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Supreme Court Curtails the FTC's Power to Seek Monetary Relief in Court

By Michael Moiseyev, Megan Granger, Natalie Hayes, and Jarui Wang

On April 22, 2021, the Supreme Court issued its decision in the closely watched *AMG Capital v. FTC* case. The Court held unanimously that § 13(b) of the Federal Trade Commission Act of 1914 ("FTC Act"), which provides that the "Commission may seek . . . a permanent injunction," does not authorize the FTC to seek, or a court to award, equitable monetary relief such as restitution or disgorgement.[1]

The *AMG Capital* opinion upends the FTC's decades-long practice of seeking monetary relief directly in district courts under § 13(b) without first conducting administrative proceedings. While *AMG Capital* involved a consumer protection action, the FTC has used § 13(b) to obtain substantial monetary remedies in high profile antitrust cases as well. This decision forecloses that avenue, at least for now.

The FTC continues to have authority under § 19 of the FTC Act to seek monetary relief in court in consumer protection cases involving "unfair or deceptive acts or practices" where final cease and desist orders have been issued through administrative proceedings. This process, however, takes many years and faces other limitations that make it a less effective tool for obtaining monetary relief than the FTC's prior use of § 13(b). Moreover, the FTC's authority under § 19 may not be available in antitrust cases where the alleged violations involve "unfair methods of competition," rather than "unfair or deceptive acts or practices."

In reaching its decision in *AMG Capital*, the Court concluded that the "permanent injunction" as authorized by § 13(b) has a limited purpose that "does not extend to the grant of monetary relief."[2] The Court observed that § 13(b) "focuses upon relief that is prospective, not retrospective."[3] Since the later-enacted § 19 explicitly grants the FTC limited authority to seek monetary relief in court in cases involving unfair or deceptive acts following an administrative proceeding, the Court reasoned that "to read § 13(b) . . . as authorizing injunctive but not monetary relief produces a coherent enforcement scheme."[4]

Statutory Background

The FTC Act prohibits unfair methods of competition and unfair or deceptive acts or practices. Since its inception in 1914, the FTC has been authorized to enforce the Act through its own administrative proceedings as outlined under § 5. Claims brought by the FTC are adjudicated by an administrative law judge, who conducts hearings and writes reports regarding fact findings and legal conclusions. In cases where the alleged conduct is found to violate the FTC Act, the administrative law judge has the authority to issue a cease and desist order to enjoin the unlawful conduct. Such orders are ultimately subject to judicial review by a court of appeals.

In 1973, Congress enacted § 13(b), which authorizes the FTC to obtain, "in proper cases," a "permanent injunction" in federal court against "any person, partnership, or corporation" that it believes "is violating, or is about to violate, any provision of law" that the Commission enforces.[5] In 1975, Congress enacted § 19, which authorizes district courts to grant relief that the court finds "necessary to redress injury to consumers," including through the "refund of money or return of property." An important limitation of § 19 is that it applies only to "unfair or deceptive acts or practices" but not "unfair methods of competition," which renders it potentially inapplicable to antitrust cases. In addition, to obtain monetary relief under § 19, the FTC must obtain a cease and desist order through administrative proceeding following a hearing and separately seek relief in district court within one year of the issuance of the final order. This multi-forum litigation could take several years and would require substantial agency resources, thus potentially limiting the number of enforcement actions that the FTC could pursue.

Section 13(b) and FTC Enforcement in Antitrust Cases

Prior to the *AMG Capital* decision, § 13(b) was a powerful tool in the FTC's law enforcement arsenal. Since its enactment, the FTC has regularly invoked § 13(b) in consumer protection cases to obtain injunctive and equitable monetary relief in federal court.

Section 13(b) is an equally important enforcement tool in antitrust cases. It has been a mainstay in the FTC's merger enforcement program, where its "unique public interest standard" is used to obtain preliminary injunctions pending an administrative trial that often spells the end for time-sensitive mergers.[6]

In addition, the FTC has used § 13(b)'s grant of authority for injunctive relief to assert that other equitable remedies—including disgorgement—are also available. Using this broad interpretation of § 13(b), the FTC successfully sought and obtained significant monetary awards, particularly in the pharmaceutical industry. In *FTC v. Mylan Laboratories, Inc.*, Mylan Laboratories settled for $100 million in disgorgement to resolve allegations that it has conspired with industry suppliers to deny its competitors ingredients necessary to make two anti-anxiety drugs.[7] In *FTC v. Cephalon, Inc.*, the FTC reached a settlement with Cephalon for $1.2 billion to resolve an antitrust suit alleging Cephalon made illegal reverse payments to delay the entry of generic equivalents of its sleep-disorder drug.[8] In *FTC v. Mallinckrodt ARD Inc.*, Mallinckrodt agreed to pay $100 million in disgorgement to settle charges that its acquisition of Synacthen Depot, a nascent competitor to Mallinckrodt's adrencorticotropic hormone (ACTH) drug monopoly, would constitute monopolization and unfair methods of competition.[9]

The FTC has also used § 13(b) to challenge violations of the Hart-Scott-Rodino Act regarding premerger notification. In *FTC v. The Hearst Trust*, the settlement required Hearst to disgorge $19 million in profits for failure to provide documents required by premerger notification law and subsequently consummating a merger that monopolized the integrated drug information database market.[10]

Court's Analysis and Ruling

In *AMG Capital*, the FTC brought an "unfair or deceptive acts or practices" action against the Petitioner and his short-term loan companies under § 5 of the FTC Act and sought $1.27 billion in restitution and disgorgement.[11]

The Court engaged in both textual and structural analysis of § 13(b) as well as a review of congressional intent. The Court noted that the language in § 13(b) "refers only to injunctions," which are "not the same as an award of equitable monetary relief."[12] Furthermore, the text indicates that § 13(b) focuses on prospective, rather than retrospective, relief.[13] While § 13(b) allows the FTC to seek injunctive relief in district courts pending administrative proceedings or when it seeks only a permanent injunction, the provision does not authorize the FTC to "dispense with administrative proceedings to obtain monetary relief as well."[14]

The Court noted that other statutory provisions, notably § 5(l) and § 19, grant the FTC explicit but limited authority to seek monetary relief with conditions (*e.g.*, for both provisions, the FTC must invoke an administrative proceeding, and § 19 has a three-year statute of limitations). The Court determined that it is "highly unlikely" that Congress would have "implicitly allowed the Commission to obtain the same monetary relief and more [under § 13(b)] without satisfying those conditions and limitations."[15]

The Court flatly rejected the FTC's claim that "the traditional equitable authority to grant an injunction includes the power to grant restorative monetary remedies."[16] Rather, the Court held that the scope of equitable relief that a provision authorizes needs to be interpreted on a case-by-case basis.[17]

The Court also dismissed the FTC's policy argument that it is "undesirable simply to enjoin those who violate the Act while leaving them with profits earned at the unjustified expense of consumers."[18] The Court punted the issue to the legislature, noting that the FTC is "free to ask Congress to grant it further remedial authority," as the FTC has done recently.[19]

Where do we go from here?

- **Will the FTC continue to have the authority to seek monetary relief in antitrust cases?** The answer to this question is likely to have immediate practical implications as there are a number of antitrust cases pending in federal court where the FTC is seeking monetary relief.[20] The FTC has the authority to seek monetary relief in consumer protection cases involving unfair or deceptive acts or practices under § 19 of the FTC Act. However, the terms of § 19 do not apply to violations involving unfair methods of competition, which makes § 19 potentially inapplicable for the FTC to seek monetary relief in antitrust cases. Under § 19, to obtain monetary relief, the FTC must first invoke the administrative proceeding and issue a final cease and desist order following an administrative hearing and adjudication, and subsequently seek monetary relief in court. This multi-forum process is expected to be lengthier than directly seeking injunctions and monetary relief in court. Other limitations in § 19 include a statute of limitations, which requires the FTC to begin administrative process within three years of the underlying violation.
- **Will there be future legislation granting the FTC the authority to seek monetary relief directly in federal court?** The FTC is actively advocating for Congress to pass legislation to protect and strengthen the FTC's enforcement power, including by amending § 13(b) to allow the FTC to seek monetary relief in court. In October 2020, all five FTC Commissioners, including the then-Chairman Joseph Simons, submitted a letter to the Chairs and Ranking Minority members of the Senate Committee on Commerce, Science, and Transportation and the House Committee on Energy and Commerce. The Commissioners urged Congress to amend § 13(b) to make clear that the FTC can obtain monetary relief directly in court and that the FTC can bring actions in court against a violation that occurred in the past, even if the violation is not ongoing or impending when the suit is filed.[21] On April 20, 2021, the FTC Commissioners testified before the Senate Committee on Commerce, Science, and Transportation on the need to preserve the FTC's authority to obtain monetary relief under § 13(b). U.S. Senator Maria Cantwell (D-WA), the Chair of the Senate Committee on Commerce, Science, and Transportation, has responded positively to the hearing. Following the Supreme Court's ruling in *AMG Capital*, Senator Cantwell said in a statement, "Protecting consumers and compensating them for harm is a paramount duty of the FTC . . . We are working to move legislation immediately to make sure this authority is properly protected."[22] On April 27, 2021, Congressman Tony Cárdenas (D-CA-29) introduced the Consumer Protection and Recovery Act in the House of Representatives. The bill would amend § 13(b) to explicitly authorize the FTC to obtain injunctive and equitable relief including disgorgement in court.[23] In addition, the bill would expand the reach of § 13(b) to redress not only ongoing and future violations of the FTC Act but also past violations with a ten-year statute of limitations.[24] The retroactivity provisions in the Cárdenas proposal do not initially appear to have bipartisan support. Thus, if adopted, the amendments may apply only to actions and proceedings that are pending or commenced on or after the enactment date.[25]

[1] AMG Capital Management, LLC v. FTC, 593 U. S. ____ (2021), slip op. at 1.

[2] *Id.* at 7.

[3] *Id.* at 8.

[4] *Id.* at 10.

[5] *Id.* at 1.

[6] The FTC, unlike the Department of Justice and other plaintiffs, has successfully argued that Congress intended that "injunctive relief be broadly available to the FTC," by applying a "unique public interest standard." FTC v. Exxon Corp., 636 F.2d 1336, 1343 (D.C. Cir. 1980).

[7] Press Release, Fed. Trade Comm'n, FTC Reaches Record Financial Settlement To Settle Charges of Price-fixing in Generic Drug Market (Nov. 29, 2000), *available at* https://www.ftc.gov/news-events/press-releases/2000/11/ftc-reaches-record-financial-settlement-settle-charges-price.

[8] 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), *available at* https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill.

[9] Press Release, Fed. Trade Comm'n, Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants (Jan. 18, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it.

[10] Press Release, Fed. Trade Comm'n, Hearst Corp. To Disgorge $19 Million and Divest Business to Facts and Comparisons to Settle FTC Complaint (Dec. 14, 2001), *available at* https://www.ftc.gov/news-events/press-releases/2001/12/hearst-corp-disgorge-19-million-and-divest-business-facts-and.

[11] *AMG Capital Management*, slip op. at 2.

[12] *Id.* at 6.

[13] *Id.* at 8.

[14] *Id.*

[15] *Id.* at 9.

[16] *Id.* at 11 (internal quotations omitted).

[17] *Id*. at 11.

[18] *Id.* at 14.

[19] *Id.*

[20] *See, e.g.*, FTC v. Surescripts, LLC, No. 1:19-cv-01080-JDB (D.D.C. Apr. 17, 2019).

[21] Letter from the FTC Commissioners to Members of the Senate Committee on Commerce, Science, and Transportation and the House Committee on Energy and Commerce (Oct. 22, 2020), at 4, *available at* https://www.adlawaccess.com/wp-content/uploads/sites/793/2020/10/2020.10.22-FTC-Letter-Section-13b-of-the-FTC-Act.pdf.

[22] Cantwell Statement on Supreme Court Ruling Regarding Section 13 (b) of the Federal Trade Commission Act (Apr. 22, 2021), *available at* https://www.commerce.senate.gov/2021/4/cantwell-statement-on-supreme-court-ruling-regarding-section-13-b-of-the-federal-trade-commission-act.

[23] Consumer Protection and Recovery Act (H.R. 2668), *available at* https://docs.house.gov/meetings/IF/IF17/20210427/112501/BILLS-1172668ih.pdf.

[24] *Id*.

[25] *Id*.

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Contacts:

Michael Moiseyev (Washington, D.C.)	View Bio	michael.moiseyev@weil.com	+1 202 682 7235
Megan Granger (Washington, D.C.)	View Bio	megan.granger@weil.com	+1 202 682 7026

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