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U.S. Supreme Court Limits the FTC’s Authority to Seek Monetary Relief in Deceptive Practices Enforcement Cases

In a unanimous decision released on April 22, 2021, the U.S. Supreme Court upended decades of lower court precedent by finding that Section 13(b) of the Federal Trade Commission Act (FTC Act) does not authorize the FTC to seek, or a court to award, equitable monetary relief such as restitution or disgorgement. Instead, in *AMG Capital Management, LLC v. FTC*,¹ the Court pointed to other sections of the FTC Act, notably the administrative procedures contained in section 5 and the consumer redress available under section 19, as the proper legal avenues for the FTC to seek consumer redress and restitution in most cases. The ruling substantially curbs the FTC’s ability to obtain consumer redress under section 13(b), the FTC’s preferred means of seeking monetary damages due to its administrative efficiency compared to other Commission enforcement authority granted under the FTC Act.

By eliminating the possibility of restitution and redress under section 13(b), the decision also eliminates the FTC’s ability to obtain associated relief in the form of asset freezes and receiverships imposed in temporary restraining order and preliminary injunction cases, which historically have proved to be potent weapons used by the FTC in enforcement actions, in particular consumer protection cases. The Court reversed the federal Ninth Circuit’s decision and remanded the case for further proceedings consistent

¹ *AMG Capital Management, LLC et al. v. Federal Trade Commission*, No. 19-508, 593 U.S. ____ (2021).

with *AMG Capital*. The Court's holding could affect numerous investigations now underway at the FTC or cases pending in federal courts.

Takeaways

As described further below, the most obvious consequence of the Court's decision is that, going forward, the FTC generally may obtain monetary relief only *after* first invoking its administrative procedures under FTC Act section 5 and, then, under section 19's qualified redress provisions. After doing so, the FTC then may use section 13(b) to obtain injunctive relief while an administrative proceeding is forthcoming or underway (or if/when it seeks solely injunctive relief). Simply put, the FTC may no longer use 13(b) as a convenient substitute for sections 5 and 19, and, in the absence of a congressional amendment to the FTC Act, the Commission is likely to bring many more cases in administrative litigation seeking final cease and desist orders and then, in appropriate circumstances, possibly followed by seeking monetary relief in federal court under section 19. This will apply in consumer protection, privacy and data security, and antitrust cases, and in relation to many other allegations of section 5 deceptive or unfair business practices.

Based on the tenor of the Jan. 13 oral argument, the Court's decision in *AMG Capital* was not wholly unforeseen, where many of the Justices in their questioning displayed a decided leaning towards AMG's arguments. The month prior to the decision, the FTC announced a new rulemaking group within the FTC's Office of the General Counsel to focus on creating rules for deterrence and to stop widespread consumer harm, "especially given the risk that the Supreme Court substantially curtails the FTC's ability to seek consumer redress under section 13(b)...."² On the same day as the decision, Acting Chairwoman Rebecca Slaughter released a statement "urg[ing] Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole."³

Absent congressional action, it is also the case that the FTC could pursue other avenues for relief. For instance, companies alleged to have violated the Restore Online Shoppers Confidence Act (ROSCA) or the Telemarketing Sales Rule (TSR) are still subject to the FTC's going directly to court to obtain monetary relief under section 19. The FTC could also refer certain cases to the Consumer Financial Protection Bureau or the Department of Justice for certain civil penalties. And, the FTC could urge state attorneys general, who operate under state-specific deceptive acts or practices statutes, to pursue matters where financial redress may be available. It is also possible for private plaintiffs to seek redress via class action lawsuits.

Procedural Background

The Petitioner in *AMG Capital*, Scott Tucker, controlled multiple businesses that provided borrowers with short-term payday loans, the fine print of which explained that the loan would be automatically renewed unless the consumer affirmatively opted out. In combination with high interest rates, this allegedly resulted in massive overcharging of consumers such that, "between 2008 and 2012, Tucker's businesses made more than 5 million payday loans, amounting to more than \$1.3 billion in deceptive charges."⁴ In 2012, the FTC sued Tucker and his businesses, alleging that they were engaging in unfair or deceptive acts or practices, in violation of FTC Act section 5(a).⁵

² See FTC Press Release, "FTC Acting Chairwoman Slaughter Announces New Rulemaking Group," rel. Mar. 25, 2021.

³ See FTC Press Release, "Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC*," rel. Apr. 22, 2021.

⁴ *Id.* at 2.

⁵ 15 U.S.C. section 45(a)(1).

In filing its suit, the FTC did so directly in federal district court under section 13(b), rather than following the administrative proceedings set forth elsewhere in the FTC Act, and requested the issuance of a permanent injunction and court-ordered monetary relief. The district court granted the FTC's motion for summary judgment and also directed Tucker to pay \$1.27 billion in restitution and disgorgement—the largest litigated award the FTC had ever obtained. The court ordered the FTC to use these funds first to provide “direct redress to consumers” and then to provide “other equitable relief” reasonably related to Tucker's alleged business practices.⁶ Tucker lost his appeal to the Ninth Circuit, which cited circuit precedent to reject Tucker's argument that section 13(b) does not authorize the monetary relief granted by the district court. Tucker petitioned the U.S. Supreme Court for certiorari, in light of a circuit court split with the Seventh Circuit in the *Credit Bureau* case⁷ on the issue of whether section 13(b) grants the FTC the authority to obtain monetary relief directly from courts. The Supreme Court granted certiorari on July 9, 2020, and oral arguments were held on Jan. 13, 2021. Justice Breyer penned the unanimous decision for the Court.

FTC Act Construction and Evolution

In reaching its decision, the Court leveraged historical and textual arguments about the construction and content of the FTC Act. Since its creation in 1914, the FTC has always been authorized to enforce the Act through its own administrative proceedings. In brief, section 5 sets forth that if the FTC has “reason to believe” that a party “has been or is using any unfair method of competition or unfair or deceptive act or practice,” the FTC may file a complaint and adjudicate its claim before an Administrative Law Judge. The ALJ conducts an administrative hearing and issues a report, and if the ALJ finds that the conduct violated section 5, the ALJ can then issue a cease and desist order (CDO) to enjoin the conduct at issue. At that point, the infringing party may seek review before the full FTC and then a court of appeals, and if the judicial review finds in favor of the FTC, the Commission's CDO then becomes final and enforceable.

Notably, in 1973, Congress amended the FTC Act to include section 13(b), which allows the FTC to proceed directly to court—i.e., even in the absence of a CDO—to obtain a “temporary restraining order or a preliminary injunction,” or, “in proper cases,” to obtain a court-ordered permanent injunction.⁸ At that time, Congress also updated the FTC Act at section 5(l) to authorize district courts to award civil penalties against CDO violators, and to grant mandatory injunctions “and such other and further equitable relief as they deem appropriate in the enforcement” of final CDOs.⁹ Then, in 1975, Congress enacted FTC Act section 19, authorizing district courts to grant whatever relief is necessary to redress consumer injury, including through the “refund of money or return of property.” Significantly, however, Congress clarified that this consumer redress in relation to unfair or deceptive practices could only be sought *after* the FTC and ALJ had first issued a final CDO.¹⁰ Despite this, from the late 1970s onward, the FTC regularly began using section 13(b) through its interpretation of its “permanent injunction” wording to obtain court orders for monetary redress in consumer protection cases (and, later, in antitrust cases), without first pursuing the administrative proceedings—winning restitution and other forms of equitable monetary relief directly in court.

⁶ *AMG Capital*, 593 U.S. at 2.

⁷ *Federal Trade Commission v. Credit Bureau Center, LLC, et al.*, No. 19-825 (initially consolidated with *AMG Capital*, the *Credit Bureau Center* case was disassociated on Nov. 9, 2020).

⁸ 15 U.S.C. section 53(b).

⁹ 15 U.S.C. section 45(l).

¹⁰ 15 U.S.C. section 57b(a)(2).

The Supreme Court's Rationale

Section 13(b)'s Reference to Injunctions. In its opinion joined by all nine Justices, the Court indicated that no single consideration, but rather several factors taken together, convinced the Justices that 13(b)'s "permanent injunction" language does not authorize the FTC directly to obtain court-ordered monetary relief. Chief among these factors is that section 13(b) refers only to injunctions, which "is not the same as an award of equitable monetary relief." Analyzing the several paragraphs of 13(b), the Court concluded that "taken as a whole, the provision focuses upon relief that is prospective, not retrospective."¹¹ To read the "permanent injunction" statutory language as allowing the FTC to unilaterally choose to avoid administrative proceedings to obtain monetary relief "would allow a small statutory tail to wag a very large dog."¹² Moreover, the Court reasoned that because Congress enacted sections 5(l) and 19 with certain important limitations and, in effect, due process safeguards—and in the years *after* the enactment of section 13(b) in 1973 no less—it was highly unlikely that Congress, without mentioning the matter, "would have granted the Commission authority so readily to circumvent its traditional section 5 administrative proceedings."¹³ Justice Breyer concluded, "we cannot believe that Congress merely intended to enact a more onerous alternative to section 13(b) when it enacted section 19 two years later."¹⁴

Distinguishing Prior Supreme Court Precedent. Although the Court acknowledged that, historically, it has sometimes interpreted statutory injunctive relief language comparable to 13(b)'s as authorizing courts to order equitable monetary relief, it clarified that this was not a "universal rule of interpretation" and that the opinions relied upon by the FTC for this proposition were distinguishable. For instance, the *Porter* case,¹⁵ involving the Emergency Price Control Act, and the *Mitchell* case,¹⁶ involving the Fair Labor Standards Act, both examined the text of the respective statutes at issue and, in contrast to the present case, found that there was no indication in the language of those laws that would preclude restitution in a court's exercise of its equity jurisdiction.

Congressional Assent May Not Be Inferred. The Court also rejected the FTC's argument that its interpretation of section 13(b) should prevail based on most courts of appeal having followed this view for decades, as well as the fact that Congress revised section 13(b) in 1994 and 2006, suggesting that Congress in effect had ratified the FTC's expansive reading to include the availability of restitution under section 13(b). Justice Breyer rejected that argument because those amendments did not involve section 13(b)'s remedial provisions or interpret "permanent injunction," and therefore were unavailing in relation to its scope. As well, Justice Breyer cited other Supreme Court case law in clarifying that when Congress makes only isolated amendments to a law, rather than a comprehensively revised statutory scheme, it is not possible to be sure that Congress's failure to act represents affirmative congressional approval of a court's statutory interpretation.¹⁷

Other Avenues Available. In concluding that section 13(b), as currently written, does not grant the FTC authority to obtain equitable monetary relief, the Court, while seemingly sympathetic to the FTC's law enforcement mission but unpersuaded that section 13(b) was properly being used by the FTC to achieve that, nonetheless offered suggestions on possible courses of action for the FTC. For one, the FTC

¹¹ *AMG Capital*, 593 U.S. at 8.

¹² *Id.* at 8-9.

¹³ *Id.* at 9-10.

¹⁴ *Id.* at 12.

¹⁵ *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

¹⁶ *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960).

¹⁷ *Id.* at 13 (citing *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001)).

certainly may continue to use its authority under sections 5 and 19 to obtain restitution on behalf of consumers. Justice Breyer also explicitly suggested that the FTC ask Congress to formally and explicitly grant it section 13(b) authority to obtain monetary relief, which the FTC did in late 2020 and did again the same week as the Supreme Court's opinion.¹⁸ However, at this time it is unclear whether, or how quickly, the Congress will act on the FTC's request to amend section 13(b). It is also unclear, even if Congress were to act on the FTC's request, whether the FTC's full 13(b) remedial authority will be restored to its pre-*AMG Capital* scope or whether certain limitations (such as a required showing of scienter or a limitation to cases involving fraud) will be incorporated into possible amending language.

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¹⁸ See U.S. Senate Committee on Commerce, Science and Transportation, hearing titled “[Strengthening the Federal Trade Commission's Authority to Protect Consumers](#),” April 20, 2021.