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## Supreme Court Eliminates FTC's Ability to Seek Restitution in Federal Court Actions Without First Using Its Administrative Process: Will There Be a Congressional Override?

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On April 22, 2021, the Supreme Court resolved a circuit split as to the Federal Trade Commission's authority to seek restitution in a federal court action under the Federal Trade Commission Act ("Act") without first obtaining a final cease and desist order in an administrative proceeding under the Act. In a unanimous opinion authored by Justice Breyer, the Court held in *AMG Capital Mgmt., LLC v. FTC*, No. 19-508, that § 13(b) does not authorize the FTC to seek equitable monetary awards in addition to injunctive relief in stand-alone federal court litigation. Such restitution is only available to the FTC in federal court after an administrative law judge has found in favor of the agency in an administrative proceeding.

The acting chair of the FTC reacted strongly to the decision, claiming the Court had "deprived the FTC of the strongest tool [the agency] had to help consumers." Most legal observers, however, believe the Court's construction of § 13(b) as limiting the FTC's authority to mandatory injunctive relief (and other non-monetary-related relief for violation of court orders) is correct and that the decision will not lead to "get out of jail" cards for scammers and others who violate the consumer protection and antitrust laws that the FTC enforces.

The Court's decision resolves a circuit-split between the Seventh, Third and Ninth Circuit Courts of Appeals over whether Congress intended to authorize the FTC to recover restitution and other monetary damages for past unfair and deceptive conduct in actions filed in federal court. The unanimous Court held that § 13(b) does not explicitly authorize the FTC to obtain court-ordered monetary remedies, but rather authorizes the FTC to enforce the Act through a "permanent injunction." The Court ruled that the reference to an injunction means § 13(b) authorizes only prospective injunctive relief, not any form of monetary relief, like restitution or disgorgement, which are retrospective in nature.

Nonetheless, the FTC has for decades used § 13(b) as its preferred avenue to obtain restitution for consumers who have been harmed by unfair or deceptive acts. Although other provisions of the Act – mainly § 5(l) and the follow-up § 19 – permitted recovery of ill-gotten gains, the FTC routinely used § 13(b) as it was a more direct approach, which circumvented the administrative hurdles and delay associated with commencing administrative proceedings under § 5(l) and § 19. In 2019, for example, the FTC filed 49 complaints in court under § 13(b) and obtained 81 permanent injunctions and over \$720 million in restitution or disgorgement, while filing only 21 administrative complaints.

In *AMG*, the FTC used § 13(b) to direct Scott Tucker, the Petitioner, to pay \$1.27 billion in restitution and disgorgement for fraudulent pay-day loans. Tucker argued that such an award exceeded the FTC's authority under § 13(b). The Ninth Circuit, in stark contrast to the Seventh and Third Circuits, disagreed and held that § 13(b) "empowers district courts to grant any ancillary relief necessary to accomplish justice, including restitution."

The FTC and its *amici*, concerned that simply telling bad actors that they were not to do it again would not deter their future misconduct, argued that "permanent injunctions" include "restorative monetary relief." The strict construction-textualist bent of the current Supreme Court showed itself quite clearly, as the Justices unanimously agreed that such an expansive interpretation was not supported by the text of the law. As Justice Kavanaugh unsurprisingly stated to FTC's counsel during oral argument, "It seems the problem you have is the text." The Court highlighted that injunctions are prospective in nature serving to eliminate future harm whereas the monetary relief which the FTC seeks provides a retrospective remedy for past redress. Intimating, perhaps, as to where this issue is best resolved, the Court stated that if Congress had intended for the FTC to obtain monetary relief through § 13(b), it would have clearly said so.

Although the *AMG* decision appears to impose a significant limitation on the FTC's ability to seek financial redress, its impact may well be short lived. The FTC can continue to initiate administrative proceedings under § 5(l) and an enforcement action § 19, and, if it succeeds, then pursue monetary remedies in federal court. In addition, §§ 5 and 10 of the FTC Act, as well as § 7A(g)(1) of the Clayton Act, give the Commission the authority to seek penalties for illegal conduct and those penalties can be used to provide restitution to consumers and others injured by illegal conduct. Not to mention, most states have their own mini-FTC acts that allow for consumer restitution in unfair and deceptive trade practice litigation. State Attorneys General routinely utilize these statutes to secure disgorgement of ill-gotten gains and to provide consumers with redress for their damages.

Finally, perhaps fearing or sensing a text-based loss, the FTC had previously requested that Congress pass legislation giving the Commission clear statutory authority to obtain equitable monetary relief in court proceedings. On April 27, 2021, the FTC will appear before the House Subcommittee on Consumer Protection and Commerce to testify in favor of H.R. 2668 which would amend § 13(b) to explicitly provide the FTC the ability to obtain both injunctive and monetary equitable relief. We will be watching those legislative developments closely on behalf of our clients.

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