

## HEATER v. FTC AND THE FEDERAL TRADE COMMISSION IMPROVEMENT ACT: THE FTC'S POWER TO ORDER RESTITUTION

Recent developments in the courts and Congress have significantly affected the remedial options of the Federal Trade Commission (FTC). In *Heater v. FTC*,<sup>1</sup> decided on September 4, 1974, the Ninth Circuit Court of Appeals held that the FTC, acting pursuant to its cease and desist power,<sup>2</sup> could not remedy violations of the Federal Trade Commission Act<sup>3</sup> (FTCA) by ordering the restitution of fraudulently obtained money to the victims of the illegal practices.<sup>4</sup> On January 4, 1975, President Ford signed into law the Federal Trade Commission Improvement Act,<sup>5</sup> which gives the Commission authority to bring an independent judicial action to obtain remedial relief, including restitution, on behalf of consumers injured by violators of a Commission cease and desist order.<sup>6</sup> The Commission's interpretation of this law and its reaction to the *Heater* decision have caused considerable uncertainty as to the present state of the FTC's remedial powers.

This Recent Development will examine the *Heater* decision and the recent amendments to the FTCA as they affect the FTC's ability to remedy violations of the Act and violations of a cease and desist order. Initially, the FTC's past practices and justification for ordering

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1. 503 F.2d 321 (9th Cir. 1974).

2. If . . . the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited . . . it shall . . . issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice. 15 U.S.C. § 45(b) (1970).

3. 15 U.S.C.A. §§ 45 (l), (m), 46, 53, 56 (Supp. 1974), amending 15 U.S.C. §§ 41-58 (1970), as amended, Pub. L. No. 93-637 (Jan. 4, 1975). Section 5 of the FTCA now provides *inter alia* that: "(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Pub. L. No. 93-637, § 201(a) (Jan. 4, 1975), amending 15 U.S.C. § 45(a) (1970), reprinted in 4 TRADE REG. REP. ¶ 25,245. If the FTC finds a violation of section 5, it may issue a cease and desist order. 15 U.S.C. § 45(b) (1970). See note 2 *supra*.

4. 503 F.2d at 321-22.

5. Pub. L. No. 93-637 (Jan. 4, 1975). See note 29 *infra* for text of pertinent sections.

6. *Id.* § 204(a)(2), reprinted in 4 TRADE REG. REP. ¶ 25,268. The Commission is given authority to seek relief for a violation of a rule it issued under the FTCA relating to unfair or deceptive acts or practices (other than an interpretative rule or a rule the violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 5(a)). *Id.* § 206(a)(1), reprinted in 4 TRADE REG. REP. ¶ 25,271.

restitution as part of a cease and desist order will be set forth. An analysis of *Heater* and its effects will follow. Finally, the Federal Trade Commission Improvement Act will be considered in terms of how it changes the FTC's remedial options and the light it sheds upon the *Heater* opinion.

Prior to *Heater*, it was the policy of the FTC to incorporate a restitution provision within a cease and desist order in certain circumstances where such a remedy was necessary to prevent the continuation of past unlawful conduct and to redress injury to competition attributable to the violation.<sup>7</sup> Thus, the FTC would typically issue a cease and desist order for a flagrant violation<sup>8</sup> of the FTCA and would include within the order a requirement that the violator refund to his customers the monies which he had obtained from them, even if the monies had been obtained prior to the issuance of the Commission's cease and desist order.<sup>9</sup> In defending this practice, the Commission has had to counter arguments that such a refund provision was beyond its cease and desist power because it was retroactive, punitive, or an award of private

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7. See *Curtis Publishing Co.*, 78 F.T.C. 1472, 1513 (1971). The FTC complaint in *Curtis* attacked the company's failure to offer subscribers refunds, in addition to a choice of alternative subscriptions to other magazines, after the *Saturday Evening Post* ceased publication. The hearing examiner rejected the Commission's proposed refund order on the grounds that it exceeded the authority of the Commission under the FTCA, *id.* at 1502, and that *Curtis* did not have sufficient assets to make refunds in any case, *id.* at 1511. The full Commission rejected the examiner's contention that the order exceeded its authority and held that the FTC had the power to require refunds of customers' money obtained by a respondent prior to the issuance of the Commission's complaint. *Id.* at 1511-18. However, the Commission went on to affirm the examiner's dismissal of the complaint on the ground that *Curtis* was financially unable to make refunds. *Id.* at 1523-24. Since dismissal mooted any appeal to the courts, the Commission's holding regarding its power to order refunds is of doubtful precedential value and amounted to little more than a "brief" in support of its position. See also *Bower*, *New Developments in FTC Remedies*, 41 ANTITRUST L.J. 465 (1972).

8. The Commission has been particularly prone to issue restitutionary orders where the violation has been flagrant and knowingly fraudulent. See, e.g., *Holiday Magic, Inc.*, 3 TRADE REG. REP. ¶ 20,757 (FTC Final Order, Oct. 15, 1974), where the Commission observed:

With regard to the propriety of restitution in this particular case, we believe it is clear beyond peradventure. Illegality permeated every facet of the promotion of the *Holiday Magic* marketing program . . . . There is every indication in the record that respondent *Patrick* regarded institution of the Commission's suit not as a sign to go slow, but as a spur to intensify the heist. Retention of deceptively and illegally obtained property is as much a violation of Section 5 as continuation of the deception. Our duty is to enjoin both. *Id.* at 20,618 (emphasis added).

9. See, e.g., *Holiday Magic, Inc.*, 3 TRADE REG. REP. ¶ 20,757 (FTC Final Order, Oct. 15, 1974); *Universal Credit Acceptance Corp.*, 82 F.T.C. 570 (1973); *Curtis Publishing Co.*, 78 F.T.C. 1472 (1971). See also *Cookware Associates*, 40 F.T.C. 654 (1945); *Interstate Home Equip. Co.*, 40 F.T.C. 260 (1945); *Success Portrait Co.*, 35 F.T.C. 227 (1942). But cf. *Credit Card Serv. Corp.*, 82 F.T.C. 191 (1973), enforced, 495 F.2d 1004 (D.C. Cir. 1974).

compensatory damages.<sup>10</sup> The Commission relied upon cases where the Supreme Court had upheld FTC orders requiring other affirmative undertakings, such as divestiture,<sup>11</sup> patent licensing,<sup>12</sup> and corrective advertising.<sup>13</sup> Furthermore, the Commission argued that restitutionary relief was within its cease and desist power because some deceptive practices cannot be adequately remedied by an order which merely enjoins the recurrence of the practice.<sup>14</sup> Additionally, the FTC urged a comparison of its remedial powers to those of a court of equity,<sup>15</sup> which has great flexibility in designing a proper remedy, includ-

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10. See *Curtis Publishing Co.*, 78 F.T.C. 1472, 1502-04 (1971):

While cease and desist orders are supposed to be prohibitory, the Commission's proposed order would require the initiation of affirmative undertakings. While cease and desist orders apply only prospectively to future conduct, the Commission's proposed order would apply retroactively to conduct completed. And while a cease and desist order is not compensatory for past damage but only prohibitory of future deceptive conduct, the Commission's proposed order . . . would have respondents pay a money judgment to former Post subscribers . . . . In each respect, the proposed order exceeds the authority of the Commission under the Federal Trade Commission Act. *Id.* at 1502 (Opinion of Hearing Examiner).

In rejecting the hearing examiner, the Commission stated that an order granting restitutionary relief may actually operate prospectively. Since retention of funds obtained by illegal practices might place the unscrupulous wrongdoer in a stronger financial and competitive position than his law-abiding counterparts, restitution would prospectively restore the desired competitive balance among the parties. *Id.* at 1516.

In answer to the hearing examiner's claims that restitution was punitive or an award for private compensatory damages, the Commission argued that this was not the case where restitution was necessary to terminate an illegal practice or to cure its effects. It cited *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946), where the Supreme Court emphasized that restitution could be justified as a tool to enforce compliance with a federal statute and was therefore distinguishable from a punitive or compensatory damage remedy. 78 F.T.C. at 1517. In such cases, the Commission's order directing restitution is primarily to vindicate *public* rights to be free from illegal practices and all their effects; the benefit to *private* persons who are restored to the status quo is merely an incidental aspect of the Commission's order. See *id.* at 1518.

11. See *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971) (requiring jeweler in national high school and college ring market to divest itself of subsidiary in order to restore competition in the market); *Golden Grain Macaroni Co.*, 78 F.T.C. 63 (1971), *aff'd in pertinent part*, 472 F.2d 882 (9th Cir. 1972); *Curtis Publishing Co.*, 78 F.T.C. 1472, 1513 (1971).

12. See *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966) (requiring licensing under a patent and the furnishing of technical know-how to competitors). The case was remanded and decided by the Commission in *American Cyanamid Co.*, 72 F.T.C. 623, *aff'd*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969). See also *Curtis Publishing Co.*, 78 F.T.C. 1472, 1513 (1971).

13. See *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967) (requiring the manufacturers of Geritol to disclose affirmatively in its advertising that vitamin or iron deficiency anemia was not the cause of tiredness in great majority of people). See generally Note, *Corrective Advertising—The New Response to Consumer Deception*, 72 COLUM. L. REV. 415 (1972); Note, "Corrective Advertising" Orders of the Federal Trade Commission, 85 HARV. L. REV. 477 (1971).

14. *Curtis Publishing Co.*, 78 F.T.C. 1472, 1515-16 (1971).

15. This analogy was made by the Supreme Court in *Pan Am. World Airways v.*

ing the authority to order restitution. Finally, the Commission offered further justification for its refund provision by characterizing the continuing retention of fraudulently obtained monies as an unfair trade practice in itself.<sup>16</sup> Thus viewed, ordering one holding such funds to cease and desist from retaining them would be within the traditional scope of the FTC's prohibitory power.

In *Heater v. FTC*,<sup>17</sup> where the FTC had ordered the immediate refund of monies raised in a flagrantly fraudulent credit card scheme, the Ninth Circuit Court of Appeals rejected the FTC's justifications that its refund order was permissible either as a remedy under its cease and desist authority or under its delegated power to define what constitutes an unfair or deceptive trade practice, and struck down the remedy as ultra vires the Commission's power.<sup>18</sup> While recognizing that the FTCA gave the Commission wide latitude in defining unfair trade practices, the court ruled that use of this definitional power to accomplish an essentially remedial objective was inconsistent with the overall purpose and design of the Act.<sup>19</sup> Although the framers of the FTCA gave the Commission broad power to define a violation in order to prevent clever circumvention of a more precise definition, they limited the sanction for violating the FTCA to a cease and desist order which would give violators specific notice and an opportunity to conform to the terms of the FTCA before being held liable for their acts.<sup>20</sup> Since

United States, 371 U.S. 296, 312 n.17 (1963). See also *Curtis Publishing Co.*, 78 F.T.C. 1472, 1512 n.2 (1971).

16. *Universal Credit Acceptance Corp.*, 82 F.T.C. 570, 651 (1973). There is substantial authority giving the FTC broad power to determine what acts and practices are unfair and deceptive. See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FTC v. R.F. Keppel & Bros.*, 291 U.S. 304 (1934).

17. 503 F.2d 321 (9th Cir. 1974). *Heater* involved a fraudulent credit card plan and the FTC cease and desist order provided for immediate refund of franchise deposits and fees, membership fees and dues, and travel expenses to all victims of the scheme. *Universal Credit Acceptance Corp.*, 82 F.T.C. 570, 641 (1973).

18. 503 F.2d at 322-23. It should be noted that courts will normally not interfere with the Commission's expert determination of the need for a particular remedy. In *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946), the Supreme Court said:

The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist. *Id.* at 612-13.

19. 503 F.2d at 323.

20. *Id.* at 324. "[Congress] withheld from the Commission the power to make a determination which would expose the businessman to liability for acts occurring before the Commission gave the general definition specific meaning in a factual context." *Id.* See also 51 CONG. REC. 13114 *et seq.* (1914). Although the *Heater* court's reading of the legislative history appears correct, it is difficult to reconcile with the Supreme Court's approval of other affirmative FTC remedies. Divestiture and corrective adver-

a refund requirement within an FTC cease and desist order would subject a businessman to liability for his acts which occurred before the Commission had defined a statutory violation, and thus before the FTC gave the required notice that the prior conduct was prohibited by the Act, it was not within the remedial authority granted to the Commission.<sup>21</sup> The *Heater* court distinguished those cases which have allowed other affirmative remedies as curing public rather than private injuries, stating that Congress chose to leave private injuries caused by violations of the FTCA to whatever common law remedies existed.<sup>22</sup> The court, however, was troubled because its decision would limit the FTC's cease and desist authority to commanding violators to "go and sin no more," which would allow an unscrupulous violator to engage in conduct clearly forbidden by the FTCA without the threat of being ordered to disgorge monies thereby obtained and to continue such actions until the FTC issues a cease and desist order.<sup>23</sup> Nevertheless, faced with the dilemma of weighing two valid but seemingly irreconcilable concerns, the FTCA's policy of fair notice dictated a *limitation* on the Commission's definitional and remedial powers while effective deterrence of practices clearly illegal under the FTCA demanded broad powers, the *Heater* court chose to forbid the FTC from ordering a refund of illicitly gained monies.

Reacting strongly to the limitation of its refund power, the FTC immediately announced it would appeal the *Heater* decision,<sup>24</sup> and continued to order restitutionary relief, even in the Ninth Circuit.<sup>25</sup> How-

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tising, for example, both impose economic costs attributable to conduct occurring before the conduct is declared illegal. Yet they are condoned because they are thought necessary to remedy the continuing effects of violations of the Act. See notes 11-13 *supra* and accompanying text.

21. 503 F.2d at 323.

22. *Id.* at 325 n.13. *But see* note 20 *supra*.

23. *Id.* at 325 n.16.

Under the present design of the Act, those sufficiently unscrupulous or reckless to engage in conduct clearly forbidden by the Act may do so until a cease and desist order is entered, escaping with the fruits of the violation. In many situations no individual has a sufficient interest to bring a suit for redress, and a violation of the Act may be quite profitable. *Id.*

For an example of this danger, see *Holiday Magic, Inc.*, 3 TRADE REG. REP. ¶ 20,757 (FTC Final Order, Oct. 15, 1974), quoted in note 8 *supra*.

24. *Holiday Magic, Inc.*, 3 TRADE REG. REP. ¶ 20,757, at 20,617 n.11 (Final FTC Order, Oct. 15, 1974); *see* 697 BNA ANTITRUST AND TRADE REG. REP. A-19 (Jan. 21, 1975).

25. *Holiday Magic, Inc.*, 3 TRADE REG. REP. ¶ 20,757 (Final FTC Order, Oct. 15, 1974). *Holiday Magic* involved a cosmetics concern which marketed its products by means of an open-ended, multi-level distribution network displaying the attributes of the familiar pyramid scheme. *Id.* at 20,612. The Commission ordered refunds to all franchisees, who had invested millions of dollars in huge inventories of cosmetics. *Id.* at 20,618. *See* note 8 *supra*.

ever, the Commission soon thereafter changed its position, withdrawing both the appeal<sup>26</sup> and its outstanding refund order.<sup>27</sup> Perhaps this change in position was motivated by the recent amendments to the FTCA, the Federal Trade Commission Improvement Act,<sup>28</sup> which offer an alternative resolution to the dilemma faced in *Heater*.

The "Consumer Redress" provision of the Federal Trade Commission Improvement Act<sup>29</sup> provides that the Commission may, after issuing a final cease and desist order with respect to an unfair or deceptive act or practice, commence a civil action in an appropriate court on behalf of injured consumers.<sup>30</sup> If the Commission satisfies the court that the act or practice to which the cease and desist order is related is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant whatever relief is necessary to redress injury to consumers or others, including the refund of money or return of property.<sup>31</sup> Thus, not only may a consumer gain a refund of his monies through an FTC initiated and conducted civil suit, but the flagrant violator is also prevented from retaining what *Heater* allowed him—those proceeds from conduct clearly prohibited by the FTCA but which occurred before the issuance of a final cease and desist order.<sup>32</sup> Moreover, the FTCA's requirement of

26. 697 BNA ANTITRUST & TRADE REG. REP. A-18 to 19 (Jan. 21, 1975).

27. 699 BNA ANTITRUST & TRADE REG. REP. A-19 to 20 (Feb. 4, 1975).

28. Pub. L. No. 93-637 (Jan. 4, 1975).

29. *Id.* § 206, reprinted in 4 TRADE REG. REP. ¶ 25,271. Section 206 of the amendment reads as follows:

[(a)](2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 5(a)(1)) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

30. *Id.* § 206(a)(2), reprinted in 4 TRADE REG. REP. ¶ 25,271.

31. *Id.* § 206(b), reprinted in 4 TRADE REG. REP. ¶ 25,271.

32. See note 23 *supra* and accompanying text. The language of section 206 of the amendments, see note 29 *supra*, is somewhat ambiguous on this point, and at least one FTC official has suggested that it enables the FTC to seek restitution only if a company violates a final order. 698 BNA ANTITRUST & TRADE REG. REP. A-20 (Jan. 28, 1975) (comments of Miles W. Kirkpatrick). The legislative history, however, makes it clear

notice is preserved. The refund remedy is only authorized where the Commission proves in court that the conduct violating the Act is that "which a reasonable man would have known was dishonest or fraudulent."<sup>33</sup>

Although the majority of the Commission has indicated that its new authority to seek court-ordered restitution in limited circumstances seems an ample substitute for its authority, which was denied in *Heater*, to do so directly through a cease and desist order,<sup>34</sup> the Commission's decision to withdraw its appeal in the case was not a unanimous one. Two Commissioners considered the Commission's power to grant restitution directly to be of extreme importance.<sup>35</sup> They emphasized that the new legislation makes clear that the consumer redress remedies are to be in addition to, and not in lieu of, any pre-existing remedial authority the Commission may have had under the preamendment FTCA.<sup>36</sup> Indeed, a Senate Report on a proposed but unenacted version of the amendments indicates that the Senate assumed that the Commission already had the "power to compel restitution by its own order when such restitution is necessary to terminate a continuing violation."<sup>37</sup> Further, the dissenters noted that the amendments relate

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that violation of a final order is not necessary and that section 206 relates to injuries caused prior to the issuance of the cease and desist order, *i.e.*, prior to the time the conduct was formally declared illegal. See S. REP. No. 1408, 93d Cong., 2d Sess. 41 (1974); S. REP. No. 151, 93d Cong., 1st Sess. 27-28 (1973).

33. Pub. L. No. 93-637, § 206(a)(2) (Jan. 4, 1975), *reprinted in* 4 TRADE REG. REP. ¶ 25,271.

34. 700 BNA ANTITRUST & TRADE REG. REP. F-1 (Feb. 11, 1975); *see* 698 BNA ANTITRUST & TRADE REG. REP. AA-1 to 3 (Jan. 28, 1975) (remarks of FTC Bureau of Consumer Protection Director J. Thomas Rosch).

35. 700 BNA ANTITRUST & TRADE REG. REP. F-1 (Feb. 11, 1975) (dissenting statement of Commissioners Hanford and Nye).

36. *Id.* The new Act provides:

(e) Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by state or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provisions of law. Pub. L. No. 93-637, § 206(e) (Jan. 4, 1975), *reprinted in* 4 TRADE REG. REP. ¶ 25,271.

37. S. REP. No. 151, 93d Cong., 1st Sess. 28 (1973):

[T]here is no intent on the part of the Committee to disturb the Commission's power to compel restitution by its own order when such restitution is necessary to terminate a continuing violation of section 5 of the Federal Trade Commission Act. Section 203 [which was eventually to become section 206 of the amendments and new section 19 of the Act] is applicable to those situations where the Commission acts to make consumers whole and is not intended to supplant general actions by the Commission which are designed to dissipate the prior effects of unfair or deceptive acts or practices.

It should be noted, however, that the Conference Report on the amendments, while claiming to preserve the Commission's pre-existing remedial powers, did not specifically mention that the FTC had *restitutionary* powers.

S. REP. No. 1408, 93d Cong., 2d Sess. 42 (1974):

.. The section is intended to supplement the ability of the Commission to redress

only to remedies for "unfair or deceptive acts or practices" and do not affect the Commission's remedial power for "unfair methods of competition."<sup>38</sup> Where the circumstances surrounding an unfair method of competition violation are such that restitution of money to consumers is necessary to dissipate the *anticompetitive* effect of unlawful conduct, the power to obtain restitution would appear to be an essential weapon in the Commission's remedial arsenal.<sup>39</sup> However, neither the amendments nor the *Heater* decision would seem to allow such a remedy. Finally, the dissenters feared that courts may be long in determining the relationship between what is "unfair or deceptive" (the preamendment statutory standard of issuing a cease and desist order) and what is "dishonest or fraudulent" (that standard which a reasonable man must knowingly violate before a refund order by a court will be permitted under the amendments).<sup>40</sup>

At present, it appears that the FTC is willing to accept its defeat in *Heater*, at least insofar as "*unfair or deceptive acts or practices*" are concerned, and to rely on the remedial provisions of the amendments to correct such violations. The possibility remains open, however, that the Commission will still order restitution under its own cease and desist power when remedying "*unfair methods of competition*" which are not covered by the amendments. Such an order would, of course, challenge the rationale of *Heater* and its flat prohibition of FTC-ordered refunds and reignite the controversy between the Commission and the

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consumer and other injury resulting from violations of its rules or of section 5(a) of the Federal Trade Commission Act and is not intended to modify or limit any existing power the Commission may have to itself issue orders designed to remedy violations of the law. That issue is now before the courts. It is not the intent of the Conferees to influence the outcome in any way.

38. 700 BNA ANTITRUST & TRADE REG. REP. F-1 n.3 (Feb. 11, 1975).

39. For example, if a businessman, by using an unfair method of competition, realizes substantial monetary gain and uses this gain to disrupt significantly the balance of competition, an order which merely prohibited the unfair method in the future would allow him the use of his ill-gotten gains to further his illegally obtained competitive advantage. An order requiring him to refund such monies would not only strip the violator of wrongfully obtained economic power but also allow consumers to place these funds in legitimate competitive activities. In such cases, a restitutionary order would be the only effective means of restoring the competitive status quo. Restitutionary relief in such circumstances would be closely analogous to the affirmative remedies of divestiture and corrective advertising allowed by the Supreme Court because necessary to restore competition. See *Universal Credit Acceptance Corp.*, 82 F.T.C. 570, 652 (1973); *Curtis Publishing Co.*, 78 F.T.C. 1472, 1515-16 (1971). Theoretically, then, by placing an "unfair method of competition" label on the practice in question, the FTC could circumvent the apparent congressional preference for a court proceeding in restitution cases, and order a refund directly under its cease and desist power. However, the validity of this approach remains questionable since it would seem to violate the fair notice policy of the FTCA deemed so important by the court in *Heater*.

40. 700 BNA ANTITRUST & TRADE REG. REP. F-1 n.3 (Feb. 11, 1975).

Ninth Circuit. The recent amendments to the FTCA, however, suggest an analysis that should satisfy the *Heater* court's objections without emasculating the Commission's cease and desist remedy. As previously noted, the *Heater* court objected to the FTC's refund order because it read the FTCA's legislative history as mandating prior notice before a violator could be held liable for his acts.<sup>41</sup> If the Commission would limit itself to including a refund provision in a cease and desist order in those situations where a reasonable man would have known he was violating the Act, the violator would have *constructive notice* of his violation. Although the Commission labelled Heater's conduct as "patently fraudulent,"<sup>42</sup> Heater contended otherwise, and the court found it unnecessary to decide the issue. The *Heater* court proclaimed without support that Congress, out of a concern for "debatable cases," made a blanket prohibition of retroactive sanctions, even for "exceptional violations" and with no exceptions.<sup>43</sup> Although the court's reasoning for demanding a cease and desist order prior to imposing liability in normal cases makes eminently good sense, the court's unsupported demand for such actual notice where constructive notice is present, as it is for flagrant violations of the Act, is unpersuasive. Furthermore, the adequacy of constructive notice in such instances is recognized for the imposition of a similar sanction in the recent amendments to the FTCA.<sup>44</sup> Therefore, the FTC should be able to issue a cease and desist order which includes a refund requirement where the violation of the FTCA was such that a reasonable man would have known he was violating the law. If that argument is accepted, the FTC will have the advantage of being able to issue directly a cease and desist

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41. See notes 19-21 *supra* and accompanying text.

42. 503 F.2d at 325 n.15. The Commission argued "that notice considerations play no part in this case because petitioner's acts were so patently fraudulent that he must have known his conduct violated the Act." *Id.* In their *Heater* appeal brief, the Commission emphasized that Heater's conduct was not simply a technical violation of the Act: "This is not a case of a business practice which, but for the guidance of the Commission in its capacity as interpreter of the broad proscriptions of § 5, could colorably have been considered legal and proper—this is a case, in popular vernacular, of a 'bunco' operation, a confidence game." 503 F.2d at 322 n.4, quoting FTC Brief at 19, *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974).

43. 503 F.2d at 325 n.15.

44. Of course, the amendments require a *court* to rule on the propriety of granting a restitutionary remedy, perhaps evidencing a congressional preference for judicial rather than administrative proceedings when private relief is sought. Still, based on the legislative history of the amendments (which evidenced a desire to preserve pre-existing FTC remedial power) and the Supreme Court's prior indication that the FTC has the powers of a court of equity, see note 15 *supra*, a post-*Heater* court could, consistent with the notice policy of the FTCA, uphold the Commission's own restitutionary power in cases of flagrant violations.

order with a refund provision to cure unfair acts or practices, as well as the alternative of seeking similar redress in a consumer redress civil suit. More importantly, in unfair competition situations, the FTC will not be prevented from obtaining any refund at all, and knowing violators will be prevented from retaining their bounty illicitly obtained before a cease and desist order issued.