In the

United States Court of Appeals

for the Seventh Circuit

No. 21-2945

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

CREDIT BUREAU CENTER, LLC,
and MICHAEL BROWN,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 17-cv-194 — Matthew F. Kennelly, Judge

ARGUED JUNE 3, 2022 — DECIDED AUGUST 30, 2023

Before SYKES, Chief Judge, and FLAUM and BRENNAN, Circuit Judges.

SYKES, Chief Judge.

option feature" on its websites. The websites offered visitors a free credit report but automatically enrolled them in a $29.94 monthly membership subscription when they applied for the free report; the information about the monthly membership was scant and buried in much smaller text. FTC v. Credit Bureau Ctr., 937 F.3d 764, 766 (7th Cir. 2019). Brown's contractors ginned up website traffic by posting Craigslist advertisements for fake rental properties and directing applicants to the company's websites for a "free" credit score. Id.

I. Background

We described the background of this case in the first appeal, Credit Bureau Ctr., 937 F.3d at 767–68, so we provide an abbreviated overview of Brown's scheme here. In January 2014 Brown contracted with Danny Pierce to increase traffic to websites advertising his credit-monitoring services. These websites—with names like "eFreeScore.com" and "FreeCreditNation.com"—promised visitors a "free credit report and score." Id. at 767. But requesting the free report automatically enrolled applicants in a paid monthly subscription. Fine print on the websites warned visitors that ordering the free report would enroll them in an unspecified "membership" subscription that cost $29.94 each month. A letter from Brown followed, explaining to new subscribers that the fee-based subscription was for credit monitoring.

Pierce later subcontracted with Andrew Lloyd to drum up more referrals to Brown's websites. Lloyd posted Craigslist advertisements for fake rental properties at cheap prices. Posing as the landlord, he directed prospective tenants to Brown's websites to obtain a free credit report. Pierce and Lloyd's efforts paid off. They referred more than 2.7 million customers to Brown, yielding just over $6.8 million in revenue. Unsuspecting customers complained, but Brown denied any involvement with Pierce and refused to grant refunds. Ultimately, credit-card companies canceled more than 10,000 of Brown's charges.

The Commission eventually stepped in, suing Brown and his company and alleging that the websites and the Craigslist advertisements violated the FTCA, ROSCA, and two other consumer-protection statutes not relevant here. Proceeding under section 13(b) of the FTCA, 15 U.S.C.

§ 53(b), the Commission sought a permanent injunction and restitution. The remedial options listed in section 13(b) are limited to restraining orders and injunctions, but the Commission had long and frequently used this provision to win equitable monetary relief as well. AMG Capital, 141 S. Ct. at 1346–47. Our circuit blessed this practice in Amy Travel, 875 F.2d 564, holding that section 13(b) implicitly authorizes restitution in addition to injunctive relief; other circuits also endorsed this approach. Credit Bureau Ctr., 937 F.3d at 779.

Ruling on cross-motions for summary judgment, the district judge found Brown liable, issued a detailed permanent injunction, and ordered Brown to pay over $5 million in restitution to the Commission. Id. at 768.

Brown appealed, contesting the judge's liability ruling and challenging the court's authority to award monetary relief under section 13(b). We first addressed the judge's determination that Brown had violated ROSCA, agreeing with his liability ruling and rejecting Brown's arguments to the contrary. As we explained, ROSCA specifically addresses the use of a so-called "negative option feature" to sell goods or services on the internet. Id. at 769. A negative-option feature is "a provision [in an offer] under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." 16 C.F.R. § 310.2(w); see also 15 U.S.C. § 8403 (incorporating the definition by reference). As relevant here, the statute makes it unlawful for any person to use a negative-option marketing device unless he "clearly trao

We had no difficulty affirming the judge's determination that Brown's websites violated this provision. And because "ROSCA violations are 'unfair or deceptive acts or practices' under the FTCA," we explained that the Commission could "use the FTCA's enforcement regime against violators." Credit Bureau Ctr., 937 F.3d at 769 (quoting 15 U.S.C. § 8404). We thus had no need to consider the Commission's other theories of liability. Id.

Turning to the restitution award, we explained that an award of monetary relief—legal or equitable—was incompatible with the text of section 13(b), which by its terms authorizes only injunctive relief. Id. at 771–75. That text, and the language and structure of the FTCA's other remedial provisions—notably, section 19, which provides for monetary relief but only if specific preconditions are met—called into question the Commission's view that section 13(b) implicitly authorizes restitution awards. Id. W

dated the two cases for decision but later reversed course and separated them. The Court then proceeded to the merits in the Ninth Circuit's case, concluding in a unanimous opinion that section 13(b) "does not grant the Commission authority to obtain equitable monetary relief" such as restitution or disgorgement. AMG Capital, 141 S. Ct. at 1352. The Court's analysis followed the same path as ours in this case. The decision in AMG Capital rests on the plain text of section 13(b),

Brown lodged a host of objections. He argued that the Commission had knowingly "misused" section 13(b) and should be barred by the doctrine of "unclean hands" from seeking relief under ROSCA and section 19. He argued that awarding monetary relief would defy the mandate rule and the law-of-the-case doctrine. He insisted that no intervening change in the law justified an amended judgment and that the Commission had waived reliance on section 19. Still more, he argued that the judgment covered websites that had not been proved to violate ROSCA, that any award must be limited to net profits, and that the Commission must trace the funds to the underlying fraud. The judge rejected each argument, reimposed the restitution award under section 5 of ROSCA and section 19 of the FTCA, and entered the requested amended judgment.

not obtain any monetary award. This argument plucks our mandate from its context. We addressed only the availability of restitution under section 13(b); we did not consider (let alone decide) whether the Commission could obtain monetary relief under any other statutory provision. The amended judgment relies on ROSCA and section 19—not section 13(b)—so it does not exceed the scope of the mandate or disregard the law of the case.

Brown's next argument targets the judge's authority to grant the Rule 59(e) motion. An "intervening change in the controlling law" may justify a motion to amend the judgment. Cosgrove v. Bartolotta, 150 F.3d 729, 732 (7th Cir. 1998). Brown insists that our decision in the first appeal and the Supreme Court's decision in AMG Capital do not fit the bill. This argument ignores the wid

seeking restitution awards under section 13(b) threatened to undermine the conditions precedent for monetary relief outlined in section 19. Credit Bureau Ctr., 937 F.3d at 774. But ROSCA expressly bypasses these procedural requirements, authorizing the Commission to go directly to court to seek relief under section 19 to enforce its provisions. So permitting the Commission to enforce ROSCA through section 19—unlike section 13(b)—does not undermine the remedial structure that Congress created in the FTCA. To the contrary, it ensures that we respect Congress's decision to use the Act's enforcement mechanisms to implement ROSCA.[2]

Brown's last set of arguments challenge the amount of the restitution award. The judge reinstated the original award—a total of $5,260,671.36, which equals the revenue Brown obtained through traffic that Pierce directed to the websites minus refunds already paid, chargebacks customers obtained, and a settlement paid by Pierce and Lloyd.

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[2] Two related arguments merit less attention. Brown suggests that ROSCA does not actually incorporate section 19. But the plain text of the statute defeats that argument. See § 8404(a) ("Violation of this chapter or any regulation prescribed under this chapter shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act … ."); 15 U.S.C. § 57b (identifying a rule violation under the Act as the basis for a civil action).

Brown also suggests that the Commission has not complied with the requirement to notify the Attorney General of its litigation. He cites no evidence to support his claim that the Commission has not communicated with the Attorney General ; he does not explain why his allegation , if true, would require reversal ; and he does not recognize that the statute provides—for actions both under sections 13(b) and 19—that "the Commission shall have exclusive authority to commence or defend … such action." 15 U.S.C.nr"

Brown contends that the Supreme Court's decision in Liu v. SEC, 140 S. Ct. 1936 (2020), requires us to vacate the award and remand for recalculation of the amount. In Liu

"the payment of damages." § 57b(b) Because the monetary award consists of direct consumer redress in the form of refunds—a form of relief expressly permitted by the statute—it need not be measured by net profits and tracing is not required.

Brown's final argument challenges the temporal scope of the award. He draws a line between websites activated before and after December 1, 2015, arguing

relief as the court finds necessary to redress injury to consumers." § 57b(b). The judgment directs the Commission to deposit any excess money not used for consumer redress and administrative expenses "to the U.S. Treasury as disgorgement." The Commission acknowledged at oral argument that this part of the judgment sweeps beyond the statute. We therefore modify part IX.D of the amended judgment to remove this sentence: "Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement." As modified, the judgment is

AFFIRMED.