

Will the FTC Need to Rethink its Enforcement Playbook (Part II)? Circuit Split Casts Doubt on the FTC's Ability to Seek Restitution in Section 13(b) Suits

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Earlier this year, the U.S. Court of Appeals for the Seventh Circuit held in *FTC v. Credit Bureau Center, LLC*, that the Federal Trade Commission (FTC or Commission) cannot obtain restitution (i.e., repayment of money for consumer redress) in suits under [Section 13\(b\)](#) of the Federal Trade Commission Act (FTC Act). In so doing, the Seventh Circuit overturned its own precedent and created a split of opinion on this issue with eight other federal courts of appeals. The *Credit Bureau Center* decision also adds to recent case law curtailing the FTC's enforcement authority under Section 13(b) in other respects, including a [decision](#) by U.S. Court of Appeals for the Third Circuit earlier this year (discussed in an earlier [Sidebar](#)) limiting the FTC's ability to bring Section 13(b) suits at all.

Credit Bureau Center has significant implications for the FTC's enforcement practices. The Commission generally lacks authority to impose civil monetary penalties when bringing suits based on a defendant's first-time violation of the FTC Act. Consequently, the FTC has instead relied on restitution under Section 13(b) to obtain monetary relief in such suits. Unless and until the Supreme Court resolves the newly-created split among the circuits as to whether restitution is available in Section 13(b) suits, the FTC will have different enforcement powers in different jurisdictions, and may be limited to seeking primarily non-monetary injunctive relief and cease-and-desist orders from courts within the Seventh Circuit.

This Sidebar begins by placing Section 13(b) in its context within the FTC Act's enforcement framework. It then discusses past federal appellate court decisions interpreting the remedies available under Section 13(b). The Sidebar then details the reasoning of the Seventh Circuit in *Credit Bureau Center* and considers the decision's implications for FTC enforcement actions and Congress.

FTC Act's Enforcement Framework

The [FTC Act](#) established the FTC in 1914, setting forth the agency's [dual mission](#) of protecting consumers and promoting competition. Along with enforcing several statutes addressing specific types of

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conduct (such as the [Children’s Online Privacy Protection Act](#) and the [Equal Credit Opportunity Act](#)), the FTC largely carries out its dual mission by enforcing the broad mandates of [Section 5](#) of the FTC Act. Section 5(a)(1) [prohibits](#) “unfair methods of competition” and “unfair or deceptive acts or practices in commerce” (often referred to as the UDAP prohibition). Through its UDAP authority, the FTC polices a broad range of conduct. For instance, the FTC has used this authority to become the primary U.S. privacy enforcer, effectively filling in gaps left by more targeted privacy statutes. (For more background on the FTC’s privacy enforcement, see CRS Report R45631, *Data Protection Law: An Overview*, by Stephen P. Mulligan, Wilson C. Freeman, and Chris D. Linebaugh.)

The FTC Act provides multiple mechanisms for enforcing Section 5’s prohibitions. First, under [Section 5\(b\)](#), the agency can initiate an adjudication before an administrative law judge (ALJ). Through this proceeding, the Commission can obtain a cease-and-desist order requiring the respondent to refrain from allegedly unlawful conduct. The FTC cannot obtain monetary relief in an administrative adjudication, but once the ALJ issues a final cease-and-desist order, [Section 19](#) of the FTC Act allows the Commission to bring an action in federal or state court seeking consumer redress from the respondent, including the “refund of money or return of property.” In such cases, the Commission [must show](#) that a “reasonable man” would have known the respondent’s conduct was “dishonest or fraudulent.” If a respondent violates a cease-and-desist order, [Sections 5\(l\)–\(m\) and 16](#) of the act empower the FTC to sue the respondent in federal court for civil penalties, injunctions, and other equitable relief that the court “deem[s] appropriate,” provided that the Attorney General first declines to seek relief on the Commission’s behalf. [Section 5\(m\)](#) also allows the FTC to bring an action in federal district court for civil penalties against any person—regardless of whether the person was a party to cease-and-desist order—for engaging in conduct prohibited by the order. But in such cases the Commission [must show](#) that the defendant had “actual knowledge that such act or practice is unfair or deceptive and is unlawful.”

The FTC may also address industry-wide conduct by adopting [rules](#) defining particular acts or practices as UDAPs. These rules are often called “trade regulation rules” (TRRs). To issue TRRs, the FTC [must comply](#) with several procedural requirements, such as publishing an advance notice of proposed rulemaking and giving any interested persons an opportunity for an informal hearing. While the FTC rarely uses its TRR rulemaking authority, when it does issue a TRR, [Section 5\(m\)](#) of the FTC Act allows the agency to seek civil penalties in federal district court for violations of the rule. Under [Section 19](#) of the FTC Act, the Commission may also seek consumer redress for TRR violations in a federal or state court.

Lastly, the FTC has enforcement authority under [Section 13\(b\)](#) of the FTC Act. The provision [states](#) that the FTC may bring an action in federal district court for a “temporary restraining order or preliminary injunction” whenever the agency “has a reason to believe” that a person “is violating, or is about to violate, any provision of law enforced by” the FTC. Section 13(b) further [states](#) that “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.”

Past Court Decisions Interpreting Section 13(b)

Although Section 13(b) by its terms permits the FTC to seek injunctive relief from a federal district court, [numerous circuit courts](#) (including the [Seventh Circuit prior to *Credit Bureau Center*](#)) have held that Section 13(b) also allows district courts to award other forms of equitable relief, including monetary remedies like restitution and disgorgement of profits. These decisions have [relied](#) on a line of U.S. Supreme Court cases holding that, when enforcing statutes, federal courts may award equitable relief—including restitution— unless the statute prohibits them from doing so. In particular, in its 1946 opinion in *Porter v. Warner Holding Co.*, the Supreme Court [held](#) that, “[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.” The Supreme Court [later elaborated](#) on this view in *Mitchell*

v. *Robert DeMario Jewelry, Inc.*, writing that if “Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.” The Court, however, also [quoted](#) *Porter*’s caveat that a statute could restrict the “full scope” of a court’s equity jurisdiction by “necessary and inescapable inference.”

FTC v. Credit Bureau Center

In *Credit Bureau Center*, the Seventh Circuit revisited its precedent allowing restitution in Section 13(b) actions and vacated the district court’s restitution award. The FTC [brought](#) a Section 13(b) action against Michael Brown and his company, a credit-monitoring service. Brown [allegedly used](#) multiple websites inviting people to sign up for a free credit report and score. But upon signing up, consumers were enrolled automatically in a credit-monitoring service and charged a monthly fee. The [only disclosures](#) on the websites regarding this service were statements in small font that said signing up enrolled consumers in a “membership” costing \$29.94 a month. The FTC [maintained](#) that this practice violated, among other things, the FTC Act’s UDAP prohibition and the Restore Online Shopper Confidence Act, which [requires](#) online merchants to disclose “material terms of the transaction” before charging consumers through a “negative option feature.” The district court [agreed](#) with the FTC and granted a permanent injunction restricting Brown’s continued involvement in the credit-monitoring industry, while ordering him to pay over \$5 million in restitution.

On appeal, the Seventh Circuit had little trouble affirming that Brown violated the law. But while upholding the district’s court’s issuance of the permanent injunction, the Seventh Circuit reversed the restitution award, holding that restitution is not permitted under Section 13(b). The court [started](#) with the “obvious” threshold point that “[r]estitution isn’t an injunction” and thus is not expressly authorized by Section 13(b). While “injunction,” the court conceded, is a “broad term,” it [cited](#) Supreme Court precedent holding that “statutory authorizations for injunctions don’t encompass other discrete forms of equitable relief like restitution.” Consequently, the Seventh Circuit characterized the issue as whether Section 13(b) “implicitly” authorizes restitution. Examined the text of Section 13(b), the structure of the FTC Act, and Supreme Court precedent, the court concluded that it did not.

First, the court considered the text of Section 13(b) itself, concluding that implied restitution “doesn’t sit comfortably within the text of section 13(b).” While restitution is a “remedy for past actions,” Section 13(b) requires the Commission to establish that the defendant “is violating” or “is about to violate” the law. It would be “illogical,” the court reasoned, to “condition the Commission’s ability to secure restitution for past conduct on the existence of ongoing or imminent unlawful conduct.”

Looking at the FTC Act as a whole, the court [reasoned](#) that the act’s other enforcement provisions “amplify” the poor fit between Section 13(b) and restitution because these other provisions use “more than the word ‘injunction’ to authorize other forms of equitable relief.” The court [pointed](#), in particular, to [Section 5\(l\)](#)’s express statement that courts may award “further equitable relief as they deem appropriate” and [Section 19](#)’s authorization of “the refund of money or return of property.” The Seventh Circuit [observed](#) that, if Section 13(b) allowed an “unqualified right” to monetary remedies such as restitution, the FTC’s other enforcement provisions explicitly allowing these remedies would be rendered “largely pointless.” Those other provisions impose a “detailed framework” the FTC must follow before obtaining a restitution order. Specifically, the court [said](#), these provisions require the FTC to give defendants “fair notice” either through cease-and-desist orders or through TRRs that “define with specificity” the prohibited acts. As the Court [explained](#), Section 13(b) offers none of these protections.

Lastly, the Seventh Circuit reviewed Supreme Court precedent and concluded that the Supreme Court’s views on this issue had evolved. The Seventh Circuit [recognized](#) that the Supreme Court’s decisions in *Porter* and *Mitchell* established a presumption “in favor of implying equitable remedies that accord with

statutory purpose” and that appellate courts, including the Seventh Circuit, [relied](#) on these cases to interpret Section 13(b) as a “broad grant of equitable authority.” But the circuit court [pointed out](#) that *Porter* and *Mitchell* recognized that this presumption could be rebutted by an “express statement or a ‘necessary and inescapable inference.’” None of the circuit courts had “examined whether reading a restitution remedy into section 13(b) comports with the [statute’s] text and structure.” Furthermore, the Supreme Court’s “modern” implied remedies jurisprudence underscored the need to carefully examine the full text and structure of the statute in question. In particular, in its 1996 decision in *Meghrig v. KFC Western, Inc.*, the Supreme Court [held](#) that, under the Resource Conservation and Recovery Act’s (RCRA) citizen suit provision, district courts may not order defendants to reimburse plaintiffs for past expenses cleaning up hazardous waste. The Supreme Court reasoned that the provision was not intended to remedy past harm, [pointing](#) to the provision’s requirement that the defendant’s actions present an “imminent and substantial endangerment to health or the environment.” The Court [contrasted](#) RCRA’s citizen suit provision to the enforcement provisions of a related statute, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), which expressly permits recovery of past cleanup costs. [According](#) to the Seventh Circuit, “[e]very one” of the High Court’s reasons in *Meghrig* applies “with equal force to section 13(b)” of the FTC Act, given Section 13(b)’s forward-looking language and relationship to other enforcement provisions. Consequently, the court concluded that there was a “compelling reason” to overturn its own precedent and depart from the “consensus view” of its sister circuits that Section 13(b) permits restitution awards.

While the three-judge Seventh Circuit panel was unanimous in its decision, Chief Judge Diane Wood, writing for herself and two other judges, [dissented](#) from the Seventh Circuit’s denial of a petition to rehear *Credit Bureau Center en banc* (the Seventh Circuit’s [procedural rules](#) allow panel decisions to overrule circuit precedent where, as in this case, the panel decision was circulated among all active judges on the court and a majority declined to rehear the case as a group). In her dissent, Judge Wood criticized the panel’s reading of the statute’s text. Among other things, she [reasoned](#) that the word “injunction” could encompass court orders requiring the return of ill-gotten gains, as an injunction is simply an “order from the court either to do something or to refrain from doing something.” She further [took issue](#) with the panel’s treatment of Supreme Court precedent, such as *Meghrig*. According to Judge Wood, *Meghrig* does not support the majority’s reading of Section 13(b) [because](#) that case turned on the “temporal line(s)” drawn by the statute’s “imminent and substantial endangerment” requirement, rather than “[g]eneral rules about equitable powers.” Judge Wood further [pointed out](#) that the Supreme Court in *Meghrig* did not “purport categorically to exclude from injunctive relief an order to make payments,” as it declined to address cases where the temporal requirement for bringing suit was met. Rather than relying on *Meghrig*, Judge Wood [instead focused on](#) the Supreme Court’s 1990 decision in *California v. American Stores Co.* In *American Stores*, the Supreme Court [held](#) that divestiture was a “form of injunctive relief” under Section 16 of the Clayton Act [because](#) Congress intended “traditional principles of equity” to govern the grant of injunctive relief. Judge Wood [wrote](#) that *American Stores* “supported the approach” she would take, since a divestiture order is “almost identical” to an equitable restitution order.

Implications of *Credit Bureau Center* and Legislative Considerations

Credit Bureau Center creates a split between the Seventh Circuit and eight other federal courts of appeals that have considered whether restitution is available under Section 13(b). While district courts in the Seventh Circuit no longer will be able to award restitution or other monetary relief in Section 13(b) suits, the decisions in the other circuits allowing such relief remain good law in those circuits. The Supreme Court, however, may weigh in and resolve the split. While a petition for Supreme Court review was not filed in *Credit Bureau Center*, the losing parties in two cases in which the U.S. Court of Appeals for the

Ninth Circuit affirmed restitution awards under Section 13(b)—*Publishers Business Services, Inc. v. FTC* and *AMG Capital Management v. FTC*—have filed such petitions. The FTC has filed briefs in both *Publishers* and *AMG* opposing the petitions. While the Commission [noted](#) in its briefs that the circuit split over Section 13(b) would “ordinarily warrant” Supreme Court review, it [asked](#) the Court to hold the petitions given the Court’s recent [decision](#) to review the “analogous” case *Liu v. SEC*. The Court’s future decision in *Liu*, however, may not resolve the circuit split. The Court agreed to review in *Liu* [to address whether](#) the Securities and Exchange Commission (SEC) may obtain “disgorgement as ‘equitable relief’ for a securities violation,” given the Court’s prior determination in *Kokesh v. SEC* that disgorgement as a remedy for such violations is a “penalty.” Yet, as discussed above, the Seventh Circuit’s decision in *Credit Bureau Center* was based in large part on the specific text and structure of the FTC Act and did not turn on whether restitution was considered a penalty. Consequently, until the Supreme Court weighs in on the specific Section 13(b) issue, the range of equitable relief available under the provision likely will remain dependent on the jurisdiction in which the FTC files the enforcement action.

Credit Bureau Center continues the recent trend of court rulings paring back the FTC’s perceived enforcement authority under the FTC Act. As discussed in a [previous Sidebar](#), earlier this year, the Third Circuit [held](#) in *FTC v. Shire ViroPharma, Inc.* that to sue under Section 13(b), the FTC must show the defendant “is violating, or is about to violate” the law. This holding limits the FTC’s ability to sue for past violations, particularly because the Third Circuit [clarified](#) that this standard requires more than showing a “past violation and likelihood of recurrence.” While the FTC [previously stated](#) that it generally favors Section 13(b) enforcement over administrative adjudications because it can obtain injunctive and monetary relief in one action, *Credit Bureau Center* and *Shire ViroPharma* may cause the Commission to rethink this preference.

In light of these developments, Congress may be interested in addressing the scope of the FTC’s enforcement authority under Section 13(b). No bills amending Section 13(b) have been introduced in the current Congress. Potential legislation might clarify the questions at issue in *Credit Bureau Center* and *Shire ViroPharma*—namely, the scope of equitable remedies available under Section 13(b) and the extent to which the FTC may bring Section 13(b) actions based on the defendant’s past conduct.

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