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U.S. Supreme Court Holds That the Federal Trade Commission Cannot Obtain Monetary Relief Under Section 13(b) of the Federal Trade Commission Act

The Ruling Could Significantly Impact the FTC's Enforcement Program

SUMMARY

Earlier today, a unanimous U.S. Supreme Court held in *AMG Capital Management, LLC v. Federal Trade Commission*¹ that Section 13(b) of the Federal Trade Commission Act does not give the Federal Trade Commission the authority to seek (or authorize a court to award) equitable monetary relief such as restitution or disgorgement. In so holding, the Court relied principally on the plain text and structure of Section 13(b), as well as that provision's place in the broader enforcement scheme of the FTC Act.

The FTC itself has described its "ability to seek an injunction that requires the defendant to return illegally obtained funds to consumers" under Section 13(b) as "essential to the effective enforcement of the FTC Act and other laws enforced by the Commission."² In recent decades, the FTC has relied on its Section 13(b) authority to collect billions of dollars from defendants in both consumer protection and antitrust cases. In anticipation of the Court's ruling, the FTC had already begun efforts to obtain a legislative fix. Without legislation, the FTC may resort to more cumbersome administrative proceedings with more limited statutory authority to obtain financial redress for consumers and businesses. Finally, the Court's holding should not directly affect other federal agencies with specific statutory authority to obtain financial relief, such as the Consumer Financial Protection Bureau and the federal banking agencies.

I. BACKGROUND

Section 13(b) of the Federal Trade Commission Act authorizes the FTC to bring an action in federal court against any person who "is violating, or is about to violate, any provision of law enforced by the [FTC]" in order "to enjoin any such act or practice" through a "temporary restraining order or a

preliminary injunction.”³ The provision then states that “in proper cases,” the FTC may obtain “a permanent injunction.”⁴

Although the provision expressly grants the FTC only the ability to seek restraining orders and injunctions, for decades the federal courts of appeals had uniformly held that a court’s authority to grant a permanent injunction under Section 13(b) also includes the authority to require wrongdoers to return illegally obtained money. Those courts generally relied on two midcentury Supreme Court decisions—*Porter v. Warner Holding Co.*⁵ (1946) and *Mitchell v. Robert DeMario Jewelry Inc.*⁶ (1960)—that broadly construed courts’ powers pursuant to equitable jurisdiction granted by Congress unless Congress specifically provided otherwise.

In August 2019, the U.S. Court of Appeals for the Seventh Circuit relied on a strict interpretation of Section 13(b)’s text to hold that the provision does not authorize relief in the form of restitution or disgorgement, reversing its own long-standing precedent and splitting with seven other circuits.⁷ The U.S. Court of Appeals for the Third Circuit subsequently adopted that same approach.⁸

In this case, after awarding summary judgment to the FTC on its consumer-protection claims against the defendants based on allegedly deceptive practices in short-term payday lending, the district court ordered the defendants to pay \$1.27 billion in restitution and disgorgement pursuant to Section 13(b). On appeal, relying on its own precedent, the Ninth Circuit rejected the defendants’ argument that Section 13(b) does not authorize the award of monetary relief. The Supreme Court then agreed to resolve the emergent conflict among courts of appeals on that question.

II. THE SUPREME COURT’S DECISION

In a unanimous decision by Justice Breyer, the Court held that Section 13(b)’s reference to a “permanent injunction” does not authorize the FTC to obtain court-ordered monetary relief. In reaching this conclusion, the Court cited several factors. *First*, the Court emphasized that the Act’s plain language refers exclusively to “injunctions,” and not to monetary relief or even other “equitable” relief. *Second*, the Court explained that the language and structure of Section 13(b) indicate that the words “permanent injunction” are focused on prospective, rather than retrospective, relief. In the Court’s view, the language of Section 13(b) as a whole indicates that it “addresses a specific problem” of “stopping seemingly unfair practices from taking place while the Commission determines their lawfulness.” *Third*, the Court noted that because Congress expressly provided for “other and further equitable relief” in other provisions of the FTC Act, Congress likely did not intend for Section 13(b)’s “permanent injunction” language to have the same broad scope. *Fourth*, the Court pointed to other FTC Act “provisions expressly authorizing *conditioned* and *limited* monetary relief,” such as Section 19, which was enacted after Section 13(b) and authorizes monetary relief only after completion of administrative cease and desist proceedings *and* “where ‘a reasonable man would have known under the circumstances’ that the conduct at issue was ‘dishonest or fraudulent.’” The Court thought it unlikely that Congress would have enacted this more specific provision if Section 13(b) had already given the Commission authority to

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obtain the same relief without meeting the same conditions. *Fifth*, the Court stressed that reading Section 13(b) “to mean what it says” produces a “coherent enforcement scheme” by authorizing the FTC to obtain monetary relief by first invoking its administrative procedures and then Section 19’s redress provisions.

The Court found the FTC’s arguments to the contrary unpersuasive. *First*, in response to the Commission’s argument that the *Porter* and *Mitchell* decisions require interpreting provisions authorizing injunctive relief to also authorize equitable monetary relief, the Court noted that those cases involved different statutes and did not intend to announce a “universal rule of interpretation.” The Court cited more recent cases in which it had stressed that the scope of authorized equitable relief will remain “a question of interpretation in each case.” *Second*, to the Commission’s argument that Congress simply created two parallel enforcement avenues for the Commission to pursue at its discretion, the Court found that theory could not “overcome the interpretive difficulties” the Court had described, such as with the conditioned and limited relief provided for in Section 19. *Third*, the Court rejected the Commission’s reliance on a savings clause in Section 19, reasoning that the question was not one of preserving preexisting remedies in Section 13(b), but rather whether Section 13(b) “gave that remedy in the first place.” *Fourth*, while the Commission pointed to the courts of appeals’ long-standing interpretation of Section 13(b) as authorizing monetary relief, the Court stated that it was unpersuaded that Congress had acquiesced to the lower courts’ interpretation. And, *fifth*, in response to the Commission’s policy arguments regarding the importance of allowing it to use Section 13(b) to obtain monetary relief, the Court noted that the Commission was still free to use “its authority under §5 and §19 to obtain restitution on behalf of consumers.” The Court further observed that the FTC has already asked Congress to grant it expanded remedial authority.

III. IMPLICATIONS

This decision may significantly impact the FTC’s enforcement program. In the FTC’s own words, “[o]ver the past four decades, the Commission has relied on Section 13(b) of the Federal Trade Commission Act to secure billions of dollars in relief for consumers in a wide variety of cases, including telemarketing fraud, anticompetitive pharmaceutical practices, data security and privacy, scams that target seniors and veterans, and deceptive business practices, among many others.”⁹ For example, in fiscal year 2019, the FTC filed 49 complaints in federal district court and obtained 81 permanent injunctions and orders, resulting in \$723.2 million in consumer redress or disgorgement.¹⁰ Under current law, the FTC no longer can pursue such monetary awards in most cases unless it first initiates administrative proceedings.

Additionally, the decision applies not only to the FTC’s consumer protection cases, but also to its use of Section 13(b)’s “permanent injunction” authority in antitrust cases to seek disgorgement.¹¹

The decision does not address whether the FTC may still seek to obtain an order freezing the defendant’s assets or appointing a receiver when seeking a temporary restraining order and preliminary

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injunction, given that the authority to obtain financial redress must now be sought in a separate action under Section 19 following administrative proceedings. Although the Supreme Court’s reasoning would seem to preclude the FTC’s ability to seek an asset freeze premised on its authority to seek a *permanent* injunction under Section 13(b), it is possible that courts could still allow the FTC to obtain a temporary asset freeze and receivership to preserve the possibility of obtaining redress in an action filed later under Section 19.¹²

The FTC will seek a legislative fix. In response to the Court’s decision, Acting FTC Chair Rebecca Kelly Slaughter issued a forceful statement that the ruling deprived the FTC of its strongest tool to help consumers. “The Supreme Court ruled in favor of scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior,” she said. “We urge Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole.”¹³

Indeed, as the Court noted, the FTC did not wait for the Court’s ruling before beginning its push in Congress. In 2020, the Commission asked Congress for expanded remedial authority,¹⁴ and Congress has considered at least one bill that would do so.¹⁵ Moreover, the FTC’s written statement before the Senate Commerce Committee on April 20, 2021—two days before the Court issued its ruling—asked Congress to act. The statement characterized recent court of appeals decisions on Section 13(b) as “grave” “judicial threats” and warned that, “if Congress does not act promptly, the FTC’s ability to protect consumers and execute its law enforcement mission will be significantly impaired.”¹⁶

There is recent precedent for the possibility of a legislative fix. In June 2020, the Supreme Court issued a ruling that limited the authority of the U.S. Securities and Exchange Commission to obtain disgorgement in SEC enforcement actions, requiring that any such remedy not exceed a wrongdoer’s net profits and be awarded for the benefit of victims.¹⁷ On January 1, 2021, Congress passed an omnibus spending bill that included a provision authorizing the SEC to seek disgorgement of ill-gotten gains within 10 years for certain securities law violations, and five years for others.¹⁸

The FTC may revisit alternative authority that it has not utilized in recent decades. Rohit Chopra—who is both a current FTC Commissioner and the nominee to be the Director of the CFPB—has proposed in a pending law review article that the FTC historically has been far too reliant on Section 13(b).¹⁹ As a result, he argues, the FTC has not made sufficient use of its other statutory authorities. In particular, he advocates that the FTC begin using Section 5(m)(1)(B) of the FTC Act, commonly known as the Penalty Offense Authority. Under that provision, if the FTC formally condemns a specific practice as unfair or deceptive in a cease-and-desist order, that would become a “Penalty Offense.” Other parties that commit these offenses with knowledge that they have been condemned by the Commission face potentially severe financial penalties. While this route presents certain obstacles to the FTC that were absent from Section 13(b)—such as referring the action to the U.S. Department of Justice—the approach also offers certain advantages to the agency, such as the authority to seek civil penalties. Time will tell whether the new Administration adopts Commissioner Chopra’s proposal.

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The Supreme Court's decision should not directly affect the CFPB's or banking agencies' authority to obtain financial penalties. The CFPB's organic statute provides that the CFPB may obtain in administrative proceedings or in court actions all of the usual legal and equitable remedies—except punitive damages—as well as civil money penalties.²⁰ But in both *AMG Capital* and last summer's decision in *Liu v. SEC*, the Supreme Court has openly questioned whether leftover consumer redress money obtained under “equitable” authority may be deposited in the U.S. Treasury. The CFPB typically includes such a provision in its orders, and that practice may now be questionable.

This decision, on its face, should not directly affect the federal banking agencies, which have statutory authority to order an insured depository institution or any institution-affiliated party to “make restitution or provide reimbursement, indemnification, or guarantee against loss if . . . such depository institution or such party was unjustly enriched in connection with such violation or practice,” or if “the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency.”²¹

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ENDNOTES

- 1 593 U. S. ____ (2021).
- 2 Brief for Petitioner, *FTC v. Credit Bureau Center* (No. 19-825), 2019 WL 7584804, at *12.
- 3 15 U.S.C. § 53(b).
- 4 15 U.S.C. § 53(b).
- 5 328 U.S. 395, 398 (1946).
- 6 361 U.S. 288, 291–92 (1960).
- 7 *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764, 767 (7th Cir. 2019).
- 8 *FTC v. AbbVie Inc.*, 976 F.3d 327, 379 (3d Cir. 2020).
- 9 Prepared Statement of the Federal Trade Commission: Strengthening the Federal Trade Commission’s Authority to Protect Consumers 9 (Apr. 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589164/prepared_statement_of_the_ftc_before_the_senate_committee_on_commerce_science_and_transportation.pdf.
- 10 Federal Trade Commission, Fiscal Year 2021 Congressional Budget Justification 5 (Feb. 10, 2020), https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf.
- 11 In addition, although the Supreme Court did not directly address the issue, a court in the Southern District of New York held, in a 2011 action brought by the Department of Justice’s Antitrust Division, that “disgorgement is available to remedy a Sherman Act violation”—a holding that may no longer stand in light of today’s decision. See *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 641 (S.D.N.Y. 2011).
- 12 See *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir. 1982) (“In the exercise of this inherent equitable jurisdiction the district court may order temporary, ancillary relief [under Section 13(b)] preventing the dissipation of assets or funds that may constitute part of the relief eventually ordered in the case.”).
- 13 See Leah Nylén, ‘The Supreme Court ruled in favor of scam artists,’ *FTC chief says after justices gut agency’s powers*, Politico (Apr. 22, 2021, 11:44 AM), <https://www.politico.com/news/2021/04/22/9-0-supreme-court-ruling-guts-ftcs-ability-to-seek-redress-for-consumers-484194>.
- 14 Prepared Statement of the Federal Trade Commission: Oversight of the Federal Trade Commission 3–5 (Aug. 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1578963/p180101testimonyftcoversight20200805.pdf.
- 15 See S. 4626, 116th Cong., 2d Sess., § 403 (2020) (revising § 13 to expressly authorize restitution and disgorgement).
- 16 Prepared Statement of the Federal Trade Commission: Strengthening the Federal Trade Commission’s Authority to Protect Consumers 12–13 (Apr. 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589164/prepared_statement_of_the_ftc_before_the_senate_committee_on_commerce_science_and_transportation.pdf.
- 17 See *Liu v. Sec. & Exch. Comm’n*, 140 S. Ct. 1936, 1940 (2020); see also *Kokesh v. Sec. & Exch. Comm’n*, 137 S. Ct. 1635 (2017).
- 18 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat 3388.
- 19 Rohit Chopra; Samuel A.A. Levine, The Case for Resurrecting the FTC Act’s Penalty Offense Authority, U. Pa. L. Rev. 10–15 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256.
- 20 12 U.S.C. § 5565.
- 21 12 U.S.C. § 1818.

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