

# Supreme Court Limits FTC Authority to Obtain Disgorgement or Restitution, Rejecting Decades of Precedent

## Publications

April 23, 2021

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In a high-profile decision in *AMG Capital Management, LLC v. Federal Trade Commission*, No. 19-508 (Apr. 22, 2021), the US Supreme Court held that the Federal Trade Commission's (FTC) statutory authority to obtain a "permanent injunction" does not permit it to obtain "equitable monetary relief" such as restitution or disgorgement. The Court's unanimous decision interpreted Section 13(b) of the FTC Act to "mean what it says"[1]—contrary to what the FTC and many courts have long read the statute to mean—and strips the FTC of a tool it has often used in antitrust and consumer protection cases. If the FTC wants that tool back, the Court explained, it must look to Congress.

The path to the Court's decision is relatively straightforward. In 2012, the FTC sued a payday lender, alleging deceptive practices in violation of § 5(a) of the Federal Trade Commission Act. Invoking § 13(b), which authorizes the FTC to obtain a "permanent injunction" in "proper cases" where a party "is violating, or is about to violate, any provision of law" that the FTC enforces, the FTC asked the District Court to grant a permanent injunction and order \$1.27 billion in restitution and disgorgement. The District Court granted the request. On appeal, the Ninth Circuit affirmed based on binding circuit precedent holding that § 13(b) permitted the relief the FTC sought. Two of the three judges on the panel "expressed doubt as to the correctness of that precedent" as well as of similar precedent in at least eight other circuits stretching back more than thirty years.

In a unanimous decision, the Court validated the judges' skepticism, rejected "precedent in many Circuits," and held that § 13(b) does not permit the FTC to seek disgorgement and restitution. Looking to the text, the Court reasoned that "the language refers only to injunctions," contemplates prospective (not retrospective) relief, and "the words 'permanent injunction' have a limited purpose" which "does not extend to the grant of monetary relief." [2] In addition, other provisions of the FTC Act (§ 5(l) and § 19) explicitly provide for limited equitable monetary remedies—but only after the FTC undertakes administrative proceedings that are "more onerous" than simply filing a complaint in federal court, obtains a cease and desist order, and satisfies various other conditions and limitations. Reading § 13(b) to permit the FTC to obtain the same relief without that additional

process or those additional requirements “would allow a small statutory tail to wag a very large dog.”[3] By contrast, reading § 13(b) “to mean what it says ... produces a coherent enforcement scheme.”[4]

The decision may have a major practical impact on those within the FTC’s purview. With this decision, the Supreme Court has taken away the FTC’s long-used, self-proclaimed “strongest tool” for obtaining monetary relief in cases alleging deceptive business practices, anti-competitive conduct, and fraud.[5] For example, in 2019, the FTC invoked § 13(b) in “49 complaints in federal court and obtained 81 permanent injunctions and orders, resulting in \$723.2 million in consumer redress or disgorgement.”[6] And the FTC has been using § 13(b) with increasing frequency. For instance, the FTC “sought disgorgement in anti-trust cases four times between 2012 and 2016,” after seeking that relief only four times “in the prior twenty years.”[7]

Going forward, if the FTC wants disgorgement or restitution in federal court it must first pursue administrative proceedings—and must contend with the statutory limitations on the FTC’s authority and the protections for defendants in Sections 5(*l*) and 19. As the Supreme Court noted, however, the FTC remains “free to ask Congress to grant it further remedial authority.” The agency has recently done so, and following the decision’s announcement the FTC renewed its call on Congress “to act swiftly to restore and strengthen the powers of the agency.”[8] Time will tell whether Congress heeds that call. Meanwhile State Attorneys General may step up their own efforts to use state law to obtain monetary awards, or to partner with the FTC.[9] So while the *AMG* decision may be welcome for businesses,[10] it does not immunize them from being targeted for alleged misconduct or from potentially being required to pay large sums as a result.

[1] *Id.* at \*10.

[2] *Id.* at \*7.

[3] *Id.* at \*8-9.

[4] *Id.* at \*10.

[5] Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the US Supreme Court Ruling in *AMG Capital Management LLC v. FTC*, Federal Trade Commission (April 22, 2021).

[6] *Id.* at \*6.

[7] *Id.* at \*6.

[8] FTC Statement, *supra* note 5.

[9] *See* Brief Amici Curiae of States of Illinois, et al. (Dec. 7, 2020),

[10] *See, e.g.*, Brief Amici Curiae of Chamber of Commerce of the United States, et al. (Oct. 2, 2020).

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