Antitrust, Vol. 34, No. 1, Fall 2019.

Seventh Circuit Sets Up Potential Supreme Court Review of FTC Monetary Relief Authority

BY M. SEAN ROYALL, RICHARD H. CUNNINGHAM, OLIVIA ADENDORFF, AND ASHLEY ROGERS

FOR MORE THAN 30 YEARS, THE Federal Trade Commission has sought and obtained monetary remedies styled as equitable restitution, disgorgement, and/or contractual rescission pursuant to Section 13(b) of the FTC Act. Indeed, in recent years many of the FTC's largest monetary remedies have been obtained using the agency's Section 13(b) authority, including, among many other matters, a $1.2 billion settlement with Teva Pharmaceutical Industries in a matter involving pay-for-delay allegations; up to $1.2 billion in a settlement with Volkswagen relating to allegedly misleading claims about "clean diesel"; at least $575 million in a settlement with Equifax relating to a 2017 data breach; and $448 million in a district court judgment against AbbVie for alleged antitrust violations.[1]

Although Section 13(b) has been the statutory basis upon which the FTC has collected such massive monetary recoveries, the provision in fact makes no express reference to any form of monetary remedy or relief, referring instead only to "injunctions." The Supreme Court has never addressed whether Section 13(b) can properly be read to authorize monetary relief, but—prior to August 21, 2019—nine federal courts of appeal[2] had construed Section 13(b) to allow the FTC to obtain monetary relief, and the FTC has long viewed its authority in this area to be well-settled.[3]

On August 21, 2019, in an extraordinary decision, the Seventh Circuit in *FTC v. Credit Bureau Center*[4] broke with eight other circuits and expressly overturned its own earlier precedent—*FTC v. Amy Travel Service, Inc.*[5]—in holding that Section 13(b) of the FTC Act does not authorize the FTC to seek monetary awards like restitution, vacating a $5.26 million judgment in favor of the FTC. As the Seventh Circuit acknowledged in its majority opinion, its conclusion "departs from the consensus view of [its] sister circuits," setting up a clear circuit split on this important question of FTC authority.[6]

The Seventh Circuit's reexamination of its own prior landmark precedent regarding Section 13(b) relies on what the panel viewed as an intervening sea change in the extent to which the Supreme Court has been willing to read implied remedies into statutory provisions authorizing only injunctive relief. In particular, *Credit Bureau* interprets the Supreme Court's 1996 ruling in the environmental lawsuit *Meghrig v. KFC Western, Inc.*[7] as reversing earlier jurisprudence that took a more expansive approach to authorizing implied remedies.[8] Moreover, in *Kokesh v. SEC*, the Supreme Court held that disgorgement constitutes a "penalty," indicating that it may not be appropriate to infer the power to impose disgorgement from a statute authorizing only injunctions, a remedy that is entirely equitable in nature.[9] The potential application of *Kokesh* to the interpretation of Section 13(b) was the subject of a special concurrence by Judge Diarmuid F. O'Scannlain to the Ninth Circuit's majority opinion in *FTC v. AMG Capital Management, LLC* that also called into question whether Section 13(b) permits the FTC to obtain monetary remedies.[10]

The implications of *Credit Bureau* are potentially far-reaching. In our view, there is a high likelihood of Supreme Court review, which the FTC has already signaled it will seek. The likelihood of the Supreme Court granting certiorari is heightened because the prior Seventh Circuit decision *Credit Bureau* overruled—*Amy Travel*—was relied upon by many other circuits in decisions upholding the FTC's authority to obtain monetary relief under Section 13(b). If the Supreme Court affirms *Credit Bureau*, the FTC's ability to obtain monetary remedies pursuant to Section 13(b) will be eliminated or substantially curtailed. And, in this circumstance, the FTC, absent new statutory authority, will be limited to pursuing monetary remedies through other existing means, including the process set forth in Section 19 of the FTC Act that requires, as a condition to such relief, that the agency invoke a previously promulgated rule or prevail in a prior administrative proceeding.

Section 13(b)

Section 13(b) of the FTC Act provides that "the Commission may seek, and after proper proof the court may issue, a per-

M. Sean Royall, Richard H. Cunningham, and Olivia Adendorff are partners at Kirkland & Ellis LLP. Ashley Rogers is of Counsel, with Gibson, Dunn & Crutcher LLP. Mr. Royall served as Deputy Director of the FTC Bureau of Competition from 2001 through 2003 and Mr. Cunningham served as Staff Attorney and Senior Trial Counsel with the Bureau of Competition from 2004 to 2013. Messrs. Royall and Cunningham represent LendingClub in FTC v. LendingClub, *Case No. 3:18-cv-02454 (N.D. Cal.), a matter that is currently pending in which the FTC is seeking monetary relief pursuant to Section 13(b) of the FTC Act. Mr. Royall also was counsel for the appellant in* FTC v. Commerce Planet, Inc., *815 F.3d 593 (9th Cir. 2016), discussed below. The authors thank Julie Hamilton for her valuable contributions to this article.*

manent injunction."[11] The language of the statute does not reference monetary relief.

Nevertheless, nearly all circuit courts—including the Seventh Circuit in *Amy Travel*—have held that the word "injunction" as used in Section 13(b) implicitly authorizes equitable remedies involving monetary payments, including restitution, rescission, and disgorgement. In reaching this conclusion, courts have often relied on the Supreme Court's 1946 decision in *Porter v. Warner Holding Co.*[12] In *Porter*, the Court held that Section 205(a) of the Emergency Price Control Act of 1942, which empowered district courts to grant "permanent or temporary injunction, restraining order, or other order," also authorized restitution, because "all the inherent equitable powers of the District Court are available" unless the statute provides otherwise, and such powers include equitable monetary remedies like restitution and disgorgement.[13] Following this expansive interpretation of the judiciary's inherent equitable powers, lower courts held that Section 13(b)'s reference to "a permanent injunction" likewise allowed the FTC to obtain equitable monetary remedies, including restitution and disgorgement.

Credit Bureau

The Seventh Circuit's *Credit Bureau* decision examines *Porter* and its progeny interpreting Section 13(b) in detail, but ultimately rejects the logic and analysis presented in those cases and relies instead on its close reading of the FTC Act as a whole and the Supreme Court's *Meghrig* decision to reject prior circuit precedents.

Credit Bureau arose when the FTC sued Michael Brown and his credit-monitoring company, Credit Bureau Center, LLC (collectively "Brown"), for enrolling customers, without consent, in a $29.94 monthly subscription for Brown's credit-monitoring service when they applied for a "free" credit report.[14] The FTC brought suit under Section 13(b), alleging that Brown violated several consumer protection statutes and seeking a permanent injunction and restitution.[15] The U.S. District Court for the Northern District of Illinois entered a permanent injunction and ordered Brown to pay $5.26 million in restitution to the FTC.[16] On appeal, Brown challenged aspects of his liability, the permanent injunction, and the restitution award.[17]

A three-judge panel of the Seventh Circuit, consisting of Judges Diane Sykes, Daniel Manion, and Michael Brennan, upheld the district court's finding of liability and issuance of the permanent injunction, but vacated the restitution award.[18] In so doing, as mentioned above, the panel expressly overturned its prior decision in *Amy Travel*.[19]

The panel directly addressed the FTC's two main arguments in support of restitution authority: statutory interpretation and *stare decisis*. Starting with "the obvious," the panel first stated that "[r]estitution isn't an injunction."[20] *Amy Travel* had held that Section 13(b)'s "statutory grant of authority to the district court to issue permanent injunctions includes the power to order any ancillary equitable relief necessary to effectuate the exercise of granted powers," including restitution.[21] But the *Credit Bureau* panel rejected that analysis because "[a]n implied restitution remedy doesn't sit comfortably with the text of [S]ection 13(b)."[22] The panel explained that unlike injunctions, which are forward-looking, restitution is a remedy for past actions.[23] It also pointed to two other detailed remedial provisions in the FTC Act that do *expressly* authorize restitution if the FTC provides certain procedural protections (such as prior notice), and it held that reading Section 13(b)—which lacks similar protections—to *impliedly* authorize restitution would allow the FTC to circumvent these provisions, rendering them "largely pointless."[24]

Turning to *Amy Travel*, which "endorsed [a] starkly atextual interpretation" of Section 13(b), the panel noted that in the three decades since the decision "the Supreme Court has clarified that courts must consider whether an implied equitable remedy is compatible with a statute's express remedial scheme" and specifically instructed courts "not to assume that a statute with 'elaborate enforcement provisions' implicitly authorizes other remedies."[25] The panel therefore overruled *Amy Travel*.

To justify this upheaval of longstanding precedent, the panel relied heavily on the Supreme Court's 1996 ruling in *Meghrig v. KFC Western, Inc.*[26] There, the Court held that the Resource Conservation and Recovery Act, which authorizes district courts to "restrain" an individual handling potentially dangerous waste or order the individual "to take such other action as may be necessary," does not authorize restitution.[27] Stating that its "limited analysis in *Amy Travel* doesn't offer a way to distinguish *Meghrig*" and instead "requires [it] to ignore [S]ection 13(b)'s text and disregard the [FTC Act's] 'elaborate enforcement provisions,'" the Seventh Circuit panel concluded that, in light of *Meghrig*, its "holding in *Amy Travel* is no longer viable."[28] In the court's words, "*Stare decisis* alone cannot overcome *Amy Travel*'s clear incompatibilities with the FTCA's text and structure, *Meghrig*, and the Supreme Court's broader refinement of its implied remedies jurisprudence."[29]

The panel expressly acknowledged that its holding "departs from the consensus view of [its] sister circuits"—as reflected, in particular, in decisions from the Ninth[30] and Eleventh[31] Circuits—but held that *Meghrig* compelled the departure.[32] The panel further noted that "[n]o circuit has examined whether reading a restitution remedy into [S]ection 13(b) comports with the [FTC Act's] text and structure,"[33] whether Section 45 "forecloses this remedy," or the impact of *Meghrig* in a Section 13(b) case.[34] Instead, said the panel, "most circuits adopted their position by uncritically accepting [the] holding in *Amy Travel*."[35]

A majority of Seventh Circuit judges declined to rehear this case en banc,[36] but the decision to decline rehearing drew an ardent dissent from Chief Judge Diane P. Wood, joined by Judges Illana Rovner and David Hamilton, on both procedural and substantive grounds. The dissent criticized the

***Credit Bureau*'s clear break with precedent sets up a circuit split and may push other circuits to reevaluate their own precedents, many of which cite and rely on *Amy Travel*.**

majority for wielding a circuit rule to avoid plenary en banc review, and characterized the majority opinion as incorrectly extrapolating from cases, like *Meghrig*, that address whether a *private party* has an implied right of action to determine whether a *government agency*, "which enjoys an express right of action under a statute for injunctive relief, is entitled to a restitutionary remedy that is ancillary to, or part of, the injunction."[37]

According to the dissenting opinion, "Nothing in *Meghrig* . . . comes close to holding that a government agency acting pursuant to express authority to seek injunctive relief cannot ask for a mandatory injunction requiring turn-over of money."[38] In the dissenters' view, a court's equitable powers are broader in nature where the public interest is concerned, and the presence of a government (rather than private) plaintiff is "especially important" to the analysis when "the government seeks remedies that (1) lie uniquely within its toolbox and (2) are aimed squarely at undoing public harms and preventing future ones through deterrence."[39] "To my knowledge," asserted Chief Judge Wood, writing for the dissent, "no court has ever tied the hands of a government agency in the way that the majority has done here, and the majority cites none."[40]

The dissent also criticized the majority's "effort[s] to trivialize the fact that eight of our sister circuits agree with *Amy Travel*'s holding," stating that "[t]hey brush off this consensus with the accusation that these courts have done so unthinkingly," a charge which is "quite unwarranted."[41] According to the dissent, the majority opinion "upends what the agency and Congress have understood to be the status quo for thirty years, and in so doing grants a needless measure of impunity to brazen scammers like the defendant in this case."[42]

On September 17, 2019, the FTC responded to the panel decision by filing a motion to stay the mandate, which the Seventh Circuit granted just three days later.[43] The Seventh Circuit granted the motion just three days later, on September 20, 2019.[44] In its motion, the FTC cited Federal Rule of Appellate Procedure 41(d)(1), which allows a court to stay a mandate for "good cause" pending the filing of a petition for a writ of certiorari. The FTC argued that there is a reasonable probability the Supreme Court will grant certiorari and reverse the Seventh Circuit, and the FTC will suffer irreparable harm if the mandate issues.[45] To support its arguments regarding certiorari, the FTC asserted that the panel in *Credit Bureau* "effectively applied the opposite rule" to that established in *Porter* and *Mitchell v. Robert DeMario Jewelry, Inc.*,[46] and the Court is "especially reluctant" to depart from precedent in statutory interpretation cases where "Congress has long acquiesced in the interpretation" at issue, as the FTC claimed Congress has here.[47]

AMG Capital Management

Credit Bureau's clear break with precedent sets up a circuit split and may push other circuits to reevaluate their own precedents, many of which cite and rely on *Amy Travel*.

Notably, the Seventh Circuit is not the only federal appellate court to focus on these issues in recent months. Ninth Circuit Judge Diarmuid F. O'Scannlain's special concurrence to the majority opinion in *FTC v. AMG Capital Management, LLC*,[48] joined by Judge Carlos Bea, adopted a similar view. Judge O'Scannlain described permitting the FTC to obtain monetary relief under Section 13(b) as "an impermissible exercise of judicial creativity" that "contravenes the basic separation-of-powers principle that leaves to Congress the power to authorize (or to withhold) rights and remedies."[49] While he ultimately felt that arguments against the FTC's authority to seek monetary remedies were "foreclosed by [Ninth Circuit] precedent"[50]—namely, *FTC v. Commerce Planet, Inc.*[51]—Judge O'Scannlain called on the Ninth Circuit to hear the case en banc to reconsider that precedent.[52]

Unlike *Credit Bureau*'s reliance on *Meghrig*, Judge O'Scannlain relied heavily on *Kokesh v. SEC* to argue that *Commerce Planet* was "no longer tenable" because it "wrongly" interpreted Section 13(b).[53] *Kokesh* held that disgorgement sought by the SEC is a penalty.[54] Applying the test set forth in *Kokesh*, Judge O'Scannlain likewise reasoned that the restitution the FTC seeks under Section 13(b) is "a penalty—not a form of equitable relief," and thus not included implicitly within the equitable injunctive power afforded by the statutory text.[55] He explained that, in his view, this conclusion comports with the historical powers of a court sitting in equity.[56]

In addition to this reliance on *Kokesh*, Judge O'Scannlain stated that he would reach the same conclusion based only on an analysis that "would begin (and end) with the statute's text"—which provides authority only to seek an "injunction."[57] "[I]f 'injunction' included court orders to pay monetary judgments, then 'a statutory limitation to injunctive relief would be meaningless, since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction.'"[58] Judge O'Scannlain also relied, as did the Seventh Circuit in *Credit Bureau*, on the difference between the forward-looking nature of an injunction intended to address "*imminent* harm" and the backward nature of monetary remedies intended to "deprive a defendant of 'unjust gains from *past* violations.'"[59] Moreover, Judge O'Scannlain examined the differences between Section 13(b) and Section 19 and again found the statutory scheme was logically intended to "give the Commission two complementary tools—one forward-looking and preventive, the other backward-looking and remedial," rather than redundant remedies.[60] The con-

currence then emphasized Section 19's greater procedural protections—including securing a "final cease and desist order" through the administrative process before seeking penalties—which *Commerce Planet* "allows the Commission to avoid."[61]

However, in June 2019 the Ninth Circuit denied AMG's petition for rehearing en banc after no judge requested a vote on whether to rehear the case.

Potential Implications of *Credit Bureau*

The panel opinion in *Credit Bureau* and the concurrence in *AMG Capital Management* draw on a marked shift in Supreme Court jurisprudence away from interpretation of statutes based on the Court's view of the purpose of the statute and toward an interpretation focused more on the words of the statutory text.

This narrower reading of Section 13(b) has important procedural consequences for the FTC. As the FTC stated in its motion to stay, the FTC has utilized Section 13(b) to "return billions of dollars to victimized American consumers." Thus, for the FTC, the question of whether Section 13(b) authorizes monetary relief "is a recurring one of great public importance."[62] If the FTC cannot obtain monetary relief pursuant to Section 13(b), the agency will be forced to proceed through Section 19 of the FTC Act (or by invoking a rule or other subject-matter-specific authority) to obtain monetary remedies. Section 19 requires the FTC to prove that a defendant violated a rule promulgated through the Commission's rulemaking procedures,[63] or, if no such rule exists, the Commission must secure a final cease-and-desist order through an administrative adjudication before heading to federal court to prove the defendant's conduct was such that a "reasonable man" would know it was "dishonest or fraudulent."[64] The FTC views these options as significantly less desirable. Indeed, even before the FTC filed its motion to stay, an FTC spokesperson issued a statement describing its "ability to recover money for consumers" as "an essential and long-established tool in [the agency's] enforcement arsenal," and stating that the FTC was "disappointed by th[e] decision" and "evaluating [its] options."[65]

If the Supreme Court accepts the case, there are signs that at least some Justices may agree with the Seventh Circuit's analysis. For example, Justice Gorsuch stated at oral argument in *Kokesh* that the Court had never given its approval to 50 years of lower-court precedent allowing disgorgement based on inherent equitable authority ancillary to an injunction.[66] Justice Gorsuch further noted that "there's no statute governing" such a remedy; in his words, the Court is "just making it up."[67] Chief Justice Roberts similarly expressed discomfort with the lack of a specific reference to monetary remedies in relevant provisions.[68] And Justice Sotomayor pressed the parties to identify statutory authority authorizing disgorgement.[69]

Given these statements, the current Court's interest in staying closely wedded to the statutory remedial regime expressly set forth by Congress, and the clear circuit split that now exists, it is easy to envision the Court granting certiorari. And, as the FTC stated in its motion to stay the mandate, a circuit split is perhaps "the 'most assured way' of obtaining Supreme Court review."[70] Even if the Supreme Court does not take up this issue, one thing is clear: the FTC's authority to obtain monetary relief under Section 13(b) is no longer settled law.

Unsurprisingly, Commissioners and others are already calling for new legislation addressing the FTC's authority to obtain monetary relief.[71] The inclination of Congress to answer those calls could be influenced by the ultimate resolution of *Credit Bureau*. How this area of law unfolds during the coming months could very significantly impact the Commission's tools and legal strategies in matters in which it seeks monetary remedies. ■

---

1 Press Release, Fed. Trade Comm'n, FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go to Purchasers Affected By Anticompetitive Tactics (May 28, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill; Press Release, Fed. Trade Comm'n, Federal Judge Approves FTC Order for Owners of Certain Volkswagen, Audi, and Porsche 3.0 Liter "Clean" Diesels to Receive Refunds (May 17, 2017), https://www.ftc.gov/news-events/press-releases/2017/05/federal-judge-approves-ftc-order-owners-certain-volkswagen-audi; Press Release, Fed. Trade Comm'n, Equifax to Pay $575 Million as Part of Settlement with FTC, CFPB, and States Related to 2017 Data Breach (July 22, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/equifax-pay-575-million-part-settlement-ftc-cfpb-states-related; Press Release, Fed. Trade Comm'n, Statement of FTC Chairman Joe Simons Regarding Federal Court Ruling in FTC v. AbbVie (June 29, 2018), https://www.ftc.gov/news-events/press-releases/2018/06/statement-ftc-chairman-joe-simons-regarding-federal-court-ruling; Opening Brief of the Fed. Trade Comm'n, FTC v. AbbVie Inc., Nos. 18-2621, 18-2748, 18-2758 (3d Cir. Mar. 28, 2019).

2 *See* FTC v. Commerce Planet, Inc., 815 F.3d 593, 598–99 (9th Cir. 2016); FTC v. Ross, 743 F.3d 886, 890–92 (4th Cir. 2014); FTC v. Bronson Partners, LLC, 654 F.3d 359, 365–66 (2d Cir. 2011); FTC v. Magazine Sols., LLC, 432 F. App'x 155, 158 n.2 (3d Cir. 2011) (unpublished); FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 15 (1st Cir. 2010); FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); FTC v. Gem Merch. Corp., 87 F.3d 466, 468–70 (11th Cir. 1996); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1314–15 (8th Cir. 1991); FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 571–72 (7th Cir. 1989).

3 *See, e.g.*, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, Fed. Trade Comm'n, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (stating that the Commission "*may seek* . . . imposition of various kinds of monetary equitable relief" under Section 13(b) (emphasis added)); Brief of the Fed. Trade Comm'n at 28, FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019).

4 FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019).

5 *Amy Travel*, 875 F.2d 564.

6 *Credit Bureau*, 937 F.3d at 785.

7 Meghrig v. KFC W., Inc., 516 U.S. 479 (1996).

8 *See Credit Bureau*, 937 F.3d at 780–82.

9 Kokesh v. SEC, 137 S. Ct. 1635, 1639 (2017).

10 *See* FTC v. AMG Capital Mgmt., LLC, 910 F.3d 417, 429–37 (9th Cir. 2018). This decision was discussed at length in a prior article we published in the Spring 2018 edition of Antitrust. M. Sean Royall, Richard H. Cunningham & Ashley Rogers, *Are Disgorgement's Days Numbered?* Kokesh v. SEC *May*

Foreshadow Curtailment of the FTC's Authority to Obtain Monetary Relief, ANTITRUST, Spring 2018, at 94.

[11] 15 U.S.C. § 53(b)(2).

[12] Porter v. Warner Holding Co., 328 U.S. 395 (1946).

[13] *Id.* at 398–99.

[14] *Credit Bureau*, 937 F.3d at 766.

[15] *Id.*

[16] *Id.* at 766, 768.

[17] *Id.* at 768.

[18] *Id.* at 766–67.

[19] *Id.* at 767.

[20] *Id.* at 771.

[21] *Amy Travel*, 875 F.2d at 572.

[22] *Credit Bureau*, 937 F.3d at 772.

[23] *Id.* at 772–73.

[24] *Id.* at 773–74.

[25] *Id.* at 767.

[26] 516 U.S. 479 (1996).

[27] *Id.* at 484–88.

[28] *Credit Bureau*, 937 F.3d at 785.

[29] *Id.* at 786.

[30] FTC v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982).

[31] FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431 (11th Cir. 1984).

[32] *Credit Bureau*, 937 F.3d at 785.

[33] The question of whether restitution can be sought under Section 13(b) has arisen in district courts in recent years, including in *FTC v. Hornbeam Special Situations*, No. 17-cv-3094 (N.D. Ga. Oct. 15, 2018), and *FTC v. Shire ViroPharma*, No. 17-131-RGA (D. Del. Mar. 20, 2018), although prior to the Seventh Circuit's ruling it had not been definitively answered.

[34] *Credit Bureau*, 937 F.3d at 785.

[35] *Id.*

[36] *Id.* at 767 n.1.

[37] *Id.* at 786 (Wood, J., dissenting).

[38] *Id.* at 794 (Wood, J., dissenting).

[39] *Id.* at 793 (Wood, J., dissenting).

[40] *Id.* at 786 (Wood, J., dissenting).

[41] *Id.* at 794 (Wood, J., dissenting).

[42] *Id.* at 797 (Wood, J., dissenting).

[43] Fed. Trade Comm'n's Motion to Stay Mandate, FTC v. Credit Bureau Ctr., LLC, No. 18-2847 (7th Cir. Sept. 17, 2019) [hereinafter Motion].

[44] Order re: Motion to Stay Mandate, FTC v. Credit Bureau Ctr., LLC, No. 18-2847 (7th Cir. Sept. 20, 2019).

[45] Motion, *supra* note 43, at 3–4.

[46] 361 U.S. 288 (1960).

[47] *Id.* at 6–9 (internal citations omitted).

[48] *AMG Capital Management*, 910 F.3d 417.

[49] *Id.* at 437.

[50] *Id.* at 426.

[51] 815 F.3d 593, 598 (9th Cir. 2016).

[52] *AMG Capital Management*, 910 F.3d at 429 (O'Scannlain, J., specially concurring).

[53] *Id.* (O'Scannlain, J., specially concurring).

[54] *Kokesh*, 137 S. Ct. at 1640.

[55] *AMG Capital Management*, 910 F.3d at 433–34.

[56] *Id.* at 434–35.

[57] *Id.* at 430.

[58] *Id.* (quoting Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 211 n.1 (2002)).

[59] *Id.* (quoting *Commerce Planet*, 815 F.3d at 599).

[60] *Id.* at 431–32.

[61] *Id.*

[62] Motion, *supra* note 43, at 5.

[63] 15 U.S.C. § 57b(a)(1). Section 13(m) of the FTC Act also permits the agency to obtain monetary relief in the form of penalties for "knowing violations of rules and cease and desist orders" in certain circumstances. 15 U.S.C. § 45(m)(1)(a).

[64] 15 U.S.C. § 57b(a)(2).

[65] Debra Cassens Weiss, *Overruling Its Own Precedent, 7th Circuit Curbs FTC's Ability to Obtain Restitution*, ABA J., http://www.abajournal.com/news/article/overruling-its-own-precedent-7th-circuit-curbs-ftcs-ability-to-obtain-restitution.

[66] *See* Transcript of Oral Argument at 52, Kokesh v. SEC, 137 S. Ct. 1635 (2017).

[67] *Id.*

[68] *Id.* at 33 ("[T]hey're sort of backing and filling. I mean, this remedy is out there, and yes, [Congress is] saying this. But it does seem to me that we kind of have a special obligation to be concerned about how far back the government can go when it's something that Congress did not address because it did not specify the remedy.").

[69] *Id.* at 7, 9.

[70] Motion, *supra* note 43, at 4 (internal citation omitted).

[71] *See, e.g.*, *Hearing Before the Subcomm. on Consumer Protection and Commerce of the H. Comm. on Energy and Commerce*, 116th Cong. 1 (2019) (statement of Christine S. Wilson, Comm'r, Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/1519254/commissioner_wilson_may_2019_ec_opening.pdf.