



Insight

Questionable FTC Restitution Authority Heads to Supreme Court

DAN BOSCH, BERNARD ZAMANINIA | NOVEMBER 17, 2020

EXECUTIVE SUMMARY

- The Federal Trade Commission (FTC) currently asserts the right to seek restitution directly in federal court, without affording the alleged wrongdoer full administrative process, a violation of due process that can result in economic harm.
- The Supreme Court this term will rule on the FTC's authority to seek restitution.
- Should the Supreme Court agree with the FTC's interpretation of its authority, Congress could consider action to clarify that the FTC can only seek restitution with full due process.

INTRODUCTION

Currently, the Federal Trade Commission (FTC) claims to have the authority—without going through a complete administrative process—to sue businesses directly in federal court and obtain profits that a business has allegedly acquired by committing deceptive or anticompetitive practices. The FTC claims that restitution is necessary to ensure that parties responsible for anticompetitive or deceptive conduct abide by the terms of cease and desist orders. This analysis examines whether the FTC has a right to seek restitution in cases where businesses are not afforded administrative process and offers a policy response if the Supreme Court sides with the FTC.

ECONOMIC HARM OF FTC'S ASSERTED AUTHORITY

Without administrative due process, a firm can be found liable for restitution after only one set of eyes, the federal district court, has evaluated the case. This expedited process increases the likelihood that an innocent firm could be unjustly deemed liable of a violation. A cautionary example includes *Federal Trade Commission v. Vylah Tec*^[1]. The FTC alleged Vylah Tec was committing deceptive practices by selling unnecessary services. The federal district court in Florida granted a preliminary injunction freezing Vyla Tech's assets. The company laid off its employees, ceased working, and active contracts were terminated. The court, however, ultimately found for Vylah Tec, ruling that the business could not be found liable for restitution. But it was too little too late; over the course of the two years of litigation the business went bankrupt.^[2]

FTC SECTION 13(b) POWER GRAB

Congress has laid out two clear paths for FTC enforcement actions. First, the FTC has authority to promulgate rules making particular "unfair or deceptive acts or practices" unlawful.^[3] If the FTC can establish in federal court that a business knowingly violated such a rule, with actual or constructive knowledge, the FTC can seek restitution.^[4] This method requires a long and complex set of procedures to issue the regulations, unlike the method available through the Administrative Procedure Act (APA). The FTC's process requires the FTC to issue an Advanced Notice of Proposed Rulemaking sent to Congress 30 days before issuance of a rule, conduct

oral hearings with opportunity for cross examination, and finally hold a traditional APA-style notice and comment period. The FTC, unsurprisingly, has refrained from utilizing its authority to regulate through rulemaking.

Second, if the FTC issues a final administrative cease and desist order against a business, and the business subsequently violates the terms of the order, the FTC can sue in federal court to force compliance and obtain restitution for the wronged parties. In order to obtain restitution, the FTC must not only prove that deceptive or anticompetitive conduct occurred, but that a reasonable individual in the defendant's shoes would have known that the conduct is deceptive or anticompetitive.^[5] This second method, like the first, is difficult to put into practice by design. This is because an independent administrative law judge (ALJ) within the FTC must first determine that wrongdoing took place, then the commissioners of the FTC must agree with the ALJ, and finally, the FTC must argue before a federal court that their conclusion was correct.

Both these methods are quite involved and by design difficult to put into practice. For this reason, the FTC has sought other ways to impose restitution. It initially tried to do so under Section 5 of the Federal Trade Commission Act (FTCA). But its ability to do so was blocked by the courts in a 1974 Ninth Circuit case, *Heater v. FTC*. Congress responded to the *Heater* decision with the Magnuson-Moss Act that authorized the FTC to demand restitution for profits achieved through deceptive or anti-competitive conduct, but only if the business is permitted multiple instances of due process—the procedural hoops noted above—to ensure that they are truly liable for what the FTC accused the business of and that a federal court, not a government agency, has determined that restitution is an appropriate remedy.

Prior to Magnuson-Moss, a 1973 amendment to the FTCA referred to as “Section 13(b)” granted the agency the power to skip the Magnuson-Moss procedural hoops and directly sue for a cease and desist injunction in federal court. When combined with the decision by the Ninth Circuit in *Federal Trade Commission v. Commerce Planet, Inc.*, federal courts can allow for restitution as part of the request for a cease and desist injunction, and the FTC again had a way to bypass administrative procedures.

This brings us to the present where the Seventh Circuit in *FTC v. Credit Bureau Ctr., LLC* broke with precedent and found that the FTC did not have an explicit or implicit right to demand restitution under Section 13(b).^[6] On September 30, 2020, the Third Circuit joined the Seventh Circuit by breaking with precedent in *Federal Trade Commission v. AbbVie Inc.*, agreeing that the FTC cannot seek restitution when it sues directly in federal court for an injunction. As a result, the current Supreme Court case, *AMG Capital Management, LLC, et al., Petitioners v. Federal Trade Commission*, will likely determine whether the FTC has authority to seek restitution pursuant to its right to seek cease and desist orders under Section 13(b) of the FTCA.

A CONGRESSIONAL POLICY RESPONSE

If the Supreme Court finds that the FTC can include requests for restitution pursuant to Section 13(b), Congress could consider amending Magnuson-Moss, requiring that the FTC only seek restitution when the business targeted for restitution is afforded both administrative and judicial process. Congress intended with Magnuson-Moss to ensure that businesses are afforded the benefit of the doubt that there was no wrongdoing, but the FTC's workaround has prevented this. While Section 13(b) district court injunctions are necessary to allow the FTC to immediately prevent blatant cases of deceptive and anticompetitive conduct in their incipiency, Congress did not intend for it to be used to circumvent Magnuson-Moss.

CONCLUSION

The FTC currently asserts the right to seek restitution directly in federal court, without affording the alleged wrongdoer administrative process in the form of review by an ALJ and the commissioners of the FTC before seeking restitution. The Supreme Court this term may rule that Section 13(b) does grant the FTC the right to seek restitution when directly suing for a cease and desist order in federal court.

Should the Supreme Court agree with the FTC's interpretation of Section 13(b), Congress could consider amending Magnuson-Moss to clarify that the FTC can only seek restitution when full due process—meaning an FTC ALJ, the commissioners of the FTC, and a district court have all reviewed the case.

[1] *Federal Trade Commission v. Vylah Tec LLC*, 378 F. Supp. 3d 1134 (M.D. Fla. 2019).

[2] Brief for the Cause of Action Institute as Amicus Curiae, *Publishers Business Services, Inc. v. Federal Trade Commission*, No. 19-508 at 19-20 (U.S. 2020).

[3] 15 U.S.C. § 57b(a)(1).

[4] 15 U.S.C. § 57b(a)(2).

[5] 15 U.S.C. § 57b(a)(1), (b).

[6] *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 780–781 (7th Cir. 2019).