

Supreme Court Curbs FTC's Authority To Seek Monetary Relief in Federal Court — At Least Temporarily

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Last week, the U.S. Supreme Court decided unanimously in *AMG Capital Management, LLC v. FTC* that Section 13(b) of the Federal Trade Commission Act of 1914 (FTC Act) does not authorize the Federal Trade Commission (FTC) to seek monetary relief from defendants in federal court. We had anticipated this outcome in our December 2020 client alert "[Supreme Court Review of FTC Monetary Relief Authority Threatens Long-Standing Agency Practice](#)."

As we noted then, for decades the FTC used Section 13(b) to seek billions of dollars in restitution and disgorgement in a wide range of cases, including those involving telemarketing and online frauds, deceptive business practices, data security and privacy breaches, as well as in antitrust conduct cases. In its opinion, the Court seemingly slammed the door on the FTC's long-standing practice. The curb on the FTC, however, may well be short-lived as Congress is expected to enact legislation that will authorize the FTC to seek monetary relief directly in federal courts.

Writing for the Court, Justice Stephen Breyer detailed the history of the FTC Act's provisions authorizing the agency to seek redress for consumer protection violations. Since 1914, the act has allowed the FTC to use its internal, administrative process to issue cease and desist orders. In 1973, Congress added Section 13(b) to allow the FTC to proceed directly to federal district court to seek temporary restraining orders, preliminary injunctions and, "in proper cases," permanent injunctions, even in instances where the FTC had not yet obtained a cease and desist order in its own administrative proceeding. As Section 13(b) does not provide for monetary relief explicitly, Congress separately added a provision for monetary penalties for violations of cease and desist orders, meaning orders issued through an FTC administrative proceeding. However, that process is cumbersome and time-consuming, as it requires an administrative law judge to hear evidence and write a report, while also providing the responding party the opportunity for the full group of FTC commissioners to review the judge's decision as well as any appeal in a federal circuit court. Therefore, over the past several decades, the FTC has routinely bypassed its administrative process and instead invoked Section 13(b) to seek monetary relief in both consumer fraud and antitrust cases with "great frequency." Slip. Op. at 5. Accordingly, the FTC has enjoyed considerable success, including in the well-known *FTC v. Cephalon, Inc.* "reverse payments" case, where the court ordered the pharmaceutical company to disgorge \$1.2 billion in profits. While many courts of appeals had long approved the FTC's reliance on Section 13(b), a circuit split ultimately developed over the question of whether Section 13(b)'s provision for permanent injunctions allowed the FTC to obtain monetary relief directly in federal court, without resorting to its administrative process.

The Supreme Court answered the question with a resounding no, ruling that Section 13(b) "refers only to injunctions," and "[a]n 'injunction' is not the same as an award of equitable monetary relief." Slip. Op. at 6. Instead, the Court noted that Section 13(b) "focuses on relief that is prospective, not retrospective." Slip. Op. at 8. Beyond the provision's plain language, the Court focused on the structure of the act, with Justice Breyer explaining that Section 13(b) must be read in the context of the FTC seeking relief through its administrative process. Accordingly, he said the section "addresses a specific problem, namely, that of stopping seemingly unfair practices from taking place while the Commission determines their lawfulness." Slip. Op. at 8. The Court rebuffed a reading of the provision that would allow the FTC to bypass its administrative process to seek monetary relief, with Justice Breyer noting that "that reading would allow a small statutory tail to wag a very large dog." Slip. Op. at 8-9.

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Even before the Supreme Court heard argument in *AMG* in January 2021, the FTC requested via letter that Congress amend Section 13(b) to codify the FTC's long-held interpretation that the provision authorizes monetary relief. Congress did not act then, but earlier this year, Rep. Tony Cárdenas, a California Democrat, introduced a bill to amend Section 13(b) explicitly to allow the FTC to seek monetary remedies in federal court petitions for permanent injunctions. The bill may find fertile ground in emerging bipartisan support for more aggressive antitrust enforcement, as reflected in the October 2020 report and recommendation by the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law and separate statement from subcommittee Republicans. Accordingly, both sides of the aisle may view the Court's *AMG* decision as an erosion of enforcement that must be fixed by Congress.