

Supreme Court Rejects FTC's Disgorgement and Restitution Authority under Section 13(b)

April 23, 2021

In a unanimous decision, the Supreme Court held in *AMG Capital Management, LLC v. FTC* that the FTC does not have authority to seek disgorgement or restitution under Section 13(b) of the Federal Trade Commission Act. The decision eliminates one of the FTC's most frequently used enforcement tools and may result in more administrative proceedings.

Background

Section 13(b) authorizes the Commission to seek preliminary and permanent injunctions in federal district court to remedy "any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b). The FTC has long asserted that Section 13(b) gives the FTC authority to obtain equitable relief in district court without first initiating its administrative process. The FTC has obtained this relief "with great frequency" in both consumer protection and antitrust cases, including more than \$500 million in new redress, disgorgement, and civil contempt awards in 2020.¹ Circuit courts had reached different conclusions in recent years over the extent of this authority.

Supreme Court Decision

In 2012, the FTC filed suit in federal district court against an individual and several companies, alleging that they engaged in "unfair and deceptive acts" in violation of Section 5(a) by using misleading information regarding terms of payday loans. Citing Section 13(b), the FTC sought a permanent injunction, restitution, and disgorgement. The district court granted both forms of equitable relief, and the Ninth Circuit affirmed.

The Supreme Court unanimously reversed, holding "that § 13(b) as currently written does not grant the Commission authority to obtain equitable monetary relief." The Court considered that the language of the statute refers only to *injunctions*, and focuses on prospective relief to "stop[] seemingly unfair practices." The Court noted that other provisions of the Act were clear in granting authority for the FTC to seek, in other circumstances, "other and further equitable relief," or the "refund of money or return of property."

The Court explained that a reasonable enforcement scheme results without equitable authority under Section 13(b): the FTC may seek monetary relief through administrative proceedings under Section 19, and use Section 13(b) for preliminary injunctive relief before the administrative proceeding or for a permanent injunction afterward.

The Court rejected a series of contrary arguments by the FTC, including that Congress intended Sections 13 and 19 to allow for "separate, parallel, enforcement paths," and that Congress acquiesced to precedent upholding the FTC's authority. The Court also dismissed the FTC's arguments about the policy implications of a narrow interpretation of Section 13(b), noting that the Commission may still seek

¹ Federal Trade Commission, "Annual Highlights: Stats & Data 2020," at <https://www.ftc.gov/reports/annual-highlights-2020/stats-data-2020>.

equitable monetary relief by using a two-step process, initially winning a case in its own administrative court under § 19, and then going to federal court to show that the act or practice was one that a reasonable person would have known was dishonest or fraudulent. The Court also noted that the FTC could ask Congress to amend the FTC Act to give it clear authority to obtain equitable relief.

Future Impact

The decision puts an end to one of the Commission's most significant—and frequently used—enforcement tools. Acting Chairwoman Rebecca Kelly Slaughter noted that, “[w]ith this ruling, the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most.”² Commissioner Christine Wilson testified in 2019 that the Commission “relies heavily” on the authority to obtain equitable monetary relief in federal district court under 13(b) in carrying out its mission to protect consumers.³ Former Chairman Joseph Simons stated that limitation of Section 13(b) authority would be “highly problematic” and “basically destroy” the FTC’s anti-fraud program.⁴

The Court’s decision is the latest case to limit the FTC’s authority. In 2019, the Third Circuit held that the FTC must plead *ongoing or imminent* illegal conduct in order to survive a motion to dismiss in a Section 13(b) suit, rejecting the Commission’s argument that the provision should be read more broadly.⁵ Later in 2019, the Seventh Circuit overruled its own precedent regarding the FTC’s ability to seek equitable monetary relief, creating the circuit split addressed by the Supreme Court in *AMG Capital Management*.⁶

In the near term, we expect that the FTC will rely more heavily on its administrative process to obtain equitable monetary relief, which based on historical patterns will likely lead to high win rates for the Commission, followed by appeals to the U.S. circuit courts. Beyond that, the Commission likely will increase efforts to reverse the decisions through legislation, as the decision came down just two days after the Commission submitted written testimony seeking amendments to Section 13(b) to expand its authority to obtain injunctive and monetary relief.⁷ Indeed, within hours of the Supreme Court’s decision, Senator Maria Cantwell (D-WA) released a statement that the Senate will be “working to move legislation immediately to make sure this authority is properly protected.”⁸ The chance of such legislation passing under the current division of the Senate, however, remains highly uncertain. A House companion measure has already been introduced by Representative Tony Cardenas (D-CA), and the Energy and Commerce Committee is holding a hearing on the measure next week.⁹

² Press Release, Acting FTC Chairwoman Rebecca Kelly Slaughter, Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC* (Apr. 22, 2021), available [here](#).

³ *Oversight of the Federal Trade Commission: Hearing Before the Comm. on Energy and Commerce Subcomm. on Consumer Prot. and Commerce*, 116th Cong. (2019). A district court in the Eleventh Circuit reached a similar result. See *FTC v. Hornbeam Special Situations, LLC*, No. 1:17-CV-03094-TCB, 2018 WL 6254580, at *6 (N.D. Ga. Oct. 15, 2018) (“when the FTC attempts to bring suit under [13(b)], it must satisfy the Court under [Fed. R. Civ P.] 8 that it has a reason to believe that each of the Defendants is violating or about to violate the law.”).

⁴ *Id.*

⁵ *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147, 161 (3d Cir. 2019). See also, *FTC v. AbbVie Inc.* 2020 WL 5807873 (3d Cir. Sept. 30, 2020) (finding that district courts lack the power to order disgorgement under Section 13(b) of the FTC Act).

⁶ *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764, 786 (7th Cir. 2019).

⁷ *Strengthening the Federal Trade Commission’s Authority to Protect Consumers, Hearing Before the Senate Committee on Commerce, Science & Transportation*, 117th Cong. (Apr. 20, 2021) (Prepared Statement of the FTC).

⁸ Press Release, U.S. Senator Maria Cantwell, Cantwell Statement on Supreme Court Ruling Regarding Section 13(b) of the Federal Trade Commission Act (Apr. 22, 2021), available [here](#).

⁹ H.R. 2668, 117th Congress (2021).

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