

The Importance of Identifying the Correct Relief in FTC Litigation

December 1, 2010

For nearly 30 years, the Federal Trade Commission ("FTC") has sought, and federal courts have awarded, monetary redress for consumers in actions brought under Section 13(b) of the Federal Trade Commission Act ("FTC Act"). A recent article co-authored by John Villafranco entitled, "[Consumer Redress Under Section 13\(b\): Correcting the Record](#)," which was published in the November 2010 issue of Regulatory Affairs Professionals Society's *Regulatory Focus* magazine, clarifies what a court can and cannot award in Section 13(b) litigation.

The article (i) identifies the types of equitable monetary relief that typically are awarded in such actions, and distinguishes between equitable restitution (which may be awarded) and legal restitution (which may not); (ii) discusses the concept of "tracing," which is a necessary prerequisite to an award of restitution; and (iii) explains why disgorgement of a defendant's net profits generally will be the only proper form and measure of consumer redress in Section 13(b) litigation.

Whether a court awards restitution or disgorgement in a Section 13(b) action can have a substantial impact on the amount of money that a defendant who violates the FTC Act might be ordered to pay in consumer redress. For example, a company that spends a significant amount of money on product advertising, marketing, and promotion might have low net profits (the measure of a disgorgement award) despite, at the same time, having high gross revenues from product sales (typically awarded in restitution). In that case, the difference between an award of disgorgement or restitution could be the difference in a redress award totaling thousands rather than millions of dollars. Thus, companies and individuals who are named defendants in Section 13(b) actions should be aware of what form of consumer redress is awardable in such litigation and how that redress is measured, as it could impact settlement negotiations with the FTC and litigation strategy generally.