

US Supreme Court Rules FTC Cannot Seek Restitution

May 3, 2021

In a resounding rejection of the Federal Trade Commission's ("FTC") longstanding interpretation of its statutory powers, the U.S. Supreme Court unanimously ruled on April 22, 2021, that the FTC lacked authority to secure consumer restitution in Federal courts under the FTC Act's Section 13(b).¹ According to the opinion by Justice Stephen Breyer in *AMG Capital Management v. FTC*, Section 13(b) only allows the FTC to secure injunctive relief to stop ongoing fraud, not monetary relief for consumers that had previously been harmed. Although the FTC still has the authority to obtain financial restitution on behalf of consumers under Sections 5 and 19 of the FTC Act, those legal avenues are arguably slower and more burdensome to the agency because they require the FTC to engage in administrative proceedings and issue cease and desist orders. Ultimately, the court's elimination of the FTC's key avenue for obtaining consumer restitution is likely to result in increased enforcement activity by state attorneys general, which may have authority to seek restitution under their respective state consumer protection statutes. In the near term, we anticipate Congress will move quickly to enact legislation that would empower the FTC to seek restitution and disgorgement of ill-gotten gains.

In deciding *AMG Capital*, the Court weighed whether a strict reading of Section 13(b), a provision enacted in 1973, outweighed decades of precedent. The FTC has used Section 13(b) for many years to force companies to pay back harmed consumers, and the Commission said it had obtained \$11.2 billion in refunds to consumers in just the past five years.² But appeals courts have recently raised questions about that authority, leading to the Supreme Court's decision.

State AGs Expected To Pick Up The Enforcement Slack

Because of shared subject matter jurisdiction on issues such as consumer protection, antitrust and data privacy, the FTC and State AGs have historically partnered on large scale investigations and states have benefited from the FTC's resources, expertise and ability to address federal violations of law in these areas. As 30 AGs warned in their amicus brief in support of the FTC's position, the Supreme Court's ruling could impede federal-state collaborations to combat anticompetitive, unfair, and deceptive practices.³ Going forward, we believe that state AGs will continue to partner with the FTC, but AGs will be taking on more responsibility in these investigations, including leadership on the issue of consumer restitution.

Congressional Action Requested by the FTC and Consumer Advocates

In his opinion, Justice Breyer foreshadowed where this matter was headed: "If the Commission believes that (FTC Act

§5 and §19) authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority.” FTC Chairwoman Rebecca Kelly Slaughter subsequently issued a scathing statement attacking the ruling and called on Congress “to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole.” In fact, Congress is already considering legislation to remedy the Supreme Court decision. The House Energy and Commerce Committee recently held a hearing on legislation to strengthen the FTC’s legal authority to seek consumer redress, and the Senate is likely to consider legislation in the near future. ⁴

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1. https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf↔
 2. <https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us>↔
 3. https://illinoisattorneygeneral.gov/pressroom/2020_12/20201207152632568_AMG_v_FTC_Illinois_Amicus_BriefFinaltoFile.pdf↔
 4. <https://energycommerce.house.gov/newsroom/press-releases/ec-announces-hearing-on-legislation-to-preserve-ftc-s-13b-consumer>↔

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