

It's about time to give FTC defendants a fairer shot

By William Rothbard

In some nations, the government can accuse a business of harming consumers and, without prior notice or hearing, use the courts to: shut it down; freeze its and its owners' assets; appoint a receiver to take control and immediately begin to liquidate its assets; and deny the owners access to their assets to live and hire an attorney. Without the ability to defend themselves, they have no choice but to surrender and allow the government to take everything, including their homes, cars, valuables, and, of course, all their money. Often with families, they are left penniless and forced to start over, a daunting task. Suicides happen. And all without a fair opportunity for a trial to determine their culpability.

China, Russia, Iran? Sure, but you can add the United States to the list, too. This one-sided scenario plays itself out in the law enforcement actions of our government as well, including at the Federal Trade Commission, Securities and Exchange Commission, and Department of Justice.

As a former FTC attorney and member of the FTC bar, I am most familiar with its laws and procedures. How, you may ask, does it have the authority to destroy a business and a person's life without a fair fight?

Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. Section 53(b), says that the agency may seek an "injunction" against violations. At the FTC's bidding, federal courts have interpreted this provision to allow them not only to stop a violation, but, in the name of "equity," to order monetary relief as well, such as ex parte asset freezes and receiverships, disgorgement, and restitution. The rationale for freezing assets without notice and hearing — the core of due process denial — is that the defendant will dissipate them, denying or limiting potential disgorgement or restitution to consumers. But asset freezes are routinely granted without evidence of dissipation, and in some jurisdictions are permitted on a mere "possibility" rather than a likelihood of dissipation. As one court has said, the logical corollary of this standard, where there is no evidence of risk of dissipation other than misleading marketing practices, is that an "asset freeze ... would issue in every deceptive advertising case." *FTC v.*

John Beck Amazing Profits, LLC et al., 2:09-cv-4719-FMC-FFMx (C.D. Ca., Nov. 17, 2009).

Some judges are waking up to this misuse of the agency's statutory authority. In dismissing an FTC suit last October, one wrote:

"The difficulty of statutes like §113(b) arises from the accretions of time, those well-meaning or oversighted judicial glosses that encrust themselves upon a law through loose interpretation. Among these encrustations is the ubiquitous holding of the courts of appeals that equitable relief under §113(b) other than injunctions is available ... Section 113(b) ... mentions nothing of disgorgement or otherwise." *FTC v. Hornbeam Special Situations, LLC*,

an asset freeze. While the FTC must show only a likelihood of success in a case to obtain an injunction, to obtain an asset freeze, it should have to show, through actual evidence rather than unsupported assertion, a substantial probability that without one, assets will be secreted or dissipated. Courts, which today have unlimited discretion to deny defendants funds for living and legal expenses, should be required to release frozen funds for those essential needs in proportion to the total amount available, unless the defendant has independent means of support. And receivers must be prohibited from liquidating a defendant's assets and possessions until there has been a final adjudication of liability or a settlement.

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1:17-cv-3094-TCB (N.D. Ga., Oct. 15, 2018) Calling this interpretation an "impermissible exercise of judicial creativity" which "wrests from Congress its authority to create rights and remedies," two judges have asked the 9th U.S. Circuit Court of Appeals to overrule its precedent upholding ancillary equitable relief under Section 13(b) and "relinquish what Congress withheld." *FTC v. AMG Capital Management, LLC*, 910 F.3d 417, 437 (9th Cir. Dec. 3, 2018) (O'Scannlain, J., and Bea, J., concurring). And Supreme Court Justice Neil Gorsuch, at oral argument on the question of the SEC's authority to obtain disgorgement, answered: "Well, here we don't know, because there's no statute governing it. We're just making it up." *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

Still, the FTC and its sister agencies go blithely along, their assembly lines of asset freeze actions continuing to hum in the name of preserving assets for disgorgement or restitution. Any broad judicial awakening and correction of this abuse of power will take too long. To level the playing field for FTC defendants, Congress must step in and amend the FTC's statute, making explicit its right to seek monetary relief in federal court and under what terms.

Specifically, it must significantly tighten the standards for the grant of

Consumers have a right to redress for their injuries arising from deceptive business activity. But defendants have rights, too, including the right to basic fairness and due process. America is not China or Russia. We are a nation that believes in fair laws and fair play. For too long, the system has been rigged against FTC defendants in asset freeze cases. It is time their rights and property are protected, too, and that they be given a fair shot to defend themselves in court. ■

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