

Ten Things to Know When Sued In An Enforcement Action By The FTC

Your business offices just got raided. They took everything but did leave some papers. Fortunately, they left you behind because they were not police officers. They were with the Federal Trade Commission. Now what happens?

More likely than not, the papers they handed to you consist of a Complaint and a Temporary Restraining Order (TRO), including an Asset Freeze. There are a few things you should know and consider as you begin to digest the situation.

The FTC's Power to Act. Under the Federal Trade Commission Act (15 U.S.C. §§ 41-58, as amended), the Commission is empowered, among other things, to (a) prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce; (b) seek monetary redress and other relief for conduct injurious to consumers; (c) prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices; (d) conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and (e) make reports and legislative recommendations to Congress.

Specifically, Section 5(a) of the FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce. 15 U.S.C. 45(a). In addition, Section 12 of the FTC Act makes it unlawful to disseminate, or cause to be disseminated, any false advertisement to induce the purchase of food, drugs, devices, services or cosmetics. 15 U.S.C. 52. The FTC may initiate federal district court proceedings to enjoin violations of the FTC Act, and to secure other equitable relief such as restitution and disgorgement of ill-gotten gains. 15 U.S.C. 53(b).

No Right to a Jury Trial. There is no right to a jury trial in such actions. *FTC v. Commonwealth Marketing Group, Inc. et al.* 72 F. Supp. 2d 530 (1999). The reasoning behind the denial of a right to a jury is that the FTC is seeking injunctive and equitable relief. *See id.*

Temporary Restraining Orders. Individuals and businesses should be aware that the FTC may proceed directly to federal court to pursue enforcement, and in many instances, the Commission has pursued a temporary restraining order (TRO). For example, in August 2010, at the request of the FTC, a federal judge issued a TRO barring an operation that offered health and beauty products to consumers on a "free trial," "risk free," or "trial" basis from making unauthorized debits from consumers' bank accounts, and froze the assets of the corporate defendants and two individual defendants. *FTC v. Central Coast Nutraceuticals, LLC, et al, Temporary Restraining Order with Asset Freeze, Appointment of*

Temporary Receiver, Immediate Access to Business Premises, Expedited Discovery, and Order to Show Cause Why a Preliminary Injunction Should Not Issue (August 16, 2010), available at <http://www.ftc.gov/os/caselist/1023028/100816centralcoastro.pdf>.

In addition, the TRO order usually instills a temporary receiver to take over the corporate defendants' assets and operations.

Asset Freeze. Along with the TRO, the FTC generally seeks and obtains an immediate asset freeze of both business and personal assets. The typical asset freeze order prohibits dissipation of any assets – no matter how small – both within and outside the United States. *FTC v. Central Coast Nutraceuticals, LLC, et al, Temporary Restraining Order with Asset Freeze, supra*, available at <http://www.ftc.gov/os/caselist/1023028/100816centralcoastro.pdf>

Reasonable Living Expenses. Under the order, the individual defendants may be permitted to designate one account from which they could “pay reasonable, usual, ordinary, and necessary living expenses” – and this is only if they, among other things, “obtained written authorization from counsel for the Commission for each ... withdrawal,” and demonstrated “to the satisfaction of counsel for the Commission that the value of that Defendant’s assets will not suffer unreasonable diminution due to such proposed expenditures . . .” *See id.*

Request for Attorneys’ Fees. The defendants may request payment of attorneys’ fees, a move that is always opposed by the FTC. District courts have discretion to regulate the payment of attorneys’ fees from assets that are frozen pending trial and to forbid the payment of some fees out of those assets. Indeed, even a flat prohibition against the payment of all attorneys’ fees, including those essential to provide a defense, is within a district court’s discretion. *See, e.g. FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 348 (9th Cir. 1989).

Resolution. After having seized nearly all of a defendant’s assets, the FTC may agree to settle the action. Any settlement must receive the approval of the entire Commission. This is usually done through a Stipulated Final Order. The Stipulation will include, amongst other things, defined terms, prohibited conduct, civil damages and/or consumer redress, compliance and monitoring (which can be for several years). Any resolution also includes a Stipulated Permanent Injunction and, in many instances, a suspended judgment.

For instance, in *Central Coast Nutraceuticals*, the resolution included an \$80 million judgment, which represents the total amount of consumer injury caused by the scheme. The monetary judgment, however, will be suspended when the FTC receives assets worth approximately \$1.5 million from the defendants.

The resolution prohibits defendants from engaging in various marketing practices and requires compliance and monitoring for six years. See *FTC v. Central Coast Nutraceuticals, LLC, et al, Stipulated Order for Permanent Injunction and Final Judgment*, available at <http://www.ftc.gov/os/caselist/1023028/120109centralcoaststip.pdf>.

Compliance Monitoring and Reporting. The Stipulated Final Order may contain a compliance monitoring and reporting requirement. Under such provisions, a settling party must, “[w]ithin ten (10) days of receipt of written notice from a representative of the Commission, . . . submit additional written reports, which are true and accurate and sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and provide entry during normal business hours to any business location.” See *FTC v. Innovative Marketing, Inc., et al.*, available at <http://www.ftc.gov/os/caselist/0723137/110127innovativemktgorder.pdf>. The compliance reporting may require things, such as, notifying FTC of any change in address, employment, and business ownership (direct or indirect). See *id.*

Permanent Injunction. Another aspect of any FTC resolution is a permanent injunction. Section 13(b) of the FTC Act provides that “in proper cases the [FTC] may seek, and after proper proof, the court may issue, a permanent injunction.” By way of example, in *Federal Trade Commission v. Mercury Marketing of Delaware, Inc., and Neal D. Saferstein*, No. 00-CV-3281 (E.D. Pa. filed June 29, 2000), the parties agreed to a stipulated judgment and order for permanent injunction, which contained various prohibitions to protect customers from unauthorized billing and directed defendants to send postcards to all of their customers informing them that they were being billed and were paying for defendants’ services. Despite the agreement, the individual defendant directed that those postcards be altered or destroyed. As a result of this and other noncompliant conduct, the FTC sought to hold defendants in contempt and prevailed. See *United States v. Saferstein*, 2012 U.S. App. LEXIS 1619 (3d Cir. Pa. Jan. 26, 2012) (discussing the contempt hearing).

Suspended Judgment. A resolution tends to include a suspended judgment and a Right to Reopen provision, which is used to enforce a suspended judgment. Typical language provides: “judgment is hereby entered against defendants [], jointly and severally, in the amount of []; provided, however, that this judgment shall be suspended until further order of the Court, and provided further that this judgment shall be subject to the conditions set forth in this Order.” See *Ftc v. Rapp*, 2000 U.S. Dist. LEXIS 20627 (D. Colo. June 23, 2000). The right to reopen provision, in turn, provides: “A finding of material misrepresentation or omission as to the financial statements of defendant [] will render immediately due and payable the entire amount of the suspended judgment

herein entered against him[/her/it], provided that the FTC will not seek an amount in excess of said judgment.” *FTC v. Independence Medical*, 1996 U.S. Dist. LEXIS 13217 (D.S.C. Aug. 26, 1996).

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Individuals and their business can be exposed to significant liability for conduct that violates the FTC Act. Companies and individuals should consult with attorneys experienced in FTC enforcement actions.



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