

Fifth Circuit Holds FTC Adjudication of Deceptive Advertising Claims Is Unconstitutional

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On March 20, 2026, the US Court of Appeals for the Fifth Circuit delivered a major decision in *Intuit, Inc. v. FTC*, holding that the Federal Trade Commission's internal administrative adjudication of deceptive advertising claims violates the constitutional separation of powers. By vacating a 20-year cease-and-desist order against Intuit over its TurboTax "Free Edition" marketing, the Fifth Circuit has fundamentally disrupted the FTC's enforcement playbook in that circuit.

This decision has important implications for the agency's ability to obtain monetary relief and signals a potential shift in how the FTC will undertake its enforcement mission.

Background: The shadow of *AMG*

For decades, the FTC routinely used Section 13(b) of the FTC Act to go directly to federal court to obtain equitable monetary relief (like restitution and disgorgement). The US Supreme Court's 2021 decision in *AMG Capital Management, LLC v. FTC* definitively stripped the FTC of this power, ruling that Section 13(b) only allows for injunctions, not monetary awards.

Post-*AMG*, the FTC was forced to rely on an arduous workaround to obtain money in most scenarios: Section 19 of the FTC Act. This required a two-step process. First, the FTC had to successfully sue a company in its own in-house administrative court to obtain a final cease-and-desist order. Then, the agency had to take that administrative order to federal court and prove the conduct was of a kind that a reasonable person would have known under the circumstances was dishonest or fraudulent, in order to secure monetary redress.

The holding

In *Intuit*, the Fifth Circuit essentially dismantled step one of that Section 19 workaround for deceptive advertising claims. Relying heavily on the Supreme Court's recent decision in *SEC v. Jarkesy*, which held that the Securities and Exchange Commission's use of administrative tribunals for fraud claims violated the Seventh Amendment right to a jury trial, the Fifth Circuit applied the same logic to the FTC. The court concluded that deceptive advertising claims under Section 5 of the FTC Act closely mirror the common law torts of fraud and deceit. Because these claims implicate traditional "private rights" rather than "public rights," the Constitution requires them to be adjudicated in an Article III federal court, not by an in-house administrative law judge (ALJ).¹

Narrowing the path to monetary relief

This ruling is a major development because it effectively forecloses the FTC's primary pathway to obtaining monetary relief in the Fifth Circuit for deceptive advertising practices in cases where:

- i. No specific statute or trade regulation rule independently authorizes monetary remedies.
- ii. The company lacked actual knowledge that its conduct was unfair or deceptive (precluding civil penalties under Section 5(m)(1)(B)).
- iii. The FTC must therefore rely on the Section 19 administrative-order-first process to reach monetary redress.

If the FTC cannot constitutionally adjudicate deceptive advertising claims in its own administrative courts, it cannot secure the foundational administrative cease-and-desist order required to trigger Section 19. Without that order, the FTC cannot go to federal court for monetary redress in these cases in the Fifth Circuit.

The FTC's remaining options

Because the administrative route to create new orders is now constitutionally suspect – at least in the Fifth Circuit – for deceptive advertising, the FTC will likely lean into alternative avenues to maintain its ability to obtain money through enforcement. We anticipate the agency will explore several strategic workarounds:

Aggressive enforcement of specific statutes and rules

The FTC will likely double down on enforcing specific federal statutes and their implementing regulations, such as the Children's Online Privacy Protection Act (COPPA), the Restore Online Shoppers' Confidence Act (ROSCA) and trade regulation rules. Violations of these statutes and rules allow the agency to seek civil penalties and consumer redress directly in federal district court, circumventing the administrative adjudication process entirely.

A surge in 'Notices of Penalty Offenses'

Under Section 5(m)(1)(B), the FTC can seek civil penalties directly in federal court if a company engages in conduct it knows has been condemned in prior FTC administrative orders. By sending out "Notices of Penalty Offenses" – which attach older, finalized administrative decisions to hundreds of companies – the FTC can attempt to establish the requisite "actual knowledge" to seek monetary penalties. The FTC has used this mechanism in the past to enhance its ability to obtain monetary penalties for specific types of deceptive practices, such as unsubstantiated "Made in the USA" labeling claims, deceptive claims about money-making opportunities, unsupported claims about job placement rates for graduates of for-profit universities, deceptive endorsements and testimonials, and unfair practices related to commercial surveillance and data security. Expect the FTC to consider expanding its use of this tool.

A narrow reading of 'advertising'

The Fifth Circuit specifically addressed "deceptive advertising," but the FTC regulates an array of deceptive conduct. The decision leaves open whether general misrepresentations – for example, in a company's privacy policy – constitute "advertising" subject to the ruling. Where such a statement is designed to induce a consumer to use a service, it closely resembles common law fraud and likely falls into the *Jarkesy* "private rights" bucket, barring administrative adjudication. However, expect the FTC to argue that misstatements in privacy or data security disclosures are not advertising and distinct from common law deceit.

Pivoting to 'unfairness' claims

Section 5 prohibits both "deceptive" and "unfair" acts. While the court found deception has a common law analogue in fraud, "unfairness" (defined as practices causing substantial, unavoidable consumer injury not outweighed by benefits) is arguably a modern regulatory construct without a direct common law twin. The FTC may attempt to pivot to unfairness claims, arguing these implicate "public rights" and therefore survive the *Jarkesy* framework.

Coordination with state regulators

State attorneys general wield broad authority under state-level "little FTC Acts" – unfair or deceptive acts or practices (UDAP laws) – to seek monetary relief, including restitution and civil penalties, directly in state or federal court. With its own administrative avenues for monetary relief restricted in the Fifth Circuit, the FTC could increase its collaboration with state attorneys general, resulting in more joint enforcement actions or direct referrals to state authorities to ensure financial consequences for deceptive conduct.

The FTC retains its authority under Section 13(b) to go directly to federal court to seek preliminary and permanent injunctions. However, this power is statutorily limited. Section 13(b) only applies when the agency has reason to believe a company "is violating, or is about to violate" the law. The FTC can use this direct-to-court avenue to halt ongoing or imminent harm, but it cannot use it to pursue companies for purely past conduct that has already ceased, nor can it use this avenue to extract monetary settlements.

Echoes of *AMG* and looming circuit splits

The genesis of this decision strongly mirrors how the *AMG* decision came about. For nearly 40 years, appellate courts universally accepted the FTC’s Section 13(b) monetary authority – until the Seventh Circuit broke from that consensus, creating a circuit split that the Supreme Court ultimately resolved against the agency.

We are likely to witness a similar trajectory regarding the FTC’s administrative adjudication. Companies currently facing FTC administrative proceedings (whether for data privacy, dark patterns or false advertising) will quickly assert this Article III defense. As these cases are appealed to the DC, Ninth or other circuits, the potential for a circuit split is high, making this an issue ripe for Supreme Court review.

The concurrence: A roadmap for constitutional attack

Going further than the majority, the concurrence broadly questioned the fundamental constitutionality of the FTC itself. Specifically, Judge James Ho questioned whether the combination of legislative (rulemaking), executive (enforcement) and judicial (adjudication) powers in a single agency is consistent with the separation of powers principles embedded in the Constitution. His opinion serves as an open invitation for future litigants to mount existential structural challenges against the agency.

What you need to know now

The *Intuit* decision is a major strategic victory for targets of FTC investigations. Companies facing FTC scrutiny should reassess their litigation leverage, as the agency’s threat of a grueling, yearslong administrative proceeding just lost significant credibility – at least in the Fifth Circuit. However, companies should also brace for FTC counter-maneuvers, including a heavier reliance on rulemaking, unfairness claims, characterization of deceptive practices as violations of rules or statutes, Notices of Penalty Offenses and more coordinated enforcement with state partners.

If you have questions about how this decision impacts your business or your interactions with the FTC, please reach out to the Cooley lawyers listed below.

Note

1. While the FTC’s Rules of Practice technically permit the FTC itself, or individual commissioners, to preside over adjudicative hearings instead of an ALJ (16 CFR § 3.42), using this mechanism would almost certainly face the exact same constitutional defect. The Fifth Circuit’s ruling is rooted in the requirement for an Article III court and a jury trial for “private rights” claims; keeping the adjudication within the executive branch, regardless of who presides, fails to cure this violation.

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