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AMG v. FTC: US Supreme Court Severely Limits FTC’s Ability to Seek Monetary Relief

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The US Supreme Court ruled last week that the Federal Trade Commission doesn't have the authority to seek equitable monetary relief in federal court under Section 13(b) of the FTC Act in *AMG Capital Management LLC v. FTC*.

The text of Section 13(b) expressly allows the Commission to seek injunctive relief (temporary restraining orders or preliminary injunctions in aid of administrative proceedings, as well as permanent injunctions in "proper cases"), but is silent on whether the agency can also seek equitable monetary relief. Nonetheless, courts for years have ordered consumer redress, including disgorgement and restitution under Section 13(b) in response to agency requests.[1] AMG Capital Management petitioned the Supreme Court to review the FTC's authority to seek equitable monetary relief after the Ninth Circuit affirmed the District Court's decision ordering AMG to pay $1.27 billion for engaging in unfair or deceptive acts or practices, by failing to disclose the terms of payday loans, in violation of Section 5 of the FTC Act.

The Supreme Court's decision, which reversed the Ninth Circuit's ruling, strips the FTC of one of its most powerful enforcement tools and severely limits the FTC's ability to seek monetary relief. Such limitation may be temporary, as Congress is already considering bills to overturn the decision. In the meantime, the FTC is pursuing alternate avenues to obtain monetary redress, including Section 19 of the FTC Act. Although this is a more cumbersome tool than 13(b)—because it requires the FTC to undertake additional steps before beginning an action—it still poses a financial risk to companies.

History of the FTC's use of 13(b) to pursue monetary relief

The FTC's use of Section 13 to obtain large monetary relief raises fundamental questions about the agency's mission: Should the FTC be focused on companies that pose a prospective threat to consumers, or is it now the presumptive "cop on the beat," expected to punish retrospective harm? There are difficulties with both approaches. Practitioners often complain that the FTC's use of Section 13 to penalize past conduct focused on policies or practices that had long since changed, unfairly applying current standards to past conduct. But proponents of the use of Section 13 to obtain monetary relief cite the quick and effective benefits to consumers. This debate has existed since the enactment of Section 13(b) in 1973. For decades, the FTC conservatively used its authority to obtain restitution and disgorgement, and even specifically noted in its 2003 Policy Statement that monetary remedies are not "routine remedies for antitrust cases" and should be reserved for "exceptional cases." The FTC withdrew its 2003 Policy Statement in 2012, however, stating "competition cases may often be appropriate candidates for monetary equitable relief." Between 2016 and 2020, the Commission obtained $11.2 billion in equitable monetary relief.[2] The FTC's budget during that same period was only $1.5 billion. Monetary relief under Section 13 often reached the billions, including $1.2 billion in 2015 by Cephalon for monopolizing the market for its sleep-disorder drug Provigil and $1.27 billion by AMG.

A circuit split creates uncertainty about the scope of the FTC's 13(b) authority

The Seventh Circuit signaled a change in the law when it challenged the FTC's use of 13(b) to pursue consumer redress in *FTC v. Credit Bureau Center*, stating that "nothing in the text or structure of the FTCA supports an implied right to restitution in Section 13(b), which by its terms, authorizes only injunctions." A year later, the Third Circuit came to the same conclusion, holding in *FTC v. AbbVie et al.* that a lower court erred in providing

disgorgement to the FTC as the remedy "is unavailable under Section 13(b) of the FTC Act." However, in *AMG Capital Management*, the Ninth Circuit held that a district court did not err in ordering monetary relief under 13(b). The Supreme Court later granted cert to decide "[w]hether Section 13(b) of the Federal Trade Commission Act, by authorizing 'injunction[s],' also authorizes the Federal Trade Commission to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief."

AMG argued that the text and structure of 13(b) is meant to address presently occurring harm remedied by injunctive relief, and the FTC's reading of 13(b) ignores the FTC Act's history and structure. The FTC, in contrast, relied on historical practice and precedent, arguing that Section 13(b)'s authorization of injunctive relief, and Congress not specifically limiting monetary relief under Section 13 implies the ability to seek monetary relief.

The Supreme Court unanimously held in a decision authored by Justice Breyer that "§13(b) as currently written does not grant the Commission authority to obtain equitable monetary relief." The court stated that the language of Section 13 refers only to injunctions; that the structure and language of 13(b) authorizing permanent injunctions is designed as a limiting force on the FTC; and that 13(b) is focused on prospective, rather than retrospective relief. The court went on to explain that because Sections 5(l) and 19 of the FTC Act explicitly provide for "other and further equitable relief," as well as "refund of money or return of property," 13(b) is not meant to be as broad as the other provisions providing for equitable relief. Section 19 also contains critical prerequisites to monetary relief incorporated by Congress that are not incorporated by Section 13. The Supreme Court advised the Commission that the decision did not hamper its ability to engage Sections 5 or 19 and if the FTC was dissatisfied with the court's authority, it was free to request additional authority from Congress.

The future of FTC enforcement

Even before the Supreme Court's decision, the FTC had been strongly advocating for Congress to address the gap in authority should the Supreme Court rule against the FTC. Indeed, on April 20, just before the Supreme Court decision, several FTC commissioners testified before the US Senate Committee on Commerce, Science and Transportation, calling for the FTC to retain at least some ability to use Section 13 to obtain monetary relief.

On April 20, Rep. Tony Cárdenas (D-Calif.) introduced H.R. 2668, the Consumer Protection and Relief Act, which would amend Section 13(b) to grant explicit authority to obtain monetary relief for the violation of all laws enforced by the FTC. The House Energy and Commerce Consumer Protection Subcommittee is scheduled to hold a follow-up hearing this week. In February 2021, Sen. Amy Klobuchar (D-Minn.) introduced the Competition and Antitrust Law Enforcement Reform Act, a bill that would give the FTC new power to levy civil fines and increase its enforcement budget. The timing and breadth of any legislative solutions are unclear. Narrow legislation restoring the FTC's equitable monetary relief authority in cases with fraud or clear violations of law could pass fairly quickly, but those who want to restore broad authority to obtain consumer redress are likely to face substantial opposition, including from the pharmaceutical industry. Notably, when the Securities and Exchange Commission had its authority to obtain disgorgement limited by Supreme Court rulings in 2017 and 2020, Congress took almost four years from the first ruling to legislatively restore the SEC's power.

After the Supreme Court's decision, Acting FTC Chairwoman Rebecca Slaughter implored Congress to "act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole," noting that the decision was a boon for "scam artists and dishonest corporations." In addition to restoring the FTC's ability to obtain monetary damages under Section 13, Congress could also increase the FTC's budget so that it could pursue more cases. The timeline for congressional restoration of the FTC's authority under 13(b), however, remains unclear.

While waiting for a congressional fix, the FTC may turn to Section 19 to engage its ability to seek restitution and disgorgement. While we expect the FTC will continue to use Section 13 to obtain injunctions in cases where it can legitimately argue that a defendant is "violating" or "about to violate" the law, where the FTC is investigating past conduct and can't identify ongoing or imminent harm, it will have to adhere to the procedural requirements of Section 19, which authorizes consumer redress only after the Commission administratively files a cease-and-desist order. The order may be challenged, in which case it is subject to a lengthy appeals process and review. Only if the FTC obtains a final cease-and-desist order can it bring the Section 19 claim to district court, after which the district court's decision will remain subject to review by appellate courts. Further, this section applies only where "a reasonable [person] would have known under the circumstances" that the conduct at issue was "dishonest or fraudulent."

The FTC may engage in alternate methods to obtain monetary relief. For example, the FTC recently sought

monetary penalties under the COVID-19 Consumer Protection Act in a federal complaint filed by the US Department of Justice on the FTC's behalf. The Act, passed in 2020, makes it illegal "under the FTC Act to engage in deceptive marketing related to the treatment, cure, prevention, mitigation or diagnosis of COVID-19, or any government benefit related to COVID-19," and permits the FTC to seek monetary relief for first-time violations of the Act. The FTC quickly brought its first case under the Act on April 15, 2021 and prospective Commissioner Lina Khan stated in her recent confirmation hearing that she hopes the Commission will vigorously use this new civil penalty authority.

Further, while unlikely, the FTC may also revive its Penalty Offense Authority, a tool that would essentially make certain acts or practices presumptively deceptive or unfair. Under this authority, companies could be subject to civil penalties for committing a presumptively deceptive or unfair act, even without being under a specific consent order.[3]

The holding in *AMG Capital Management* has severely limited the FTC's enforcement resources, and companies currently responding to FTC investigations where the FTC is asserting its Section 13 authority should closely examine whether the alleged harm is ongoing. If not, *AMG Capital Management* forecloses equitable monetary relief. But we can expect that the FTC will continue aggressive enforcement to meet its priorities through alternative measures, while it waits for Congress to deliver a legislative fix. Companies can also expect an increase in enforcement actions brought by agencies with concurrent authority, such as the Federal Communications Commission, the Consumer Financial Protection Bureau or federal banking agencies. In many cases, these agencies have explicit authority to obtain equitable monetary relief with fewer procedural obstacles. Likewise, state consumer protection enforcement, already on the rise, could see an uptick as a result of this decision. The FTC can and has partnered with the states, using the agency's authority to obtain injunctive relief under Section 13 and by working with states to impose consumer restitution through their particular statutes.

Notes

1. The courts have previously relied on cases holding that they can grant equitable monetary relief unless Congress specifically provided otherwise. See *Porter v. Warner Holding Co*.,328 U.S. 395, 398 (1946); *Mitchell v. Robert DeMario Jewelry Inc*., 361 U.S. 288, 291–92 (1960).
2. See FTC Refunds to Consumer.
3. Rohit Chopra and Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, U. Pa. L. Rev. 10–15 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256.

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