

Seventh Circuit Strikes a Blow Against the FTC's Preferred Enforcement Power

August 28, 2019

Last week, the U.S. Court of Appeals for the Seventh Circuit overruled its own precedent and held that the Federal Trade Commission ("FTC") does not have the legal authority to obtain restitution under Section 13(b) of the Federal Trade Commission Act ("FTCA").¹ For the past thirty years, the FTC has relied on Section 13(b) of the FTCA to obtain a wide range of "equitable remedies," including equitable restitution (e.g., money to compensate consumers for harm arising from unfair and deceptive acts and practices found to violate Section 5 of the FTCA). This enforcement mechanism has enabled the FTC to recover billions of dollars.

Although Section 13(b) does not expressly authorize restitution, most courts over the last thirty years have taken the position that the authority is implied (as an inherent equitable remedy). Recent judicial decisions, however, have challenged an expansive, extra-textual interpretation of Section 13(b). For example, in *FTC v. Hornbeam Special Solutions, LLC*, a case likely headed to the U.S. Court of Appeals for the Eleventh Circuit, the district court stated that equitable relief beyond injunctions is "not supported by the plain text" of Section 13(b).² The Ninth Circuit in *FTC v. AMG Capital Management LLC* upheld a \$1.3 billion award, but only to avoid overruling its own precedent.³ Two of the three judges wrote a concurrence calling for revisiting that precedent. And, as we reported in a recent Debevoise Update, the Third Circuit in *FTC v. Shire ViroPharma, Inc.* held that the FTC lacks the authority to bring cases under Section 13(b) for violations of the FTCA that are not imminent or ongoing.⁴

This Seventh Circuit decision, *FTC v. Credit Bureau LLC*, however, is potentially even more damaging for the FTC. It establishes precedent, which, if followed by other circuit courts, would preclude the FTC's ability to obtain monetary relief for FTCA violations

¹ *FTC v. Credit Bureau LLC et al.*, No. 18-3310 (7th Cir. Aug. 21, 2019).

² *FTC v. Hornbeam Special Situations, LLC*, No. 1:17-cv-03094-TCB, 2018 WL 6254580 (N.D. Ga. Oct. 15, 2018).

³ *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018).

⁴ *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019); Debevoise Update: The Third Circuit Sharply Curtails the FTC's Preferred Enforcement Power (Mar. 1, 2019), https://www.debevoise.com/~media/files/insights/publications/2019/03/20190301_the_third_circuit_sharply_curtails_the_ftcs_preferred_enforcement_power.pdf.

regardless of whether the violations are ongoing or imminent or whether the monetary relief is characterized as restitution, disgorgement, or consumer redress. This decision will have immediate ramifications in the Seventh Circuit for both competition and consumer protection (including false advertising and privacy/cybersecurity) matters.

Majority Decision

The Seventh Circuit reviewed the district court's decision to enter a permanent injunction and order the defendants, Credit Bureau Center and its sole owner and operator, Michael Brown, to pay more than \$5 million in restitution to the FTC. The district court had found the defendants liable for the content of their websites, which offered a "free credit report and score" while obscuring in small text the key detail that applying for that "free" information automatically enrolled and charged customers for unwanted credit monitoring services.

Based upon a careful statutory construction analysis of the FTCA, the Seventh Circuit held that although Section 13(b) authorizes injunctive relief, the provision does not authorize equitable restitution. Rather, the Seventh Circuit concluded that "nothing in the text or structure of the FTCA supports an implied right to restitution in [S]ection 13(b), which by its terms authorizes only injunctions" and that Congress crafted the FTCA to authorize restitution only in circumscribed conditions. Specifically, in order to obtain restitution under Section 19 of the FTCA, the FTC must engage in a cumbersome two-step process: (1) the FTC must first successfully obtain a cease-and-desist order before an Administrative Law Judge; and (2) the FTC must then prove either a violation of that order or, in a subsequent case brought in federal court, that a "reasonable man would have known under the circumstances" that the underlying activity was "dishonest or fraudulent."⁵

The majority acknowledged that its decision overturns the Seventh Circuit's 1989 decision in *FTC v. Amy Travel Service* and its "starkly atextual interpretation" of Section 13(b). The court reasoned that, in the intervening years, the Supreme Court in *Mehrig v. KFC W., Inc.* had "clarified that courts must consider whether an implied equitable remedy is compatible with a statute's express remedial scheme" and instructed courts "not to assume that a statute with 'elaborate enforcement provisions' implicitly authorizes other remedies." Applying the Supreme Court's ruling, the Seventh Circuit concluded that "[S]ection 13(b)'s grant of authority to order injunctive relief does not implicitly authorize an award of restitution," in large part because the FTCA already expressly authorizes restitution under Section 19. The court emphasized that while the

⁵ The FTC can also seek legal and equitable remedies, including restitution, under Section 19 of the FTCA for violations of a final FTC rule.

FTCA does contain “backward-facing methods to obtain monetary relief for past injury,” Section 13(b) “serves a different, forward-facing role: enjoining ongoing and imminent future violations.” And while the majority recognized that it was creating a circuit split, it noted that “most circuits adopted their position by uncritically accepting our holding in *Amy Travel*” and that the issue of whether Section “13(b) implicitly authorizes restitution has largely escaped critical examination.”

Notably, the Seventh Circuit upheld the FTC’s authority to obtain both temporary and permanent injunctions under Section 13(b), as the statute specifically allows injunctions “[w]henver the Commission has reason to believe . . . that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC]” and the injunction “would be in the interest of the public.”

Dissenting Opinion

Chief Judge Diane Wood authored a dissent joined by two other judges criticizing the denial of a *sua sponte* rehearing *en banc*.⁶ Judge Wood noted that eight other circuit courts have held that the FTC has the authority to seek restitution under Section 13(b) and that “no court has ever tied the hands of a government agency in the way that the majority has done here.” She reasoned that Section 13(b) clearly allows the FTC to pursue injunctions and that restitution is one of the equitable provisions that may be included in an injunction. Judge Wood concluded by sharply rebuking the majority, stating that “[t]he majority’s interpretation upends what the agency and Congress have understood to be the status quo for thirty years, and in so doing grants a needless measure of impunity to brazen scammers like the defendant in this case.” The dissent provides an informative roadmap of likely FTC arguments should the case be appealed.

Implications

The Seventh Circuit’s decision creates a circuit split. The decision’s immediate implication is to bar the FTC from seeking monetary relief for FTCA violations that are ongoing or imminent in federal courts in Illinois, Indiana, and Wisconsin.

It is unclear if the FTC will appeal the decision to the Supreme Court. Given the strong possibility that the current Supreme Court would agree with the court’s “plain language”

⁶ As the Seventh Circuit overruled its own precedent and created a circuit split, the proposed opinion before publication was circulated under Circuit Rule 40(e) to all Seventh Circuit judges in active service, a majority of whom did not favor a rehearing *en banc*.

analysis, the FTC may not want to risk extending this ruling beyond the Seventh Circuit. In the meantime, companies and individuals investigated by the FTC and/or in consent decree negotiations should recognize that the FTC's ability to obtain restitution or any form of monetary relief under Section 13(b) is in question.

This ruling's effect will be most acutely felt in competition cases where the FTC lacks the authority to seek disgorgement or restitution in administrative cases. The FTC has typically sought those remedies under Section 13(b) in federal court.

As noted above, the FTC can still pursue restitution in consumer protection cases pursuant to a lengthy and cumbersome two-step process. Specifically, the FTC would first need to seek a cease-and-desist order from an administrative law judge that prohibits the company from engaging in the unlawful conduct at issue. The order would then undergo an administrative appeal and judicial review; if the order survives, it would become final. Once final, the cease-and-desist order would allow the FTC to seek legal and equitable relief (including restitution) in federal court, but only if "a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent."

Due to the burdensome nature of this process, requiring the FTC to deploy limited resources in multiple proceedings against the same defendant, and difficulty in convincing a court that the conduct rises to the "dishonest or fraudulent standard," the FTC would likely pursue restitution in only extreme cases (unlike today where the FTC's default position is often to pursue "consumer redress" unless convinced otherwise).⁷ Of course, if a company violates a cease-and-desist order on a forward-looking basis, the FTC would be able to sue for civil penalties and equitable relief.

In order to restore its authority, we expect the FTC to ask Congress to enact legislation expressly authorizing restitution under Section 13(b). In fact, FTC Commissioner Christine S. Wilson recently testified before the House Energy and Commerce Committee, Subcommittee on Consumer Protection and Commerce, requesting that Congress clarify the FTC's powers under Section 13(b) of the FTCA.⁸ Commissioner Wilson criticized the Third Circuit's decision in *Shire ViroPharma* and other recent decisions that have questioned the FTC's authority to obtain restitution. She argued that "[c]ourts have long held that by granting the FTC authority to seek injunctive relief,

⁷ The FTC could proceed directly to federal court to obtain a temporary restraining order and a preliminary or permanent injunction under Section 13(b). In this case, however, the FTC would not be able to seek restitution or any other monetary relief.

⁸ Oral Statement of FTC Commissioner Christine S. Wilson Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (May 8, 2019), https://www.ftc.gov/system/files/documents/public_statements/1519254/commissioner_wilson_may_2019_ec_opening.pdf.

Section 13(b) gives courts the authority to grant the full range of equitable relief,” which the FTC believes is consistent with Congressional intent (others argue the opposite, noting that Congress would have expressly authorized restitution if it intended for the FTC to use this power under Section 13(b)).

Based upon the upcoming election year, we believe it is unlikely that FTC reform legislation will be enacted in the 116th Congress. When the 117th Congress convenes in January 2021, however, we expect this to be one of many controversial issues considered by the new Congress.

* * *

Please do not hesitate to contact us with any questions.

NEW YORK



David H. Bernstein
dhbernstein@debevoise.com



Jeremy Feigelson
jfeigelson@debevoise.com

WASHINGTON, D.C.



Luke Dembosky
ldembosky@debevoise.com



Ted Hassi
thassi@debevoise.com



Paul D. Rubin
pdrubin@debevoise.com



Leah S. Martin
lmartin@debevoise.com



Melissa B. Runsten
mrunsten@debevoise.com