

11-374-cv
FTC v. Bluehippocet al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: February 23, 2012

Decided: August 12, 2014)

Docket No. 11-374-cv

FEDERAL TRADE COMMISSION,

Plaintiff–Appellant

v.

BLUEHIPPOFUNDING, LLC, BLUEHIPPOCAPITAL, LLC, AND JOSEPHK. RENSIN,

Defendants–Appellees¹

Before:

LEVAL, SACK, and HALL, Circuit Judges

The Federal Trade Commission (“FTC”) appealed the damages portion of an order of the district court (Crotty, J.) granting, in part, the FTC’s motion for contempt relating to defendants’ violation of the Stipulated Final Judgment and Order of Permanent Injunction which enjoined the defendants from making any express or implied representations of material fact with respect to, inter alia, their store credit and refund policy. Arguing that it was entitled to a presumption that consumers relied, when deciding to purchase defendants’ products, on defendants’ omissions and misrepresentations, the FTC sought \$14,062,627.51 in compensatory damages, an amount equal to the defendants’ gross receipts, i.e., the gross sales generated through its contumacious conduct. The district court’s order is silent with regard to the presumption of reliance and plainly rejects the

¹ The Clerk of Court is directed to amend the official caption as noted above.

In its contempt motion the FTC sought damages for BlueHippo's alleged violation of the Consent Order by failing to disclose, at the time of purchase, material details concerning BlueHippo's store credit policy. The FTC argued that it was entitled to a presumption that consumers relied, when deciding to purchase defendants' products, on defendants' omissions and misrepresentations. Accordingly, it sought \$14,062,627.51 in contempt damages, an amount equal to the defendants' gross receipts, i.e., the gross sales generated through its contumacious conduct. The district court granted the FTC's motion for contempt, but awarded damages only with regard to consumers who complied with BlueHippo's payment requirements and thus qualified for but never received the promised computer. The court's order is silent with regard to the presumption of reliance and plainly rejects the FTC's damages calculation. The FTC filed a motion seeking an amendment or modification to the July 27 order to reflect the damages associated with all customer orders placed during the period of BlueHippo misrepresented or omitted information concerning its store credit and refund policy. The district court denied the motion and the FTC appealed.

BACKGROUND

A. The FTC's Preceding Direct Action

BlueHippo marketed computers and electronic products to consumers, regardless of their credit history. Prospective customers wishing to order a computer through BlueHippo would call a toll-free number, listen to a sales pitch, place their order, and provide irrelevant financial details. The premise of BlueHippo's sales pitch was if a customer made thirteen consecutive installment payments and signed an installment contract, BlueHippo would then ship a computer and allow the consumer to finance the remaining balance owed. If the customer skipped a payment, he or she would not qualify for financing but could continue to pay off the computer on a layaway program

or convert the previous payments to store credit for the purchase of other merchandise from BlueHippo's online store.

With respect to the store credit and refund policy (the conduct relevant to this appeal), at the time of purchase BlueHippo informed consumers that they were entitled to cash refunds within the initial seven-day period after placing an order, and that customers could cancel their orders and obtain a store credit from BlueHippo's online store. However, when consumers agreed to purchase a computer and entered into an installment contract, BlueHippo failed to disclose that store credits could not be applied to shipping and handling fees and tax charges, or that only one online store order could be placed at a time. BlueHippo would not inform a consumer about these restrictions until the consumer attempted to make a purchase with store credit.

In February 2008, the FTC filed a complaint in the Southern District of New York against BlueHippo Funding LLC and BlueHippo Capital. The complaint alleged that BlueHippo, in its advertising, sales pitches, and representations to consumers, had engaged in persistent practices of deception since 2003 in violation of Section 5(1) of the FTC Act, 15 U.S.C. § 45(a)(1). Pursuant to 15 U.S.C. § 53(b), the FTC sought permanent injunctive relief and disgorgement of the proceeds BlueHippo had obtained through these allegedly deceptive practices. In April 2008, the parties resolved the suit through entry of the Consent Order.

² The first count alleged that BlueHippo represented to consumers that it would ship products within a particular time frame when, in fact, these consumers did not receive the products purchased within the represented timeframe, if at all. The second count alleged that BlueHippo failed to disclose to consumers that payments made as part of a plan for the purchase of computers and electronics goods were nonrefundable, even if the consumer never received the purchased product. The complaint also alleged violations of the Mail Order Rule under regulations promulgated pursuant to the FTC Act, violations of the Truth in Lending Act and associated regulations, and violations of the Electronic Fund Transfer Act and associated regulations. These allegations are not at issue in the present appeal.

B. The FTC's Contempt Action & the District Court's Contempt Ruling

district court concluded that the FTC “conceded [] it failed to provide record evidence approximating damages to consumers.”

The FTC accepted the court’s finding of liability but moved for reconsideration on the issue of damages with respect to the misrepresentations BlueHippo made regarding its store credit policy.⁵ The district court denied that motion, and the FTC initiated this appeal.

Discussion

On appeal, the FTC asserts that the district court committed an error of law when it: (1) failed to take into account the express language of the Consent Order which establishes the time of injury as the moment the consumers sign up a computer without having received all the material terms of the agreement; (2) failed to apply the presumption of consumer reliance and harm in an FTC civil contempt action; and (3) previously concluded that the FTC conceded that it had failed to prove damages associated with representations and omissions concerning the store credit and refund policy. We agree with the FTC and join our sister circuits in holding today that the FTC is entitled, when the proper showing has been made, to a presumption of consumer reliance. Because the district court’s opinion and order does not reflect the application of this principle, we vacate the district court’s July 27, 2010 order as to damages, and remand for the district court to consider, in the first instance, whether the requirements for this presumption have been met. Additionally, we agree with the FTC that the appropriate baseline for assessing contempt damages, i.e., the actual loss to consumers as a result of the defendants’ contumacious conduct, is the defendants’ gross receipts. That baseline damages calculation is rebuttable, and the district court, on remand, should therefore consider whether defendants have proffered

⁵ The FTC does not challenge the district court’s denial of recompense for BlueHippo’s failure to fulfill 1348 computer orders within a three week time frame, and BlueHippo’s conditioning of their extension of credit on mandatory preauthorized transfers. Appellant’s Br. 14–15 n.12.

sufficient evidence demonstrating that the baseline consumer loss should be offset and, if so, by how much.

A. Standard of Review

“We review the district court’s conclusions of law de novo and its factual findings for clear error.” *FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006). “We review a finding of contempt under an abuse of discretion standard that is more rigorous than usual . . . *S. New England Tel. Co. v. Global NAPs Inc.*” 624 F.3d 123, 145 (2d Cir. 2010) (internal quotation marks omitted).

B. FTC Civil Contempt Actions

Before addressing the FTC’s arguments on appeal we must answer a threshold question: whether the FTC can seek contempt damages on behalf of consumers when the defendant has violated a lawful Consent Order and Permanent Injunction. Section 13 of the FTC Act empowers the FTC to seek redress on behalf of injured consumers. 15 U.S.C. § 53. *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993) (en banc) (“Section 13 serves a public purpose by authorizing the Commission to seek redress on behalf of injured consumers.” (internal quotation marks omitted)). We agree with the Tenth Circuit that “no reason exists to believe Congress intended to withhold the traditional remedy of compensation to those consumers victimized by defendants’ violations of [a] Permanent Injunction,” or in this case, a Consent Order. *FTC v. Kuykendall*, 371 F.3d 745, 764 (10th Cir. 2004) (en banc); see also *FTC v. Febr*, 428 F.3d 530, 536 (7th Cir. 1997) (noting that a primary purpose

relied upon by reasonable prudent persons;" (2) the misrepresentati

showing that certain amounts should offset the sanctions assessed against the defendant, *Kuykendall*, 371 F.3d at 766.

To the extent that defendants argue that Circuit precedent suggests rejecting a presumption of consumer reliance, they misconstrue prior holdings. Defendants rely chiefly on *FTC v. Verity International, Ltd.*, 443 F.3d 48 (2d Cir. 2006), which does not address the presumption of reliance. *Verity* offers little guidance in this case, but insofar as it sheds light on general principles of remedies in FTC cases, it nevertheless bolsters today's holding. In that case, the FTC brought a direct action against internet pornographers who wrongly billed telephone line subscribers for internet access regardless of whether those subscribers had actually accessed the pornographers' websites. We held first that disgorgement, or equitable restitution, was the proper measure of damages. *Id.* at 66. We then adopted a "two-step burden-shifting framework" for calculating disgorgement, which requires the FTC to first 'show that its calculations reasonably approximated' the amount of the defendant's unjust gains, after which the burden shifts to the defendants to show that those figures were inaccurate." *Id.* (quoting *Febré*, 128 F.3d at 535). Our holding today adheres to this framework. That required a different method for calculating disgorgement in *Verity* from that which we are endorsing today merely reflects the material factual disparities between the two cases. See *Verity*, 443 F.3d at 66–69 (explaining that the restitution award in that case should be calculated based on monies actually received, rather than the "full amount lost by consumers," because consumers had passed through a middleman and therefore defendants had not received the full amount consumers paid).

It is undisputed that BlueHippo was permanently enjoined from making material misrepresentations to its customers about its store credit policy, and the Consent Order affirmatively required BlueHippo to disclose all material conditions of their store credit refund

policy prior to receiving any money from consumers BlueHippo, as the district court found and the defendants do not dispute, violated the Consent Order. Based on the FTC's proffered evidence, the district court found that during the period of violation 62,673 customers made purchases and 55,892 customers had been compensated in any form. The district court noted that at the time of these purchases BlueHippo info

