

## GOP Concerns May Delay Bill To Restore FTC Restitution Tool

By **Christopher Cole**

Law360 (April 28, 2021, 11:22 PM EDT) -- Legislation making clear that the Federal Trade Commission can go after bad marketplace actors for court-ordered monetary relief appears to have bipartisan support in Congress, but GOP opposition to some provisions of the proposed bill could complicate passage.

House Democrats are poised to push through a measure by Rep. Tony Cárdenas, D-Calif., adding language to the FTC Act giving the commission the power to seek restitution and profit disgorgement when it asks district courts for preliminary injunctions against fraudulent behavior and antitrust violations.

The bill would deal with the fallout from last week's U.S. Supreme Court decision **striking down** the FTC's ability under the act's Section 13(b) injunctive authority to seek monetary relief. In **AMG Capital v. FTC** , a unanimous high court found that preliminary injunctions permitted to the FTC are prospective, meant only to stop ongoing or future illegal behavior such as scams and antitrust violations.

Not all provisions of **the Cárdenas bill** enjoy support from both parties — mainly because the bill sets in stone a number of measures on which there's still no consensus. Splits remain over whether the reinstated power can be applied retroactively, how the amount of restitution and disgorgement should be calculated and how to protect the due process rights of entities targeted by the FTC. Still, the concept of fixing the perceived shortcomings of 13(b) through legislation is one that has bipartisan backing.

"It does seem like there is consensus that Congress needs to act [in] both parties, which suggests that the likelihood of a bill passing seems pretty high," said Steven M. Wernikoff, partner and co-leader of the data, privacy, and cybersecurity group at Honigman LLP.

There's **strong impetus** to act because "the Supreme Court's opinion has particular negative effects on the FTC's fraud programs," Wernikoff said.

The FTC's power to get money back from fraud and other bad behavior has not been completely halted, but now it has only a complex and time-consuming in-house administrative process, not the quick route of seeking a preliminary injunction in federal court, a route the FTC has increasingly relied on to punish those who commit fraud as soon as possible.

But giving the FTC back that power through an act of Congress is not as simple as expanding 13(b) to include monetary relief. The extent to which restitution authority would apply retroactively was major issue in a congressional hearing Tuesday on the Cárdenas bill, known as the Consumer Protection and Recovery Act.

That issue is a critical because the FTC — whose leadership strongly supports the legislation — says it has **24 outstanding enforcement cases** that will be affected by the Supreme Court decision.

Rebecca Kelly Slaughter, acting FTC chairwoman, said during House testimony Tuesday that Facebook Inc. has cited recent Third Circuit decisions affecting 13(b) authority in moving to dismiss the FTC's

current antitrust complaint against the social media giant, arguing that Section 13(b) bars the federal court suit.

Slaughter said the decisions also limit the FTC's ability to settle cases efficiently.

But Rep. Kelly Armstrong, R-N.D., said during Tuesday's hearing in a House Energy and Commerce subcommittee that he's concerned about the bill not dealing with the retroactivity issue. The only part of the bill that comes close is a 10-year statute of limitations for equitable relief, he said.

"Retroactivity is not favored by the law. The ex post facto clause espouses this principle in criminal contexts but we have judicial estoppel, laches, all sorts of various degrees on this," he said. "And it's based on fairness. Laws produce expectation and reliance," and people adjust accordingly.

"In the 13(b) reform bill, I think it is our duty to address the retroactivity question," Armstrong said. "If we fail to do so, we can expect continued uncertainty and litigation."

Wernikoff, a former FTC enforcement official, told Law360 he believes the bill tees up disputes over retroactive use of 13(b) because of the pending enforcement actions.

"Even if this law is enacted, it will be interesting to see how those cases are affected and whether the law would take retroactive effect. It's not addressed specifically in the bill," he said, predicting that it "will be a litigated issue" if retroactivity isn't addressed.

Republicans also signaled this week that they have concerns about expanding FTC authority without fully addressing due process concerns. The methods that the agency uses for calculating ill-gotten gains may also be subject to debate, experts said.

Democrats characterized a fix for 13(b) authority as something that could easily pass both chambers — Rep. Kathy Castor, D-Fla., said it "should be a bipartisan slam dunk."

Yet observers said there are reasons for the FTC to stay up at night. Stephen Calkins, a former FTC general counsel who backs 13(b) restitution, noted that what seems like a straightforward legislative "fix" could be fraught with demands for revisions. He pointed to the FTC commissioners' testimony last week before the Senate Commerce Committee, **which examined** the potential rollback of restitution authority in anticipation of a loss in the AMG Capital case.

Democratic Commissioner Rohit Chopra testified that a narrow 13(b) "fix" would be much too modest, but GOP Commissioners Noah Joshua Phillips and Christine Wilson said any reinstatement of the authority ought to come with "guardrails."

The question is what happens if progressives in Congress follow Chopra's lead "and insist that it is more or nothing" and attach some of their many antitrust reform efforts, Calkins, a professor at Wayne State University Law School, said in an email. "And what if conservatives are adamantly opposed to a [bill] that lacks what they view as important 'guardrails'?"

"In other words, a 13(b) 'fix' is far from a certainty even though Democrats and Republicans all say they want one," Calkins said, and a lot will probably turn on whether the new Biden-appointed FTC chair can persuade conservatives that the FTC can be trusted not to abuse new 13(b) authority — and persuade progressives to accomplish a quick, "skinny" 13(b) fix.

Honigman's Wernikoff said while most of the attention directed at the Supreme Court ruling has been at the FTC's power to force targets of investigations to quickly cough up money, another big issue is whether it will harm the agency's power to prevent them from fleeing with the money while under investigation.

The FTC has also relied on 13(b) to freeze assets, which put the money on hold so it could be recovered should the FTC win. Some defendants are already seeking to persuade courts to roll back asset freezes because of the court's ruling, he said.

Restitution and asset freezes are "very powerful remedies," he said, and that's part of what makes the legal development such a huge priority for the commission.

As the FTC awaits potential congressional action, some lawyers speculate that other agencies are going to fill the enforcement vacuum left by its diminished court powers.

O'Melveny counsel Melissa Baal Guidorizzi, who spent eight years at the Consumer Financial Protection Bureau developing legal theories and policy for fintech, said in a statement Wednesday that after the high court ruling, the CFPB "will be more likely to step into matters that have previously been handled by the FTC. This means that more nonbank financial service providers will be subject to the CFPB's enforcement authority both to impose fines and obtain relief for consumers."

"We expect aggressive enforcement and coordinated efforts between the agencies to increase, in concert with the numerous new consumer protection offices and resources implemented over the last several years by state regulators and attorneys general," she said.

--Editing by Rich Mills.