

## Updates

April 23, 2021

### Supreme Court Rules FTC Cannot Obtain Monetary Relief Under Section 13(b)



On April 22, 2021, in a unanimous decision, the U.S. Supreme Court in *AMG Capital Management v. FTC* held that the authorization to seek a "permanent injunction" under Section 13(b) of the Federal Trade Commission Act does not permit the FTC to obtain equitable monetary relief such as restitution and disgorgement.

In the underlying dispute, the FTC sued an individual and several entities for engaging in "unfair or deceptive acts or practices" by misleading consumers in connection with providing short-term payday loans online. In addition to seeking a permanent injunction, the FTC also sought restitution and disgorgement. The district court issued a permanent injunction and granted the FTC's requested monetary relief in the amount of nearly \$1.27 billion. The U.S. Court of Appeals for the Ninth Circuit affirmed, relying on its precedent holding that Section 13(b) "empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution." *FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417, 426 (9th Cir. 2018) (internal quotation marks omitted). The Ninth Circuit's decision was in accord with six other circuit courts of appeals that interpreted Section 13(b) the same way, but in 2019, the U.S. Court of Appeals for the Seventh Circuit created a circuit split when it held that restitution is unavailable under Section 13(b).

Writing for the Court, Justice Breyer resolved the circuit split and in so doing disagreed with the Ninth Circuit, holding that "as currently written," Section 13(b) "does not grant the Commission authority to obtain equitable monetary relief."

### **Key Takeaways**

- The FTC may still seek monetary relief via Section 19 of the Act for deceptive or unfair acts or practices that violate Section 5 of the Act, as the Supreme Court expressly noted. That path, however, can be longer and more difficult for the agency to pursue. Section 19 can be used only after the FTC has engaged in administrative litigation resulting in a final cease and desist order, and then initiates a district court action in which it establishes that the conduct to which the cease and desist order relates is one that a "reasonable man" would have known under the circumstances was "dishonest or fraudulent."
- Although the FTC does not have generally applicable civil penalty power for any and all Section 5 violations, civil penalties when available (such as for violations of some rules like Children's Online Privacy Protection Act (COPPA) and violations of consent orders) are unaffected by the Court's ruling.
- Nonmonetary remedies also remain unaffected. Particularly for privacy and data security cases, the FTC has long relied heavily on conduct remedies such as requirements that companies build and maintain internal programs or that they enact certain technical practices.
- FTC Acting Chairwoman Rebecca Kelly Slaughter [expressed disappointment](#) in the Court's decision, stating that "the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most." She plans to ask Congress to "act quickly and advance legislation to protect and strengthen the FTC's powers." It remains to be seen how Congress will act, including whether it might legislate to provide the equitable monetary relief capability sought by the FTC in *AMG Capital Management* case or perhaps even provide greater monetary relief options to the FTC.
- Even if Congress does not act, it is possible that state attorneys general will step in to obtain restitution in cases in which the FTC obtains other remedies. Many states have their own unfair and deceptive acts and practices laws permitting state attorneys general to seek restitution (as well as civil penalties). Class action plaintiff attorneys also may seek monetary relief in cases where the FTC is not able to do so.

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