

Seventh Circuit Reins in Federal Trade Commission's Implied Powers

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David A. Karp

The Seventh Circuit recently reduced the scope of one of the Federal Trade Commission's most effective enforcement tools, the power to seek restitution for violations of consumer protection laws. The decision in *Federal Trade Commission v. Credit Bureau Center LLC* signals that the appeals court is willing to overrule long-standing precedent to rein in a federal agency's implied powers.

The Seventh Circuit reversed a \$5.2 million restitution judgment against the owner of a credit monitoring service who had misled customers into signing up for a \$29.94 monthly service. The company argued, among other things, that the Federal Trade Commission lacked power to seek a restitution award.

The Seventh Circuit had previously held in a 1989 decision that the FTC could seek restitution as an implied power, furthering its statutory purpose. Eight other circuits agreed.

But a three-judge panel overturned the precedent without en banc review. Judge Diane Sykes wrote that section 13(b) of the FTC's statute, 15 U.S.C. § 53(b), authorized it to seek only temporary restraining orders and injunctions in this case. Other provisions allowed the FTC to seek restitution, but only to enforce rules defining specific acts as deceptive and after proving a violator had actual or fairly implied knowledge that her conduct violated the rule.

Judge Sykes made clear that the court would limit an agency to explicit powers granted by statute. "[A]n exploration of statutory purpose is no longer the Supreme Court's polestar in cases raising interpretative questions about the scope of statutory remedies," Judge Sykes wrote.

Chief Judge Diane Wood dissented from the court's refusal to hear the case en banc without oral argument, "a commitment ... that consistently improves the quality of our decisionmaking." She compared the court's willingness to overturn precedent and create a circuit split to Julius Caesar's intrusion into Rome in 49 B.C., ending the Roman Republic and making him dictator for life. "[N]o court has ever tied the hands of a government agency in the way that the majority has done here. ..."

Read the opinion: *Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, No. 18-2847 (7th Cir. Aug. 21, 2019).

UPDATE: The U.S. Supreme Court agreed on July 9, 2020, to review the Seventh Circuit's decision to resolve a circuit split over the breadth of the Federal Trade Commission's power.