MIKE LEE
US SENATOR *for* UTAH

December 14, 2021

Consumer Protection and Due Process Act

Congress first created the Federal Trade Commission (FTC) in 1914 with a broad mission to "protect consumers and promote competition." In 1973, Congress added Section 13(b), providing the FTC with the authority to seek preliminary and permanent injunctions to remedy "any provision of law enforced by the Federal Trade Commission."

In the late 1970s, the FTC began to use the term "permanent injunction" in 13(b) as a means to seek equitable monetary relief, including restitution and disgorgement, in both consumer protection and antitrust cases. However, on April 22, 2021, the United States Supreme Court issued a unanimous opinion,[1] authored by Justice Breyer, holding that Section 13(b) of the Federal Trade Commission Act does not authorize the FTC to seek, or a court to award, equitable monetary relief. The decision, based on a plain reading of the statute, appropriately found that Congress did not explicitly authorize this authority.

While the Court found that the FTC did not have the authority to pursue equitable remedies under Section 13(b), consumers would likely benefit from Congress granting this authority with appropriate safeguards in place to ensure due process is protected. Granting this authority without proper protections would ensure that the FTC would be free to abuse its open-ended authority and engage in substantial agency overreach.

Bill Specifics:

The Consumer Protection and Due Process Act would

- Expressly provide the Federal Trade Commission with the authority to pursue equitable remedies for unfair or deceptive trade practices under the following conditions:
    - A "reasonable individual would have known, under the circumstances, [the act or practice] was unfair or deceptive"[2] and
    - The equitable remedy award is for an individual who materially relied on the unfair or deceptive practice of the violator and that such practice proximately caused harm to the individual.
- Remove an existing legal presumption that an individual has been harmed by an unfair or deceptive act or practice solely on the basis that such person has been exposed to an unfair or deceptive act or practice.
- Set a three-year statute of limitations for the Commission to seek equitable remedies beginning on the date of enactment of this legislation with no retroactive application of this new authority.
- Require any action brought by the Commission involving an unfair method of competition to be referred to the Attorney General to collect actual damages under the Clayton Act.

---

[1] *AMG Capital Management, LLC v. FTC,* 141 S. Ct. 1341 (2021)

[2] A similar "reasonable person" standard exists in Section 19 of the Federal Trade Commission Act