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FTC Enforcement Authority in the Modern Era: A Commission in Crisis?

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Abstract

This note provides a brief history of the Federal Trade Commission (FTC)'s enforcement authority before analyzing the U.S. Court of Appeals for the Seventh Circuit's circuit-splitting decision in FTC v. Credit Bureau Center, LLC. As the Supreme Court prepares to tackle questions surrounding authority to seek monetary relief, I contextualize how enforcement authority has historically been derived before analyzing how the issue may be resolved. Doing so involves engaging several cases that may prove consequential in determining the outcome and outlines potential legislative solutions to the battle over restitution. Before arriving at the most likely scenarios, a view of the budding relationship between consumer protections giants the FTC and Consumer Financial Protections Bureau (CFPB) provides potential for a synergistic solution, but uncertainty surrounding both institutions indicates a murky outlook on a purely administrative resolution. This in-depth dive, breaking down various aspects of the administrative predicament, details the common law history of traditional restitution authority in the FTC, examines challenges facing the FTC and CFPB, and explores how similar issues facing the Securities and Exchange Commission (SEC) may affect FTC enforcement authority.

I. INTRODUCTION

Congress has long sought to protect consumers and has tasked the Federal Trade Commission ("FTC") with investigating, enforcing, and preventing violations of consumer protections laws, among other duties. This goal has expressed itself in various forms over time, as the law has adapted to fit changing eras in the realm of consumer protections. It has resulted in case law that expanded executive authority, the rise of the Consumer Financial Protections Bureau in response to financial crisis, and a cooperative, symbiotic administrative relationship between the fledgling agency and the FTC.

Recently, however, a judicial trend favoring less expansive interpretation of congressionally granted authority has emerged. Established, historically unchallenged authority largely and liberally granted to federal agencies, has come under fire by textualist and structuralist legal minds. In practice, the elimination of enforcement tools seen as customary for decades has the potential to result in millions of dollars lost due to a drop in operational efficiency and monetary relief. Thus, Congress, administrative officials, members of the judiciary, and consumers at large await the resolution of this conflict in approach to

statutory interpretation begun in *Kokesh v. SEC*, carried over into *FTC v. Credit Bureau Center*, and likely culminating either in the chambers of the Supreme Court or the meeting rooms on Capitol Hill.

II. BACKGROUND ON THE FTC

The FTC Act has protected consumers from unfair or deceptive acts or practices since its 1938 amendment expanding the FTC's jurisdiction from simply business competition and the prevention of the growth of monopolies.[1]

Investigative Authority

One of the powers granted in the Act was the authority "to gather and compile information concerning, and to investigate . . . the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions . . . Federal credit unions . . . and common carriers . . . ."[2] More specifically, in cases involving deceptive acts or practices, the FTC can issue "civil investigative demands" to obtain existing documents, oral testimony, or written answers to questions.[3] Another investigative tool at the FTC's disposal is the authority to order entities to file annual reports on their business or other practices or conduct investigative studies that do not have a specific law enforcement purpose under Section 6(b).[4] These demands can be contested and reviewed by a court.[5] Section 21(b) allows internet service providers and other similar entities to voluntarily inform the FTC about potential violations without liability.[6] Beyond domestic powers, the Commission can use all of its investigative tools to help foreign law enforcement agencies in consumer protections matters under section 6(j).[7]

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1 Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U.L. REV. 1139, 1141 (1992).

2 15 U.S.C. § 46(a) (2020).

3 F.T.C., *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (last visited Feb. 22, 2020).

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

Enforcement Authority

The Commission's authority to enjoin deceptive or unfair acts or practices arises from section 5(a).[8] A deceptive practice is a "material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances."[9] On the other hand, an unfair practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[10]

One method the FTC uses is its power to conduct adjudicative proceedings.[11] Firstly, however, the Commission must have reason to believe someone has violated a law.[12] Once this standard has been met, a complaint is issued detailing the charges.[13] Next, the defendant can elect to settle, singing a consent agreement that does not admit fault, consent to entry of a final order, and wait thirty days for a decision on whether the order becomes final.[14] Otherwise, defendants may contest the charges. When this occurs, an adjudicative proceeding reminiscent of a trial result in an initial decision which recommends dismissal or issuance of a cease-and-desist order.[15] Respondents may appeal to any United States court of appeals with jurisdiction.[16] If the court of appeals upholds, it then issues its own enforcement order.[17] Either party may then file a petition for writ of certiorari to the Supreme Court.[18]

Commission orders become final sixty days after they are issued, and a violation of a final order may result in a civil penalty being levied against the defendant for each violation, as long as the defendant had "actual knowledge that such act or practice is unfair or deceptive and is unlawful.[19] Under section 19, if a reasonable person would consider the violating conduct fraudulent or dishonest, the Commission may pursue redress for any injuries consumers may have suffered.[20]

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8 *Id.*

9 James C. Miller, *FTC Policy Statement on Deception*, F.T.C. (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

10 15 U.S.C. § 45(n) (2020).

11 *See* F.T.C., *supra* note 3.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 15 U.S.C. § 45(m)(1)(B)(2) (2018).

20 *Id.* § 57b(a).

Most often, however, the FTC exercises its authority under section 13(b) to pursue permanent injunctions issued directly by a court, skipping the adjudicative proceeding altogether.[21] Section 13 also, the Commission believes, grants it to seek various kinds of monetary relief such as rescission or restitution, along with injunctive relief.[22] Due to its efficiency, the agency makes "widespread use" of the section in its efforts to protect consumers.[23]

FTC rulemaking authority on unfair and deceptive acts is derived from section 18 of the FTC Act, which allows the Commission to create rules that "define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce."[24] These rules must allow for limited cross-examination in an informal hearing and the Commission must demonstrate why it considers a targeted practice to be prevalent.[25]

Enforcement Tools

The agency operates by issuing cease-and-desist orders to enjoin unfair or deceptive acts or practices. However, because these orders did not serve as effective deterrents, the FTC began to claim that it had the power to order restitution for consumers victimized by unfair practices.[26] Although courts never agreed, with the only court to consider the issue rejecting the FTC's claim, Congress provided the agency a new tool, adding section 13(b) to the FTC Act with the intention of allowing preliminary or permanent injunctions against violators of section 5 of the Act.[27]

Initially, the FTC did not utilize section 13(b) as it does today. On the contrary, the agency was criticized by the General Accounting Office for failure to take advantage of the newly enacted amendment.[28] Meanwhile, it continued to push for an interpretation of the cease-and-desist power that included the power to order restitution.[29]

Subsequently, Congress enacted section 19 of the Act.[30] One year after section 13(b) was enacted, this new section finally granted the FTC express power to collect restitution for victims, provided the agency can meet certain standards of proof and a statute of limitations. The

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21 F.T.C., *supra* note 3.
22 *Id.*
23 *Id.*
24 15 U.S.C. § 57a(a)(2).
25 F.T.C., *supra*, note 3.
26 Ward, *supra* note 1, at 1142.
27 *Id.* at 1142.
28 *Id.* at 1179.
29 *Id.*
30 *Id.* at 1142.

introduction of section 19 clearly demonstrated Congress's understanding that section 13(b) did not provide for consumer redress. Section 19, however, was largely abandoned by courts in the 1980's. Instead, courts interpreted section 13(b) to grant ancillary equitable relief power to the FTC in conjunction with injunctions.[31] The spread of the implied power to receive remedies such as restitution and rescission through section 13(b) left section 19 essentially redundant. The path to restitution carved out by the judiciary has thus allowed the FTC a way around Congress' express proof and statute of limitations requirements for decades.[32]

The differences between the two sections are unsurprisingly substantial. The FTC has relied on section 13(b) and would be forced to drastically change its approach to enforcement if the judiciary removed the tool it granted the agency over three decades ago. To grasp the potential ramifications of such a decision, one must first look to the language of the statute.

Section 13(b)

Section 13(b) authorizes the FTC to seek "a temporary restraining order or a preliminary injunction" or, upon providing further proof, a "permanent injunction" against "any person, partnership, or corporation [that] is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission."[33]

Section 19

Section 19 provides courts "jurisdiction to grant such relief . . . [which] may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages" against violators of Commission-issued final cease and desist orders or any rule regarding unfair or deceptive acts or practices.[34] This section, however, includes a statute of limitations barring actions brought "more than three years after the rule violation."[35]

In all, section 19 would place a heavier burden on the FTC to prosecute cases quickly and provide more evidence than the lower standard of proof required for a preliminary injunction under section 13(b). This burden would bar a significant amount of the claims brought by the agency,

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31 *Id.* at 1143.
32 *Id.*
33 15 USC § 53(b)(2) (2018).
34 *Id.* § 57b(b).
35 *Id.* § 57b(d).

possibly forcing it to rely on its own slow-moving administrative adjudication process in place of restitution granted in federal courts.[36]

"Part 3" Adjudication

The adjudication process, often called a "Part 3" proceeding, is complex and arduous. This adjudication proceeding includes pre-complaint investigation, rapid fact and expert discovery, pretrial motions, lengthy trials similar to bench trials in federal courts, filing of voluminous last reply findings by the parties, a nonbinding initial decision, a complex appeal process, and a potential appeal to a circuit court of appeals that generally defers to the Commission.[37] Resorting to this option would be costly and inefficient for the FTC, possibly leading more defendants to contest the FTC's findings than otherwise would.

Singer and Amy Travel

The Court of Appeals for the Ninth Circuit held in *FTC v. H.N. Singer* that a freeze order could be issued in order to protect the court's power to grant restitution as part of a permanent injunction in section 13(b) cases, regardless of section 19's limitations on the restitution remedy.[38] This ruling set the stage for expansion of the FTC's restitution authority under section 13(b). The Seventh Circuit plainly recognized this right in 1989 with its holding in *FTC v. Amy Travel Service, Inc.*

In *Amy Travel*, the Seventh Circuit relied on *Singer* and a pair of prior Seventh Circuit cases, *FTC v. World Travel Vacation Brokers, Inc*. and *FTC v. Elders Grain, Inc*.[39] In World Travel, the court was permitted to grant interlocutory relief as well as permanent injunctive relief, while in Elders Grain, the court found that granting of equitable power "carries with it the power to issue whatever ancillary equitable relief is necessary to the effective exercise of the granted power.[40] In no unclear words, the Amy Travel court fully establishes that, in "a proceeding under section 13(b), the statutory grant of authority to the district court to issue permanent injunctions includes the power to order any ancillary equitable

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[36] Kelley Drye, *Section 13 (b)log: Business As Usual? FTC Practice in the Wake of Shire ViroPharma and Credit Bureau Center*, AD LAW ACCESS (Oct. 22, 2019), https://www.adlawaccess.com/2019/10/articles/section-13-blog-business-as-usual-ftc-practice-in-the-wake-of-shire-viropharma-and-credit-bureau-center/.

[37] *See generally* J. Robert Robertson, *Administrative Trials at the Federal Trade Commission in Competition Cases*, 14 SEDONA CONF. J. 101, 105, 112 (2013).

[38] FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982).

[39] FTC v. Army Travel Serv., Inc., 875 F.2d 564, 571 (7th Cir. 1989).

[40] FTC v. Elders Grain, Inc., 868 F.2d 901 (7th Cir. 1989); FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1026 (7th Cir. 1989).

relief necessary to effectuate the exercise of the granted power."[41] The decision explicitly lists restitution and rescission as "proper forms of ancillary relief," blowing the doors wide open for the FTC to seek restitution in all Seventh Circuit section 13(b) cases.

Amy Travel's position was then adopted by many of the remaining circuit courts of appeal, including the Eleventh Circuit in *FTC v. Gem Merchandising Corp.*, the Eighth Circuit in *FTC v. Sec. Rare Coin & Bullion Corp*., the Second Circuit in *FTC v. Bronson Partners LLC*, the Tenth Circuit in *FTC v. Freedom Communications Inc.*, the Ninth Circuit in *FTC v. Pantron I Corp.*, and the Fourth Circuit in *FTC v. Ross*. Until recently, the position has gone largely unchallenged. However, a few recent cases, especially *FTC v. Credit Bureau Center, LLC*, stand to change the way the FTC approaches its enforcement authority. The next section of this paper will discuss *Credit Bureau Center* in depth, demonstrating why it poses a large, looming threat to the FTC not just in the Seventh Circuit, but across the entire nation.

III. FTC v. CREDIT BUREAU CENTER, LLC

Factual Background

Credit Bureau Center is a credit-monitoring service owned by Michael Brown.[42] This service attracted customers by automatically enrolling them in a $29.94 monthly subscription upon application for the supposedly free credit report and score service.[43] This fact was buried in a disclaimer in small font Customers were not alerted of their enrollment until they received a letter notifying them after they had already been enrolled.[44]

Meanwhile, Brown contracted Danny Pierce, who then subtracted Andrew Lloyd, to advertise false rental properties on Craigslist and instruct applicants to utilize Brown's service to get their supposedly free credit score.[45] After generating $6.8 million in revenue and failing to offer refunds (instead often offering reduced prices in an attempt to keep the customer subscribed to his service), Brown was found liable and a permanent injunction was issued and upheld.[46] The opinion takes the district court's $5 million restitution order, on the other hand, in a very different direction.[47]

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41 *Army Travel Serv*., 875 F.2d at 571.
42 FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 766 (7th Cir. 2019).
43 *Id.*
44 *Id.*
45 *Id.* at 768.
46 *Id.* at 767-68.
47 *Id.* at 766.

A Statutory Breakdown

Judge Sykes begins the court's analysis by first recognizing that the FTC has not only section 13(b) at its disposal, but quick enforcement under section 19 as well, which may have expressly granted the agency the ability to seek restitution payments.[48] Quickly shifting to a breakdown of section 13(b), the court comes to its primary argument – the language of section 13(b) does not provide for a restitution remedy and the FTC Act does not lend itself well to the interpretation of an implied restitution remedy stemming from section 13(b). The court notes the nature of restitution as a remedy for past actions rather than one intended to prevent ongoing or future violations as the "violating" or "about to violate" language indicates.[49] The conclusion that the ability to receive restitution for past violations depends on whether present or future violations are occurring does not sit well with the court, as one might expect, and exposes a critical flaw in the FTC's interpretation of section 13(b).[50]

In continuance of its textualist approach, the court points to the specific empowerment to receive "such other and further equitable relief as they deem appropriate" and "the refund of money or return of property" in the FTC Act's cease and desist power and section 19, respectively.[51] The lack of a "detailed framework" in comparison to other FTC enforcement tools, in addition to its striking lack of any mention of additional equitable remedies, strongly indicate that section 13(b) was never intended to grant the same powers as do the other tools.[52]

The FTC Act's "saving clause" does not salvage a restitution remedy, either, as acts "cannot be held to destroy" themselves with saving clauses and saving clauses can only preserve existing remedies.[53] The court does, however, see a role for each enforcement mechanism. Cease and desist powers "target individual violations," section 19 "more efficiently addresses widespread unfair or deceptive practices," and section 13(b) "enjoin[s] ongoing and imminent future violations."[54] In order to reach this result, the court must first revisit its past rulings on the issue at hand in the wake of the Supreme Court rulings issued since *Amy Travel*.

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48 *Id.* at 771.
49 *Id.* at 772.
50 *Id.* at 773.
51 *Id.* at 773 (quoting § 45(1) (2018); §57(b)(b) (2018)).
52 *Id.* at 774.
53 *See id.* at 775 (quoting Tex. & Pac. Ry. Co. V. Abilene Cotton Oil Co., 204 U.S. 426, 446).
54 *Id.* at 774.

The Impact of Meghrig

After a brief rundown of the caselaw that resulted in *Amy Travel*, the court explains a trend, in its view, that has reigned the expansive implied restitution remedies of *Porter v. Warner Holding Co.*, *Mitchell v. Robert DeMario Jewelry, Inc.*, and *Amy Travel* back in.[55] This trend is best exemplified by the Supreme Court's ruling in *Meghrig v. KFC Western, Inc.*, a case somewhat similar to *Credit Bureau Center*.

Meghrig centers on whether a provision of the Resource Conservation and Recovery Act of 1976 which empowers district courts to "restrain" or order people who contribute to handling waste "to take such other action as may be necessary" allows plaintiffs to recover restitution damages for clean-up costs.[56] Because these remedies are forward-looking, prohibitory and mandatory injunctions rather than remedies for past costs, the Court in *Meghrig* declined to recognize an implied restitution remedy.[57]

The *Meghrig* court also looked to some familiar factors in determining that no implied restitution remedy existed. It looked to statutory prerequisites for imminence of the danger and a mechanism that halts citizen suits if the government pursues action and requires a ninety-day notice before the suit.[58] These factors and a lack of statutes of limitations or reasonable cost requirements textually lead to a conclusion that the section is not a restitution mechanism, but a solely injunctive one.[59] Since *Meghrig,* Judge Skye posits, the Supreme Court has ceased the presumption of congressionally authorized judicial supplementation of remedies, and now views express provision of one form of enforcement to mean the preclusion of others.[60]

The Seventh Circuit believes *Meghrig* limited the impact of the old line of cases on implied restitution essentially to their facts and every reason *Meghrig* was decided as it was applies here.[61] The textual reading and structuralist view of each statute shows in each that the plain meaning does not support restitution and other sections of the statute serve the role courts have tried to pigeonhole section 13(b) into.[62] As in *Meghrig*, a temporal requirement of current events should not logically be a prerequisite for restitution.[63] Section 13(b)'s lack of a statute of limitations

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55 *See id.* at 780.
56 *Id.* (quoting § 6972(a)).
57 *Id.* (citing Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996))
58 *Id.* (citing Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996)).
59 *Id.* (citing Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996)).
60 *See id.* at 772.
61 *Id.* at 782-83.
62 *Id.* at 783.
63 *Id.*

and notice requirement strike again as factors toward a conclusion that restitution has not been authorized, implicitly or otherwise.[64]

Credit Bureau Center concludes its analysis by failing to find a material distinction between the case at hand and *Meghrig* based on the identity of the plaintiff as a state actor, and acknowledging that stare decisis and the initiation of a circuit split are not sufficient reasons to uphold the restitution remedy.[65] Instead, the court prioritizes respect for the role of Congress in legislating and the language of statutes.[66] In the eyes of the Seventh Circuit, *Meghrig* has made *Amy Travel* "incompatible" with the FTC Act.[67]

IV. A BROADER PROBLEM FOR THE FTC

FTC v. Shire ViroPharma, Inc.

As acknowledged in the majority opinion in *Credit Bureau Center*, the FTC's improper usage of section 13(b) is under fire from other angles in other circuit courts, as well. Although *FTC v. Shire ViroPharma, Inc*. is a competition case and not a consumer protections case, the Third Circuit there opted to tighten its interpretation of "violating" or "about to violate" language of section 13(b). That court found that having merely "the incentive and opportunity to engage in similar conduct in the future" does not satisfy the requirement because "this language is unambiguous; it prohibits existing or impending conduct."[68]

FTC v. AMG Capital Mgmt., LLC

This case was decided in favor of the FTC. However, a separate concurrence has raised some interesting concerns for the FTC. Along with many of the same concerns expressed in Credit Bureau Center, the AMG concurrence believes that *Kokesh v. SEC* "undermines a premise in our reasoning: that restitution under § 13(b) is an "equitable" remedy at all."[69] In *Kokesh*, the Supreme Court ruled that disgorgement – a form of restitution—by the SEC was a penalty rather than an equitable remedy.[70] This opens the door for an entirely different line of attacks on the FTC's

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64 *Id.* at 783-84.
65 *Id.* at 785-86.
66 *Id.* at 775.
67 *Id.* at 786.
68 FTC v. Shire Viropharma, Inc., 917 F.3d 147, 153 (3rd Cir. 2019).
69 FTC v. AMG Capital Mgmt., LLC, 910 F.3d 417, 429 (9th Cir. 2018) (O'Scannlain, J., concurring).
70 Kokesh v. S.E.C., 137 S. Ct. 1635, 1640 (2017).

reasoning that restitution is available under section 13(b) as an ancillary equitable remedy. AMG has since been granted writ of certiorari from the Supreme Court, allowing the Court to decide whether the holding of the Ninth Circuit in *AMG Capital Management* or the Seventh Circuit in *Credit Bureau Center* will prevail.

V. THE CFPB

History

Following the financial crisis, Congress enacted the Dodd Frank Wall Street Reform and Consumer Protection Act. One effect of the legislation was the formation of the Consumer Financial Protection Bureau, a federal agency conceived by Senator Elizabeth Warren during her years as a professor. The agency aims to protect consumers from unfair, deceptive, and abusive practices through enforcement of consumer financial protection laws.[71] The CFPB's authority covers "banks, thrifts and credit unions with over $10 billion in assets, as well as many nonbank consumer financial service providers, such as mortgage lenders and servicers, student lenders and servicers, payday lenders and certain participants in the debt collection and consumer reporting markets."[72]

The agency is a compilation of various functions and responsibilities previously separated among different groups finally shifted under one governing body.[73] It receives funding from the Federal Reserve, has a director appointed to a five year term who is not accountable to the president and requires a steep showing of cause for removal, and executes its daily functions with little oversight.[74] Beyond regulation, the CFPB can "issue subpoenas, conduct investigations and take legal action in federal court to enforce consumer protection laws."[75] With its sights set on improving protections for the most vulnerable, the CFPB has accomplished a number of valuable feats including but not limited to the creation of a financial database allowing consumers to research loan companies as well as new rules for mortgage and payday loans.[76]

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71 Jon Eisenberg, *An Early History of the CFPB: Part 1*, LAW 360 (Mar. 18, 2014) (available via LexisNexis).

72 *Id.*

73 Daniel Bush, *What is the Consumer Financial Protection Bureau, anyway?*, PBS (Nov. 27, 2017, 4:39 PM), https://www.pbs.org/newshour/economy/making-sense/what-is-the-consumer-financial-protection-bureau-anyway.

74 *Id.*

75 *Id.*

76 *Id.*

CFPB enforcement relief often includes: orders barring continuing and future violations, including cease and desist orders or injunctions; governance and review of the offending areas, often consisting of a review of the compliance program used by the product or services and improvement of procedures designed to prevent future violations, usually involving a mandate to retain outside consultants and to report to the board and CFPB; restitution paid to consumers harmed, potentially reviewed by a third-party; and payment of a civil money penalty.[77] Violators often are required to have all board members assume full responsibility for ensuring the integration of proper procedures in avoidance of future violations.[78]

Restitution

The CFPB has been granted statutory authority to seek remedies including "restitution," "disgorgement or compensation for unjust enrichment," "refund of moneys or return of real property" and "payment of damages or other monetary relief."[79] These remedies far exceed those authorized for many administrative agencies, notably the aforementioned FTC and SEC. In fact, the CFPB requires payment of restitution in most cases it settles.[80]

An Unfriendly Welcome

The Bureau's emergence, however, has not come without controversy. Concerns regarding the constitutionality of its single-director structure and vague, ambiguous language dictating its core responsibilities have surrounded the agency since its inception. Many of the central designs, including its exemption from congressionally apportioned funding, lead enforcer who cannot be fired by the executive branch at will, and deference received from courts, have been under fire since its inception.[81] These aspects arguably violate the separation of powers doctrine in their attempt to keep the agency politically impartial. These arguments have played out in courtrooms.

Seila Law LLC v. CFPB is set to determine critical issues for the CFPB going into the future. Primarily, the case will determine whether the CFPB's single director structure is unconstitutional, holding too much

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77 Jon Eisenberg, *An Early History of the CFPB: Part 2*, LAW 360 (Mar. 19, 2014), https://www.law360.com/articles/517133/an-early-history-of-the-cfpb-part-2.

78 *Id.*

79 *Id.*

80 *Id.*

81 Iain Murray, *The Case Against the Consumer Financial Protection Bureau*, COMPETITIVE ENTER. INST. (Sept. 21, 2017), https://cei.org/content/case-against-cfpb.

power within the executive branch.[82] A potential ruling determining the structure unconstitutional creates increasing uncertainty on the future of the Bureau. If the structure is improper, as even CFPB director Kathy Kraninger now argues, the Supreme Court must decide how to rectify the issue.[83] The Court must determine whether it can sever the violating provision, 12 U.S.C. §5491(c)(3), from the Dodd-Frank Act.[84] If the structure is unconstitutional, not only could its independence be at stake, but its ability to operate at all in its present form due to enforcement actions being led by an unconstitutionally appointed director.

However, the Court can extend its decision even further. In *CFPB v. RD Legal*, U.S. District Judge Loretta Preska held that severability clauses do not permit courts to rewrite statutes, and the Supreme Court may agree that to simply sever the violating provision would be judicial overreach.[85] In that event, the CFPB could be struck down in its entirety.[86]

VI. HOW THE FTC AND CFPB INTERACT

Impact of the Dodd-Frank Act

The FTC, even before the creation of the CFPB, did not have regulatory authority over consumer protection with regards to banks and credit unions.[87] In creating the CFPB, the Dodd-Frank Act shifted consumer protections authority over banks and credit unions from federal banking regulators themselves to being within the CFPB's jurisdiction.[88] Dodd-Frank, however, gave the CFPB other responsibilities as well. The CFPB also has jurisdiction over any company involved in offering or providing a consumer financial product or service as well as companies who are service providers to those that offer or provide consumer financial products or services.[89] This shift in authority from the FTC to the CFPB

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82 Kelsey Ramírez, *Supreme Court to Determine CFPB Constitutionality in March*, HOUSINGWIRE (Dec. 3, 2019), https://www.housingwire.com/articles/supreme-court-to-determine-cfpb-constitutionality-in-march/.

83 *See id.*

84 *Id.*

85 Alison Frankel, *CFPB Just Told SCOTUS it's Unconstitutional. What Does That Mean for its Mission?*, REUTERS (Sept. 18, 2019), https://www.reuters.com/article/us-cfpb-standing-lawsuit/cfpb-just-told-scotus-its-unconstitutional-what-does-that-mean-for-its-mission-idUSKBN1W32UJ.

86 *Id.*

87 CFPB Monitor, *How the CFPB and FTC Interact (part 1)*, BALLARD SPAHR LLP (July 7, 2011), https://www.consumerfinancemonitor.com/2011/07/07/how-the-cfpb-and-the-ftc-interact-part-i/.

88 *Id.*

89 Public Law 111-517, Title X, §1002(6).

has effectively revoked the FTC's ability to enforce the Truth in Lending Act and similar federal consumer financial laws against companies.[90] The FTC's consumer protections responsibilities now include sole authority to enforce laws regarding unfair or deceptive acts or practices and concurrent jurisdiction with the CFPB in enforcing the Fair Credit Reporting Act.[91]

The two agencies are also tasked with coordinating with each other throughout the rulemaking process.[92] They must negotiate with the goal of avoiding duplicate or conflicting rules.[93] This shall be handled by consulting each other prior to each rule proposal grounded in concurrent jurisdiction as well as during the rules' comment periods.[94] Interestingly, the CFPB is permitted to enforce rules on unfair or deceptive acts or practices that rely on FTC authority, and vice versa.[95] The CFPB's expanded remedy arsenal allows the federal government to pursue remedies the FTC has never had explicit authority to seek, and is not hindered by any rulings on the FTC's restitution authority.

FTC-CFPB Memorandum of Understanding

The FTC and CFPB are required, by statute, to come to an agreement regarding how to handle concurrent jurisdiction.

> The Bureau and the Federal Trade Commission shall negotiate an agreement for coordinating with respect to enforcement actions by each agency regarding the offering or provision of consumer financial products or services by a covered person . . . or service providers thereto. The agreement shall include procedures for notice to the other agency, where feasible prior to initiating a civil action to enforce any Federal law regarding the offering or provision of consumer financial products or services.[96]

In that agreement, the two governing bodies agree to conduct joint investigations and share resources where appropriate. They also agree to discuss legal issues presented in enforcement actions at least once per year in order to ensure a consistent approach is maintained in enforcing consumer protections laws.[97] The agencies, in an effort not to initiate

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90 CFPB Monitor, *supra* note 87.
91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.*
96 Title X, Section 1024(c)(3)(A).
97 *Memorandum of Understanding Between The Consumer Financial Protection Bureau And The Federal Trade Commission*, FEDERAL TRADE COMMISSION (Feb. 25, 2019), https://www.ftc.gov/system/files/documents/cooperation_agreements/ftc-cfpb_mou_225_0.pdf.

double enforcement against violators, must maintain records of investigations and enforcement matters so that they may inquire of each other and receive a prompt response on what action, if any, has been taken against a violator.[98] This includes setting deadlines for reporting of the commencement of investigations, filing of complaints, resolution of a proceeding, and issuance of a no action letter.[99] The agreement permits each to intervene in a court proceeding initiated by the other on matters within concurrent jurisdiction, so long as proper notice of intervention is given.[100]

The agencies must notify each other prior to issuing rule proposals, and meet once per year to discuss publication of policy statements, bulletins, advisory opinions, and the like.[101] When the agencies seek to conduct examinations of covered entities, they are to coordinate schedules.[102] Upon termination, they share reports and confidential supervisory information.[103] Meetings are also held to coordinate strategy and operations, including routing of complaints to proper recipients, initiatives to inform and empower members of the military on consumer financial products, discuss ongoing and anticipated research, and many more objectives.[104]

The duo has already begun to work in concert for the specific purpose of taking advantage of the CFPB's impressive remedial authority. For instance, the FTC and CFPB coordinated investigative efforts in a proceeding against Equifax.[105] There, the CFPB was able to use its remedial authority to receive an order for $100 million in civil monetary penalties.[106] In response to potential loss of restitution authority, the FTC could conduct more and more joint efforts with the CFPB in order to rely on its authority.

However, this may not be an optimal solution in the long term. Without proper authority to collect restitution of its own, the FTC could come to rely on the CFPB to the point where the FTC no longer serves as an efficient enforcer of consumer protections laws. In essence, the FTC would be merely an investigative partner for the CFPB in cases involving

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98 *Id.*
99 *Id.* at 4-6.
100 *Id.* at 6-7.
101 *Id.* at 9.
102 *Id.*
103 *Id.* at 10
104 *Id.* at 11.
105 Jonathan B. Engel & Silki Patel, *Will Questions About FTC Enforcement Authority Shift Enforcement to CFPB?*, DAVIS WRIGHT TREMAINE LLP (Sept. 11, 2019), https://www.dwt.com/blogs/payment-law-advisor/2019/09/ftc-v-credit-bureau-center-7th-circuit-decision.
106 *Id*.

areas of concurrent jurisdiction. Because such a set up would likely bog down both agencies and be poor use of federal resources, it is difficult to imagine it as more than a short-term resolution while lawmakers seek to address the FTC's authority by passing new legislation.

Additionally, there are many areas in which the sibling agencies do not share jurisdiction. Laws regarding unfair or deceptive acts or practices fall solely within the FTC's authority. Thus, in those cases, the FTC could not rely on CFPB authority to pursue restitution. Ultimately, the FTC will likely need to look toward a Supreme Court holding overturning *Credit Bureau Center* or a legislative solution that more permanently solves the issues surrounding Section 13b, as it will not find comfort under the wing of the CFPB's remedial authority.

Given the uncertainty regarding the status of the CFPB going forward as well as the looming chipping away of enforcement tools facing the FTC, the federal consumer financial protections landscape could possibly be on the precipice of change and look vastly different within the next several years.

VII. SUPREME COURT OPPORTUNITIES TO SETTLE SECTION 13(B)

The Supreme Court will have an opportunity to settle the questions surrounding the controversial FTCA section. The opportunity has arrived via the aforementioned *FTC v. AMG Capital Management, LLC*, which decided *Credit Bureau Center*'s question in favor of the FTC in the Ninth Circuit Court of Appeals. The Supreme Court's decision in *AMG Capital Management* will look to finally determine the scope of the FTC's enforcement authority under 13(b).[107]

Another pivotal case that could have shed light on the future of 13(b) is *Liu v. SEC*. Although not a case that deals directly with section 13(b), the issues and statute it grapples with it are similar enough that the Solicitor General of the United States in a brief for *AMG Capital Management* sought a stay of consideration in that case because the question there "and the question presented in *Liu* overlap.[108] The debate in *Liu* centers on the SEC's authority to order disgorgement in its enforcement actions, a conversation first broached in *Kokesh v. SEC*. A

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[107] *See* FTC v. AMG Capital Management, LLC, 910 F.3d 417 (2018).

[108] Brief for the Respondent at 7, FTC v. AMG Capital Management, LLC, 910 F.3d 417 (2018), No. 19-508 (Dec. 13, 2019); Leonard L. Gordon & Michael A. Munoz, *Statutory Dreams or Equitable Nightmares: A Trifecta of Cases Before the Supreme Court Threaten the FTC's Enforcement Authority*, ALL ABOUT ADVERTISING Law (Dec. 30, 2019), https://www.allaboutadvertisinglaw.com/2019/12/statutory-dreams-or-equitable-nightmares-a-trifecta-of-cases-before-the-supreme-court-threaten-the-ftcs-enforcement-authority.html.

footnote from *Kokesh,* initiated the momentum that culminated in *Liu*, noting that,

[N]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context. The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period.[109]

This footnote opened the floodgates for what was to come, leaving the question of whether disgorgement was a proper remedy under the SEC's authority open to attack by defendants in SEC enforcement actions. Ultimately, the Supreme Court in *Liu* held that disgorgement awards that do not exceed a wrongdoer's net profits and are awarded for victims are equitable relief permissible under §78u(d)(5).[110]

The defendants in *Liu* garnered $27 million in funding from Chinese investors as part of the EB-5 program allowing foreign investors to gain entry into the United States in return for a substantial investment.[111] However, the defendants failed to properly invest the funds, instead misappropriating a majority of the funds.[112] Consequently, the SEC sought and was granted disgorgement of the funds, and the district court also issued civil penalty of $8.2 million, along with barring them from participating in the EB-5 program in the future.[113]

Historically, the SEC has used disgorgement often and to great effect.[114] In fact, 74% of all monetary relief obtained by the SEC was gained through disgorgement in 2019.[115] Its use has not been questioned for decades, despite never actually being explicitly authorized by statute.[116] Thus, *Liu* will undoubtedly have a vast impact on the SEC's enforcement approach.

However, as the Solicitor General noted, the relevant SEC statute is very similar to the one relied on by the FTC. One of the SEC's primary

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109 Kokesh v. SEC, 137 S. Ct. 1635, 1642 (2017).

110 Liu v. SEC, 591 U.S. ___ (2020).

111 Securities Litigation Alert, *Liu v. SEC: Supreme Court Agrees to Hear Challenge to SEC's Ability to Obtain Disgorgement*, AKIN GUMP STRAUSS HOWER & FELD LLP (Nov. 11, 2019), https://www.akingump.com/en/news-insights/liu-v-sec-supreme-court-agrees-to-hear-challenge-to-sec-s.html.

112 *Id.*

113 *Id.*

114 *Id.*

115 John C. Scalzo ET AL., *Liu v. SEC: U.S. Supreme Court Agrees to Review SEC's Ability to Seek Disgorgement*, REED SMITH LLP (Dec. 2, 2019), https://www.reedsmith.com/en/perspectives/2019/12/liu-v-sec-us-supreme-court-agrees-to-review-secs-ability-to-seek.

116 Securities Litigation Alert, *supra* note 111.

arguments for how Congress has authorized disgorgement relies on the Sarbanes-Oxley Act of 2002, which empowers courts to order "any equitable relief that may be appropriate or necessary for the benefit of investors."[117] Therefore, according to the SEC, disgorgement is authorized as an equitable remedy.

Likewise, a more textualist approach similar to the one employed in *Credit Bureau Center* by the Seventh Circuit, could acknowledge that disgorgement (or restitution) is not an equitable remedy. If restitution is deemed not to be an equitable remedy, as the Supreme Court decided of disgorgement in *Kokesh*, it may be difficult for the FTC to argue that it is implied as an ancillary equitable power accompanying its permanent injunction authority. The Supreme Court's stance on the issue remains unclear, as the Court in *Liu* allowed the SEC to continue its disgorgement practice with limitations, throwing the administrative agency a lifeline of sorts.[118] Thus, although the statutory issues in *Liu*, *AMG Capital Management*, and *Credit Bureau Center* may seem intertwined, the Supreme Court does not seem to have decided all three in one fell swoop. Having vacated its prior grant of the petition in *Credit Bureau Center*, the Court is preparing to cast final judgment on the FTC's practices when it issues its decision in *AMG Capital Management*.[119]

VIII. "OVERRULING" THE COURT, POTENTIAL LEGISLATIVE SOLUTIONS

Congress may have the final word on these issues, regardless of how the Supreme Court rules. As a number of courts in the relevant cases have discussed, Congress understands how to authorize these remedies explicitly, and has done so in each statute. In the case of the FTC Act, restitution is explicitly authorized in Section 19. This remedy is simply

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[117] 15 U.S.C. § 78u(d)(5); Jonathan Rosenberg ET AL., *Dismantling the SEC's Federal Court Disgorgement Authority*, NEW YORK LAW JOURNAL (Jan. 10, 2020), https://www.law.com/newyorklawjournal/2020/01/10/dismantling-the-secs-federal-court-disgorgement-authority/?slreturn=20200023142928.

[118] Kyle DeYoung ET AL., *An Analysis of the Supreme Court's Decision in Liu v. SEC*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (July 4, 2020), https://corpgov.law.harvard.edu/2020/07/04/an-analysis-of-the-supreme-courts-decision-in-liu-v-sec/.

[119] *See* John E. Villafranco & Bez Stern, *Supreme Court Vacates its Prior Grant of the FTC's Petition for Certiorari in FTC v. Credit Bureau Center, LLC*, KELLEY DRYE AD LAW ACCESS (Nov. 9, 2020), https://www.adlawaccess.com/2020/11/articles/supreme-court-vacates-its-prior-grant-of-the-ftcs-petition-for-certiorari-in-ftc-v-credit-bureau-center-llc-what-does-it-mean-for-section-13b-and-amg-capital-management-llc-v-ftc/.

less appealing to the Commission because it is subject to a statute of limitations and requires administrative proceedings that take longer to come to final conclusions then 13(b)'s direct appeal to courts, just as is the case for the SEC.[120] If Congress is not satisfied with section 19 as a remedial tool, it may amend the act to explicitly authorize restitution in a more satisfactory manner.

Although legislation has not been put forth explicitly authorizing expanded restitution for the FTC, largely because only one court of appeals has ruled against the FTC, the same is not true for the SEC. Two bills have been introduced in Congress in response to *Kokesh*.[121] The first, brought forth by Sens. Mark R. Warner (D-Va.) and John Kennedy (R-La.), would essentially cement *Kokesh*'s ruling outside footnote 3.[122] The bill would authorize a five-year statute of limitations for disgorgement and a ten-year statute of limitations for restitution.[123] The other bill, introduced by Rep. Ben McAdams (D-Utah), would grant the SEC express disgorgement authority by amending Section 21(d)(5) to explicitly allow disgorgement rather than simply equitable relief.[124]

Far from the only examples of Congressional power to circumvent the courts, these bills nonetheless provide excellent examples on what Congress may do in the event of a Supreme Court ruling against the FTC, and certainly the SEC. Despite the legislative process taking some time, a legislative solution would likely prove to be the best option, as Congress is the body of government with the most control. The FTC is created by Congress, governed by legislature, and can be immunized from judicial overreach with proper statutory drafting. With an express grant of authority in clear, precise language, Congress could put the issue to rest permanently.

IX. CONCLUSION

The FTC is in the midst of a bureaucratic tornado, one it likely never saw coming after decades of unchallenged enforcement activity. Its authority to circumvent the burdensome administrative proceedings and statutory restrictions by invoking section 13(b) has served a critical function for the Commission. Without it, some confusion about how the government may pursue enforcement against violators of consumer

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120 *Id.*

121 Kathryn Barry ET AL., *The Lasting Impact of Kokesh: Footnote 3 and Beyond*, JD SUPRA (Sept. 17, 2019), https://www.jdsupra.com/legalnews/the-lasting-impact-of-kokesh-footnote-3-72176/#_ednref9.

122 *Id.*

123 *Id.*

124 *Id.*

protection laws. Unless the FTC Act is amended, that objective may fall largely to the CFPB. The Bureau's more explicit statutory authority makes it a capable fill-in or ally to the FTC in its effort to protect consumers.

Given the political and legal criticisms and uneven entrance into the stage as an emerging executive agency, the future of the CFPB is far from certain. Questions surrounding its structure and constitutionality loom large over the administrative landscape, making reliance on a mere shifting of roles to the CFPB a difficult solution for the federal government to embrace. Thus, a prudent approach may entail allowing the other branches of government to settle the discussion amongst themselves.

In the short term, the discrepancy in FTC enforcement authority may cause some trouble for the agency nationwide. Many defendants are sure to dispute the Commission's authority citing *Credit Bureau Center*. Meanwhile, a similar battle rages on in regard to SEC enforcement actions. As the issue of restitution and disgorgement await an impending resolution, excessive litigation on the most basic issues look to hamper the courts.

However, a number of resolutions may put an end to the confusion surrounding 13(b). The judicial branch provides the promise of resolution in the form of *FTC v. AMG Capital Management*, and may have laid the groundwork for such in *Liu v. SEC*. The Supreme Court could end the use of motions based on lack of authority facing the FTC with its decision in *AMG Capital Management*. However, in the event that the Court decides against the FTC, the climate may yet remain uncertain.

To maintain administrative efficiency and utility, Congress may seek to amend the FTC Act. In doing so, it would return the FTC's enforcement capacity to the state it remained in for decades before the Seventh Circuit's industry-shifting decision. Whether in the form of bills currently making their way through the halls of Congress or another bill designed to address the concerns of a potential Supreme Court decision, the legislative branch is likely to have final say on the matter if the Court does not.