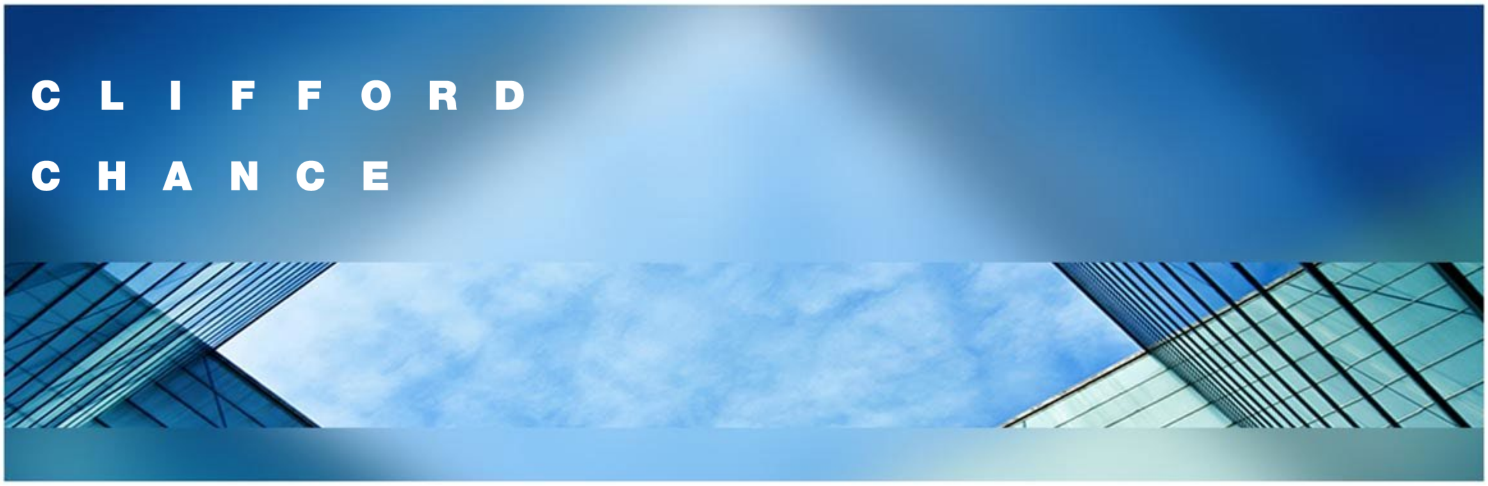

SUPREME COURT RULES FTC CANNOT SEEK MONETARY RELIEF UNDER SECTION 13 OF THE FTC ACT

On April 22, 2021, the Supreme Court unanimously held in *AMG Capital Management, LLC v. Federal Trade Commission* that §13(b) of the Federal Trade Commission (FTC) Act—which authorizes the FTC to obtain a "permanent injunction" in competition or consumer protection cases filed in federal court—does not authorize the FTC to seek equitable monetary relief such as restitution or disgorgement.[1] Instead, the FTC must pursue equitable monetary relief through its §5 and §19 powers, which have more conditions and limitations than §13(b). The decision is the latest by the present Court to cabin federal agencies' efforts to pursue penalties beyond those expressly authorized by Congress. While this decision may limit the tools available to the FTC's enforcement efforts in the short term, it provides clarity on the Commission's statutory enforcement capabilities. That said, any limits may be short-lived: with antitrust enforcement garnering increased national attention, there seems to be bipartisan support in Congress to re-equip the FTC with this capability in the near future.

Background

Enacted in 1973, section 13(b) of the FTC Act allows the Commission to seek equitable relief from federal courts, including a "permanent injunction," for actual or threatened violations of "any provision of law" enforced by the FTC. Until then, the Commission was authorized to enforce the FTC Act only through its own administrative proceedings, subject to review by the Commission and then by a federal appeals court. In the same legislation, Congress amended §5(l) of the FTC Act to authorize district courts to award civil penalties against respondents who violate final cease and desist orders issued in an FTC administrative proceeding.

1 *AMG Capital Management, LLC v. FTC*, 593 U.S. __ (2021).

Two years later, Congress enacted §19, which authorized district courts to grant "such relief as the court finds necessary to redress injury to consumers," including "refund of money or return of property," but likewise, only after the Commission had issued a final cease and desist order identifying a violation.

The Commission then began using §13(b) in the late 1970s to seek injunctive orders directly from federal courts without utilizing the administrative proceedings outlined in §5. In the late 1990s, the Commission expanded its use of §13(b) powers to pursue equitable monetary relief directly in court, without a prior administrative proceeding. In the Supreme Court's words, the FTC has sought this relief "with great frequency," in both antitrust and consumer protection cases.

The *AMG Capital Management* Case

Petitioner Scott Tucker controlled several companies that provided short-term payday loans to borrowers. These companies misled customers by including provisions in fine print that allowed the loans to renew automatically, unless the borrower took affirmative steps to opt out of the renewal, accruing more than $1.3 billion in deceptive charges for Tucker's companies between 2008 and 2012.

In 2012, the FTC filed suit against Tucker and his companies for engaging in "unfair or deceptive acts or practices in or affecting commerce," a violation of §5(a) of the FTC Act. As opposed to pursuing an administrative proceeding, the FTC filed suit against Tucker in federal district court. The FTC asked the court to issue a permanent injunction and monetary relief under §13(b) in the form of, among others, restitution and disgorgement against Tucker and his companies. The court granted the FTC's request, issuing an injunction and ordering Tucker to pay $1.27 billion in relief. Tucker appealed the decision, arguing that §13(b) does not, by its terms, authorize monetary relief. The Court of Appeals for the Ninth Circuit disagreed, citing circuit precedent interpreting §13(b) to empower courts to grant "any" relief "necessary to accomplish complete justice," including restitution. Tucker sought certiorari in the Supreme Court, which accepted the case in light of recent differences among the Circuits in *FTC v. AbbVie Inc*. and *FTC v. Credit Bureau Center, LLC*, respectively.

The Court unanimously reversed the Ninth Circuit. Justice Breyer determined that the question before the Court was a "purely legal" one: "Did Congress, by enacting §13(b)'s words, 'permanent injunction,' grant the Commission authority to obtain monetary relief directly from courts, thereby effective bypassing the process set forth in §5 and §19?" The Court decided that it did not.

The Court identified two main reasons for its decision, both grounded in the "text and structure" of §13(b) and the FTC Act more broadly. First, the Court explained that the language of §13(b) refers only to "injunctions," not monetary relief. The Court contrasted the "prospective" focus of that section to prevent ongoing or future harms (where the Commission believes a party "is violating," or "is about to violate" the Act) against the "retrospective" relief monetary restitution offers to redress past harms.

Second, the Court reasoned that the "structure of the Act beyond 13(b)" cut against the FTC's position. Two years after Congress passed §13(b), it enacted §19, which expressly authorized district courts to grant monetary relief so long as the Commission had issued "a final cease and desist order" in its administrative proceedings. The Court concluded that it is "highly unlikely that Congress would have enacted provisions expressly authorizing *conditioned* and *limited* monetary relief if the Act, via §13(b), had already implicitly allowed the Commission to obtain that same monetary relief and more without satisfying those conditions and limitations." Rather, the Court concluded that interpreting 13(b) "to mean what it says" results in a "coherent enforcement scheme" through which the Commission could obtain monetary relief by first invoking its §5 administrative procedures and then applying its §19 redress provisions. Finally, the Court rejected the FTC's contrary statutory interpretations and was unmoved by "policy-related" concerns for permitting parties to keep the proceeds of their violations. The Court explained that the FTC could petition Congress for further enforcement authority if it believed its present limitations "too cumbersome or otherwise inadequate."

Key Takeaways

First, the FTC believes that pursuing monetary relief for consumers is now more difficult, at least in the short term. A review by FTC Commissioner Rohit Chopra found that the FTC invoked §13(b) in nine out of ten cases over the last five years.[2] Bikram Bandy, chief litigation counsel for the consumer protection bureau, said during the ABA Antitrust Law Spring Meeting that if the Supreme Court did not allow monetary relief under §13(b), the FTC would face a lengthy, multistep process in both its administrative court and federal district court. Mr. Bandy also stated the FTC would bring fewer cases due to protracted legal battles each case would require.

Further, while the case before the Supreme Court was a consumer protection claim, the ruling significantly curtails the monetary relief available to the FTC in both consumer protection and competition cases. This is due to the fact that the FTC can prosecute "unfair methods of competition" and "unfair or deceptive acts or practices" using §5(a) of the FTC Act, and, in turn, use §13(b) to prosecute any provision of law enforced by the FTC. Antitrust enforcement capabilities are also implicated by the decision, which limits the available remedies the FTC has moving forward, such as "other equitable relief necessary to restore competition and remedy the harm to competition," a requested relief in the *FTC v. Facebook* complaint.

Indeed, while the ruling may have been expected by many observers, it was still criticized by the FTC. In a statement, Acting Chairwoman Rebecca Kelly Slaughter said that, "In *AMG Capital*, the Supreme Court ruled in favor of scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior. With 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."[3]

Anticipating the Court's decision, the FTC has requested that Congress provide a legislative remedy, which the Court's opinion noted was an option if the FTC felt

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2 Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, U. PA. L. REV. at n.43 (Oct. 29, 2020), available at https://ssrn.com/abstract-3721256.

3 Press Release, Federal Trade Comm'n, *Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in* AMG Capital Management, LLC v. FTC (Apr. 22, 2021), https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us.

the limitations "too cumbersome or otherwise inadequate." While the FTC raised concerns about a delay in legislative remedies, Congress may act quickly to resolve the FTC's enforcement authority. Only four months after Congress failed to reauthorize the Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA), which reduced civil liability for companies that sought and received leniency from the Department of Justice's Antitrust Division, Congress permanently extended ACPERA to its original form and applied it retroactively to any agreements during the brief time it expired. For the Commission's specific restitution and disgorgement powers, there are currently bills in both chambers of Congress that would restore those tools to the FTC. In the House, Representative Tony Cárdenas (D-CA) has introduced "The Consumer Protection and Recovery Act", which would allow the FTC to obtain equitable relief for violations that occurred in the previous decade. Similarly, Senator Josh Hawley (R-MO) has proposed the "Trust-Busting for the Twenty-First Century Act", which empowers the FTC to pursue disgorgement of all illegally obtained profits in federal court as a penalty for antitrust violations.

Conclusion

While the Supreme Court's decision clarifies the FTC's powers, it removes a streamlined process that the FTC used to seek restitution and disgorgement for consumers. While opinions differ on whether and how quickly Congress will authorize this enforcement tool, many members of Congress seem to agree that the FTC should have the power to seek equitable monetary relief as it previously did under Section 13(b). It will be worth watching how Congress considers reinstating this power, if through a stand-alone bill or part of a comprehensive bill, several of which have been proposed by legislators calling for an overhaul of the antitrust laws that have remained largely unchanged for over a century.

CLIFFORD CHANCE

CONTACTS

Sharis Pozen
Partner

T +1 202 912 5226
E sharis.pozen@cliffordchance.com

Timothy Cornell
Partner

T +1 202 912 5220
E timothy.cornell@cliffordchance.com

Peter Mucchetti
Partner

T +1 202 912 5053
E peter.mucchetti@cliffordchance.com

John Friel
Partner

T +1 212 878 3386
E john.friel@cliffordchance.com

Abigail Cessna
Associate

T +1 202 912 5452
E abigail.cessna@cliffordchance.com

Julius Pak
Associate

T +1 202 912 5128
E julius.pak@cliffordchance.com

Jordan Passmore
Associate

T +1 202 912 5416
E jordan.passmore@cliffordchance.com