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Supreme Court to Review FTC Authority to Obtain Restitution



On July 9, 2020, the U.S. Supreme Court granted certiorari in two cases to review whether the FTC has authority to seek restitution under Section 13(b) of the FTC Act. Section 13(b) provides that the FTC "may seek, and after proper proof, the court may issue, a permanent injunction."

For decades, courts have interpreted this language to authorize the full panoply of equitable remedies, including restitution and disgorgement of ill-gotten gains. Last year the Seventh Circuit broke with that long line of cases, including its own precedent, in *FTC v. Credit Bureau Center, LLC*, by holding that the plain language of Section 13(b) does not authorize the award of restitution. The Supreme Court granted certiorari in *Credit Bureau* as well as *FTC v. AMG Capital Management, LLC*. In *AMG*, the Ninth Circuit held that Section 13(b)'s authorization of injunctive relief "empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution." The Court's grant of certiorari in *Credit Bureau* and *AMG* comes on the heels of its decision in *Liu v. SEC*. There, the Court sustained the SEC's authority to seek restitution if limited to the wrongdoer's net profits. The provision of the Securities Exchange Act of 1934 at issue in *Liu* states that federal courts may grant "any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5). That explicit reference to "equitable relief" and the absence of comparable language in Section 13(b), along with Congress' express authorization of court authority to award monetary remedies under Section 19 of the FTC Act, may portend an uphill battle for the FTC's efforts to preserve its authority. An adverse ruling could have a significant impact on the FTC. Since Section 13(b) was added to the FTC Act in 1973, the FTC has obtained restitution and disgorgement awards totaling billions of dollars in at least hundreds of district court cases. The cases are consolidated and set for argument in the Court's October 2020 term.

Authors

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