

## Dead Men Violate No Injunctions

October 31, 2018 | Rebecca E. Kuehn & Nora R. Udell

Can the Federal Trade Commission ("FTC") prove that it needs a court order to stop deceased people from violating or being "about to" violate the law? Haunted by this question, the District Court for the Northern District Georgia asked the FTC to prove it in *Federal Trade Commission v. Hornbeam Special Situations, LLC*.<sup>[1]</sup> In *Hornbeam*, the FTC sued several companies and individuals for an injunction, alleging that they were marketing memberships in online discount clubs to consumers seeking payday, cash advance, or installment loans, in ways that violated the FTC Act, the FTC's Telemarketing Sales Rule, and the Restore Online Shoppers' Confidence Act.

The FTC sought an injunction against the various players, alleging that it had "reason to believe" that defendants were violating, or were about to violate the law, the standard for injunctive relief under 15 USC 53(b).<sup>[2]</sup> The court initially agreed that the FTC's allegation that it had "reason to believe" was "unreviewable" based on a prior decision under the Administrative Procedure Act ("APA") and was sufficient to survive a motion to dismiss for failing to state a claim.<sup>[3]</sup> But after its ruling, the court ordered the parties to brief whether that was the correct standard to be applied in a federal court action.

After reviewing the parties' new briefs, the court held that when the FTC seeks an injunction, it must meet federal court pleading standards and satisfy the Court *with factual allegations* that it has a reason to believe that each of the defendants is violating or is about to violate the law. The court will not rely on conclusory allegations, and the deference that the APA provides is inapplicable in a case originally brought in federal court. The court observed that since the FTC's original filing, in fact, two of the defendants had died and that it "strains credulity to blindly accept that the dead men are violating (or about to violate) any laws."<sup>[4]</sup>

The court then looked to what types of allegations were required to show that a person was violating or "about to" violate the law. When seeking an injunction based solely on past conduct, as the FTC was doing, the court noted that there is a risk that an injunction will be moot as there is no current conduct to enjoin. The FTC argued that "about to" in § 53(b) means "likely to recur" in the mootness test. In contrast, the defendants pointed out that § 53(b) says "about to" - not "likely to recur" - and that the FTC should have to show that the defendants are "about to" violate the law, not just that the violation is "likely to recur."

The court agreed with defendants and found that the "about to" and "likely to recur"

standards are not equivalent. The court explained that though related, the tests should not be conflated. The dictionary definition of "about to" explains that the phrase evokes imminence. In contrast, "likely to recur" is less immediate. (For example, something that is likely to recur in 30 years isn't about to recur). The court observed that "likely to recur" is similar to "more likely than not" and cannot be considered synonymous with "about to."

The court held that when the FTC sues under § 53(b), it must satisfy the court with factual allegations, that it has a reason to believe that each of the defendants is violating or is about to violate the law. When the FTC's "reason to believe" is predicated upon past conduct, it must show the defendant is about to violate the law, which requires more than the mere likelihood of resuming the offending conduct.

It will be interesting to see whether this decision impacts the FTC's likelihood of seeking relief in federal court or will lead FTC to use its administrative process more often. As of late, the FTC appears to have preferred seeking relief in federal court, as opposed to proceeding administratively. If the FTC is not entitled to deference when seeking injunctions in federal court cases, however, the FTC may reconsider that approach. In any event, this case likely will discourage the FTC from seeking injunctions against the dead.

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[1] Civil Action No. 1:17-cv-3094-TCB (N.D. Ga. Oct. 15, 2018).

[2] 15 USC § 53(b).

[3] *Federal Trade Commission v. Hornbeam Special Situations, LLC*, 308 F.Supp.3d 1280, 1294 (N.D. Ga April 16, 2018) (citing *Federal Trade Commission v. National Urological Group, Inc.*, No. 1:04-cv-3294-CAP, 2006 WL 8431977, at \*3 (N.D. Ga. Jan. 9, 2006)).

[4] *Hornbeam*, Civil Action No. 1:17-cv-3094-TCB, p.10 (N.D. Ga. Oct. 15, 2018).

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