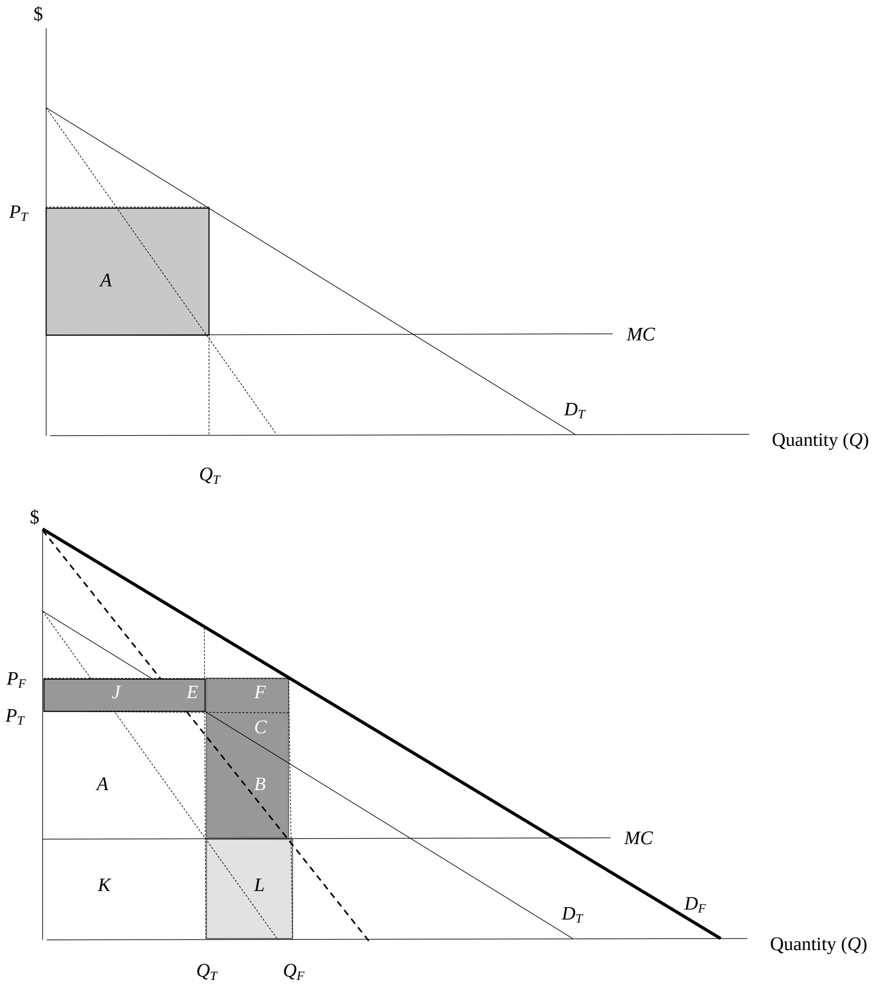

FIGURE 2:
DECEPTION WITH LEGITIMATE PRODUCT

trates the effect of a misrepresentation. With the misrepresentation, the demand curve shifts out to D_F. The misrepresentation increases the firm's revenues through two primary effects—by an increase in the profit-maximizing price of the product to P_F and by causing sales to increase to Q_F. The additional revenues caused by the misrepresentation-induced price premium [$P_F - P_T$] equal a transfer equal to the area *J* + *E* from inframarginal consumers (consumers in the interval [*0*, Q_T] who would have purchased the product in the absence of the deception). The firm also gains by inducing additional consumers to purchase the good. The additional revenue from the deception-induced sales to marginal consumers (consumers in the interval [Q_T, Q_F] whose purchases are caused by the deception) equals area $F + C + B + L$. Incremental profits caused by the deception therefore equal $J + E + F + C + B$.

Figure 3 illustrates the harm to consumers from the deception. The objectively measurable harm to consumers from the deception is equal to the rectangle defined by areas $J + E$, which is the deception-induced increase in the price premium transferred from inframarginal consumers to the deceptive seller, plus harm imposed on marginal consumers depicted by areas $F + C$. The marginal consumers who would not have purchased but for the deception pay a price that is greater than the product's true marginal valuation only because the firm has tricked them into thinking that the product is more valuable than it really is. Specifically, these consumers are willing to pay only an amount equal to $B + L$ for this output, but actually pay $B + L + C + F$. As a result, these marginal consumers pay a price for the product that exceeds their marginal use value, equal to area $C + F$. There are also subjective losses from the deception. Marginal consumers lose consumer surplus equal to the area of triangle G, and inframarginal consumers—those who still would have purchased absent the deception—also lose the expectation of increased consumer surplus from the deception equal to the area H.

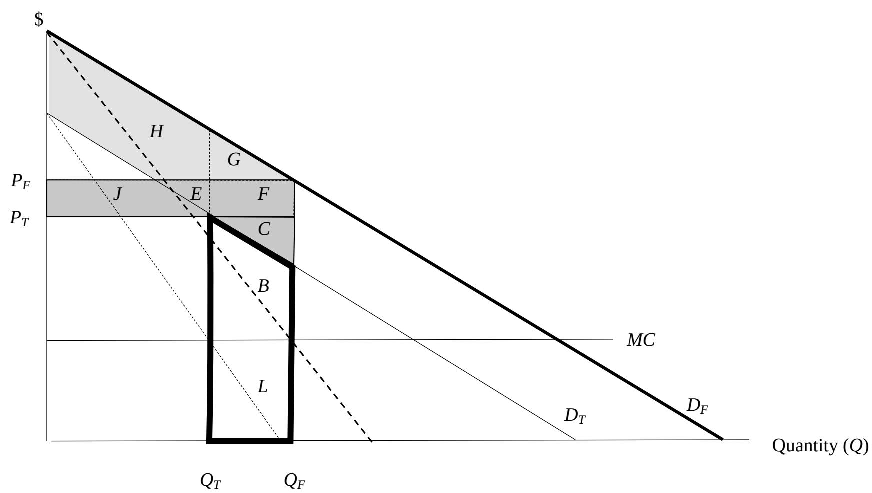

FIGURE 3:
HARM FROM DECEPTION WITH LEGITIMATE PRODUCT

Unlike the case of pure fraud, where all consumer expenditures represent social harm, deception about the quality of a legitimate product involves a combination of transfers from inframarginal consumers to producers and social loss from marginal consumers paying more for a product than they value it.[75] The amount of social loss will vary according to the impact of the deception, production costs, and the elasticity of demand. As will be discussed below, these factors should play a role in crafting a remedy policy designed to deter net harmful conduct in the face of informational constraints.

D. Deception Involving Price

Figures 1–3 focused on deception that increased demand by making claims that falsely inflate the quality of the product. A firm also could engage in deception about the price it charges. For example, the FTC's cases against DIRECTV and AMG Capital focused on insufficient disclosures of the true price.[76] The effects from deception involving price are in many ways similar to those from deception over quality analyzed above.

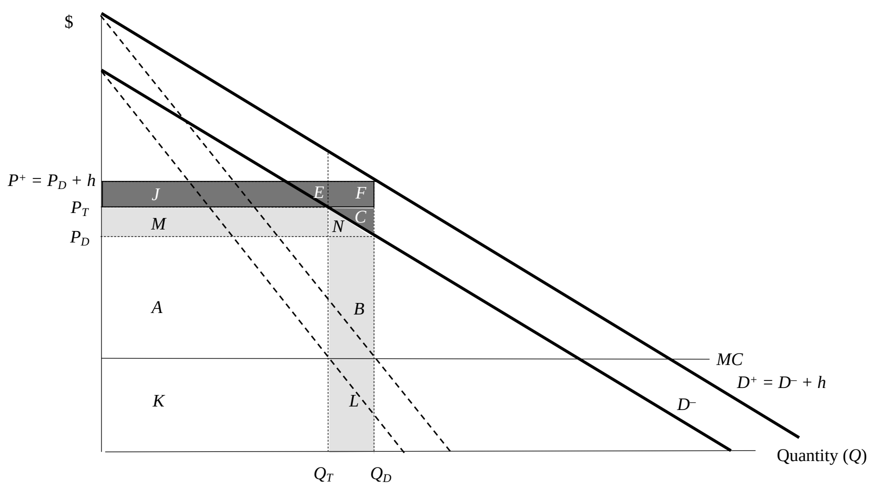

FIGURE 4:
DECEPTION INVOLVING PRICE

Figure 4 illustrates the economics of this type of deception. D^- is the consumer demand for the firm's product or service in the non-deceptive state of

[75] For an example of empirical measurement of the increase in demand from false advertising, see Anita Rao & Emily Wang, *Demand for "Healthy" Products: False Claims and FTC Regulation*, 54 J. MKTG. RSCH. 968 (2017).

[76] FTC v. AMG Cap. Mgmt., LLC, 910 F.3d 417 (9th Cir. 2018), *cert. granted*, 141 S. Ct. 194 (2020) (argued Jan. 13, 2021); FTC v. DIRECTV, Inc., No. 15-cv-01129-HSG, 2018 WL 3911196 (N.D. Cal. Aug. 16, 2018). The FTC also enforces the Restoring Online Shoppers Confidence Act (ROSCA), which lays out rules governing the use of negative-option features. 15 U.S.C. § 8401.

the world, and P_T is the non-deceptive optimal price. Deception involving price consists of the firm deceptively representing to the consumer that the price is P_D, but charging an actual price $P^+ = P_D + h$, where h is the hidden component of the price. Consumers' decisions to purchase the good or service are based on the demand curve D^-, while the firm's pricing decision is based on the demand curve $D^+ = D^- + h$. Because consumers perceive the price to be lower by h than it actually is, the deceptive firm in effect receives a subsidy of h per unit. This subsidy gives the firm an incentive to lower its optimal deceptive price P_D below the non-deceptive optimal price, P_T, in order to increase output from Q_T to Q_D. This effect causes some marginal consumers to purchase units at a with-deception price of P^+ for a product valued below P^+. However, the actual price paid by consumers P^+ will be greater than the nondeceptive optimal price P_T. This results in both marginal and infra marginal consumers paying a price premium of $h - (P_T - P_D) < h$ where $(P_T - P_D) > 0$.

The deception-induced marginal profits equal the area $J + E + F + C + N + B$ and include the capture of the price premium of $h - (P_T - P_D)$ from inframarginal consumers and the profits made from marginal consumers induced by the deception to purchase the good or service.[77] Relative to the but-for world where the product is priced nondeceptively at P_T, consumer harm includes areas J, E, and F—the transfer from consumers to the firm generated by the price premium on all sold units. Consumer harm also includes the negative surplus C generated when marginal purchasers are induced by the deception to purchase goods at a price higher than their marginal value. There are also expectation harms M for inframarginal consumers and N for marginal consumers.[78]

III. THE ECONOMICS OF SECTION 13(b)

In this Part, we explore optimal remedies from an economic standpoint, and compare the current Section 13(b) framework for this benchmark. We also examine how the deviations from this benchmark are likely to cause overdeterrence.

A. Optimal Monetary Remedies

From an economic standpoint, the ultimate goal of imposing monetary remedies in any case that the FTC pursues should be deterrence. Because con-

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[77] Because $(P_T - P_D) > 0$, the price premium $h - (P_T - P_D)$ is smaller than the hidden overcharge h. This is a standard result of the tax-incidence literature, where the burden of any unit tax (or the benefit of any subsidy) falls on both transacting parties, irrespective of who directly pays the tax (or receives the subsidy).

[78] Because the consumer demand at the time of the purchase is given by D^- and not D^+, there are no analogous expectation harms equivalent to the areas G and H in Figure 3.

sumer redress is a transfer from the defendant to the defrauded consumer, the resources expended pursuing the action dissipate the total amount of surplus available to society if an enforcement action does not prevent future consumer harm. This is not to say that consumer redress alone does not serve important non-economic goals, but only to point out that enforcement actions squander surplus unless they increase the likelihood that potential future violators will engage in less net-harmful behavior. As we will see below, however, these goals are in tension when consumers place value on a product independent from the deception: a remedy that returns deceived consumers to the status quo ante will overstate consumer harm and thus overdeter, and an optimally deterring remedy based on consumer harm would likely leave at least some consumers undercompensated.

An optimal enforcement program will not deter all conduct that risks deceiving some consumers; efficient conduct will include some actions that are potentially deceptive. Because some proportion of the population is likely to take away a misleading claim from any advertisement, few representations are completely truthful, in effect. Nonetheless, when the information contained in these representations is valuable to most people, we do not want to deter them. Thus, enforcement should focus on deterring conduct that is on net harmful to consumers. A remedy that deters socially harmful conduct without discouraging socially valuable conduct will maximize social welfare.

From society's point of view, welfare is maximized when firms engage only in conduct that creates more value than harm ($v > h$).[79] Broadly, there are two approaches to effecting optimal deterrence, both of which begin with the observation that a firm will engage in conduct only if the value from engaging in the conduct (v) is greater than the expected sanction, which is the probability of detection and punishment (p) multiplied by the sanction (S). The first approach, akin to strict liability in tort, is to charge a price equal to the harm that a firm's actions cause regardless of whether the conduct is net harmful or net beneficial. By setting the expected sanction equal to harm ($p*S = h$), the FTC forces the firm to internalize the harm that its activity causes. As a result, firms will engage in conduct only when $v > p*S = h$, thus aligning private and social incentives.[80] Note also that equating the expected sanction to harm implies setting the sanction equal to harm inflated by the probability

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[79] Value and harm could be jointly produced, in the sense that the activity always generates both harm and benefits. Alternatively, the activity could always generate benefits but only generate harm with some probability. In either case, the FTC will set the same rule that encourages activity that generates value greater than harm. *See, e.g.*, SHAVELL, FOUNDATIONS, *supra* note 20, at 474 n.2.

[80] This result is an example of the more general result that when parties internalize the consumer injury they cause, they will tend to make socially efficient care and production decisions. *See, e.g.*, R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

of detection and punishment ($S^* = h/p$). Assuming that detection and punishment is perfect ($p = 1$), the price of conduct is equal to h, ensuring that the FTC will deter only net harmful activities (those for which $v < h$), which is socially efficient. If many acts go undetected or are unsuccessfully punished (p is low), the sanction is increased commensurately. For example, if a company is detected and punished only once for every ten times it engages in deceptive advertising ($p = .10$), the sanction should be ten times the harm ($S^* = h/.10$).[81]

Rather than setting a price for engaging in all conduct, a second enforcement approach is to sanction only net harmful conduct. Under this approach, which is akin to a negligence rule in torts, the FTC sorts conduct into net beneficial and net harmful bins and sanctions only the latter category. In this manner, the sanction for engaging in conduct that generates net benefits ($v > h$) is set equal to zero, and sanctions are set sufficiently high to deter conduct that generates net harm ($v < h$). Importantly, under a negligence-like approach, sanctions do not have to be related to consumer harm to generate optimal deterrence. As long as the FTC can accurately identify conduct that generates net harm, sanctions only have to be large enough that a firm will never find it privately rational to engage in the proscribed conduct. Thus, in a negligence setting, remedies are bounded from below by the gain to the firm and have no upper bound; anything greater than the gain from engaging in conduct will be deterring, and because the conduct identified is always net harmful to society, there is no concern about overdeterrence.

[81] It is important to note that setting the price of conduct equal to harm is generally superior to setting it equal to the defendant's gain, which is sometimes suggested as an alternative sanction. First, a large proportion of conduct creates some consumer harm, but generates value to the firm in excess of this harm. Accordingly, a great deal of social value would be squandered if a firm were deprived of its entire gain for any conduct that generates harm. For example, suppose a small but significant percentage of consumers are likely to take away a false claim from an advertisement that otherwise provides valuable information to the remainder of the population. A remedy that disgorged *all* of the firm's revenues would prevent the remainder of the population from enjoying the value created by the advertising. Second, harm-based remedies are more robust to errors than gain-based remedies. This result follows from the fact that there is no necessary relationship between the gain to a firm and consumer harm. Although in some instances (e.g., pure fraud) harm- and gain-based remedies will arrive at the same measure, this need not be the case. Very harmful conduct may provide the defendant with modest gains, and a defendant may gain a great deal from conduct that causes only slight harm. To see this, suppose that a firm increases its profits by $100 when it fails to implement a data security measure it promised to consumers, but that a data breach attributable to this misfeasance will result in $1,000 in consumer harm. If an enforcer underestimates profits by just $10, the firm will engage in the act (because $100 less a penalty of $90 > $0), causing $900 in net harm ($1,000 – $100). But because the firm will forgo the security measure only if the sanction is less than $100, the enforcer must be off by more than $900 in estimating a harm-based penalty before the firm will decide that it is not rational to employ the security measure. *See* SHAVELL, FOUNDATIONS, *supra* note 20, at 477–78; A. Mitchell Polinsky & Steven Shavell, *Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?,* 10 J.L. ECON. & ORG. 427 (1994).

When the FTC can perfectly distinguish between net harmful and net beneficial conduct and effectively telegraph this legal standard to potential defendants, and transactions costs are zero, a negligence approach is equivalent to setting a price equal to consumer harm for all conduct.[82] When the net social value of conduct is likely to vary among firms and across circumstances in a way that makes it difficult for an agency to sort conduct into net harmful and net beneficial bins, however, the equivalence breaks down. When the FTC lacks accurate information to determine whether conduct is net harmful or net beneficial, firms will view the liability standard as stochastic. Consequently, when firms are planning, they will not know for certain whether their conduct will result in liability. As discussed in more detail below, stochastic liability standards can lead to overdeterrence, even if the FTC correctly sorts conduct on average. In these cases, the size of the remedy matters.

B. Overdeterrence and Section 13(b)

As explained in Part II, consumer harm from deception is equal to the difference in utility between the actual (deceptive) outcome and the counterfactual outcome in which no deception took place. Assuming that subjective harm is beyond measurement, or that the market in question is sufficiently competitive so that subjective value is likely to be minimal, operationalizing an efficient harm-based remedy requires accurate measurement of two values: (1) the marginal increase in demand and any associated price increase due to the deception; and (2) the true valuation that marginal consumers place on the product subject to deception.[83] But the case law interpreting the FTC's remedial toolkit fails at this task. Because courts, when determining remedies, employ the fiction that a deceptive claim was material to everyone who purchased, the application of Section 13(b) to valuable products makes it almost certain that any remedy will overstate consumer harm.

The application of Section 5 to deceptive conduct most closely resembles a negligence-based approach: under an unfairness theory, the FTC explicitly performs a cost-benefit analysis of the conduct in question; and under a deception theory, the FTC does not have to show explicitly that the conduct was net harmful, but employs proxies by viewing claims through the objective lens of a "reasonable consumer" and requiring that the misrepresentation be "material."[84] Thus, even if the current approach to Section 13(b) overstates consumer harm, it will have no impact on behavior as long as the legal standard is

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[82] To see this, assume that detection and punishment is perfect ($p = 1$) and note that if one sets $S = h$ and if $v < h$ for all firms, $v < S$ for all firms, and no firms will engage in the conduct.

[83] In Figure 3, the marginal consumers' welfare loss from purchasing and consuming the product or service equals the revenue from marginal consumers less the value these consumers receive: $B+L+F+C - (B+L) = F+C$.

[84] *See* Deception Policy Statement, *supra* note 16, at 1.

clear. This is likely the case for pure fraud—where there clearly are no consumer benefits to consider—because the standard is clear and there is little risk of deterring beneficial conduct. Thus, tailoring the remedy to consumer harm is unnecessary.[85] But when the line between legal and illegal conduct becomes less certain, setting remedies too high can chill socially beneficial conduct. Unfortunately, the current judicial framework for Section 13(b) remedies is least accurate in cases where accuracy is most needed. We explore these shortcomings of the judicial approach to Section 13(b) in more detail below.

1. *Identifying the Marginal Impact*

A key shortcoming of the judicially created framework for determining Section 13(b) remedies is that unless the product in question is worthless, the framework is incapable of identifying the marginal impact of deception. To prove that an act or practice is deceptive under the FTC Act, the Commission must show that at least a "significant minority" of consumers to whom the representation was targeted, "acting reasonably under the circumstance," took away a "materially" false claim.[86] Materiality asks whether the false claim impacted consumers' decision making and is a stand-in for a direct showing of harm.[87] In this manner, materiality as part of the liability portion of a case is binary—either a false claim is material or it isn't. At the remedy stage, courts focus on the concept of "reliance," which is continuous, hinging on *how many* consumers relied on the false claim.

But rather than answering the reliance question directly, the current judicial approach to Section 13(b) remedies takes a shortcut that results in an economically incoherent result. First, courts explain correctly that unlike a private action in fraud, the FTC does not have to show individualized reliance for each consumer.[88] As one court explained, "Section 13 serves a public purpose

[85] This approach finds an analogy in antitrust law, where, under a per se rule, only conduct that is clearly harmful is condemned without an inquiry into consumer harm.

[86] Deception Policy Statement, *supra* note 16, at 1 ("We examine the practice from the perspective of a consumer acting reasonably in the circumstances."); *see also* POM Wonderful, LLC v. FTC, 777 F.3d 478, 490 (D.C. Cir. 2015) (noting that the FTC "will deem an advertisement to convey a claim if consumers acting reasonably under the circumstances would interpret the advertisement to contain that message." (quoting Thompson Med. Co., 104 F.T.C. 648, 788 (1984))).

[87] *See* Deception Policy Statement, *supra* note 16, at 6 ("A finding of materiality is also a finding that injury is likely to exist . . . . Injury exists if consumers would have chosen differently but for the deception . . . . Thus, injury and materiality are different names for the same concept.").

[88] *See* FTC v. Dantuma, 748 F. App'x 735, 738 (9th Cir. 2018) ("We have previously held that 'proof of individual reliance by each purchasing customer is not needed' to establish liability under section 13(b)." (quoting FTC v. Figgie Int'l, Inc., 994 F.2d 595, 605 (9th Cir. 1993))), *petition for cert. filed sub nom.* Publishers Bus. Servs., Inc. v. FTC, No. 19-507 (U.S. Oct. 18, 2019).

by authorizing the Commission to seek redress on behalf of injured consumers . . . [and r]equiring proof of subjective reliance by each individual consumer would thwart effective prosecution of large consumer redress actions and frustrate the statutory goals of the section."[89] While this much is likely to be true, courts then fallaciously reason that since the Commission already has proved that the defendant made material misrepresentations that were widely disseminated, the Commission therefore should enjoy a presumption that *every* consumer of the product materially relied on the misrepresentation.[90] With this presumption in hand, the FTC then satisfies its initial burden of production at the remedy stage to provide a "reasonable approximation" of consumer harm merely by providing the court with total consumer expenditures on the product.[91] Thus, the fatal flaw in the current approach to Section 13(b) remedies can be traced to courts' translation of the "materiality" showing at the liability stage into a presumption that everyone who purchased did so only because of the deceptive claim.

Vital information gets lost in this translation. A presumption that a misrepresentation was the *only* reason that *anybody* bought the product identifies consumer harm only if one is dealing with a product with no demand absent the lie—think the sugar pill masquerading as a weight-loss miracle illustrated in Figure 1. In all other cases, the presumption leads to remedies that are in excess of consumer harm. To see why, it is useful to unpack exactly what a finding of materiality at the liability stage actually reveals. Recall that to prove liability, the FTC must show only that a "significant minority" of reasonable consumers are likely to take away the challenged claim from the representation in question.[92] Importantly, the FTC can satisfy this burden by showing that as few as 10 percent of consumers would interpret a representa-

[89] FTC v. Kitco of Nev., Inc., 612 F. Supp. 1282, 1293 (D. Minn. 1985).

[90] *See* FTC v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991).

[91] This approach is exemplified in *FTC v. Commerce Planet, Inc.*, in which the court approved of the FTC's instructing its expert to assume that "(i) no consumer would have joined OnlineSupplier if the nature of the membership had been fully disclosed to them, and (ii) consumers derived no benefit from their OnlineSupplier memberships." 878 F. Supp. 2d 1048, 1089 (C.D. Cal. 2012), *aff'd in part and vacated in part*, 815 F.3d 593 (9th Cir. 2016). Some courts have questioned this approach and have suggested that the FTC must do more to meet its burden. For example, in *DIRECTV*, the court questioned the FTC expert's ability to merely assume for calculating a remedy that every consumer who purchased a subscription during the relevant period would have expected to pay the introductory price for two years. FTC v. DIRECTV, Inc., No. 15-cv-01129-HSG, 2018 WL 3911196, at *23 (N.D. Cal. Aug. 16, 2018) ("The Court believes that this issue, and the breadth of the FTC's interpretation of the 'presumption of reliance,' creates a significant possibility that at the close of the evidence the FTC will be unable to establish a reasonable approximation of damages, or that its approximation will be substantially or even entirely rebutted by the Defendant.").

[92] Deception Policy Statement, *supra* note 16, at 10 n.20.

tion to make the false claim.[93] The FTC then enjoys a presumption of materiality for all express claims, intended implied claims, and claims involving "health, safety, or other areas with which the reasonable consumer would be concerned."[94] In practice, this framework means that every claim is presumptively material, and this presumption is for all practical purposes irrefutable; that is, in nearly every case, the issue of materiality is almost never seriously contested.[95]

The upshot of these dual presumptions is that in the course of proving liability, the FTC has almost invariably provided *no* evidence that the deception changed the behavior of any consumers. Indeed, in the limit, the FTC could have shown at the liability stage that as few as 10 percent of consumers were fooled by a claim and provided no evidence whatsoever about materiality. Nonetheless, courts translate this non-showing into a presumption that *all sales in the market were coerced by the false claim*. In reality, because it is unlikely that every deceived consumer changed their behavior as a result of the false claim, the "significant minority" of deceived consumers presents an *upper bound* on the marginal impact of deception. For example, suppose that the FTC's facial analysis suggests that a poor disclosure is likely to fool 40 percent of the consumers in a market. The ceiling of a firm's revenue attributable to the false claim is 40 percent, and it is likely less unless one assumes that every deceived consumer is also marginal.

Consider the deception illustrated in Figures 2 and 3. We know that consumers from Q_T to Q_F were deceived—otherwise they would not have purchased, because their marginal valuation is less than the price. But we have no idea whether consumers from the left of Q_T also were deceived, because those consumers would have purchased regardless. That is, the claim was not material to them. To the extent that these consumers were harmed, the magnitude of the harm is not measured by the revenue collected, but rather is limited to the size of any price premium ($P_F - P_T$ in Figure 3). Yet rather than attempting to measure the marginal effect on deceived consumers ($Q_F - Q_T$) or the size of any price premium ($P_F - P_T$), courts focus on the number of consumers who were deceived, which will always overstate harm unless only marginal consumers were deceived—a highly unlikely circumstance. Stated more plainly, while all marginal consumers are deceived, not all deceived consumers are

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[93] ECM BioFilms, Inc. v. FTC, 851 F.3d 599, 611 (6th Cir. 2017) ("We have previously expressed [an] unwillingness 'to overturn the deception findings of the Commission' where an ad misleads '15% (or 10%) of the buying public.'" (first quoting Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 249 (6th Cir. 1973); then citing Telebrands Corp., 140 F.T.C. 278, 291 (2005) (holding that range of 10.5% to 17.3% "was sufficient to conclude that the challenged claims were communicated"), *aff'd*, 457 F.3d 354 (4th Cir. 2006))).

[94] Deception Policy Statement, *supra* note 16, at 5.

[95] *See, e.g.*, Kraft, Inc. v. FTC, 970 F.2d 311, 322–23 (7th Cir. 1992).

marginal. Yet courts have committed this logical error in constructing the remedial framework around Section 13(b).

As misguided as this approach is, the damage could be contained if defendants were able to rebut the "100% reliance" presumption with evidence of the marginal impact of the deception. Indeed, because defendants are likely to be in possession of the data needed to answer this question, they may be the efficient providers of this information. Unfortunately, courts will not entertain this evidence. As explained above in Part I, the defendant can challenge the FTC's "reasonable approximation" of unjust gains by deducting revenue from consumers who were not exposed to the false claim, or who, through their behavior, demonstrate that they were not deceived by the claim.[96] But because the court will assume that any purchase by a deceived consumer is illegitimate, defendants cannot exclude revenue from consumers who were exposed to, and fooled by, the false claim but who would have purchased the product anyway. These are the consumers whose predeception marginal value was sufficiently high that they would have purchased at the prevailing prices in the world without deception. In the context of Figure 2, these would be deceived consumers who are to the left of Q_T. In other words, even if the false claim increased these consumers' marginal value for the product, the deception was not material for them. Because these consumers' decision to purchase the product was not affected, including their expenditures over and above any price premium they paid will overstate any remedy calculation.

One argument in favor of the current judicial approach is that, because informational hurdles make it impossible to know what consumers would have done in a counterfactual world without deception, the best approach is to return consumers to the status quo ante and let them reveal their choice. But this approach suffers from two flaws. First, in many cases, it is possible to estimate the marginal impact of deception. For example, there may be multiple methods of signing up for a negative option plan, only some of which are deceptive, and the difference in consumer choice between the two information

[96] For example, in *Commerce Planet*, the Ninth Circuit suggested that cancellations before a negative option continuity plan kicks in may suggest an understanding of the allegedly deficient disclosures. 815 F.3d at 604. Further, the Ninth Circuit expressed a similar sentiment in *PBS*, suggesting that on remand, the district court could consider whether revenue from consumers who re-subscribed should be included. FTC v. Publishers Bus. Servs., Inc., 540 F. App'x 555, 558 (9th Cir. 2013). Nonetheless, the Ninth Circuit upheld a district court decision to not allow the deduction of the original expenditures from consumers who subsequently renewed their subscriptions because the product was still "tainted" by the deception. *See* FTC v. Dantuma, 748 F. App'x 735, 738 (9th Cir. 2018) (holding that a consumer's decision to renew "does not necessarily mean [his or her] original decision to purchase was free from the taint of [PBS's] deceptive sales practices" (alterations in original) (quoting FTC v. Publishers Bus. Servs., Inc., No. 2:08-cv-00620-APG-GWF, 2017 WL 451953, at *4 (D. Nev. Feb. 1, 2017))), *petition for cert. filed sub nom.* Publishers Bus. Servs., Inc. v. FTC, No. 19-507 (U.S. Oct. 18, 2019).

flows can provide an estimate of the impact of the deceptive claim.[97] Further, even if everyone is exposed to the claim, one can estimate the impact of a false advertisement by measuring the shift in demand relative to competing products.[98] The Commission performs similar work all of the time in competition cases, and data almost always exists.[99] There simply is no good policy reason dictating that consumer protection cases not involving routine fraud should avoid the type of analytical rigor typically employed in competition cases—especially when the stakes are just as high.[100]

Second, although it is true that consumers have the best information about what they would have done in a world absent deception, if we can reliably estimate consumer choices in a counterfactual world, an approach that returns money to consumers merely adds transaction costs, if most of those exposed to the deception still would have purchased the product in question. What is more, consumer refund programs themselves are often difficult and costly to administer; the FTC does not return all of its court-ordered remedies to consumers, and when it does, consumers typically get back only a percentage of the actual purchase price.

Another defense of the current approach is that the FTC is limited to collecting equitable relief, which is focused on restoring the status quo ante, not providing damages.[101] This argument has some purchase, but if equity is concerned with removing a defendant's ill-gotten gains, the current approach overstates these gains by including revenue from consumers who would have purchased with or without the deception. That is, revenue from inframarginal consumers is not "ill-gotten" in the sense that the deception had no impact on their purchasing decisions.

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[97] For example, in *Commerce Planet*, sales were generated through telemarketing and online. Only the online sales contained the deceptive disclosures.

[98] *See* Rao & Wang, *supra* note 75.

[99] For example, although it often does not become public, parties often provide this type of information to the Commission during the investigation and consent negotiation stage.

[100] *See* Michael R. Baye & Joshua D. Wright, *How to Economize Consumer Protection*, ANTITRUST SOURCE (Feb. 2018), www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb18_full_source.pdf.

[101] *See Commerce Planet*, 815 F.3d at 603 (explaining that the purpose of disgorgement under 13(b) is "to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction" (quoting 1 DAN B. DOBBS, LAW OF REMEDIES § 4.1(1), at 552 (2d ed. 1993)).

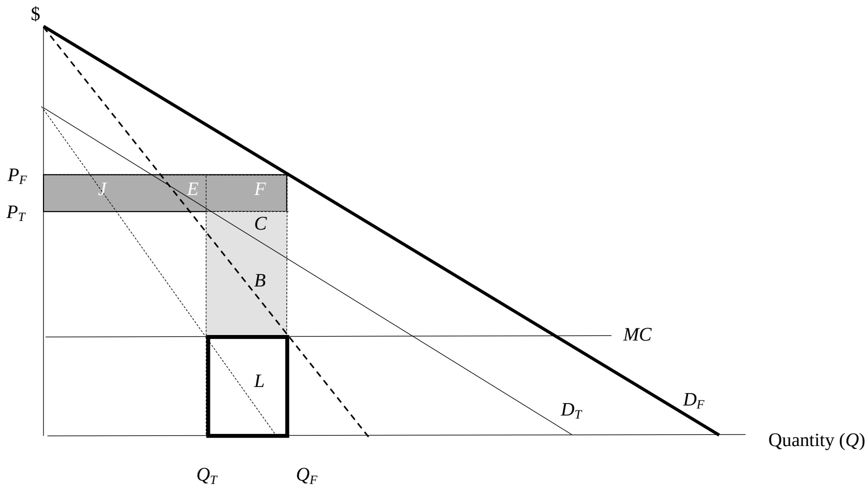

FIGURE 5:
THE REMEDIAL EFFECTS OF IDEAL RESCISSION

At least one court has attempted to design a framework under Section 13(b) to create incentives for consumers to self-identify as marginal. Indeed, consumers are likely to have the best information, as their value for the product in question is private information. In *Figgie*, the court required the defendant to provide information that cured the deception and then allowed any consumers to return their heat detectors for a court-determined refund price.[102] In theory, a *Figgie* scheme based on a rescission remedy will separate marginal from inframarginal consumers because only those consumers who value the product less than the refund price would return the product.[103]

The effects of an ideal rescission scheme are illustrated in Figure 5. First, all purchasers [0, Q_F] are offered a refund of any estimated price premium ($P_F - P_T$), so the areas *J*, *E*, and *F* are returned to consumers.[104] In addition, all consumers are given the option to forgo payment of the price premium in order to receive a full refund of their purchase price P_F if they return the product. In the absence of complicating factors such as transaction and information costs or an inability to accurately adjust for depreciation of the used products, marginal consumers in the interval [Q_T, Q_F] will rationally choose to

[102] FTC v. Figgie Int'l, Inc., 994 F.2d 595, 606 (9th Cir. 1993).

[103] In the context of Figure 2, assuming that return prices are set correctly, consumers will return the product for a refund only if their true marginal value on D_T lies between Q_T and Q_F.

[104] The *Figgie* refund scheme did not involve a price premium and merely allowed refunds for those consumers who returned their heat detectors. *See Figgie*, 994 F.2d at 607.

return the product, while inframarginal consumers in the interval [0, Q_T] will rationally choose to take the price premium payment and keep the product.

This remedy has numerous desirable goals. First, it uses consumers' private information and revealed preference to sort between marginal and inframarginal consumers. Second, it matches the appropriate endowment-based remedy to the right type of consumer, with inframarginal consumers choosing to keep the product and the payment of the price premium and marginal consumers who would have not purchased the product absent the deception choosing to return the product for a full refund. Finally, it imposes a remedy that costs the firm an amount at least equal to its marginal profits from the deception and equal to its marginal revenues from the deception if the returned products are worthless. In Figure 5, the firm must pay $J + E$ to inframarginal consumers and $F + C + B + L$ to marginal consumers. Marginal consumers return the purchased products to the seller, who can save future production costs L if the products can be resold.

Although this approach is laudable for attempting to harness consumers' private information, in practice, the use of such rescission mechanisms to measure actual consumer injury is likely to suffer some important shortcomings. First, they can be used only when there is a physical product that is capable of being returned. Items that are consumed will not be returned, whether or not the consumers' nondeceptive marginal-use values were above or below the price of the deceptively marketed good or service. But these types of products comprise the bulk of FTC deception cases. For example, recent deception cases concerning legitimate products involved baby food,[105] cognitive improvement supplements,[106] college education,[107] consumer

[105] *See* Press Release, Fed. Trade Comm'n, FTC Charges Gerber with Falsely Advertising Its Good Start Gentle Formula Protects Infants from Developing Allergies (Oct. 30, 2014), www.ftc.gov/news-events/press-releases/2014/10/ftc-charges-gerber-falsely-advertising-its-good-start-gentle.

[106] *See* Press Release, Fed. Trade Comm'n, FTC, New York State Charge the Marketers of Prevagen with Making Deceptive Memory, Cognitive Improvement Claims (Jan. 9, 2017), www.ftc.gov/news-events/press-releases/2017/01/ftc-new-york-state-charge-marketers-prevagen-making-deceptive.

[107] *See* Press Release, Fed. Trade Comm'n, FTC Obtains Record $191 Million Settlement from University of Phoenix To Resolve FTC Charges It Used Deceptive Advertising To Attract Prospective Students (Dec. 10, 2019), www.ftc.gov/news-events/press-releases/2019/12/ftc-obtains-record-191-million-settlement-university-phoenix.

loans,[108] satellite television,[109] online dating services,[110] and computer repairs.[111]

Second, even for physical products capable of being returned, the use of rescission as a remedy is likely to sort inaccurately between marginal and inframarginal purchasers. Because consumers are being offered the option of exchanging a used product—which will have depreciated in value—for the price of a new product, consumers who were not harmed by the deception (i.e., those who placed a value on the new product at least as high as the purchase price) have an incentive to engage in the refund program if depreciation is not easy to incorporate into the price premium refund. Further, because exchange is not costless, some consumers who value the product less than the purchase price will not find it worthwhile to reveal their type by engaging in the refund program.[112]

Finally, because the returned product is used, it will be essentially worthless to the defendant, and in fact may require expenditures on storage or disposal.[113] Accordingly, a *Figgie* return program will be a dissipative exercise unless the efficiency gains (in terms of tempering overdeterrence) from coaxing marginal consumers into identifying themselves are greater than the transaction costs of returning and disposing of the used product.

2. *Measuring Harm to Marginal Consumers*

In addition to overstating the marginal impact on demand, the current judicial approach to Section 13(b) remedies applied to valuable products also overstates the harm that marginal consumers suffer. As explained in Part II, in

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[108] *See* Press Release, Fed. Trade Comm'n, Online Lending Company Agrees To Settle FTC Charges It Engaged in Deceptive and Unfair Loan Servicing Practices (Apr. 15, 2019), www.ftc.gov/news-events/press-releases/2019/04/online-lending-company-agrees-settle-ftc-charges-it-engaged; Press Release, Fed. Trade Comm'n, FTC Approves Final Order with SoFi (Feb. 25, 2019), www.ftc.gov/news-events/press-releases/2019/02/ftc-approves-final-order-sofi.

[109] *See* FTC v. DIRECTV, Inc., No. 4:15-cv-01129-HSG, 2018 WL 3911196 (N.D. Cal. Aug. 16, 2018).

[110] *See* Press Release, Fed. Trade Comm'n, FTC Sues Owner of Online Dating Service Match.com for Using Fake Love Interest Ads To Trick Consumers into Paying for a Match.com Subscription (Sept. 25, 2019), www.ftc.gov/news-events/press-releases/2019/09/ftc-sues-owner-online-dating-service-matchcom-using-fake-love.

[111] *See* Press Release, Fed. Trade Comm'n, FTC Sending More Than $34 Million in Refunds to Office Depot Customers (Feb. 20, 2020), www.ftc.gov/news-events/press-releases/2020/02/ftc-sending-more-34-million-refunds-office-depot-customers.

[112] Let P_R denote the amount paid if the consumer returns the physical product, and let V_N denote the consumer's nondeceptive value of the product. A consumer will return the product only if the gain from return ($P_R - V_N$) is greater than the transaction costs, t, involved in exercising this option. It could be possible to raise the return price to include transactions costs to attract more marginal consumers in order to increase the return rate by marginal consumers.

[113] *See* Richard R.W. Brooks & Alexander Stremitzer, *Beyond Ex Post Expediency—An Ex Ante View of Rescission and Restitution*, 68 WASH. & LEE L. REV. 1171, 1175 (2011).

the case of a product that has no value but for the deception, total revenue is an accurate measure of consumer harm. But when the product provides value to a marginal consumer who would not have purchased at the market price absent the false claim, consumer harm is measured as the difference between the price they paid and the value they received. Yet courts applying Section 13(b) give defendants no credit for value, basing the remedy instead on the full price of the product. Current FTC practice can thus overcompensate consumers and may run afoul of the holding in *Liu*.

One rationale for the FTC's current approach can be found in the equitable nature of Section 13(b) remedies, which are focused on restoring consumers to the status quo ante. From an economic perspective, the goal of a remedy is to create incentives for firms to take efficient levels of care and activity, not to make deceived consumers whole. In a world of perfect information, a remedy equal to harm can achieve these goals simultaneously. For example, if the FTC could identify the marginal consumers who were deceived into purchasing the product and accurately measure their willingness to pay for that product absent deception, it could collect a remedy from the firm equal to the difference between this amount and what consumers actually paid, and return that amount to consumers.[114] Deceived consumers would then be whole in the sense that they would be indifferent to the choice between their endowment utility and their utility with deception and a remedy.

Informational burdens, however, make it practically impossible to elicit the level of compensation needed to make marginal consumers whole. First, even if one can identify the magnitude of the marginal impact of deception, it would be impossible to identify the marginal consumers who would receive the refund, let alone their individual valuations. Second, deception deprives consumers of a choice; but for the deception, they would have done something else with their money. A remedy that provides consumers the difference between some estimated value of the product and the price they paid implicitly assumes a counterfactual world in which the consumer would have purchased the product at a lower price absent the deception. But in reality, we can never know the counterfactual choice a consumer would have made had the firm offered the product without deception at a lower price. This reasoning underpinned the *Figgie* court's refusal to provide defendants credit for the value of a functioning heat detector. As the court explained with respect to its hypothetical fraud of selling rhinestones as diamonds, had consumers been offered rhinestones at the nondeceptive price, "perhaps they would not have bought rhinestones at all or only some."[115] The court's distinction between the fraud "in the selling" and fraud concerning "the value of the thing sold," how-

[114] Area $F+C$ in Figure 2.

[115] FTC v. Figgie Int'l, Inc., 994 F.2d 595, 606 (9th Cir. 1993).

ever, distracts from the true driver of the difficulty in providing defendants credit for value: imperfect information.[116] As a practical matter, it is impossible to reconstruct the but-for world of no deception.

At the same time, although returning the full purchase price will provide the fullest redress to consumers by restoring their endowment choice set, this remedy is also likely to cause firms to pay sanctions greater than consumer harm when the product in question has value. To return to the *Figgie* example, even if consumers would not have chosen to purchase any heat detectors (or rhinestones in the court's hypothetical) with their endowment resources in the counterfactual world of no deception, this does not mean that heat detectors or rhinestones are worthless to them. It means only that when confronted with scarcity, consumers would not have purchased rhinestones at the nondeceptive price; it says nothing about whether they would not have purchased them at *any* positive price.

The important point is that when choosing a remedy with imperfect information about consumer valuations, there are tradeoffs between making consumers whole and creating efficient incentives. A remedy equal to total revenue necessarily overstates consumer injury, but if returned to consumers, it leaves them in a position at least as good as they were before making the deceptive purchase. On the other hand, allowing the merchant some credit for the value provided to consumers is likely to more closely approximate actual consumer harm. But given informational limitations, even if this money were returned to consumers, some consumers will not be restored to their predeception level of utility. These tradeoffs are likely to be most stark in instances in which the marginal increase in demand from the deceptive claim is small relative to the product's non-deceptive demand.

3. *Potential Overdeterrence*

As noted above, given informational difficulties and transaction costs, most realistic approaches to remedies are likely to fall short of perfectly measuring consumer harm. A final point we make is to show how the current Section 13(b) framework can vastly overstate consumer harm, and how this fact is likely to deter beneficial conduct.

Consider the following hypothetical. An online pet food seller offers a negative-option plan in which, once the consumer signs up to buy a first bag of dog food, the merchant will charge the consumer's credit card and send a new bag on the first day of every month unless the consumer cancels the order within five days of the scheduled monthly auto-shipment. Suppose that it is undisputed that the disclosures regarding the negative option plan are inade-

[116] *Id.*

quate in the sense that at least a significant minority of reasonable consumers are unlikely to understand that a new bag will ship automatically unless they take some action.[117] Finally, assume that this online merchant has a few offline stores in which consumers can sign up for the auto-shipment program, but they are required to go through an interface that the FTC acknowledges sufficiently discloses the negative option feature. Each bag costs $20, and the data show that 500,000 consumers sign up for the service (90 percent online (450,000) and 10 percent offline (50,000)), and no consumer who signs up online cancels before the automatic shipment of their second bag of dog food, but the cancellation rate for the brick-and-mortar customers is 5 percent.

Under the current case law, the FTC would satisfy its burden to provide a "reasonable estimate" of consumer injury by merely multiplying the 450,000 online consumers who were exposed to the inadequate disclosure times the $20 they are charged for their auto-shipped second bag, to arrive at a $9,000,000 remedy. It is easy to show that this amount vastly overstates harm for two reasons. First, it assumes a counterfactual world in which no consumer deceived by the inadequate disclosure would have bought a second bag of dog food had they known the truth. In this example, we do not need to create a fictional counterfactual when we have a real one: the brick-and-mortar customers. If consumers were to randomly select into the offline and online channels, so that the difference in cancellation rates can be attributed wholly to the difference in the negative-option disclosure, the best estimate of the marginal impact of the inadequate disclosure is that it reduced cancellation rates by 5 percentage points, or 22,500 customers.[118] Thus, the upper bound on consumer harm is $450,000, or only 5 percent of the award under the current judicial treatment of Section 13(b).[119] Second, this is an upper bound because it does not include any value that the consumers received from the dog food. True, the second bag of dog food provided marginal consumers less than $20 in value, and we can never know what they would have done with their $20 in a world with no deception, but it is unlikely that they all would have been willing to pay nothing for the dog food. The current judicial approach to Section 13(b), however, would not even allow the defendant to present this evidence—courts, and the FTC, would rather stick with the fiction than learn the truth.

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[117] This could also be brought under ROSCA, which would require the FTC to show that the seller did not "clearly and conspicuously" disclose the negative option. 15 U.S.C. § 8402(a)(1).

[118] That is, 0.05 * 450,000 = 22,500. In reality, these two populations are likely to differ across attributes that are related to the choice of online versus offline outlet. Econometric techniques can be used to control for the extent to which these differences are also related to cancellation rates.

[119] That is, the upper bound for consumer harm is $20*22,500 = $450,000, which represents 0.05 or ($450,000/$9,000,000) of the award under the current judicial approach under Section 13(b).

Although equitable remedies under Section 13(b) are likely to lead to sanctions greater than consumer harm, the extent to which this limitation on the FTC's remedial power deters beneficial conduct depends on the accuracy with which the FTC can identify harmful conduct, and the ability of potential defendants to gauge whether their conduct is likely to violate the Section 5 standard. To see why, consider Figures 6 and 7.

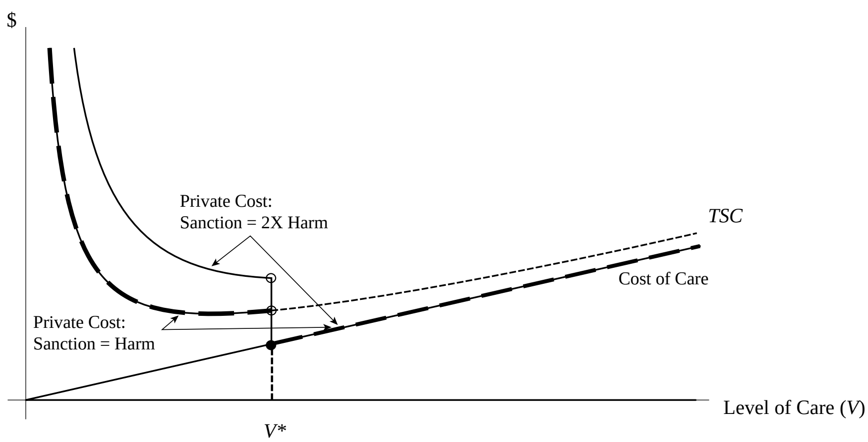

FIGURE 6:
DECEPTION PRECAUTIONS WITH CLEAR LEGAL STANDARD

In Figure 6, the horizontal axis measures care in the context of avoiding deceiving consumers. For example, care could represent understanding and substantiating all possible claims taken from an advertisement, or ensuring that an advertisement has made sufficient disclosures to correct potential misimpressions. Investing in care reduces the likelihood of deception and hence consumer harm, but it is also costly, as shown by the upward sloping *Cost of Care* curve.

For example, suppose that a firm has information suggesting an 80 percent chance that its juice provides some health benefit. In this case, the benefits from the claim being true may be large, but assume that the costs to consumers if it turns out to be false are relatively small because the price premium attributable to the possible health benefit is also small, the juice is delicious and nutritious, and drinking even large quantities poses no risk of harm. Suppose the firm could spend $1 million to know with near certainty whether the health benefits are true (for example, through conducting a large randomized control trial (RCT)), which would increase surplus by $0.5 million in terms of improved consumer decision making: if the claim turns out to be true, more people will be brought into the market, and if it turns out to be false, those marginal consumers who purchase only because of the potential health benefit will leave the market. Although consumers would make better purchasing decisions, from a social perspective, it would be inefficient for the firm to gather this additional information, even if it improves the information available to consumers. Under these assumptions, consumers are better off in terms of lower prices and higher output (that come from reduced substantiation costs) if the firm makes the speculative claim without additional substantiation. Alternatively, if the costs of relying on a false claim were high (e.g., $1.5 million), perhaps because it would mean forgoing other options known to be effective or because the product itself presents health risks, additional substantiation expenditures may be efficient.[120]

The goal of policymakers should be to create a legal regime in which firms have incentives to take the level of care that minimizes the sum of harm to consumers and costs to firms—the line labeled *TSC*, for Total Social Cost, which is solid to the left of *V** (the optimal level of care), and dashed to the right. If the FTC were able to identify *V** accurately in all circumstances, it could employ a rule under which it would challenge firms under Section 5 with certainty if they fail to take at least *V** care and would never challenge a firm that takes at least *V**. This rule would lead to efficient behavior because it is clear that firms will have strong incentives always to take *V**. To see this, examine the line labeled *Private Cost: Sanction = Harm*. The liability rule forces firms to internalize the consumer harm that it causes (purchases where marginal value is less than price) until it reaches *V**. After *V**, however, the firm is no longer liable for any harm that it causes, as shown by the stark discontinuity at *V**, where a firm's costs fall to the *Cost of Care* curve. Clearly, the cost-minimizing strategy is to always take *V** care in representations to consumers. And as discussed in Part III, this result is unaffected by the size of the sanction. Notice that even when sanctions are doubled—the curve labeled *Private Cost: Sanction = 2X Harm*—it is still optimal to take *V** care. In this manner, sanctions greater than harm will not alter behavior as long as the defendant knows the line between legal and illegal with certainty. Further, this outcome maximizes social welfare as long as the FTC sets *V** accurately.

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[120] This tradeoff is represented in the "*Pfizer* factors," which provide a framework for the FTC's analysis for determining when a firm has a reasonable basis for making a claim. Specifically, when determining the level of substantiation required for a claim, the Commission examines factors such as the type of claim, the cost of substantiation, the benefits from the claim being true, and the costs from the claim being false. *See* Pfizer, Inc., 81 F.T.C. 23, 28 (1972); Thompson Med. Co., 104 F.T.C. 648 (1984) (FTC Policy Statement Regarding Advertising Substantiation); *see also* J. Howard Beales III et al., *In Defense of the* Pfizer *Factors*, *in* THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION (James Campbell Cooper ed., 2013). Kenneth Corts formally shows how remedies for deception should be limited in order to induce efficient speculative claims. *See* Kenneth S. Corts, *Finite Optimal Penalties for False Advertising*, 62 J. INDUS. ECON. 661 (2014).

This result changes, however, if the liability standard is stochastic. This situation can arise when the FTC itself is unclear about the line between net harmful and net beneficial conduct, the line that the FTC has drawn is unclear to firms, or both. The broad discretion that courts have given the FTC to determine which implied claims consumers take away from advertisements, as well as the level of substantiation required to support these claims, is likely to leave producers of legitimate products uncertain about potential liability in a wide variety of circumstances.[121] For example, in *POM Wonderful*, the Commission found that several of POM's advertisements made implied disease treatment and prevention claims, which then required a higher level of substantiation than a general health or structure/function claim.[122] Since these claims were not express, but rather were found by the Commission's facial analysis to be implied, it is unlikely that POM would have known with anything approaching certainty that its advertisements would need to be backed by at least one RCT with statistically significant results to avoid Section 5 liability.[123]

In Figure 7, the standard is probabilistic around *V** in a symmetric fashion, as represented by the normal density function of possible levels of care needed to satisfy the FTC. That is, the FTC identifies the correct optimal level of care (*V**) on average, but from the firm's perspective, there is some probability of erroneously avoiding liability when taking care levels below *V**, and for the same distance above *V**, there is the same probability of erroneously being held liable. As seen in the curve labeled *Private Cost: Sanction = Harm*, rather than a sharp discontinuity at *V**, there is now a gradual reduction in expected costs as one approaches *V**. This result is because the odds of being held liable slowly fall as one approaches *V** from care levels below the

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[121] The Commission is not required to use extrinsic evidence to determine implied claims from representations and instead may rely on "facial analysis." *See* Kraft, Inc. v. FTC, 970 F.2d 311, 319 (7th Cir. 1992) ("[T]he Commission may rely on its own reasoned analysis to determine what claims, including implied ones . . . are reasonabl[y] clear from the face of the advertisement."). Further, courts defer to FTC findings of deception. As the Sixth Circuit explained in *ECM BioFilms, Inc. v. FTC*:

> Because the FTC "deals continually" with deception cases, "the Commission is often in a better position than are courts to determine when a practice is 'deceptive.'" Accordingly, "the Commission's judgment is . . . given great weight by reviewing courts," and "[t]his admonition is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation in this field rests so heavily on inference and pragmatic judgment."

851 F.3d 599, 609–10 (6th Cir. 2017) (alteration in original) (quoting FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965)); *see also* Thompson Med. Co. v. FTC, 791 F.2d 189, 196 (D.C. Cir. 1986) ("The Commission has special expertise in determining what sort of substantiation is necessary to assure that advertising is not deceptive.").

[122] *See* POM Wonderful, LLC v. FTC, 777 F.3d 478, 491 (D.C. Cir. 2015).

[123] The Commission originally had ordered two RCTs for all disease claims by POM, but the D.C. Circuit overturned this blanket requirement on First Amendment grounds. *See id.* at 505.

optimum but fall to zero only when one takes care sufficiently greater than V^* to never be held liable even with errors. The new cost-minimizing level of care is shown by V_1, which is higher than V^*.[124] This result would be exacerbated if the FTC's estimate of V^* was systematically greater than V^*.

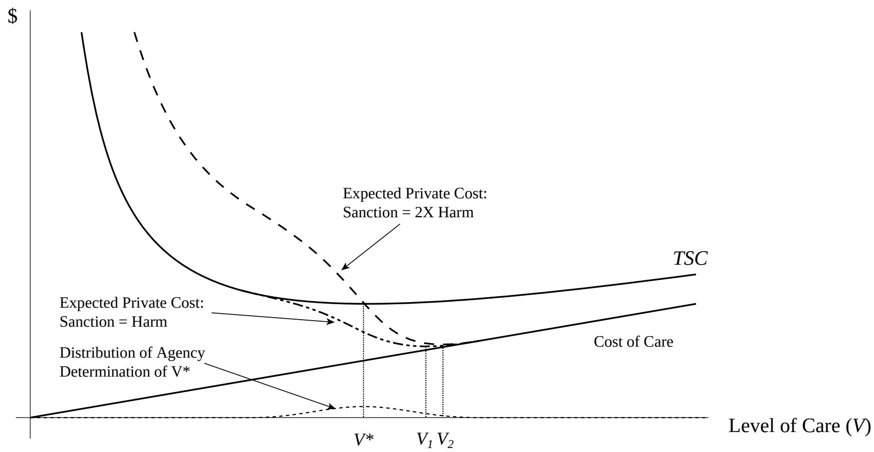

FIGURE 7:
DECEPTION PRECAUTIONS WITH STOCHASTIC LEGAL STANDARD

Note that a party ends up taking more than optimal care even though the errors are symmetric—that is, the odds of escaping liability when care is less than V^* are the same as the odds of erroneously being held liable when care is an equal amount greater than V^*. The asymmetric costs of errors are what drives overdeterrence. If a party takes more care than the legal standard actually requires, the penalty is the additional cost associated with excessive care. If a party ends up taking less care than the legal standard requires, however, the penalty is the external harm that they cause. Thus, because the costs of taking care less than V^* are greater than those of taking care greater than V^*, parties rationally hedge and take care greater than V^* when they are uncertain about the legal standard.[125] Stochastic liability standards can lead to overdeterrence, and remedies in excess of consumer harm tend to exacerbate this situation because private costs, which include liability costs, now are a continuous function of care. That is, an increase in liability costs shifts the entire private

[124] Richard Craswell and John Calfee derive this result formally. *See* Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279 (1986).

[125] Craswell and Calfee show that although overdeterrence is not a general result, it is the likely outcome for a wide variety of symmetric distributions with sufficiently low variance. *Id.* at 285–87.

cost curve, not merely the portion in the range of negligent behavior ($V < V^*$). As illustrated by the curve labeled *Private Cost: Sanction = 2X Harm*, the downside risk of taking what turns out ex post to be too little care has doubled. Now the privately optimal level of care is shown by V_2, which is even further away from V^*.

The welfare impact of overdeterrence is clear. If a firm is unsure of the liability standard, it will adopt too much care to ensure that its marketing is non-deceptive. Care—in terms of copy testing for claims, product testing for substantiation, and legal guidance—is expensive, which means that firms will produce less information about their products. What is more, the marketing they do produce is likely to be more expensive and less informative due to concerns about unintended implied claims that lack substantiation. The upshot is less informed consumers and concomitantly less competition, higher prices, reduced quality, and lower output.[126]

There are also likely to be dynamic effects. Knowing that they will not be able to make claims without complete information, in the long run, firms may invest less in discovering information about their product and in product development.[127] Consider a firm that can spend money on a study that is likely to provide useful, but not definitive, evidence of a causal link between its product and some benefit. If the sanction is set at such a level that the expected penalty from claiming the benefit is greater than the expected gain from making the claim, the firm has two choices.[128] First, it can engage in additional research to increase the certainty of the claim, thus reducing the likelihood of incurring the penalty. Second, it can refrain from making the claim, which will reduce the willingness to invest in gathering any information about the product. The path chosen will depend on the cost of additional testing. If the costs of additional testing are small enough, a firm will choose to gather additional support for the claim to lower the odds of being sanctioned.[129] On the other hand, if testing costs are high, the firm will choose to forgo additional

[126] *See* C. Robert Clark, *Advertising Restrictions and Competition in the Children's Breakfast Cereal Industry*, 50 J.L. & ECON. 757 (2007).

[127] *See* Pauline M. Ippolito & Alan D. Mathios, *Information, Advertising and Health Choices: A Study of the Cereal Market*, 21 RAND J. ECON. 459 (1990).

[128] To see this, note that the firm, when choosing to make informative but not fully substantiated claims, can expect the following payoff: $\pi_H - (1 - \lambda)S$, where π_H is the profit from the high-quality claim, λ is the probability that the claim is true, and S is the sanction that the firm faces when the claim turns out to be false with probability $(1 - \lambda)$. The firm will refrain from making the speculative claim when $\pi_H - (1 - \lambda)S < \pi_L \frac{\pi_H - \pi_L}{(1-\lambda)}$ where π_L is the lower level of profit from making no claim. This condition is satisfied as long as $S > \frac{\pi_H - \pi_L}{(1-\lambda)}$. *See* Corts, *supra* note 120 (detailing a full exposition).

[129] If firms could determine with certainty whether their product in fact had a given attribute at zero cost, it would always be optimal to set sanctions at the highest level possible to generate incentives for firms to provide consumers with the maximum level of information possible. This

testing and refrain from making the claim. In this case, incentives to gather product information in the first place are muted—there is no point in paying for product testing if you cannot use the information that it generates to attract consumers.[130] What's more, if firms cannot generate sufficient substantiation to support a product claim, they will have less incentive to innovate in areas related to that claim.[131]

IV. PATHS FORWARD

With the FTC's authority to obtain monetary relief in federal court for violations of Section 5 under fire from several directions, change is likely coming to Section 13(b). It seems that the only question is whether Congress will act before the Supreme Court forces it to. But this existential threat to the FTC's ability to obtain monetary relief should be seen as an opportunity, not just to fix the FTC Act's legal infirmities but also to align its remedial authority more closely with consumer harm. Both changes should be seen as boons for consumers.

Regardless of the outcome at the Supreme Court, the FTC should recalibrate its Section 13(b) remedies to focus on consumer harm, which we would define as comprising two elements: (1) any price premium paid by inframarginal consumers, and (2) all revenue from marginal consumers. This would equate to areas J + E + F + C + B + L in Figures 2 and 3. We realize that this measure is likely to overstate social harm because it includes transfers from inframarginal consumers to firms (area *J* in Figures 2 and 3) and fails to take account of the value received by marginal consumers (by including area *B* in Figures 2 and 3). What is more, our measure excludes subjective value (areas *H* and *G* in Figure 3), which could be large for products with significant market power. Nonetheless, we believe that the marginal benefits in terms of further reducing overdeterrence would be swamped by the administrative and information costs associated with a perfect measure of social harm. As explained in Part III, moreover, consumer harm should serve as a baseline that could be adjusted up or down depending on the clarity of the

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result is due to the fact that firms will never pay the penalty because with perfect information about the quality of their products, firms will never make false claims. *See id.*

[130] Mitchell Polinsky and Steven Shavell make a similar point with respect to muted incentives to acquire information about product risks in mandatory disclosure regimes. *See* A. Mitchell Polinsky & Steven Shavell, *Mandatory Versus Voluntary Disclosure of Product Risks*, 28 J.L. ECON. & ORG. 360 (2010). In addition, it is far from clear that firms that produce the information will be able to appropriate the returns from their investment, as it is likely that the information produced would not be protected by intellectual property. For a discussion of this issue in a separate context, see Benjamin N. Roin, Solving the Problem of New Uses (Oct. 1, 2013), papers.ssrn.com/sol3/papers.cfm?abstract_id=2337821.

[131] For example, Ippolito and Mathios find that when firms were able to advertise health claims regarding fiber, not only did fiber claims increase, but there was a large level of new entry into the fiber cereal space. *See* Ippolito & Mathios, *supra* note 127.

legal standard and the likelihood that the deception at issue is likely to be detected.

We offer a few suggestions as to how this change could be implemented. First, and most directly, Congress could amend the FTC Act to allow the FTC to bring actions for civil penalties in federal court for violations of Section 5, an authority that a parade of FTC commissioners from both political parties have supported.[132] For example, Congress simply could rewrite Section 13(b) to explicitly provide the FTC the ability to seek temporary and permanent injunctions and civil penalties. This innovation would raze the legal structure that has grown up around Section 13(b), and by untethering monetary relief from injunctive relief, it would allow the FTC to craft remedies explicitly designed to optimally deter future conduct without potentially running afoul of *Kokesh* and *Liu*.

Under the FTC Act currently, courts are directed to 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" when crafting civil penalties for knowing violations of order provisions and rules.[133] Given the capaciousness of this standard, one legitimate concern would be that the FTC would just replace one type of overdeterring penalty with another. To address this possibility, a mandate to make consumer harm the primary consideration in any civil penalty calculation should accompany any such authority. Further, the statutory language could additionally specify that the Commission must measure "consumer harm" as the impact on the marketplace from the deception and may not merely assume that any consumer exposed to a deceptive claim has been harmed. A model for these types of limitations can be found in the 1994 amendments to the FTC Act, in which Congress codified the cost-benefit framework of the unfairness policy statement.[134] Another possible (and politically easier) fix might be simply to amend Section 13(b) to explicitly permit courts to award equitable monetary relief. This approach risks further cementing the current overdeterring framework into law, but there are ways to ameliorate the economic shortcomings of a permanent Section 13(b) authority. For example, Congress could limit the definition of "restitution" under Section 13(b) to include only consumer harm measured by the marketplace impact of deception and place the burden on the FTC to make the initial showing.

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[132] Currently, the FTC Act allows the FTC to seek civil penalties in federal court for knowing rule violations and violations of final cease-and-desist orders by the party under order or by non-parties, if they have actual knowledge that the conduct in question is an unfair or deceptive act or practice. *See* 15 U.S.C. § 45(*l*), (m)(1)(A)–(B).

[133] *Id.* § 45(m)(1)(C).

[134] *See* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691, 1695 (enacting 15 U.S.C. § 45(n)).

Even if the Supreme Court leaves the status quo—by ruling for the FTC on the merits of the *AMG* case—and Congress refuses to act, the FTC could still adopt internal rules of practice or explicit external guidelines that alter how it intends to calculate remedies going forward within the current judicial framework. This guidance, for example, could require the FTC to show the deception's impact on *marginal* net revenues as part of its burden to provide a "reasonable approximation" of consumer redress, as opposed to merely relying on a presumption that all consumers in the market are harmed. This type of enhanced FTC showing, moreover, would be consistent with both *Verity* and *DIRECTV*, which have suggested that the FTC needs to do more than merely present total revenues to satisfy its initial burden at the remedies stage.[135] An alternative approach would be to keep the current burden-shifting framework, but allow the defendant to challenge the FTC's "all revenue" presumption with evidence of the marginal impact of the deception.

Regardless of which party has the initial burden of production, this type of analysis should be feasible in most cases involving legitimate products, as most defendants are likely to have the type of data needed to estimate the marginal impact of deception. For example, when not all consumers were exposed to the deceptive claim, one could derive a "reasonable approximation" of consumer harm by using unexposed consumers as a control group to estimate the marginal impact of the deception on purchasing decisions.[136] Indeed, it is not uncommon for defendants to provide this type of analysis during negotiations over settlement amounts.

From an information-cost perspective, the current burden-shifting framework may be an efficient rule, as the firm is likely to be in possession of the data needed to do this analysis. The rule that placed the initial burden on the FTC—which would have to get the data from the defendant—necessarily would introduce discovery costs and delay into the process, and also may reduce the accuracy of the eventual determination. At the same time, when deciding who bears the burden of production, one must be mindful of the impact on the FTC's incentives to bring cases. For example, if the FTC merely has to show a reasonable estimate of net revenues, the opportunity cost of bringing a case will be lower than if the FTC must make the initial showing of the marginal impact of deception. Assigning the FTC a more stringent burden of production in the first step is likely to reduce the number of cases it brings involving valuable products. Although there is the potential risk of

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[135] FTC v. Verity Int'l, Ltd., 443 F.3d 48, 67 (2d Cir. 2006); FTC v. DIRECTV, Inc., No. 15-cv-01129-HSG, 2018 WL 3911196, at *23 (N.D. Cal. Aug. 16, 2018).

[136] Methods exist for demonstrating the marginal impact. For empirical measurement of the increase in demand from false advertising, see Rao & Wang, *supra* note 75. Further, with the proper data, FTC Bureau of Economics staff have provided estimates of the impact of deception on demand during investigations.

leaving some conduct underdeterred, if estimating marginal harm is too challenging (perhaps because it is small), the FTC still has the option to challenge clearly deceptive conduct administratively.

We recognize that courts would not be bound to follow an internal FTC decision to approach Section 13(b) remedies differently. Nonetheless, because our suggested approach would result in the FTC asking for lower levels of relief from defendants selling valuable products, we are skeptical that defendants would challenge the validity of the FTC's new approach to remedies. What is more, courts may be more likely to defer to a new approach to remedies under Section 13(b) if the Commission were to adopt it through a thorough formal policy statement.[137] We also recognize that a focus on optimally deterring sanctions, rather than remedying the status quo, may not be permitted under *Kokesh* or *Liu*.[138] However, to the extent that remedies focus on actual consumer harm, they are likely to be less punitive than the current approach, which by taking away all of the defendant's revenues leaves them worse off than the status quo, and would comply with the goals explained in *Liu* that a disgorgement remedy exclude "legitimate costs" that had "value independent of fueling a fraudulent scheme."[139]

Addressing the second shortcoming of Section 13(b)—the fact that defendants get no credit for the value of their product—is trickier. On one hand, overdeterrence is a clear problem when products provide value to deceived consumers. For example, the FTC could allow defendants the opportunity to provide an estimate of the value that deceived consumers received from their product as an offset against the revenue from marginal consumers. This remedy would come closer to representing true consumer harm than a remedy that merely returns the full purchase price to consumers, but due to informational

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[137] *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976) (explaining that the level of deference afforded to an agency's nonformal interpretation of its statute "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control" (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))); *see also* Christensen v. Harris Cnty., 529 U.S. 576, 587–88 (2000) (noting that interpretations contained in policy statements and enforcement guidelines are "'entitled to respect' . . . only to the extent that those interpretations have the 'power to persuade'" (quoting *Skidmore*, 323 U.S. at 140)).

[138] *See* Kokesh v. SEC, 137 S. Ct. 1635, 1642 (2017) ("[A] pecuniary sanction operates as a penalty only if it is sought 'for the purpose of punishment, and to deter others from offending in like manner'—as opposed to compensating a victim for his loss." (quoting Huntington v. Attrill, 146 U.S. 657, 668 (1892))); Liu v. SEC, 140 S. Ct. 1936, 1944 (2020) (stating that courts should "circumscribe" an equitable award to avoid a "penalty").

[139] In *Kokesh*, the Court pointed to the fact that "SEC disgorgement sometimes exceeds the profits gained as a result of the violation" as indicia of a penalty. 137 S. Ct. at 1644. *Liu* places strict limits on such broad relief. *Liu*, 140 S. Ct. at 1943–46. If *Liu* were read to allow the FTC to pursue net revenues in cases of pure fraud, but profits in the context of legitimate goods—revenue less "legitimate expenses"—it may come closer to a remedy that approximates consumer harm.

limitations, this remedy is also unlikely to return all deceived consumers to their endowment-level utility. The important point is that when choosing a remedy with imperfect information about consumer valuations, there are tradeoffs between making consumers whole and crafting remedies that are more likely to create efficient incentives. On balance, we suggest that a focus on marginal revenues and overcharges is the better approach simply because these metrics are often relatively straightforward to estimate, as the marginal gains in optimal deterrence from deducting some measure of value is likely to be swamped by the transaction costs and inaccuracies from such an exercise.[140]

Finally, the FTC and courts should take into account the clarity of the legal standard when determining remedies. If stochastic standards lead to overdeterrence even when penalties are set equal to harm, policymakers can ameliorate this overdeterrence by setting penalties less than harm. Indeed, this insight provides a justification for the FTC's administrative litigation program, in which first-time violators receive no monetary penalties but face potentially steep monetary penalties for subsequent violations of injunctive provisions in consent orders. This result is shown below in Figure 8, where the socially optimal level of care is V^*. A stochastic standard around the socially optimal level of care, however, creates private incentives for firms to take socially excessive care to avoid liability—in this case, V_H. One way to ameliorate this problem is to reduce the expected penalty below harm for firms when the legal standard is uncertain. As Figure 8 illustrates, a sufficiently large reduction in expected sanctions causes the Expected Private Cost curve to shift in so that the new privately optimal level of care is also the socially optimal level.[141]

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[140] In cases involving a price premium, with proper data and a set of similar products, it is relatively straightforward to estimate the overcharges as the difference between the deceptive firm's price and some benchmark competitive price (area $J + E + F$ in Figure 3). For example, this was the method employed in a civil contempt proceeding in *Lane Labs*. *See* FTC v. Lane Labs-USA, Inc., No. 2:00-cv-03174, 2014 WL 268642, at *7–8 (D.N.J. Jan. 23, 2014). Note, however, that this remedy actually understates consumer harm because it excludes the difference between the value that marginal consumers place on the deceptive good and the predeception price (area C in Figure 3). This measure, however, may approximate social harm to the extent that area D in Figure 3, which is included in the remedy but is merely a transfer from inframarginal consumers to the firm, is similar to area C.

[141] This optimization problem underlying this result is shown in an earlier version of this article. James C. Cooper & Bruce H. Kobayashi, *Equitable Monetary Relief Under the FTC Act: An Opportunity for a Marginal Improvement* (George Mason L. & Econ. Research Paper No. 20-06, Mar. 3, 2020), papers.ssrn.com/sol3/papers.cfm?abstract_id=3549899. Note that this result is similar to that derived by Steven Shavell for risk-averse actors. *See* SHAVELL, FOUNDATIONS, *supra* note 20, at 475–76 n.3. Because risk bearing creates disutility, reducing sanctions below harm can be welfare improving. *See id.*

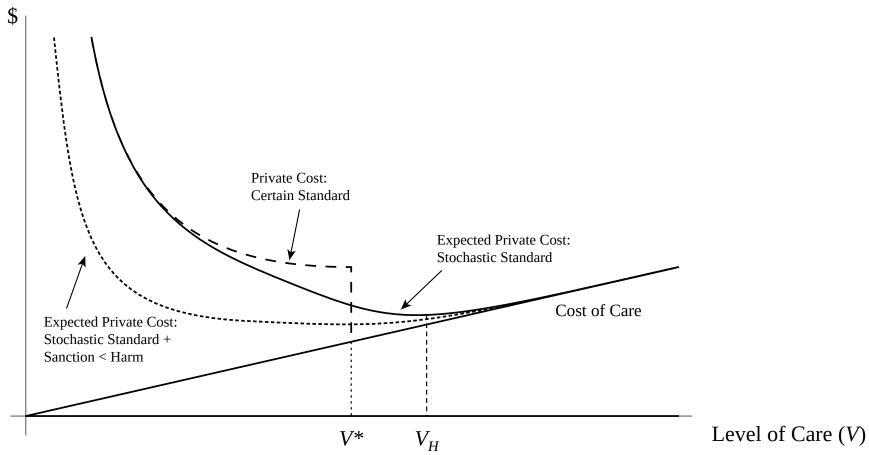

FIGURE 8:
DISCOUNTED SANCTIONS TO ACCOUNT FOR UNCERTAIN LEGAL STANDARD

In this manner, an escalating penalty structure—lower penalties for first-time violators than for recidivists—can ameliorate the social costs of uncertain liability standards. An escalating penalty structure also provides a dynamic benefit. Reducing expected liability in areas where FTC liability is uncertain fosters firms' incentives to engage in conduct that will elucidate the true legal standard, both benefiting the defendant—it will know whether its conduct violates the law, allowing it to act more efficiently in future periods—and providing a public good to all similarly situated firms by clarifying the legal standard.[142] Because clarifying the legal standard is a public good, in the sense that no firm can capture the full benefit of this information, it is likely to be undersupplied. In this manner, setting sanctions to levels less than consumer harm when liability is unclear ameliorates this market failure by subsidizing information production.

A corollary to this observation is that after an FTC action has clarified the legal line, future first-time offenders should face higher penalties because there will be less uncertainty.[143] If an order clearly defines the line between legal and illegal conduct, as shown in Figure 6, the size of monetary sanctions for future order violations will not affect the incentives of firms under order to take optimal care, leaving the Commission leeway to levy sanctions in excess

[142] *See* Omri Ben-Shahar, *Playing Without a Rulebook: Optimal Enforcement When Individuals Learn the Penalty Only by Committing the Crime*, 17 INT'L REV. L. & ECON. 409 (1997).
[143] Section 45(m)(1)(b) formalizes this procedure for cases that are litigated to conclusion.

of consumer harm for subsequent violations.[144] To the extent that the order does not precisely delineate legal from illegal conduct (e.g., mandating "reasonable security measures"), however, firms will still operate under a stochastic legal standard (as in Figure 7), albeit one with a smaller variance that likely creates incentives to engage in conduct closer to optimal levels.[145] In this case, unless the line between legal and illegal conduct is certain, sanctions greater than harm will risk deterring beneficial conduct, suggesting that consumer harm should be an upper bound sanction for violating order provisions that fail to provide clear guidance.

Finally, the economic analysis presented in this article focuses on fraud and deception that alter the perceived demand of final consumers. With some modification, the analysis and many of the general principles could be extended to analyze enforcement strategies and remedies used in other settings, such as the deceptive marketing of business opportunities and actions against multilevel-marketing (MLM) organizations. In the case of business opportunities, the FTC has promulgated the Business Opportunity Rule, which requires the disclosure of specific information.[146] This rule illustrates the use of an approach that provides for clearly stated ex ante disclosure requirements that are enforced with deterring civil penalties.[147]

The specific disclosure requirements do not generally apply to MLM organizations, as the FTC crafted the Business Opportunity Rule to avoid broadly sweeping in MLM organizations.[148] Thus, the conduct of such organizations, including claims about earnings and other benefits, are evaluated under the FTC's general UDAP authority without specific ex ante guidance from a rule.[149] In such cases, the FTC must engage in the difficult task of distinguish-

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[144] *See* Cooter, *supra* note 20.

[145] The Eleventh Circuit identified this as a problem with the Commission's data security orders that failed to specify what a company must do to avoid violating an order and thus becoming liable for civil penalties. *See* LabMD, Inc. v. FTC, 894 F.3d 1221 (11th Cir. 2018).

[146] 16 C.F.R. pt. 437. For example, earnings claims must be made in writing and must include the number and percentage of purchasers that achieve the claimed earnings. *Id.* § 437.4. The rule also requires the seller to keep and make available written materials on hand that provide substantiation for the claim. *Id.* § 437.4(a)(3).

[147] *See* Cooter, *supra* note 20. As of January 13, 2021, the maximum civil penalty for a violation of the Business Opportunity Rule with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule is $43,792 per violation. 15 U.S.C. § 45(m)(1)(A); 16 C.F.R. § 1.98(d).

[148] Because of the decentralized nature of MLM organizations, the disclosure and recordkeeping requirements contained in the Business Opportunity Rule can impose disproportionate costs on such businesses. 76 Fed. Reg. 76816, 76824 (Dec. 8, 2011). Franchises also are exempted from the Business Opportunity Rule and are covered under the FTC's Amended Franchise Rule, 16 C.F.R. pts. 436, 437.

[149] The specific disclosure requirements in the Business Opportunity Rule do not generally apply to MLM organizations, as the FTC crafted the Business Opportunity Rule to avoid broadly sweeping in MLM organizations. 16 C.F.R. pt. 437; *see* 76 Fed. Reg. at 76,820. For a list of

ing legal MLM organizations and other direct-selling organizations from net harmful pyramid schemes.[150]

In their pure form, pyramids involve a chain referral scheme that does not involve the sale of real products. In such cases, the harmful zero or negative-sum effect on participants is obvious and can be reliably identified. From an optimal remedies standpoint, remedies that exceed the harm to the participants can be efficient, as such cases can be treated as the analogy to pure fraud or theft in the economic analysis.

In contrast, MLM organizations can be a value generating and efficient way to distribute valuable products, lowering both the distribution and marketing costs associated with selling products.[151] Because pure chain referral schemes are easily detected and punished, modern pyramid schemes bundle the potentially beneficial MLM mechanism of the right to sell a valuable product with incentives for new participant recruitment. As a result, recent FTC cases in this area involve MLM organizations that combine organizations selling valuable products and incentives to recruit new participants. Economic analyses of such hybrid organizations have demonstrated that such organizations can generate harms imposed on MLM participants that are greater than the marginal consumer benefits associated with the sale of products.[152] While a more detailed analysis is beyond the scope of this article, the existence of uncertainty over the line between a legal MLM organization and an illegal pyramid scheme would suggest that the escalating penalty structure described above may be appropriate.[153] Alternatively, if monetary remedies are to be imposed for initial violations of Section 5(a) of the FTC Act,[154] the analysis suggests

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recent enforcement actions against MLM organizations, see Andrew Stivers et al., The Alchemy of a Pyramid: Transmutating Business Opportunity into a Negative Sum Wealth Transfer (Dec. 3, 2019), papers.ssrn.com/sol3/papers.cfm?abstract_id=3497682; *see also* William W. Keep & Peter J. Vander Nat, *Multilevel Marketing and Pyramid Schemes in the United States: An Historical Analysis*, 6 J. HIST. RSCH. IN MKTG. 188 (2014).

[150] For a recent case, see FTC v. AdvoCare Int'l, L.P., No. 4:19-cv-00715 (E.D. Tex. filed Oct. 2, 2019); Press Release, Fed. Trade Comm'n, Multi-Level Marketer AdvoCare Will Pay $150 Million To Settle FTC Charges It Operated an Illegal Pyramid Scheme (Oct. 2, 2019), www.ftc.gov/news-events/press-releases/2019/10/multi-level-marketer-advocare-will-pay-150-million-settle-ftc.

[151] *See* Stivers et al., *supra* note 149.

[152] Economists have made some progress toward identifying recruitment-based incentive structures and other conduct that can help distinguish between organizations that generate net harm to participants. *See id.*; Peter J. Vander Nat & William W. Keep, *Marketing Fraud: An Approach for Differentiating Multilevel Marketing from Pyramid Schemes*, 21 J. PUB. POL'Y & MKTG. 139 (2002).

[153] *See supra* discussion accompanying notes 133–135.

[154] For a recent use of Section 13(b) against an MLM organization, see Plaintiff's Complaint for Permanent Injunction and Other Equitable Relief, FTC v. AdvoCare Int'l, L.P., No. 4:19-cv-00715 (E.D. Tex. filed Oct. 2, 2019), www.ftc.gov/system/files/documents/cases/advocare_complaint_0.pdf.

that any monetary remedies be tied to participant harm rather than overall MLM revenues in order to avoid overdeterrence or the kind of "penalty" discussed in *Liu*.[155]

V. CONCLUSION

Optimal remedies should be grounded in consumer harm. The judicial framework that has grown up around Section 13(b), however, has strayed far from this benchmark. Rather than requiring the FTC to show the marketplace impact of deception, courts presume that everyone exposed to deception is harmed based on the fiction that by proving liability, the FTC has shown the deception to be material to all consumers' purchasing decisions. This approach is likely to overstate consumer harm in most circumstances involving a legitimate product, which will reduce the amount of beneficial marketplace information available to consumers.

The Supreme Court will soon decide the FTC's legal authority to use Section 13(b) to obtain equitable monetary relief, perhaps leading some to call for Congressional intervention to fix the statutory problem. *Liu* will also, undoubtedly, have an impact on how FTC remedies are calculated. We see this turn of events as an opportunity for the FTC to recalibrate its consumer protection remedies to more closely mirror consumer harm. It should do so by focusing on the marginal impact of deception, a task that could be accomplished through Congressional action or on the FTC's own initiative. Regardless of the path, this marginal improvement would be an important one for consumers.

POSTSCRIPT

At press time, the Supreme Court decided *AMG Capital Management v. FTC*, unanimously holding that Section 13(b) of the FTC Act does not grant the FTC the authority to seek, nor courts to order, equitable monetary relief.[156] Attention will now shift to Congress to "fix" Section 13(b). Our hope is that this will be seen as an opportunity for recalibration, and that the analysis in this article can help move the FTC toward an economically coherent remedial framework.

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155 Liu v. SEC, 140 S. Ct. 1936, 1943–46 (2020).

156 AMG Capital Mgmt., LLC v. FTC, slip op. (U.S. Apr. 22, 2021) (No. 19-508), www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.