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SCOTUS Ends the FTC's Section 13(b) Enforcement Program

This U.S. Supreme Court decision will impact how the Federal Trade Commission seeks to return money to consumers under the Federal Trade Commission Act.

BY MICHAEL PATTILLO

A recent decision by the U.S. Supreme Court will require the Federal Trade Commission to fundamentally change how it conducts its consumer-protection enforcement program. For the past four decades, the FTC brought the vast majority of its enforcement actions in federal district court under Section 13(b) of the Federal Trade Commission Act. The FTC recovered billions of dollars in those cases in the form of "equitable monetary relief," but there was a hitch. Section 13(b) only authorized "injunctions." It said nothing about returning money to consumers. In *AMG Capital Management v. Federal Trade Commission*, a unanimous Supreme Court held that the FTC has no authority to seek monetary remedies under Section 13(b). The Supreme Court made clear that the FTC can still seek to have defendants return money to consumers, but must use a different section of the

U.S. Federal Trade Commission building in Washington, D.C.
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FTCA that requires administrative processes and provides defendants special protections.

To understand the case and what was at stake, it is helpful to understand the FTCA as a whole. Enacted

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The U.S. Supreme Court building in Washington, D.C.

in 1914 and amended over the years, the FTCA sets out a comprehensive regulatory scheme. It provides that the FTC's mission is to prevent "unfair methods of competition" and "unfair or deceptive acts or practices in commerce." And it gives the FTC a variety of tools to carry out that mission, through both administrative proceedings and actions in federal district court.

Section 5 provides that, where the FTC believes someone is violating the FTCA, it can conduct an administrative adjudication and issue a cease and desist order. That administrative order puts the person—and the rest of the business community—on notice that the practice is prohibited in the future. If a party violates a cease and desist order, the FTC can bring an action in federal district court seeking monetary penalties, injunctions and other equitable relief.

Section 19 of the FTCA separately authorizes the FTC to bring an action in district court to seek monetary remedies, such as refunds or damages, for consumers who are injured by unfair or deceptive business practices. But Section 19 includes protections for defendants. The FTC first must conduct an administrative adjudication. And then it has to prove in court that a reasonable person would have known the conduct was fraudulent. Section 19 also limits defendants' exposure through a statute of limitations.

The administrative processes in Section 5 and Section 19 can take a long time to complete. And so, in Section 13(b), Congress also authorized the FTC to seek a preliminary injunction in district court—thereby stopping the conduct—while the FTC conducts an administrative adjudication. Section 13(b) also authorizes the FTC to obtain a permanent injunction in proper cases. But Section 13(b) does not mention monetary relief.

So how did the FTC come to use Section 13(b), which mentions only injunctions, rather than Section 19, which specifically authorizes monetary relief, as the vehicle for seeking billions of dollars from defendants? According to former officials, the FTC deemed complying with Section 19's requirements to be too time-consuming and inefficient. So in the 1980s, it developed a strategy for seeking monetary relief under Section 13(b) instead. Citing the Supreme Court's 1946 decision in *Porter v. Warner Holding*, the FTC argued that, where a statute authorizes the equitable remedy of an "injunction," that makes all of a court's equitable powers available, including ordering restitution of money. The FTC had remarkable success, persuading eight federal circuit courts of appeals to accept its argument. As a result, Section 13(b) suits served as the cornerstone of the FTC's enforcement program for decades.

The Supreme Court took up the interpretation of Section 13(b) this term in *AMG Capital Management*. In that case, the FTC had obtained a $1.27 billion judgment against Scott Tucker, who operated businesses that provided short-term loans to consumers over the internet.

In a 9-0 decision, the Supreme Court held that the FTC cannot get restitution or other monetary remedies under Section 13(b). The court explained that Section 13(b) mentions only "injunctions," and injunctions simply are not the same as monetary relief. The Supreme Court rejected the argument that had carried the day for the FTC in the courts of appeals—that, under *Porter*, a statutory reference to an "injunction" always authorizes equitable monetary relief. The court noted that references to equitable remedies must be interpreted in the context of the specific statutory scheme at issue. And in the FTCA, other provisions provided for monetary relief subject to certain conditions, which indicated that Congress did not intend for that same relief to be available under Section 13(b) under a less demanding standard.

The Supreme Court also rejected the FTC's plea that, as a policy matter, its Section 13(b) enforcement program was essential to protect consumers. The court noted that the FTC can still seek to return money to consumers, it just has to comply with the standards Congress provided in Section 19. The court explained that if the FTC considers Section 19's requirements of administrative proceedings too cumbersome, it can ask Congress for additional remedial authority.

The FTC has done just that, asking Congress to amend Section 13(b) to authorize it to seek restitution and disgorgement in district court without prior administrative proceedings. Whether Congress will grant such authority—and if it does, whether it will afford defendants protections such as a knowledge-of-wrongfulness standard of intent and a statute of limitations, as in Section 19—remains to be seen.

Michael Pattillo *is a partner at MoloLamken and an appellate specialist. He argued before the Supreme Court on behalf of the petitioners in AMG Capital Management v. FTC.*