

Unanimous Supreme Court Curtails the Federal Trade Commission's Authority to Obtain Monetary Remedies in Federal Court

April 26, 2021

On April 22, 2021, the United States Supreme Court unanimously reversed a Ninth Circuit decision ordering a payday loan company and its owner to pay \$1.27 billion in restitution and disgorgement. The Court held that Section 13(b) of the Federal Trade Commission Act (the “FTCA”) does not give the Federal Trade Commission (the “FTC”) the authority to obtain monetary remedies in federal court.

The Supreme Court’s decision overturns decades of FTC reliance on Section 13(b) for monetary remedies, resolves a 2020 circuit split on the issue and has far-reaching implications for pending and future FTC consumer protection and antitrust disputes.

Equitable Relief Under Section 13(b)

According to the legislative history, Section 13(b) of the FTCA was enacted in 1973 in order to permit the FTC to seek preliminary injunctions in federal court¹ to prevent anticompetitive mergers. Specifically, the statutory provision authorizes the Commission to obtain, “in proper cases,” a “permanent injunction” against “any person, partnership, or corporation” that it believes “is violating, or is about to violate, any provision of law” that the Commission enforces.² Unlike other provisions of the FTCA, Section 13(b) does not expressly provide the Commission with authority to seek monetary remedies.

Notwithstanding the statute’s language and the original legislative intent, the FTC steadily expanded its use of Section 13(b) to seek monetary equitable remedies in consumer protection and antitrust cases. The Commission successfully convinced courts that because Section 13(b) grants the FTC authority to seek a permanent injunction, it also implicitly authorizes federal courts to use inherent equitable powers to grant monetary relief in the form of equitable restitution or disgorgement.

¹ The FTC’s administrative court lacks the power to issue injunctions that provide immediate or interim relief to prevent a merger from closing.

² 15 U.S.C. § 53(b).

Under this theory, the FTC obtained a wide range of equitable remedies under Section 13(b), including billions of dollars in monetary remedies (i.e., restitution or disgorgement to compensate consumers for alleged harm arising from unfair and deceptive acts and practices found to violate Section 5 of the FTCA). Perhaps more importantly, the FTC's ability to obtain staggering monetary awards in federal court under Section 13(b) convinced countless companies to reach multimillion-dollar settlements with the FTC based upon alleged violations of Section 5 of the FTCA. Over the last five years, the FTC has procured over \$11 billion in monetary relief through the application of Section 13(b).³

The Supreme Court Restricts the FTC's Authority to Seek Monetary Remedies

Reversing decades of FTC reliance and precedent, the Supreme Court in *AMG Capital Management, LLC v. FTC* unanimously held that Section 13(b) does not authorize the award of equitable monetary relief in federal court.

The FTC sued a payday loan company—AMG Capital Management—and its owner, alleging that terms disclosed in consumer loans did not reflect the more stringent terms AMG actually enforced. The district court granted the FTC's summary judgment motion and ordered AMG to pay \$1.27 billion in monetary restitution. The Ninth Circuit affirmed, rejecting AMG's argument that Section 13(b) forecloses monetary relief. The Supreme Court granted certiorari in July 2020.

AMG advanced three arguments before the Supreme Court. First, AMG characterized Section 13(b) as a “narrow” provision, arguing that it only empowers the FTC to pursue injunctive relief. AMG argued that an injunction is an equitable tool whereby a court can order a party to take or not take certain actions—not order a party to pay a monetary sum. Second, AMG argued that Sections 5(l) and 19 of the FTCA expressly permit restitution whereas Section 13(b) does not, thus demonstrating Congress’ intent not to authorize monetary restitution in that section. Third, AMG argued that implicitly including monetary relief as a remedy within Section 13(b) would render the express monetary relief and equitable relief remedies of Sections 5 and 19 superfluous, and thus lead to an absurd result.

In a unanimous decision written by Justice Stephen G. Breyer, the Supreme Court reversed the Ninth Circuit’s decision, holding that Congress never intended for the FTC to wield the authority to collect restitution or disgorgement of ill-gotten gains as an equitable remedy under Section 13(b).

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

The Court found that Section 13(b)'s statutory language "refers only to injunctions," which are "not the same as an award of equitable monetary relief."⁴ The Court further noted that Section 13(b) grants the FTC the authority to seek only prospective—not retrospective—relief, given the statute's requirement that the defendant "is violating, or is about to violate" the law.⁵ The Court also noted that Congress expressly granted the FTC other means to obtain monetary remedies (subject to certain statutory safeguards and constraints). For these reasons, Justice Breyer explained that "[t]he language and structure of §13(b), taken as a whole, indicate that the words 'permanent injunction' have a limited purpose—a purpose that does not extend to the grant of monetary relief."⁶

The Court rejected the FTC's argument that the right to pursue equitable monetary relief is fundamental to its enforcement agenda. Given the statute's limited construction providing for injunctive relief, Justice Breyer noted that "[i]f the Commission believes [its] authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority."⁷

The FTC Lobbies Congress to Amend the FTCA

Immediately following the decision, the FTC's Acting Chairwoman Rebecca Kelly Slaughter decried the Court's ruling as "depriv[ing] the FTC of the strongest tool we had to help consumers" and "rul[ing] in favor of scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior."⁸ Acting Chairwoman Slaughter claimed the FTC's enforcement through Section 13(b) has enabled the Commission to secure billions of dollars in relief for consumers in a wide variety of cases, including telemarketing fraud, anticompetitive pharmaceutical practices, data security and privacy and deceptive business practices, among many others.

Given the importance of Section 13(b) enforcement to the FTC, it is unsurprising that the Commission is already lobbying for legislation to reverse the Supreme Court's decision. In fact, anticipating a potential Supreme Court defeat, the FTC began lobbying Congress on this issue as soon as the Supreme Court agreed to hear the case.

More recently, on April 20, 2021, the Commission testified before the U.S. Senate Committee on Commerce, Science, and Transportation on the need for Section 13(b)

⁴ *AMG Cap. Mgmt., LLC, et al. v. FTC*, No. 19-508, slip op. at 6 (S. Ct. Apr. 22, 2021).

⁵ *Id.* at 8.

⁶ *Id.* at 7.

⁷ *Id.* at 14.

⁸ Slaughter Statement, FTC Press Release (Apr. 22, 2021).

legislation. In its prepared statement, the FTC called Section 13(b) “the agency’s primary and most effective way of returning money to consumers that was unlawfully taken from them.” The Commission argued that restriction of its authority to seek monetary remedies will “limit the FTC’s ability to settle cases efficiently” and will embolden defendants to argue that they are immune from suit in federal court because they are no longer violating the law, despite a likelihood of recurrence. The FTC warned that, without prompt action from Congress, its ability to protect consumers and execute its law enforcement mission would be significantly impaired.⁹

In a political climate where both major political parties have expressed their support for greater antitrust enforcement, Congress will certainly contemplate legislation amending Section 13(b) to expressly allow the FTC to seek monetary relief in federal court. It is unclear, however, whether or how quickly such a bill—which would also impact consumer protection enforcement—could pass through both houses of Congress.

Republican FTC Commissioners have suggested lawmakers could restore the Commission’s authority in a way that limits the power to seek monetary judgments. By way of comparison, Section 19 of the FTCA limits equitable monetary relief to circumstances where a reasonable person would have known that the challenged conduct was dishonest or fraudulent. If Congress decides to amend the FTCA, which is not at all a foregone conclusion, one option would be for Congress to attach similar limitations to Section 13(b) in an effort to ensure the FTC uses its authority appropriately.

Implications for Pending and Future Section 13(b) Claims

The FTC relies heavily on Section 13(b) for both antitrust actions involving allegedly anticompetitive practices as well as consumer protection cases alleging unfair or deceptive practices (including false advertising and cybersecurity cases). Accordingly, limitations on the FTC’s ability to obtain monetary remedies pursuant to Section 13(b) significantly diminish the FTC’s remedial powers in these types of cases.

Certain sectors such as the pharmaceutical industry may benefit from the Supreme Court’s decision. According to the Pharmaceutical Research and Manufacturers of America (“PhRMA”), the FTC had previously obtained some of its largest Section 13(b) payments in so-called “pay-for-delay” cases, where—in the context of patent litigation—innovator pharmaceutical companies enter into settlements with generic drug

⁹ Prepared Statement of the Federal Trade Commission: Strengthening the Federal Trade Commission’s Authority to Protect Consumers, Before the Committee on Commerce, Science, and Transportation, U.S Senate, 9-12 (Apr. 20, 2021).

companies that impact the timing of generic drug introduction. The Commission has often declined to use its administrative process to adjudicate claims against pharmaceutical companies, instead pursuing questionable injunctions with significant disgorgement demands. In its amicus brief to the Court, PhRMA noted that the Commission had “demanded and obtained very substantial payments in cases in which the underlying legal theory was far from settled and where the defendants had a well-founded belief that the conduct was lawful.”¹⁰

Moving forward, the FTC is likely to rely more heavily on administrative actions in lieu of initial proceedings in federal court. If the Commission issues a final administrative cease and desist order, the FTC may then bring a subsequent federal court case to obtain monetary remedies, though it would face a heightened standard of proof requiring evidence of “dishonest or fraudulent” conduct.¹¹ Similarly, the FTC is likely to bring more “non-respondent liability” (also called “penalty offense authority”) cases, where the FTC fully adjudicates a matter, obtains a final cease and desist order, widely distributes the order provisions and then charges third parties for knowingly violating the order provisions. In fact, FTC Commissioner Rohit Chopra (who has been nominated to lead the Consumer Financial Protection Bureau and will likely be leaving the FTC in the near future) recently suggested the FTC should more frequently bring such cases.

If it chooses to initiate an action in federal court, the FTC’s inability to seek financial redress under Section 13(b) will undoubtedly impact settlement negotiations, as the Commission’s remedies are limited to injunctive relief. The decision may also hamper the Commission’s ability to obtain certain financial information or other types of proprietary information from companies in Civil Investigative Demands where the Commission lacks authority to seek disgorgement or restitution.

Similarly, companies defending themselves in federal court against the FTC where the Commission seeks monetary relief under Section 13(b) should consider moving to dismiss such relief based on the Supreme Court’s decision. If Congress does not immediately enact legislation restoring the FTC’s ability to obtain monetary relief under Section 13(b), companies currently under investigation or in litigation with the FTC should reevaluate legal arguments, strategies and tactics in light of the Supreme Court’s decision.

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¹⁰ Brief of the Pharmaceutical Research and Manufacturers of America, as Amici Curiae Supporting Petitioners, *AMG Cap. Mgmt., LLC, et al. v. FTC*, No. 19-508 (S. Ct. Apr. 22, 2021).

¹¹ Such cases have been rarely pursued by the FTC in the past due to the heightened standard of proof and because they require the use of significant agency resources.

Please do not hesitate to contact us with any questions.

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