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Legal Sidebar

AMG Capital Management v. FTC: Supreme Court Holds FTC Cannot Obtain Monetary Relief in Section 13(b) Suits

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On April 22, 2021, the U.S. Supreme Court held in *AMG Capital Management, LLC v. Federal Trade Commission* that Section 13(b) of the Federal Trade Commission Act (FTCA) (15 U.S.C. § 53(b)) does not allow the Federal Trade Commission (FTC or Commission) to seek equitable monetary relief, such as restitution or disgorgement. This decision has significant implications for the FTC's enforcement authority because Section 13(b) had been the FTC's primary mechanism for obtaining monetary relief for first-time violations of the FTCA. While the FTC will still be able to obtain monetary remedies for FTCA violations in some situations, its ability to do so will now be more limited.

This Sidebar briefly discusses the Supreme Court's decision and considerations for Congress. For a more detailed background on Section 13(b), see the earlier Legal Sidebars *Will the FTC Need to Rethink its Enforcement Playbook?* and *Will the FTC Need to Rethink Its Enforcement Playbook (Part II)?*.

Background

The FTCA gives the FTC the dual mission of protecting consumers and promoting competition in the marketplace. Section 5 of the FTCA (15 U.S.C. § 45) prohibits "unfair or deceptive acts or practices in or affecting commerce" and "unfair methods of competition." The FTCA provides several mechanisms for enforcing these prohibitions, as discussed in a previous Sidebar. One enforcement avenue is an administrative proceeding before an administrative law judge. Relief in these proceedings is limited to cease-and-desist orders. To obtain monetary relief against the subject of such a proceeding, the Commission must, within three years of the violation, bring a separate follow-on action against the defendant in federal court under Section 19 of the FTCA (15 U.S.C. § 57b). To prevail in the follow-on proceeding, the Commission must show that a "reasonable man" would have known that the conduct leading to the cease-and-desist order was "dishonest or fraudulent." The Commission may also bring a court action for civil penalties and further equitable relief if the defendant later violates the cease-and-desist order.

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Given the limited relief available in administrative cease-and-desist proceedings, the FTC has often used Section 13(b) to go directly to court and obtain equitable monetary relief. Section 13(b), which Congress added to the FTCA in 1974, states that the FTC may bring an action in federal district court for a "temporary restraining order or preliminary injunction" whenever the Commission "has a reason to believe" that a person "is violating, or is about to violate" any law enforced by the FTC. Section 13(b) further states that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." In the years following Section 13(b)'s enactment, many federal courts of appeals held that the provision allowed district courts to award broad equitable relief, such as restitution and disgorgement of profits. These courts relied on earlier Supreme Court decisions, such as *Porter v. Warner Holding Co.* and *Mitchell v. Robert DeMario Jewelry, Inc.*, to conclude that courts adjudicating Section 13(b) claims may use their inherent equitable powers to award many types of relief, since Section 13(b) doesn't expressly limit such powers. This consensus dissolved, however, in 2019 when the Seventh Circuit overturned its own precedent to hold that Section 13(b) does not authorize restitution, creating a circuit split that the Supreme Court would resolve in *AMG Capital Management*.

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In *AMG Capital Management*, the Supreme Court unanimously held that Section 13(b) does not authorize the FTC to seek equitable monetary relief, such as restitution or disgorgement. Writing for the Court, Justice Stephen Breyer explained that the Court based this conclusion on (1) the fact that Section 13(b) only refers to injunctive relief; (2) the language and structure of Section 13(b) as a whole; and (3) the broader structure of the FTCA.

On the first point, the Court stated that an injunction is distinct from equitable monetary relief. While there has been some dispute on whether a court order requiring restitution is a type of injunction (see, e.g., Judge Wood's dissent in *Federal Trade Commission v. Credit Bureau Center, LLC*), the Court provided little elaboration on this conclusion. On the second point, the Court reasoned that the language and structure of Section 13(b) as a whole shows that the provision focuses on prospective rather than retrospective relief. As analyzed in a previous Legal Sidebar, Section 13(b) contains the threshold requirement that the FTC has a "reason to believe" that a person is "violating, or is about to violate" the law. The Court said this language shows that Section 13(b) addresses situations in which the FTC needs to halt ongoing conduct while it determines (presumably through an administrative proceeding) whether the conduct is unlawful. The Court recognized that Section 13(b) does provide for permanent injunctions in "proper cases." Even so, the Court said that reading this language to allow for other unnamed types of equitable relief would allow a "small statutory tail to wag a very large dog." Lastly, the Court looked to the broader structure of the FTCA. It pointed, in particular, to other provisions, such as Section 19, which expressly allow for broader types of monetary relief. The Court noted that Congress enacted Section 19 a few years after Section 13(b) and reasoned that it is "highly unlikely that Congress would have enacted provisions expressly authorizing *conditioned* and *limited* monetary relief" if Section 13(b) had already provided for expansive equitable monetary relief.

The Court rejected the various arguments the FTC proffered for a broader reading of Section 13(b). For instance, the Commission argued that *Porter* and *Mitchell* support its interpretation of Section 13(b) because the Court held in those cases that statutory provisions authorizing injunctive relief also allowed equitable monetary relief. The Court explained, however, that both cases also recognized that the text and structure of a statute can, "by a necessary or inescapable inference," restrict a court's equity jurisdiction. The Court noted that it drew such an inference in *Meghrig v. KFC Western, Inc.*, when it held that the relevant statutory scheme as a whole showed that a particular provision did not authorize restitution. Such an inference similarly applies, the Court explained, to Section 13(b). The Court also rejected, among other arguments, the FTC's contention that Congress had acquiesced to circuit courts' broad interpretation of Section 13(b) because it had twice amended the provision without overturning these decisions. The Court recognized that congressional acquiescence to a settled judicial interpretation can suggest Congress's adoption of that interpretation. Nonetheless, it explained that this principle did not apply to Congress's amendments of Section 13(b), since those were isolated and unrelated changes dealing with the provision's venue, joinder, and service rules, rather than its remedial provisions.

Considerations for Congress

The Court's decision in *AMG Capital Management* curtails one of the FTC's most commonly used enforcement tools. As the Court noted in its opinion, the FTC brings dozens of cases a year under Section 13(b). After the Court's decision, the FTC will still be able to use Section 13(b) to obtain injunctive relief to halt ongoing or impending conduct that violates any law enforced by the FTC. But the FTC will no longer be able to obtain monetary relief in such actions. If the FTC wants to obtain monetary relief for first-time violations of Section 5 of the FTCA, it will now first have to complete an administrative case-and-desist proceeding; once the case-and-desist order is final, the FTC will then have to commence a second follow-on action in federal court under Section 19, in which it must show a reasonable person would have known defendant's conduct was dishonest or fraudulent. This development affects many cases, since Section 5 encompasses much of the Commission's competition and consumer protection authority. The Court's decision will not, however, inhibit the FTC's authority to seek monetary penalties when companies violate cease-and-desist orders, consent orders, or rules issued under Section 18(a)(1)(B) of the FTCA that define particular types of acts or practices as unfair or deceptive. The FTC will also still be able to obtain monetary relief when enforcing other statutes, such as the Children's Online Privacy Protection Act or the COVID-19 Consumer Protection Act, which provide that violations of those laws be treated as violations of Section 18(a)(1)(B) rules.

In light of *AMG Capital Management*, Congress may be interested in addressing the FTC's remedial authority under the FTCA. One approach could be to amend Section 13(b) to allow for equitable monetary relief. For example, the recently introduced bill H.R. 2668 would amend Section 13(b) to authorize many kinds of equitable relief, such as restitution, disgorgement of ill-gotten gains, and rescission of contracts. This bill would also address Section 13(b)'s limitation on suing for past conduct by amending it to allow for enforcement actions based on past violations, subject to a 10-year statute of limitations. On the other hand, some commentators have maintained that any additional monetary authority should be accompanied by safeguards ensuring that only clear violations are subject to monetary relief. For instance, the U.S. Chamber of Commerce has suggested that any amendments to Section 13(b) allowing monetary relief should also incorporate Section 19's requirement that the FTC show that a reasonable person would have known the conduct was dishonest or fraudulent. During a recent congressional hearing, however, several witnesses maintained that keeping the dishonest or fraudulent standard out of Section 13(b) would provide the FTC with necessary flexibility in recouping money for consumers.

Another issue is whether any revisions to Section 13(b) would apply retroactively to cases pending at the time of the statutory amendment. H.R. 2668 provides that its amendments shall apply to any actions pending on the date of enactment. Some commentators, however, have said that there may be constitutional due process concerns with applying monetary remedies retroactively. For a further discussion of retroactive legislation, see CRS In Focus IF11293, *Retroactive Legislation: A Primer for Congress*, by Joanna R. Lampe.

Author Information

Chris D. Linebaugh
Legislative Attorney

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