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U.S. Supreme Court Rejects Federal Trade Commission's Ability to Seek Restitution in Antitrust and Consumer Protection Cases

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In a 9-0 decision issued yesterday, the U.S. Supreme Court eliminated the Federal Trade Commission's most-used tool to obtain monetary remedies in antitrust and consumer protection cases. The decision, *AMG Capital Management, LLC v. FTC*, No. 19-508 (U.S.), will spur and invigorate calls for Congress to provide the FTC with statutory authority to obtain monetary relief in matters involving alleged unfair or deceptive conduct. It may also lead to increased activity in this space by state attorneys general (AGs), and increased collaboration between the FTC and state AGs or other federal agencies. *AMG's* impact may ultimately be measured by the legislative response to the Court's decision.

Section 13(b) of the FTC Act authorizes the FTC to seek a "permanent injunction" from a federal court against any person or company that "is violating, or is about to violate" the Act's prohibition of "unfair or deceptive acts or practices."¹

Since the 1970s, the FTC has invoked Section 13(b) to obtain monetary relief from parties in the form of restitution or disgorgement, and for years, the federal courts have endorsed this practice. Yesterday, however, in *AMG*, a unanimous Supreme Court rejected that long-standing practice, holding that Section 13(b) does not authorize the FTC to seek – or a court to award –

equitable monetary relief. The Court's opinion, authored by Justice Breyer, marks a decisive repudiation of the FTC's expansive interpretation of its statutory mandate and, in the near term, will inhibit the agency's ability to obtain monetary relief in the federal courts for allegedly unfair or deceptive acts.

In *AMG*, the Court first reviewed the enforcement tools that Congress has given the FTC in the FTC Act. As the Court explained, the FTC can bring its own administrative proceedings, the end product of which is a cease-and-desist order. Section 19 then allows the FTC to ask a district court to order the "refund of money or return of property," but only subject to certain conditions, including that the party had actual knowledge that its conduct was dishonest or fraudulent. In contrast, Section 13(b) permits the FTC, without securing a cease-and-desist order through its administrative process, to proceed directly to federal court to obtain a "temporary restraining order or a preliminary injunction" or, in "proper cases," a "permanent injunction." The Court observed that, over the past several decades, the FTC has used Section 13(b) – specifically, its "permanent injunction" language – to obtain monetary relief with "great frequency," thus "effectively bypassing" the processes set forth in Sections 5 and 19.

The Court held, however, that Section 13(b)'s "permanent injunction" language "does not authorize the Commission directly to obtain court-ordered monetary relief." Turning first to the statutory text, the Court noted that an "injunction" is "not the same as an award of equitable monetary relief." Section 13(b)'s "language and structure" indicate that "permanent injunction" within the meaning of the statute means "prospective, not retrospective" relief – specifically, to "stop [] seemingly unfair practices from taking place while the Commission determines their lawfulness" in an administrative proceeding, rather than a "grant of monetary relief." The Court also looked to the structure of the FTC Act more broadly, observing that it was unlikely that Congress would have enacted provisions like Sections 5(l) and 19 – which expressly authorize "conditioned and limited monetary relief" – if it had already implicitly allowed the FTC, via Section 13(b), to "obtain that same monetary relief and more without satisfying those conditions and limitations."

Finally, the Court rejected various arguments advanced by the FTC, including the “importance of allowing the Commission to use Section 13(b) to obtain monetary relief” so as not to leave violators with “profits earned at the unjustified expense of consumers.” As to that “policy-related” contention, the Court remarked that the FTC could still use its authority under Section 19 to obtain restitution, and if the FTC thought that authority “too cumbersome or otherwise inadequate,” it could “ask Congress to grant it further remedial authority.”

Even for observers who predicted that the FTC’s Section 13(b) practices might face skepticism at the Supreme Court, *AMG*’s unanimous rejection of that argument – which, until very recently, had commanded universal support in the federal courts of appeals – is nevertheless remarkable. Yet it is perhaps not altogether surprising; in recent years, the Court has repeatedly reined in agency overreach occasioned by aggressive statutory or regulatory interpretations, particularly those that arose (and were accepted by the lower courts) during an era when more freewheeling interpretive principles governed.

In the short term, the *AMG* decision will unquestionably foreclose the FTC’s practice of going directly to federal court to obtain monetary relief for allegedly deceptive or unfair practices; similarly, the FTC can no longer use the threat of such expedient action as a means for extracting unfavorable settlements. Instead, the FTC must resort to more time-consuming or limited approaches, including rulemaking and rule enforcement, enforcement of existing orders, and pursuit of monetary remedies through Section 19.

AMG will intensify calls for Congress to provide the FTC with the statutory authority that the Supreme Court found absent, and may catalyze support for otherwise expanding the FTC’s authority. Indeed, even before today’s decision, proponents of broader enforcement powers – including FTC Commissioners themselves – have been vociferously arguing for amendments to Section 13(b) that would expressly allow the agency to obtain monetary relief or similar redress to consumers. The *AMG* decision expressly notes that the FTC remains “free to ask Congress to grant it further remedial authority,” and we expect it will invigorate federal legislators who were already receptive to changes to Section 13(b). The timing and scope of any such legislative response is uncertain, though, and opponents have

already begun marshaling arguments against handing the FTC expanded enforcement power. Consequently, while *AMG* definitively prohibits the FTC from using the current version of Section 13(b) to obtain monetary relief in federal court, it is anything but clear whether an amended Section 13(b) may emerge to provide stronger authority and perhaps even more potent remedies in the future.

1. 15 U.S.C. §§ 45, 53(b).↔

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