

How can the FTC freeze personal and business assets without a hearing?



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In the first segment of this three-part series, "TRO/asset freeze: The FTC's nuclear option," *The Green Sheet*, June 23, 2014, issue 14:06:02, I reviewed the Federal Trade Commission's temporary restraining order (TRO)/asset freeze, known as the agency's "nuclear" enforcement option among its arsenal of weapons against unfair or deceptive acts and practices.

I stated that, remarkably, the FTC can obtain a TRO/asset freeze order from a federal court judge without notice to the defendants and can effectively shut a company down in a single afternoon, freezing all of the company's and the owner's assets and appointing a receiver to liquidate the company. As I mentioned, the FTC successfully employed this technique against at least 48 companies and 29 business owners in 2013.

You might be surprised to learn that the FTC's authority to seek and obtain TRO/asset freezes is not spelled out in any statute enacted by Congress. Instead, this process has developed over the past 30 years through a series of federal court interpretations of section 13(b) of the Federal Trade Commission Act.

Slim legal justification

The legal language that authorizes such TROs and asset freezes is actually quite meager. The statute states simply that the FTC can seek a TRO "[w]henver the Commission has reason to believe that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and that the enjoining thereof ... would be in the interest of the public."

In the dictionary, "to enjoin" means to instruct or urge to do something or, in some cases, to not do something. A common-sense interpretation of the FTC Act would be that the FTC may go to court and seek an order directing a business that is suspected of violating the FTC Act (perhaps, by making false or misleading claims about its products or services) to stop violating the law until the FTC's case can be presented and a final resolution can be reached. But that's not the way it works in practice.

Beginning in the early 1980s, shortly after the FTC Act was amended to grant the agency the power to seek TROs, the FTC's attorneys devised an aggressive strategy to expand the agency's enforcement powers. They began by identifying cases in which smaller businesses (which were unlikely to have significant assets or sophisticated legal resources) had engaged in extremely bad conduct (that would support judicial outrage toward the perpetrators). Relying on the detestable nature of the defendants' bad acts, the FTC argued that the courts needed to do more than merely order the wrongdoers to stop violating the law.

The agency's lawyers contended that, if they could prove the business had violated the law, the FTC Act authorized the court not only to enter a TRO halting the company's violations, but also to enter a permanent injunction in "proper" cases. Based on U.S. Supreme Court cases from 1946 and 1960, the FTC contended that, by granting the agency the power to obtain permanent injunctions against wrongdoers, Congress intended to allow the courts to use "the full measure of their equitable powers," including the powers to order defendants to give up any funds they received as a result of their deceptive or unfair acts.

From that argument, which was first accepted by the Ninth Circuit Court of Appeals in 1983, it was a short step to the conclusion that the courts should also have the power to freeze the defendants' assets and install a receiver. There would be no point in ordering defendants to stop violating the law and to file a lawsuit seeking an order requiring the defendants to return the funds they improperly obtained from consumers if the owners could simply drain the assets out of the company before and during the trial. Thus was born the FTC's strategy of seeking to freeze the defendants' assets before an FTC enforcement action was even served.

'Due process' ignored

The problems with this draconian approach are obvious. The 14th Amendment guarantees the right to "due process" (that is, notice and a fair hearing) before the government can strip its citizens of life, liberty or property. Also, we

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were all raised on the notion that a defendant is presumed to be innocent in the eyes of the law until proven guilty. Even Section 13(b) of the FTC Act specifies that a TRO may be issued only "after notice to the defendant."

Despite all that, however, modern federal courts routinely grant the FTC's requests for TRO/asset freezes, and it is

the exceptional case when a federal judge pushes back and insists that the defendants be provided an opportunity to respond to the FTC's claims before determining whether the freeze order should be imposed.

The typical result of a TRO/asset freeze order is that the case is over before it starts. Shortly after the lawsuit is filed, the business is shuttered and the defendants are figuratively and financially handcuffed as a result of their inability to hire or pay attorneys to defend them. All that usually remains at that point is for the FTC to negotiate a final order with the metaphorically bound-and-gagged defendants, typically directing them to turn over most or all of their remaining personal assets, savings accounts, retirement accounts, cars, boats and homes – and often banning them from working in the only industry they know.

Recently, the Fourth Circuit Court of Appeals became the last of all of the U.S. Circuit Courts to uphold the FTC's power under Section 13(b) to obtain monetary equitable relief in the case of *FTC v. Kristy Ross*. Ross' attorneys filed a petition to the U.S. Supreme Court, challenging interpretations of all of the Circuit Courts on this issue and citing the TRO/asset freeze as one of the abuses that has resulted from the Courts' failure to fully scrutinize the FTC's powers under Section 13(b). The Supreme Court's ruling on whether it will consider Ross' appeal is expected in October 2014.

While undoubtedly there are charlatans who ultimately deserve to be stripped of their ill-gotten wealth and prevented from preying on innocent victims once their misdeeds have been proven in court, Congress should revisit Section 13(b) and make appropriate changes that bring these procedures into accord with fundamental principles of justice and the rule of law.

Since federal court judges often do not have time to closely scrutinize the FTC's claims and supporting evidence, and rarely allow defendants to appear and tell "the other side of the story," the TRO/asset freeze procedure gives the FTC too much discretion. There are very few checks-and-balances preventing defendants from being subjected to TRO/asset freeze treatment for conduct that may be widespread or even accepted by their industry and peers.

In short, business defendants in FTC civil enforcement actions deserve to have their day in court, just like all other American citizens. 🇺🇸

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