

## **Corporate Officers, Directors and Managing Agents Take Heed: Individual Liability Above and Beyond General Alter-Ego and Amount Enriched**

The FTC is suing me, in addition to my company. The fact that I am incorporated protects me, right? Wrong.

Individual defendants may be held liable for injunctive relief for the corporate defendants' violations of the FTC Act, if the FTC demonstrates that the individual defendants participated directly in the wrongful acts or practices or had authority to control the corporations. *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) (citing *FTC v. American Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1087 (C.D. Cal. 1994)). "Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy." *American Standard Credit Sys.*, 874 F. Supp. at 1089; *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1117 (S.D. Cal. 2008) (authority to control can be demonstrated based on factors such as being an officer of the corporation with signatory authority, or is actively involved in the policy making and business affairs of a corporation).

To be held liable for restitution, the FTC must, in addition to the above, show that the individual defendants had knowledge that the corporation or one of its agents engaged in the wrongful acts or practices. *Publishing Clearing House*, 104 F.3d at 1171. To satisfy the knowledge requirement, the FTC must establish that the individual defendant *either*: (1) had actual knowledge of the wrongful acts or practices; (2) was recklessly indifferent to whether or not the corporate acts or practices were fraudulent; *or* (3) had an awareness of a high probability that the corporation was engaged in fraudulent practices along with an intentional avoidance of the truth. *See id.* (citing *American Standard Credit Sys.*, 874 F. Supp. at 1089) (individual liability for misrepresentations or deceptive practices under the FTC Act).

The case law above is significant in that the FTC is not required to show actual knowledge. For instance, in *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997), an individual defendant argued that the FTC failed to show the requisite intent to defraud. In affirming the District Court's grant of summary judgment, the Ninth Circuit held that reckless indifference was sufficient where the individual defendant filed the business license at the direction of someone she knew was facing criminal charges concerning his telemarketing activities, had worked as a telephone solicitor for the company before, and signed the contract with charity knowing that the charity would receive no more than 10% of the money raised by PCH. *Id.* at 1171. Thus, despite the fact that she did not personally make false representations on the solicitation calls. She was held jointly liable with the company for the company's fraudulent activities. *Id.*

An individual defendant's awareness of a high volume of consumer complaints can further demonstrate knowledge of deceptive practices. *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1087 (C.D. Cal. 1994)

What is the scope of liability? Individuals can be, and frequently are, held jointly and severally liable with co-defendants for the total amount of consumer injury.

Under Section 13(b) of the FTC Act, the power to grant ancillary equitable relief includes the power to order equitable monetary relief for consumer redress through repayment of money, restitution, disgorgement of unjust enrichment, or rescission. *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir.1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir.1989).

In determining the amount of equitable monetary relief, the amount of restitution equals the amount paid by the consumer victims of an illegal scheme, less any amounts previously returned to the victims. *See Febre*, 128 F.3d at 536; *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 469 (11th Cir.1996) (affirming an award of damages as calculated by consumers' losses); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606-07 (9th Cir.1993), *cert. denied*, 510 U.S. 1110, 114 S.Ct. 1051, 127 L.Ed.2d 373 (1994) (stating that restitution is amount of enrichment received) Corporate and individual defendants may be held jointly and severally liable for the total amount of consumer injury. *See, e.g., Amy Travel*, 875 F.2d at 570.

For instance, in *FTC v. Windward Marketing, Ltd.*, 1997 WL 33642380, at 15 (September 30, 1997), individual defendants argued that any disgorgement of profits directed at them must be limited to the amount of profits they earned. The court indicated that “this position is incorrect . . . Defendants can be held jointly and severally liable for their violations of the Act . . . Thus, any Defendant’s liability may exceed the amount that particular Defendant received from his participation in the scheme, and, instead, a Defendant may be liable for all the money Defendants received from the . . . scheme.” The corporate defendant and the two individual defendants were jointly and severally liable for \$12,693,401.

The FTC also takes it one step further to satisfy the consumer injury; it often goes after “relief defendants” and other third parties who do not have a valid right to ill-gotten funds. The legal principle of a “relief defendant” has its genesis in common law and has been fully developed in the SEC context. In *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir.1998), the Second Circuit held that federal courts may order equitable relief against a “nominal” or “relief” defendant, an individual who is not accused of wrongdoing, where that person has “(1) received ill-gotten funds; and (2) does not have a legitimate claim to those funds.” *Id.*

(citing *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir.1998)). This rationale has been transplanted into the FTC arena by the Fourth Circuit in *CFTC v. Kimberlynn Creek Ranch*, 276 F.3d 187, 191 (4th Cir. 2002)).

In *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1273 (S.D. Fla. 2007), for example, the court disgorged \$1.6 million from a relief defendant that received monies traceable to the accounts belonging to the corporate defendants.

All said and done, the concept of being protected under a corporate structure is defined differently in FTC enforcement actions and requires application of a different set of principles than the general law of alter ego.



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