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Seventh Circuit Limits Scope of Federal Trade Commission's Enforcement Authority

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The Seventh Circuit issued a decision recently that eliminates an enforcement tool long used by the Federal Trade Commission ("FTC")—the ability to obtain equitable monetary relief from defendants when the FTC challenges conduct under Section 13(b) of the Federal Trade Commission Act ("FTC Act").

Under Section 13(b), the FTC may seek an injunction in federal court "[w]henever 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 Federal Trade Commission." But the FTC has long sought and obtained restitution under Section 13(b) as an implied remedy.

In *Credit Bureau Center*, the FTC sued a credit monitoring service and its owner for an injunction and restitution. The FTC brought the suit under Section 13(b) for violating several consumer protection statutes by enrolling consumers in a monthly subscription without proper notice. The service offered a "free credit report and score" while disclosing in much smaller text that applying for the information automatically enrolled customers in an unspecified $29.94 monthly membership subscription—the defendants' credit monitoring service. The district court entered a permanent injunction and ordered the defendants to pay more than $5 million in restitution.

On appeal, the defendants made the straightforward argument that Section 13(b) does not authorize restitution because it does not mention restitution. And the Seventh Circuit agreed. It concluded that nothing in the text or structure of the FTC Act supported an implied right to restitution under Section 13(b), which by its terms authorizes only injunctions. As a result, the court affirmed the judgment against the defendants but vacated the restitution award.

The court reached its decision despite prior Seventh Circuit precedent recognizing a right to restitution under Section 13(b) in *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1989). Looking to the Supreme Court's subsequent decision in *Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996), the court concluded that it must consider whether an implied equitable remedy is compatible with a statute's express remedial scheme, and that it cannot assume that a statute with elaborate enforcement provisions like the FTC Act implicitly authorizes other remedies. The court analyzed the FTC Act's overall text and structure, including the FTC's various enforcement powers, and concluded that an implied restitution remedy was incompatible with Section 13(b).

In particular, the court observed that the FTC can obtain other equitable relief under separate provisions of the FTC Act that involve certain administrative procedures. The court explained that the FTC can try cases before an administrative law judge or define unfair or deceptive practices through rulemaking and then pursue violators of the rule, and that that those mechanisms afford protections to defendants not offered under Section 13(b). As a result, the court reasoned, the FTC asserted an unqualified right to a remedy that the FTC Act's other enforcement provisions give only with protections or, as the court called it, "heavy qualification."

The Seventh Circuit's decision is significant. It creates a circuit split on a key aspect of FTC's enforcement authority. The Seventh Circuit did not grant a rehearing *en banc*, and it is unclear whether the FTC will appeal to the Supreme Court. Congress may attempt to resolve the split through legislation. In the meantime, the FTC will no doubt see increased challenges to its right to recover restitution in Section 13(b) cases. Indeed, the Seventh Circuit criticized contrary decisions in other circuits as based on a "similarly brief analysis" as *Amy Travel* and observed that they have been the subject of recent judicial skepticism.

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