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## Supreme Court Unanimously Holds FTC Cannot Seek Monetary Relief Under FTCA Section 13(b)

Since its enactment in 1973, Section 13(b) of the Federal Trade Commission Act has been relied upon by the Federal Trade Commission as an avenue to bypass administrative proceedings and directly seek and obtain monetary relief from federal courts for alleged violations of Section 5 of the FTC Act. The recent U.S. Supreme Court decision in *AMG Capital Management v. FTC* rejected this judicially implied right developed by the lower courts, limiting the scope of the FTC's enforcement abilities.

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On April 22, 2021, the Supreme Court of the United States unanimously reversed a decision of the U.S. Court of Appeals for the Ninth Circuit and held that Section 13(b) of the Federal Trade Commission Act (the FTC Act) does not allow the Federal Trade Commission (FTC) to seek, or a federal court to award, equitable monetary relief such as restitution or disgorgement. The FTC had routinely relied on this provision for many years, with 49 complaints filed and 81 permanent injunctions and orders obtained in federal courts in 2019 that resulted in over \$723 million in consumer redress or disgorgement.<sup>1</sup>

Section 5 of the FTC Act, enacted in 1914, allows the FTC to utilize both its own administrative proceedings and federal court actions to prevent “[u]nfair methods of competition” and “unfair or deceptive acts or practices.”<sup>2</sup> In the 1970's, Congress enacted additional provisions including Section 13(b) of the FTC Act, which authorizes the FTC to obtain, among others, 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 FTC enforces.<sup>3</sup> The FTC has sought equitable monetary relief under this Section “directly in court with great frequency” ever since.<sup>4</sup>

In a unanimous opinion authored by Justice Breyer, the Supreme Court held in *AMG* that Section 13(b)'s language does not allow the FTC to “bypass the requirements of the administrative process” and obtain monetary relief directly from federal courts.<sup>5</sup> The FTC had brought suit, alleging unfair or deceptive acts in violation of Section 5 of the FTC Act, against Scott Tucker and his companies who were involved in short-term payday loans that automatically renewed unless the customer affirmatively opted out, and the lower court had ordered \$1.27 billion in restitution and disgorgement pursuant to Section 13(b), which was affirmed by the Ninth Circuit.<sup>6</sup> The Court reversed, taking into account the legislative history of the FTC Act and concluding that injunctions are not the same

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<sup>1</sup> *AMG, Cap. Mgmt., LLC v. Fed. Trade Comm'n*, No. 19-508, 2021 WL 1566607 (*AMG*), at \*4 (U.S. Apr. 22, 2021) (citing FTC, *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](https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf)).

<sup>2</sup> 15 U.S.C. § 45(a)(1)-(2).

<sup>3</sup> 15 U.S.C. § 53(b).

<sup>4</sup> *AMG*, 2021 WL 1566607, at \*4.

<sup>5</sup> *Id.* at \*1.

<sup>6</sup> *Id.* at \*3.

as an award of monetary relief and that Section 13(b)'s language regarding preliminary injunctions has a "limited purpose—a purpose that does not extend to the grant of the monetary relief" because it is "buried in a lengthy provision that focuses upon purely injunctive, and not monetary, relief."<sup>7</sup> Furthermore, the Court interpreted the provision as providing for prospective relief that would prevent "seemingly unfair practices from taking place while [the FTC] determines their lawfulness."<sup>8</sup> Reading Section 13(b) to allow the FTC to go directly to the federal courts to obtain monetary relief, Justice Breyer stated, would "allow a small statutory tail to wag a very large dog."<sup>9</sup>

The Court declined to apply the two Supreme Court cases<sup>10</sup> cited by the FTC because the opinions did not "purport to set forth a universal rule of interpretation" that authority to grant an injunction includes the power to grant monetary relief, and the cases also involved different statutes.<sup>11</sup> In addressing policy arguments set forth by the FTC and its *amici* that it is "undesirable simply to enjoin those who violate the [FTC] Act while leaving them with profits earned at the unjustified expense of consumers," the Court reasoned that its decision does not prohibit the FTC from using its authority under Section 5 and Section 19 of the FTC Act to obtain restitution through its administrative process—only that it cannot do so in federal court under Section 13(b).<sup>12</sup>

While this ruling impedes the FTC's ability to obtain monetary relief, state attorneys general in all states have express authority under functional equivalents of the FTC Act to seek consumer restitution and other equitable relief.<sup>13</sup> In addition, immediately following the *AMG* decision, the FTC Acting Chairwoman issued a statement urging Congress to "act swiftly to restore and strengthen the powers of the agency . . . [to] make wronged consumers whole."<sup>14</sup>

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Elai Katz (partner) at 212.701.3039 or [ekatz@cahill.com](mailto:ekatz@cahill.com); or Cindy D. Ham (associate) at 212.701.3254 or [cham@cahill.com](mailto:cham@cahill.com); or email [publications@cahill.com](mailto:publications@cahill.com).

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<sup>7</sup> *Id.* at \*5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at \*5.

<sup>10</sup> *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) (Emergency Price Control Act); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) (Fair Labor Standards Act).

<sup>11</sup> *Id.* at \*6.

<sup>12</sup> *Id.* at \*8.

<sup>13</sup> *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, Appendix C, NATIONAL CONSUMER LAW CENTER (2018), at <https://www.nclc.org/images/pdf/udap/udap-appC.pdf>.

<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*, FEDERAL TRADE COMMISSION (Apr. 22, 2021), at <https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us>.

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