



Office of Commissioner
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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Concurring Statement of Commissioner Andrew N. Ferguson
FTC v. Evolv Technologies Holdings, Inc.
Matter Number 2323013

November 26, 2024

Today, the Commission approves a Section 13(b) complaint and stipulated order against Evolv, the maker of the Express weapons detection system.¹ The first count of the complaint accuses Evolv of deceptive acts or practices in violation of Section 5² for making false and unsubstantiated claims about the effectiveness of Express, which uses low-frequency electromagnetic fields to detect the size, shape, and composition of objects concealed on people as they walk through a scanner. Evolv advertised that this system did not require “stopping, removing coats or backpacks, or emptying pockets,” allowing its customers to screen for weapons with less manpower and less disruption (such as long lines to enter a secured area) than traditional systems like metal detectors. The complaint alleges, however, that Express failed to reliably detect guns and knives at average sensitivity settings, and when used at higher sensitivity settings that could more reliably detect weapons, the false positive rate climbed to as high as 50%, strongly diminishing the promised advantages over traditional screening systems.

The second count, also for deceptive acts or practices in violation of Section 5, concerns Evolv’s touting in its marketing materials of a National Center for Spectator Sports Safety and Security (NCS) report on the efficacy of the Express system. Evolv claimed that the testing and report represented “third party validation” of its efficacy claims by “a trusted, fully independent third party” that “stress test[ed] our product in [a] real-world environment.” The complaint alleges, however, that Evolv failed to disclose that it helped NCS design the experiment, worked with NCS to remove negative information about Express’s efficacy from the report, and sponsored luncheons at NCS conferences. The stipulated order imposes two substantive requirements on Evolv. Part I prohibits Evolv from making certain kinds of misleading claims about its products. And Part II requires that it notify certain customers of the Commission’s settlement with Evolv and give them the opportunity to withdraw from their contracts for the purchase of Express.

I support this complaint and stipulated order in full, even though I think the Commission is on the very edge of its authority with Part II of the stipulated order. In her statement,³ Commissioner Holyoak argues that Part II’s requirement—that Evolv give some customers the right to withdraw from the contract and be relieved of the obligation to make payments that would have been incurred under the contract—amounts to both rescission and consumer redress, remedies

¹ *FTC v. Evolv Technologies Holdings, Inc.*, Complaint (“Complaint”) & Proposed Stipulated Order (“Stipulated Order”).

² 15 U.S.C. § 45(a).

³ Concurring and Dissenting Statement of Commissioner Melissa Holyoak, *In re Evolv Technologies, Inc.*, Matter No. 2323013 (“Holyoak Statement”).

that are only available under Section 19(b), not Section 13(b). As a result, she dissents from the inclusion of Part II in the order.

Commissioner Holyoak’s view is sensible, but I come to the opposite conclusion. Section 13(b) of the FTC Act provides that if “any person ... is violating, or is about to violate, any provision of law enforced by the” Commission, then the Commission may obtain from a federal district court “a permanent injunction.”⁴ For many years, the Commission took an exceptionally capacious view of this power, and frequently invoked it to obtain monetary relief for past violations of the Act.⁵ But in *AMG Capital Management v. FTC*, the Supreme Court unanimously rejected the Commission’s longstanding interpretation. It held that Section 13(b) permitted only prospective relief, that is, injunctions to restrain ongoing or impending violations of the FTC Act.⁶ The use of the word “injunction” foreclosed monetary relief, and the use the phrase “is violating, or is about to violate” limited the statute’s application to ongoing or future violations of Section 5, rather than violations that took place entirely in the past.⁷

Section 13(b) relief is thus limited to “injunction[s]” to address ongoing or future violations of the Act. The complaint satisfies the latter requirement. It alleges that Evolv induced consumers to purchase Express by making material misrepresentations about Express’s capabilities.⁸ It further alleges that Evolv “is continuing to exercise contracts won through” those misrepresentations “without giving customers an opportunity to withdraw from the contracts, thereby implicitly threatening to enforce the contracts against those” consumers.⁹ The potential future enforcement, or ongoing threat of enforcement, of a fraudulently induced contract seems to qualify as an ongoing violation of the Act’s prohibition on deception. The complaint thus states an ongoing violation of Section 5.

Whether the order qualifies as a “permanent injunction,” however, is a closer question. On the one hand, an “injunction” is a judicial decree to a party prohibiting him from doing something, or requiring him to take some action.¹⁰ The stipulated order commands Evolv to issue notices to consumers of their right to cancel the contract, and to permit consumers to cancel those contracts.¹¹ This order certainly appears injunctive. It commands Evolv to do something—issue a notice—and to refrain from doing something—collecting fees that would otherwise be due under the contracts. The order therefore bears the hallmarks of an injunction.

⁴ 15 U.S.C. § 53(b).

⁵ See *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67, 73–74 (2021).

⁶ *Id.* at 75–77.

⁷ *Ibid.*

⁸ Complaint ¶¶ 26–32.

⁹ *Id.* ¶ 32.

¹⁰ 2 Joseph Story, Commentaries on Equity Jurisprudence § 861, at 178 (13th ed. 1886); Howard C. Joyce, A Treatise on the Law Concerning Injunctions § 1, at 2–3 (1909). The word “permanent” modifying “injunction” in Section 13(b) distinguishes it from the “preliminary injunction” which Section 13(b) also authorizes. A court issues a preliminary injunction to premit irreparable harm that a plaintiff may suffer pending the resolution of litigation. *CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc.*, 48 F.3d 618, 620 (1st Cir. 1995). By contrast, a court issues a “permanent” or “final” injunction as a form of ultimate relief on the merits at the conclusion of litigation. Joyce, *supra*, § 107, 190–91; see *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

¹¹ Stipulated Order at 4.

On the other hand, a judicial decree invalidating an existing contract is “rescission.” Rescission is an equitable remedy that invalidates an existing contract and restores the parties to their pre-contract positions.¹² The order’s requirement that Evolv cease collecting fees from consumers who elect to cancel their contracts thus bears some of the hallmarks of an order of rescission.

Part II of the order, however, is not rescission. At common law—which is presumably the meaning that Congress intended when it included the phrase in Section 19(b)¹³—rescission is more than the cancellation of impending contractual obligations. It is axiomatic that a contract induced by a material misrepresentation is voidable.¹⁴ The victim of the misrepresentation may elect to continue performing the contract, or to rescind it.¹⁵ That right attaches as a matter of law even if the contract is silent on rescission. If a party elects to rescind the contract, he is entitled to both prospective *and* retrospective relief. Rescission is prospective because it terminates both parties’ impending obligations beyond the election of rescission. Indeed, this form of rescission relief was originally understood to be “an unconditional perpetual injunction” against future enforcement of impending contractual obligations.¹⁶ Rescission is also retrospective in that “[a] party exercising his option to rescind is entitled to be restored so far as possible to his former position.”¹⁷ The victim of the misrepresentation is therefore entitled to a return of his consideration and to restitution to the extent necessary to restore him to his pre-contractual economic position.¹⁸

Part II of the order forbids Evolv from continuing to enforce contracts against customers who exercise their right to avoid the contracts. That order is injunctive and purely prospective. It does not restore any customer to its pre-contractual position, nor does it require Evolv to return any ill-gotten gains. It therefore is not an order of rescission at common law. For that reason, I disagree with Commissioner Holyoak’s view of the order. We are not “undo[ing]” a contract in the common-law sense, nor could we under Section 13(b).¹⁹ Undoing a contract would require restoring the parties to their pre-contractual positions, a form of retrospective relief that Section 19(b) permits but Section 13(b) does not. Part II of the order merely forbids Evolv from engaging in future conduct under a contract induced by material misrepresentations. This purely prospective, prohibitory relief sounds in “injunction” rather than “rescission.”

The Commission for many years aggressively deployed Section 13(b) to obtain non-injunctive, retrospective relief. The Supreme Court unanimously rejected our interpretation, and rightly so. Today, however, the Commission seeks a purely prospective, non-monetary order that

¹² 17A Am. Jur. 2d Contracts § 571.

¹³ See, e.g., *SEC v. Jarkesy*, 144 S. Ct. 2117, 2130 (“When Congress transplants a common-law term, the old soil comes with it.” (cleaned up)).

¹⁴ Restatement (Second) of Contracts § 164(1) & cmt. c.; see also 7 Corbin on Contracts § 28.22.

¹⁵ Frederick Pollock, *Principles of Contract at Law and in Equity* 707 (Gustavus H. Wald & Samuel Williston eds., 3d ed. 1906) (“Pollock on Contracts”).

¹⁶ 3 Samuel Williston, *The Law of Contracts* § 1525, at 2712 (1920).

¹⁷ Frederick Pollock, *Principles of Contract at Law and in Equity* 712 (Gustavus H. Wald & Samuel Williston eds., 3d ed. 1906) (“Pollock on Contracts”); 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America* § 915, at 1913 (4th ed. 1918) (“If he elects to repudiate, and to seek for a remedy, then equity proceeds upon the theory that the fraudulent transaction is a nullity; and it administers relief by putting the parties back into their original position, as though the transaction had not taken place . . .”).

¹⁸ 3 Williston, *supra* n.16, § 1529, at 2719; see also Restatement (Second) of Contracts § 376.

¹⁹ Holyoak Statement at 2 n.11.

prohibits Evolv from engaging in future conduct. That relief does not violate the Supreme Court's interpretation of Section 13(b).