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Supreme Court Grapples with FTC’s Authority to Pursue Restitution Under Section 13(b)

*Anthony E. DiResta, Brian J. Goodrich, and Benjamin A. Genn**

The authors of this article discuss oral arguments heard recently by the U.S. Supreme Court on the issue of whether Section 13(b) of the Federal Trade Commission Act implicitly authorizes the Federal Trade Commission to seek restitution.

The U.S. Supreme Court has heard oral arguments in *AMG Capital Management, LLC v. Federal Trade Commission*, in which the Court grappled with the Federal Trade Commission’s (“FTC” or “Commission”) authority to obtain equitable monetary relief pursuant to the authority conferred by Section 13(b) of the FTC Act. The specific issue that the Court sought to resolve is whether Section 13(b), by authorizing only “injunctions,” also implicitly authorizes the FTC to seek restitution. Notably, other provisions in the FTC Act that empower the FTC to seek monetary relief—Sections 5(l) and 19—explicitly so provide.

Although the FTC has often invoked Section 13(b) to seek monetary relief in the preceding decades, a circuit split developed in 2020 on this question, precipitating the Supreme Court’s grant of certiorari.

KEY TAKEAWAYS

A decision by the Court to restrict the FTC’s ability to seek monetary relief under Section 13(b) would have significant implications. It would prevent the Commission from using a favored avenue to obtain and provide monetary redress to consumers who have been harmed by unfair or deceptive acts or practices. It would also require the FTC to utilize its more cumbersome administrative adjudication processes to get businesses to disgorge ill-gotten gains from conduct that violates the FTC Act.

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Practically speaking, such a decision could limit the ability of the FTC to seek certain financial information or other types of proprietary information from companies and individuals in Civil Investigative Demands (or law enforcement investigations), as well as impact settlement negotiations between companies and FTC staff by requiring remedies to focus solely on injunctive relief. Companies would gladly accept this result—they would be less likely to be forced to turn over sensitive business information while still enjoined from bad conduct.

Critically, this case also serves as a litmus test for the Supreme Court's expanded conservative majority. The decision in this case will follow the Supreme Court's recent decisions in *Kokesh v. Securities and Exchange Commission* and *Liu v. Securities and Exchange Commission*, in which the Court clarified and restricted the Securities and Exchange Commission's ("SEC's") ability to obtain monetary remedies based on statutory provisions allowing the SEC to seek equitable relief. As such, the outcome of this case will provide significant insight for agencies and regulated businesses as to whether future challenges to agencies' authority will find a receptive audience in the federal judiciary.

THE FTC ACT AND THE COMMISSION'S ENFORCEMENT MUSCLE

Section 5(a) of the FTC Act deems "unfair" and "deceptive" acts or practices unlawful.¹ Section 13(b) of the FTC Act in turn authorizes the FTC to seek preliminary and permanent injunctions in federal district courts to remedy "any provision of law enforced by the Federal Trade Commission . . . [w]henver the Commission has reason to believe that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [Commission]" if an injunction would be in the public interest.² Notably, Section 13(b) does not explicitly provide for monetary relief. Section 19 and Section 5(l) of the Act authorize the Commission to seek monetary relief, but those mechanisms require the FTC to first engage in drawn-out administrative adjudications. As a result, the FTC has frequently invoked Section 13(b) to seek monetary relief.

THE CONFLICT IN THE CIRCUIT COURTS

The Commission has been largely successful in its efforts to invoke Section 13(b) as a workaround to receive monetary awards against companies through

¹ 15 U.S.C. § 45(a)(1).

² 15 U.S.C. § 53(b).

judicial action. Moreover, when this authority has been challenged, a majority of federal circuit courts interpreted the “injunction” language to include a litany of equitable powers, relying on Supreme Court precedent holding that the statutory language authorizing injunctive relief also implicitly authorizes restitution. However, in the preceding years, the U.S. Courts of Appeals for the Seventh and Third Circuits both held that Section 13(b) does not permit the FTC to obtain any monetary relief, creating a circuit split necessitating the Supreme Court’s review.

In *Federal Trade Commission v. Credit Bureau Center, LLC*,³ the Seventh Circuit held that the term “permanent injunction” did not imply that the FTC is also entitled to obtain restitution. The court opined that Section 13(b) was not intended to punish past behavior but rather was limited to address only “ongoing” or “imminent” legal violations. Similarly, in *Federal Trade Commission v. Abbvie, Inc. et al.*,⁴ the Third Circuit held that the FTC was not authorized to seek disgorgement under Section 13(b) because the express references to restitution remedies in Sections 5 and 19 of the FTC Act indicated Congress’ intent to limit equitable remedies under Section 13(b) to injunctions only.

In 2018, the U.S. Court of Appeals for the Ninth Circuit came to a different conclusion that closely adhered to the FTC’s long-standing understanding and use of Section 13(b). In *AMG Capital Management, LLC v. Federal Trade Commission*,⁵ the court rejected AMG’s argument that Section 13(b) authorizes only “injunctions” and that an order to pay “equitable monetary relief” is not an injunction. The Ninth Circuit instead found that Section 13(b) “empowers district courts to grant *any* ancillary relief necessary to accomplish complete justice, including restitution.”⁶

AMG CAPITAL MANAGEMENT

In 2012, the FTC sued payday loan company AMG Capital Management and its owner, Scott Tucker, alleging that the terms disclosed in the loan notes provided to consumers did not reflect the more severe terms that AMG actually enforced. The district court granted the FTC’s summary judgment motion and

³ 937 F.3d 764 (7th Cir. 2019), *cert. granted*, 141 S. Ct. 194, 207 L. Ed. 2d 1118 (2020), *vacated sub nom. FTC v. Credit Bureau Ctr.*, No. 19-825, (U.S. Nov. 9, 2020), and *cert. denied*, 141 S. Ct. 195, 207 L. Ed. 2d 1118 (2020).

⁴ 976 F.3d 327 (3d Cir. 2020).

⁵ 910 F.3d 417 (9th Cir. 2018).

⁶ *Id.* at 426 (emphasis added).

ordered AMG to pay more than \$1.2 billion in monetary restitution. The Ninth Circuit affirmed, rejecting AMG's argument that Section 13(b) forecloses monetary relief.

AMG's Arguments

Before the Supreme Court, AMG advanced three arguments.

First, AMG characterized Section 13(b) as a "narrow" provision, arguing that it empowers the FTC to pursue an injunction only. Counsel for 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 FTC Act expressly permit restitution, meaning that the absence of that authorization in Section 13(b) demonstrated Congress' intent not to authorize the Commission to obtain restitution through Section 13(b).

Third and finally, 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 Section 5 and Section 19 superfluous, and thus lead to an absurd result.

The FTC's Arguments

The FTC argued that "three centuries of equity jurisprudence establish" that the authority to grant an injunction includes the authority to "order the return of ill-gotten gains," citing supportive Supreme Court precedent. The FTC argued that when Congress passed Section 13(b), it had this expansive understanding of injunctive relief in mind. The FTC further argued that its understanding of Section 13(b) was later ratified by Congress after the FTC began to use Section 13(b) to obtain restitution, as Congress subsequently amended the FTC Act without addressing or disturbing Section 13(b).

Oral Argument and the Justices' Questions

During oral argument, a majority of the bench appeared to struggle with the Commission's broad reading of the text. In the words of Justice Brett Kavanaugh to the FTC's counsel, "[i]t seems the problem you have is the text."

The Court also repeatedly raised its concern that alternate avenues of monetary relief are available to the FTC, namely Section 19 and Section 5(l) of the Act. Justices Stephen Breyer, Samuel Alito, Elena Kagan, Neil Gorsuch, and Kavanaugh observed that the FTC's reading around the statutory language seemed to make Section 13(b) a more favorable approach to enforcement because the agency could avoid the drawn-out administrative processes required under Section 19 and Section 5(l). Notably, Justices Kagan, Sotomayor, and

Thomas opined that Section 19 and Section 5(l) expressly permit the FTC to seek monetary relief and questioned why the Court should then permit implicit monetary relief under Section 13(b). Justice Kagan noted that the FTC's broad interpretation would render Section 19 "irrelevant," and Justice Breyer and Justice Gorsuch questioned whether seeking monetary damages through Section 13(b) provides defendants with sufficient notice of a violation. An interesting question posed to the FTC from Justice Alito focused on why Congress would allow monetary relief under Section 13(b) for ongoing violations but not if the underlying conduct had stopped—a question rooted in the rationale previously advanced by the Seventh Circuit.

Yet Chief Justice John Roberts also questioned whether the term "equitable" should be read as narrowly as counsel for AMG requested. The Chief Justice, and later Justice Kagan as well, pointed out that the term "equitable" was more broadly understood at the time the FTC Act was passed. Thus, he questioned whether the Court would be deviating from Congress' intent by now redefining that term to exclude restitution. Justices Breyer and Kavanaugh also questioned the wisdom of overturning the broader understanding of Section 13(b)'s grant of authority that has been uniformly embraced by federal district courts over the preceding decades.

Separately, Justice Kavanaugh raised a separation of powers concern. He asked counsel for the FTC "[w]hy isn't the answer here for the Agency to seek this new authority from Congress for us to maintain a principle of separation of powers?"

IMPACT OF THE DECISION

A ruling in favor of AMG would remove the FTC's favored avenue of monetary relief in federal court, and limit the Commission's remedy under Section 13(b) to only injunctive relief. Whether the Court agrees with the Commission's broad interpretation of its Section 13(b) authority will affect consumer protection enforcement actions for years to come. The FTC has sought restitution under Section 13(b) consistently for more than 40 years, and this authority has repeatedly been affirmed by courts and congressional reauthorization of the Act. A ruling in favor of the FTC would maintain the status quo. Nonetheless, within the past few years, the FTC's interpretation of Section 13(b) has come under scrutiny from an increasingly conservative-leaning federal judiciary.

Importantly, on October 22, 2020, the FTC sent a letter to Congress asking for an amendment that would codify the FTC's interpretation of Section 13(b) to include monetary relief. Now that the new Congress is in session, clarification may be the FTC's best hope for maintaining its robust enforcement

authority, although it remains to be seen if the new Congress will clarify whether Section 13(b) permits monetary relief.

Because the FTC Act authorizes the Commission to seek civil penalties only in limited circumstances and the Commission frequently uses Section 13(b) to extract monetary remedies, a decision in favor of AMG would cut the FTC's enforcement muscle under Section 13(b) off at the knees. It is entirely possible that the FTC would then lean heavily on cease and desist orders under Section 19, or would issue further rules and regulations to curb unfair and deceptive practices.

CONCLUSION

The questions from a majority of the Justices focused on the plain text of the Act and the FTC's broad reading of that text, suggesting that the Supreme Court will be hesitant to endorse the Commission's expansive authority without sufficient textual support in the Act and where other (albeit more cumbersome) methods of monetary relief are available. Yet those same justices questioned the wisdom of changing of what—until very recently—appeared to be a well-settled question of law. Justice Breyer perhaps put it best when he stated, during oral arguments, that the legal arguments in both parties' briefs were “right,” and so the question for the Court was perhaps which position is better as a matter of policy.

A decision in the case is expected to be issued in Spring 2021, toward the end of the current term.