

April 28, 2021

Supreme Court Holds that FTC Cannot Obtain Disgorgement or Restitution Remedies under FTC Act Section 13(b)

On Thursday, April 22, the Supreme Court released a unanimous decision holding that the Federal Trade Commission’s authority under Section 13(b) of the FTC Act does not grant the agency the right to seek equitable monetary relief such as disgorgement or restitution. The opinion, authored by Justice Breyer, held that the section only permits prospective injunctive relief. The import of this decision is that the FTC, in order to obtain monetary relief for unfair and deceptive trade practices, must first utilize its administrative procedures and can no longer seek such relief directly through a lawsuit in the federal courts.

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The FTC has used Section 13(b) as its primary consumer protection enforcement tool for the past several decades. Although the FTC has two other avenues of obtaining monetary relief, those methods are either more arduous for the FTC or more limited in scope. The first is for the FTC to initiate administrative proceedings under Section 5, and then pursue monetary relief under Section 19 if it is successful at the administrative level. However, this remedy not only requires the FTC to litigate the case through its own administrative process in order to obtain a cease and desist order, but also requires the FTC to defend such an order on appeal through the federal court system before it can initiate an action in district court for monetary relief. The second avenue is to pursue a remedy under Section 19 directly in federal court pursuant to a trade regulation, rule, or statute enforced by the FTC. However, this process applies only to a limited number of rules and statutes, and remedies may vary by the terms of the rules and statutes.¹ Accordingly, of the billions of dollars the FTC has collected in recent years, most have come from Section 13(b) proceedings.

AMG Capital Management v. FTC

The case before the Supreme Court involved claims against AMG Capital Management, LLC and its founder Scott Tucker for engaging in allegedly deceptive short-term lending practices. The FTC alleged that the defendants misrepresented the terms of so-called “payday loans” such that borrowers were forced to pay more than seven times the interest they were told they would have to pay.

In 2012, the FTC filed a federal lawsuit against Tucker for violating Section 5(a) of the FTC Act, bypassing its own administrative procedures. The Commission relied on Section 13(b) to seek both an injunction and equitable monetary relief. The U.S. District Court for the District of Nevada granted the FTC’s summary judgement motion and it ordered AMG and Tucker to pay over a billion dollars in restitution. The Ninth Circuit Court of Appeals affirmed.

In its unanimous decision, the Supreme Court found that the language of the section refers only to injunctions, which is a distinct remedy from an award of equitable monetary relief. The Court observed that the language and structure of Section 13(b), taken as a whole, show that the words “permanent injunction” have a limited purpose that does not extend to monetary relief. For example, the provision uses prospective language, such as “is violating” and “is about to violate,” demonstrating that the purpose was to prevent current or future harm.

Moreover, the Court held that, based on the structure of the FTC Act taken as a whole, FTC’s proposed interpretation would leave the Act incoherent. Section 5 authorizes the Commission to seek civil penalties and other equitable relief after the completion of the administrative process, while Section 19 allows for the district court (in litigation following administrative proceedings) to grant other relief necessary to redress consumers. By contrast, Section 13(b), the Court wrote, is intended to allow the Commission to seek an injunction while administrative proceedings are in progress or contemplated. The FTC’s interpretation, however, would permit the Commission to bypass Sections 5 and 19 and use Section 13(b) instead.

The Court’s opinion did not address whether the FTC *should* be permitted to seek equitable monetary relief in district courts in the first instance—it held only that the current language of Section 13(b) does not permit this. If the

Commission is unhappy with its ability to seek redress on behalf of consumers, the Court wrote, it is “free to ask Congress to grant it further remedial authority.” Indeed, as the Court recognized, “the Commission recently asked Congress for that very authority.”

Implications

The Supreme Court’s holding will have implications beyond the consumer protection context. While the FTC has traditionally used Section 13(b) to seek equitable monetary relief in consumer protection cases, *i.e.*, cases like *AMG*, the FTC has, on occasion, used Section 13(b) to seek disgorgement in antitrust cases as well. After this decision, the agency will similarly need to pursue those cases through the administrative process before seeking disgorgement or other forms of monetary relief in federal court.

Whether the Court’s decision signals the ultimate demise of the FTC’s ability to seek equitable relief in district court without first securing a cease and desist order at the administrative level is still an open question. For the past few years, the FTC has lobbied Congress to pass legislation affirming the FTC’s ability to seek monetary relief in federal court.

Congress has considered at least one bill that would do just that.² And on April 20, Acting FTC Chairwoman Rebecca Kelly Slaughter and three FTC Commissioners testified at the Senate Commerce Committee regarding the need for the legislation, reflecting the extent to which the Commission regards a requirement to first pursue administrative remedies as a significant impediment to obtaining equitable monetary relief. Just yesterday, Acting Chairwoman Slaughter appeared before the House Subcommittee on Consumer Protection and Commerce to discuss the same.

Shortly after the Court released its opinion, Acting Chairwoman Slaughter issued a statement highly critical of the Court’s decision, framing it as a victory for “scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior.”³ She “urge[d] Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole.” It remains to be seen whether this decision will invigorate Congress to revise the FTC Act to grant the Commission powers to seek equitable redress in federal court in the first instance.

For more information about this decision, please contact [Chong S. Park](#), [Douglas Hallward-Driemeier](#), [Eileen Falk](#), or the Ropes & Gray attorney with whom you regularly work.

1. A full list of the statutes enforced or administered by the FTC is available at <https://www.ftc.gov/enforcement/statutes>. Statutes include the Children's Online Privacy Protection Act and the Restore Online Shoppers Confidence Act.
2. *See* S. 4626, 116th Cong., 2d Sess., §403 (2020).
3. Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC*, April 22, 2021, <https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us>.