

White Collar Defense & Investigations and Corporate Litigation



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The Supreme Court Curtails, But Does Not Dismantle, The FTC's Ability to Seek Monetary Recoveries

In a 9-0 decision issued on April 22, 2021, the United States Supreme Court held that the Federal Trade Commission's ("FTC") authority to seek equitable monetary remedies (restitution and disgorgement) under Section 13(b) of the Federal Trade Commission Act ("FTC Act") in federal court is limited to seeking prospective injunctive relief alone—resolving a recent circuit split and upending more than 30 years of caselaw that allowed the FTC to seek such relief by marching directly into court.

Despite the apparent sea change, the outcome in *AMG Capital Management LLC v. FTC* was widely anticipated since oral arguments in January 2021. Contrary to some breathless commentary since the decision was issued suggesting that the FTC is now practically toothless to seek monetary redress for consumer injuries, however, the core of the FTC's traditional powers remain intact. Indeed, Justice Breyer's opinion makes clear that the Commission's authority to seek monetary redress remains with its internal administrative cease-and-desist procedures and possible federal court

enforcement that follows. In other words, although *AMG Capital* might frustrate and delay the FTC's ability to pursue monetary relief, the decision does not eradicate it altogether, at least in consumer protection cases. In some ways, the outcome might now be worse for defendants facing restitutionary proceedings, as the FTC's administrative process is traditionally slower and more cumbersome compared to the faster and potentially less-expensive resolution of such challenges in federal court. Short of a legislative fix, the biggest challenge for the FTC going forward may be how to streamline its internal administrative proceeding rules.¹

AMC CAPITAL MANAGEMENT LLC V. FTC: SECTION 13(B) AUTHORIZES ONLY PROSPECTIVE, INJUNCTIVE RELIEF

The Supreme Court granted *certiorari* in *AMG Capital Management* to resolve a circuit split arising from different interpretations of Section 13(b) that has developed over the last several years. Before 2019, precedent in seven of the twelve federal Courts of Appeals that had addressed the issue held that Section 13(b) authorized the FTC to seek all

1. The FTC is also pursuing a legislative "fix" to the result in *AMG Capital*. On March 25, 2021, in anticipation of the Court's ruling, the FTC announced the creation of a new rule-making group within the Office of the General Counsel. Among other things, the FTC asked Congress to codify the FTC's historic use of Section 13(b) as an avenue for restitution and disgorgement, and a bill has been introduced to accomplish that. *See*, Consumer Protection and Recovery Act, H.R. 2668, 116th Cong. (2021). Today, April 27, 2021, the subcommittee on Consumer Protection and Commerce of the Committee on Energy and Commerce will hold a legislative hearing to discuss the proposed legislation.

equitable remedies in federal court for alleged violations of the FTC Act and other statutes, including monetary recoveries for restitution and disgorgement. Recently, however, the Seventh and Third Circuits questioned this outcome. In *FTC v. Credit Bureau Center, LLC* (2019) and *FTC v. AbbVie, Inc.* (2020), these courts ruled that Section 13(b) of the FTC Act only authorizes the government to obtain injunctive relief.² Faced with the same issue in *AMG Capital*, however, the Ninth Circuit stood by its traditional interpretation of Section 13(b), and concluded that the FTC had the power to seek any and all equitable remedies in federal court, including disgorgement of wrongfully-obtained gains. It affirmed the district court's entry of an injunction and order that the defendant pay \$1.2 billion in restitution and disgorgement for his role in misleading borrowers of short-term pay day loans.

The Ninth Circuit invoked its longstanding interpretation of Section 13(b)'s allowance of the power of the FTC to seek a "permanent injunction" in federal court as an umbrella term for equitable relief—inclusive of "any ancillary relief necessary to accomplish justice, including restitution" and disgorgement.

The Supreme Court plainly disagreed. The Court reasoned instead that "[a]n 'injunction' is not the same as an award of equitable monetary relief." Moreover, Justice Breyer explained, "[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." Section 13(b)'s primary outlook and purpose is prospective, not retrospective, the Court reasoned. In other words, the FTC can invoke this authority to stop ongoing and future harms, but any recovery based on harm that has already occurred must be pursued through the other avenues outlined in the FTC Act.

THE FTC CAN SEEK RESTITUTION UNDER SECTION 19 OF THE FTC ACT

Although the FTC has been authorized to enforce the FTC Act through administrative proceedings since its inception, it was not until the 1970s that Congress granted the agency the ability to seek additional remedies in federal court. Congress adopted Section 13(b) in 1973 to allow the

FTC to seek injunctive relief—*i.e.*, a "temporary restraining order or preliminary injunction" and, in proper cases, a court-ordered "permanent injunction." Two years later, Congress adopted Section 19, pursuant to which the FTC can ask a federal court to impose monetary relief when the Commission has issued a final cease-and-desist order through its internal administrative procedures, and a federal district court concludes that the defendant had actual knowledge that its conduct was fraudulent or dishonest.

Section 19 proceedings are often unwieldy, however. After the Commission issues a complaint, cease-and-desist proceedings are first conducted in front of an administrative law judge ("ALJ"). The parties may then appeal the ALJ's findings of fact and conclusions of law to the FTC Commissioners for a *de novo* review. Following the Commissioners' likely affirmance of an order against a defendant (keeping in mind that the Commission originally found cause to issue a complaint), the defendant may appeal the order to the relevant Court of Appeals. Even if the FTC prevails in a defendant's judicial appeal (unless proceedings before the Supreme Court commence), the Commission must then file an action in a federal district court seeking restitution or other monetary damages based on the FTC's cease-and-desist order—and that secondary district court action is subject to appeal, too. As a practical matter, the entire process between the filing of an initial administrative complaint within the FTC and the final appellate resolution of a district court order awarding restitutionary damages could take a decade or longer.

Given the restrictions and limitations of Section 19, by the late 1970s the FTC turned increasingly to pursuing "permanent injunction" actions under Section 13(b) of the Act—particularly after the courts endorsed the notion that a 13(b) action allowed orders for restitution and other forms of equitable monetary relief in a wide variety of consumer protection and antitrust cases.

COMPANIES SUBJECT TO FTC SCRUTINY AND ENFORCEMENT ARE NOT OFF THE HOOK

The *AMG Capital* decision marks an end to the FTC's use of Section 13(b) as a shortcut to the relief available through the more cumbersome Section 19 procedures—at

2. *FTC v. Credit Bureau Ctr.*, 937 F.3d 764 (7th Cir. 2019); *FTC v. AbbVie Inc.*, 976 F. 3d 327 (3d Cir. 2020).

least under the current statutory language and scheme. The Supreme Court recognized that regardless of the expediency of Section 13(b), the plain language of the text, statutory scheme and legislative history all suggest Section 19 was Congress' intended path for FTC to recover restitution and disgorgement where appropriate, not through Section 13(b).

Time will tell whether the FTC is successful in convincing Congress to amend the FTC Act in a manner that restores the powers it assumed it enjoyed under Section 13(b). Another avenue to follow with interest is whether the FTC is able to address with amended rules and procedures the inefficiencies, onerous proceedings and paperwork, and other hurdles currently inherent in Section 19 enforcement actions. The agency's more immediate concern is likely whether defendants will be able to dissipate the proceeds of their allegedly ill-gotten gains, since the Supreme Court's decision makes clear that the FTC can no longer leverage the prospect of relatively quick restitution and disgorgement orders in Section 13 proceedings, and Justice Breyer's opinion was silent on the FTC's ability to obtain a preliminary injunction in anticipation of Section 19 proceedings.³

For companies whose business practices might be subject to FTC scrutiny and enforcement, the *AMG Capital* decision provides some significant good news. The FTC

cannot use a Section 13 action as a cudgel to force a settlement that could yield devastating financial results to a defendant. But the agency is far from toothless. Section 13 can—and likely will—be properly invoked to stop ongoing business activity that the FTC believes violate the laws within their purview. And the agency can pursue a Section 19 administrative proceedings and a subsequent federal court action to redress a company's willful wrongdoing in the past—and seek substantial monetary recoveries thereafter—on a timeline, and at a related cost, that may prove worse for many defendants than under the approach utilized over the past several decades. The FTC will not stop the struggle—it may only have the change the means with which it fights it.

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3. The agency may also be concerned about whether its existing restitution and disgorgement orders obtained in Section 13 injunctive actions may be subject to challenge in light of the *AMG Capital* decision. This is an open question, and one worth watching.