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Unanimous Court Cuts FTC's Power to Seek Monetary Redress

WRITTEN BY

Keith J. Barnett | Carlin A. McCrory | Barbara T. Sicalides | Robin P. Sumner | Timothy A. Butler | Troy K. Jenkins | Matthew White | Samuel D. Harrison

On April 22 the Supreme Court held in *AMG Capital Management, LLC v. FTC**[1]*** that the Federal Trade Commission (FTC) does not have authority under the Federal Trade Commission Act Section 13(b) to seek, nor a court to award, equitable monetary relief, such as restitution or disgorgement. Section 13(b) of the FTC Act authorizes the FTC to obtain a "permanent injunction" in federal court against "any person, partnership, or corporation" that it believes "is violating, or is about to violate, any provision of law" that the FTC enforces. This ruling resolves a circuit split and adopts the approach of the Third and Seventh circuits, which had both ruled against the FTC.

This case arose from Scott Tucker controlling several payday loan companies, which provided misleading loan terms. The companies' written explanations appeared to state that a customer could repay a loan by making a single loan payment, but the fine print explained that the loan would be automatically renewed unless the customer took affirmative steps to opt out.

In 2012, the FTC filed suit against Tucker and his companies, claiming they were engaging in "unfair or deceptive acts or practices" in violation of the FTC Act. The FTC did not use its own administrative proceedings, but rather filed suit in federal court asking for a permanent injunction under Section 13(b) to prevent Tucker and the companies from committing further violations and asked the court to order restitution and disgorgement. On the FTC's motion for summary judgment, the district court granted the injunction and directed Tucker to pay $1.27 billion in restitution and disgorgement.

On appeal, Tucker argued Section 13(b) of the FTC Act does not authorize the monetary relief that the District Court granted. The Ninth Circuit rejected Tucker's claim.

The FTC Act prohibits, and authorizes the FTC to prevent, "[u]nfair methods of competition" and "unfair or deceptive acts or practices." The Supreme Court's opinion addressed the question of whether "Congress, by enacting § 13(b)'s words, 'permanent injunction,' grant[ed] the Commission authority to obtain monetary relief directly from courts, thereby effectively bypassing the process set forth in § 5 and § 19?" Sections 5 and 19 authorize district courts to award civil penalties against respondents who violate cease and desist orders issued in the FTC's administrative proceedings and grant relief as the court finds necessary to provide redress to consumers, respectively.

Writing for a unanimous Court, Justice Breyer noted that the language in Section 13(b) only allows for a permanent injunction and not a reward of equitable monetary relief. Moreover, the Court stated that the language and structure of Section 13(b) indicates that the provision focuses on prospective, not retrospective relief. Lastly, the Court noted that Sections 5 and 19 of the FTC Act give district courts the authority to impose limited monetary penalties and to award monetary relief in cases where the FTC has issued cease and desist orders in its administrative proceedings. Because Sections 5 and 19 of the FTC Act allow monetary relief, it is unlikely Congress intended the "permanent injunction" language to have a broader scope.

FTC Acting Chairwoman Rebecca Kelly Slaughter issued a written statement immediately after the Court issued its decision that said, "[w]ith this ruling, the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most. We urge Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole." Chairwoman Slaughter's comments come two days after Chairwoman Maria Cantwell highlighted in a Senate Commerce Committee hearing that Section 13(b) was in danger and stated, "[w]e have to do everything we can to protect this authority and, if necessary, pass new legislation to do so." While there has been bipartisan concern over limiting Section 13(b)'s scope, Congress will now need to agree on amendments to protect the FTC's authority to obtain redress. And indeed, the Court noted that the FTC was "free to ask Congress to grant it remedial authority."[2]

Implications

Notwithstanding calls for congressional action to restore powers deprived by the Court's ruling in this case, the immediate loss of the FTC's ability to seek restitution under Section 13 of the FTC Act will have far-reaching consequences in the antitrust and consumer finance fields. For example, the FTC has, in part, used monetary relief to influence pharmaceutical companies' conduct related to what is commonly referred to as "reverse payment" settlements between branded and generics manufacturers.

Perhaps most obviously, the FTC will now face a steeper climb in seeking restitution under the FTC Act. As Justice Kagan pointed out during oral argument, the FTC can seek relief under Section 5 and Section 19, but in doing so, the FTC is required to prove repeated violations and *mens rea*. Justice Breyer noted during argument that the FTC currently has approximately 100 cases in court seeking restitution under Section 13, with only 10 to 12 seeking restitution under the "regular procedures" — those contained in Sections 5 and 19. The defendants in these FTC matters will certainly move to limit or terminate any requests for monetary relief. If this trend continues, we should expect the FTC to bring far fewer cases seeking restitution.

The ruling could also shift some of the enforcement burden onto the states. As we previously wrote, 29 states filed an amicus brief that supported the FTC's authority to obtain monetary relief.[3] The states argued that stripping the FTC of this authority would weaken their own ability to remedy anticompetitive, unfair, and deceptive practices. Given the Court's ruling, it is likely that states will have to invest more time, energy, and resources into conducting their own investigations, and will be less likely to depend on the FTC to seek restitution on behalf of their citizens.

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[1] *AMG Capital Management, LLC v. FTC*, No. 19-508, slip op. at 1 (Apr. 22, 2021).

[2] *Id.* at 14.

[3] See https://www.troutman.com/insights/29-states-file-amicus-brief-supporting-ftcs-authority-to-obtain-monetary-relief-in-the-supreme-court.html.