LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
MONDAY, DECEMBER 17, 2018

PERSPECTIVE

En banc 9th Circuit should reconsider FTC Act case

By Blaine H. Evanson and Brandon J. Stoker

For decades, the Federal Trade Commission has obtained substantial monetary remedies pursuant to Section 13(b) of the FTC Act, even though the only relief that provision authorizes is "injunctions." Many federal courts have construed Section 13(b) to allow monetary relief on the theory that Congress' use of the word "injunctions" permits the Commission to seek a broad panoply of equitable relief, including disgorgement and restitution. But recently two judges on the 9th U.S. Circuit Court of Appeals have called out this unauthorized expansion of the FTC's authority, and asked the full 9th Circuit to reconsider its precedent on this point.

In an extraordinary procedural move, Circuit Judge Diarmuid F. O'Scannlain, joined by Judge Carlos T. Bea, penned a special concurrence to his majority opinion in *FTC v. AMG Capital Management, LLC et al.*, in which he called the expansion of the FTC's powers under Section 13(b) "an impermissible exercise of judicial creativity" that "contravenes the basic separation-of-powers principle that leaves to Congress the power to authorize (or to withhold) rights and remedies." 2018 DJDAR 11385 (9th Cir. Dec. 3, 2018).

Although the court in *AMG Capital* affirmed the award of $1.27 billion as "equitable monetary relief" under Section 13(b), it did so only because the 9th Circuit's recent decision in *FTC v. Commerce Planet, Inc.*, 815 F.3d 593 (9th Cir. 2016), compelled that result. In their special concurrence, Judges O'Scannlain and Bea call on the en banc court to reconsider *Commerce Planet*'s approval of broad equitable remedies under Section 13(b) as contrary to the language and structure of the FTC Act, and inconsistent with limits placed on federal courts' "equitable" powers by the U.S. Supreme Court, including, most recently, in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

Judges O'Scannlain and Bea call on the en banc court to reconsider *Commerce Planet*'s approval of broad equitable remedies under Section 13(b) as contrary to the language and structure of the FTC Act, and inconsistent with limits placed on federal courts' 'equitable' powers by the U.S. Supreme Court

Those concerns are well founded, and the en banc court should rehear the case.

As Judge O'Scannlain emphasized, the plain text and structure of the FTC Act foreclose the kind of monetary relief authorized by *Commerce Planet* and its predecessors. Section 13(b) states that "the Commission may seek, and after proper proof, the court may issue, a permanent injunction." But an order to pay money "as reparation for injury resulting from breach of legal duty" is a damages remedy — not an injunction, or even equitable relief. Indeed, "any other interpretation would be absurd: if 'injunction' included court orders to pay monetary judgments, then 'a statutory limitation to injunctive relief would be meaningless, since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction.'" *AMG Capital*, 2018 DJDAR at 11391 (quoting Great-*West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 n.1 (2002)).

The statute also requires that the Commission believe that a person "is violating" or "is about to violate" (15 U.S.C. Section 53(b)(1)) the act in order to request injunctive relief, and thus anticipates that a court will award relief to prevent ongoing or imminent harm — not to disgorge unjust gains from past violations. *AMG Capital*, 2018 DJDAR at 11391. Section 19 — an entirely different provision — allows the Commission to collect monetary judgments for past misconduct, which "may include ... the refund of money[,] return of property [or] the payment of damages." 15 U.S.C. Section 57b(b). Yet, according to *Commerce Planet*, those very remedies "were already available under § 13(b) when the same Congress subsequently enacted § 19" — a reading that "violates the 'cardinal rule that, if possible, effect shall be given to every clause and part of a statute.'" Id at 11393.

Commerce Planet's collapsing of the two provisions nullifies procedural safeguards written into the act that should serve to constrain the FTC's enforcement authority. Before the Commission may collect ill-gotten gains under Section 19, it must either: (1) prove to a court that the defendant "violate[d] any rule" already promulgated through the Commission's rulemaking procedures (15 U.S.C. Section 57b(a) (1)); or (2) where no rule has been promulgated, first pursue an administrative adjudication, issue a "final cease and desist order," and prove to a court that the defendant's conduct was such that a "reasonable man" would know it was "dishonest or fraudulent." *Id.* Section 57b(a) (2). Congress included these procedural hurdles in Section 19 "with good reason" — to afford defendants fair notice of proscribed conducted and thereby "prevent[] the Commission from imposing significant monetary burdens simply by bringing a lawsuit in federal court." *AMG Capital*, 2018 DJDAR at 11392. *Commerce Planet*'s interpretation of Section 13(b) permits the Commission to pursue precisely the same relief with no procedural safeguards whatsoever, and thus "wrongly allows the Commission to avoid the administrative processes that Congress directed it to follow." *Id.*

Finally, under the Supreme Court's recent decision in *Kokesh v. SEC* — a case decid-

ed after *Commerce Planet* — the kind of "restitution" purportedly authorized by Section 13(b) is more accurately characterized as a penalty, not equitable relief. In a unanimous opinion penned by Justice Sonia Sotomayor, the Supreme Court in *Kokesh* held that SEC disgorgement, which it described as "a form of restitution measured by the defendant's wrongful gain," is a penalty. 137 S. Ct. at 1640 (quoting Restatement (Third) of Restitution and Unjust Enrichment Section 51 cmt. A, at 204 (2011)). The Supreme Court identified three "hallmarks" of a penalty: (1) it is imposed to redress the violation of a public law; (2) it is sought for a punitive purpose such as deterrence; and (3) it is not intended solely to compensate a victim for his loss. *Id.* at 1643- 44. Applying these principles, SEC disgorgement qualifies as a penalty because it "is imposed by the courts as a consequence for violating ... public laws," it is "punitive" rather than "remedial," and it is not "compensatory," because funds often are disbursed to the United States Treasury rather than to victims. *Id.*

Restitution under Section 13(b) bears all the hallmarks of a "penalty." It is pursued for violation of a regulatory statute (the FTC Act), with or without the support of individual victims, and it is punitive rather than "remedial" because, under *Commerce Planet*, the wrongdoer's unjust gains must be measured by "net revenues" rather than "net profits," which often "leaves the defendant worse off." *AMG Capital*, 2018 DJDAR at 11393. Nor are those funds compensatory because, in many cases, funds not returned to victims are utilized at the Commission's discretion or deposited in the U.S. Treasury as "disgorgement." *Id. Commerce Planet* was wrong the day it was decided, and it is doubly wrong after *Kokesh*. The 9th Circuit should reconsider the "implausible" judicial construction of "injunction" the court adopted in *Commerce Planet*, and rehabilitate the FTC Act's procedural safeguards.

Blaine H. Evanson *is a partner in the Orange County office of Gibson, Dunn & Crutcher LLP, practicing in the firm's Appellate and Constitutional Law practice group.*

Brandon J. Stoker *is an associate in the Los Angeles office of Gibson, Dunn & Crutcher LLP, where he practices in the Class Actions and Appellate and Constitutional Law practice groups. Mr. Evanson and Mr. Stoker were counsel for the appellant in Commerce Planet.*


EVANSON


STOKER