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# *US Supreme Court Bars the FTC from Seeking Restitution under Section 13(b) of the FTC Act: What Businesses Can Expect*

April 28, 2021

On April 22, 2021, the US Supreme Court ruled that Section 13(b) of the Federal Trade Commission Act, which authorizes the Federal Trade Commission (FTC) to pursue certain injunctive relief in court, does not authorize the FTC to pursue equitable monetary remedies such as restitution and disgorgement.<sup>1</sup> The FTC had used Section 13(b) to extract over \$11.2 billion from companies over the past five years in both consumer and antitrust cases. This alert briefly summarizes these developments and provides key implications for businesses.

## **Background**

In 2012, the FTC sued *AMG* under Section 5(a) of the FTC Act for allegedly engaging in deceptive payday lending practices between 2008 and 2012. Citing its injunctive authority under Section 13(b), the FTC sought (i) a permanent injunction to prevent future violations and (ii) \$1.27 billion in restitution and disgorgement. In August 2017, a Ninth Circuit panel upheld the district court's restitution order.<sup>2</sup> Judge Diarmuid O'Scannlain issued a concurrence, which a second panel member joined, calling on the circuit to hear the case *en banc* in order to abrogate its existing "unfortunate interpretation" of Section 13(b), which he said "wrongly authorizes a power [restitution and disgorgement] that the statute does not permit."<sup>3</sup> At the time, other circuits had found that §13(b) implicitly authorized the FTC to seek and obtain restitution or disgorgement.<sup>4</sup>

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<sup>1</sup> *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. \_\_\_, No. 19-508 slip op. at 1 (2021).

<sup>2</sup> *FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018).

<sup>3</sup> *Id.* at 429 (O'Scannlain, J., concurring).

<sup>4</sup> *See, e.g., FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984).

In August 2019, the Seventh Circuit departed from this in *FTC v. Credit Bureau Center* and abrogated its own precedent.<sup>5</sup> It explained that “nothing in the text or structure of the FTC[ Act] supports an implied right to restitution in §13(b), which by its terms authorizes only injunctions.”<sup>6</sup> In 2020, the Supreme Court granted certiorari to both cases to resolve the circuit split.

### Supreme Court Decision

In a unanimous decision, the Court held that Section 13(b) of the FTC Act does not authorize the Commission to pursue equitable monetary relief.<sup>7</sup> Based on the act’s language, structure, and history, the Court explained that Section 13(b) authorizes the FTC to seek only injunctions against unlawful conduct and nowhere mentions monetary remedies. The Court found this omission particularly notable because other sections of the FTC Act—Sections 5(l) and 19—explicitly authorize the FTC to pursue equitable monetary remedies, subject to specific limitations. The Court reasoned that the FTC cannot use §13(b) to bypass those provisions, since that “would allow a small statutory tail to wag a very large dog.”<sup>8</sup> The Court concluded that the power “to grant [the FTC] further remedial authority” lies with Congress.<sup>9</sup>

### Next Steps: FTC and Congress

This ruling confirms the FTC’s power to seek restitution and disgorgement is limited by Sections 5 and 19. Congress, as the Court noted, created these provisions to “expressly authoriz[e] **conditioned** and **limited** monetary relief.”<sup>10</sup> Accordingly:

- Under Section 5(l), the FTC can seek restitution, disgorgement, and other equitable relief against parties that violated a final FTC cease and desist order by referring the matter to the US Department of Justice (DOJ).
- Under Section 5(m), the FTC can seek civil monetary penalties through a referral to DOJ against non-parties that knowingly engage in conduct that has been determined to be unlawful in a final order litigated in court (“Penalty Offense”).<sup>11</sup>
- Under Section 19, the FTC can seek restitution and other equitable relief in federal court against parties (i) that violate an FTC rule defining an act or practice as unfair or

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<sup>5</sup> 937 F.3d 765, 786 (7th Cir. 2019) (abrogating *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 571 (7th Cir. 1989)).

<sup>6</sup> *Id.* at 775.

<sup>7</sup> *AMG Cap. Mgmt.*, slip op. at 6–7.

<sup>8</sup> *Id.* at 8-9.

<sup>9</sup> *Id.* at 14.

<sup>10</sup> *Id.* at 9 (emphasis in original).

<sup>11</sup> *Id.*, § 5(m)(1)(B).

deceptive;<sup>12</sup> or (ii) before a final order, where a reasonable person would have known that the conduct was “dishonest or fraudulent”.<sup>13</sup>

Acting Chairwoman of the FTC, Rebecca Slaughter, has asked Congress to grant the FTC authority to pursue monetary penalties in response to the Supreme Court’s decision.<sup>14</sup> The day before the ruling, Congressman Tony Cárdenas introduced the Consumer Protection and Relief Act [H. 2668], which would grant the FTC authority to obtain equitable monetary relief under § 13(b). Shortly thereafter, Senator Maria Cantwell (D-WA) [announced](#) similar legislation. In the past, there has been bipartisan support for amending the FTC Act to authorize those remedies. Last year, Senator Roger F. Wicker (R-MS) proposed [S. 4626](#), revising Section 13 to authorize the FTC to pursue restitution and disgorgement.

### **Key Implications for Businesses**

Notwithstanding the decision, businesses must remain aware of the possibility that profits from illegal conduct could be subject to restitution or disgorgement. Congress may amend the FTC Act. Other provisions of the FTC Act continue to provide for monetary remedies in certain circumstances. DOJ has obtained [disgorgement](#), and we may see an increase in FTC/DOJ cooperation, particularly to bring cases seeking disgorgement.<sup>15</sup>

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<sup>12</sup> *Id.*, §§ 19 (a)(1), 19(b). Just before the Court ruling, Chairwoman Slaughter [anticipated](#) new rules, especially “given the risk that the Supreme Court substantially curtails the FTC’s ability to seek consumer redress under section 13(b).”

<sup>13</sup> FTC Act, §§ 19(a)(2), and 19(b).

<sup>14</sup> Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC*, (Apr. 22, 2021), available at <https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us>.

<sup>15</sup> Remarks from FTC Acting Commissioner Rebecca Slaughter and DOJ’s Antitrust Division Acting Assistant Attorney General Richard Powers during the ABA 2021 Antitrust Spring Meeting, Enforcers Roundtable, March 26, 2021.

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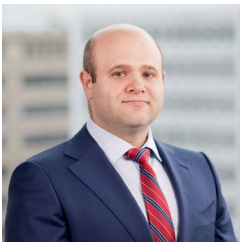
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