

Advertising & Media Alert

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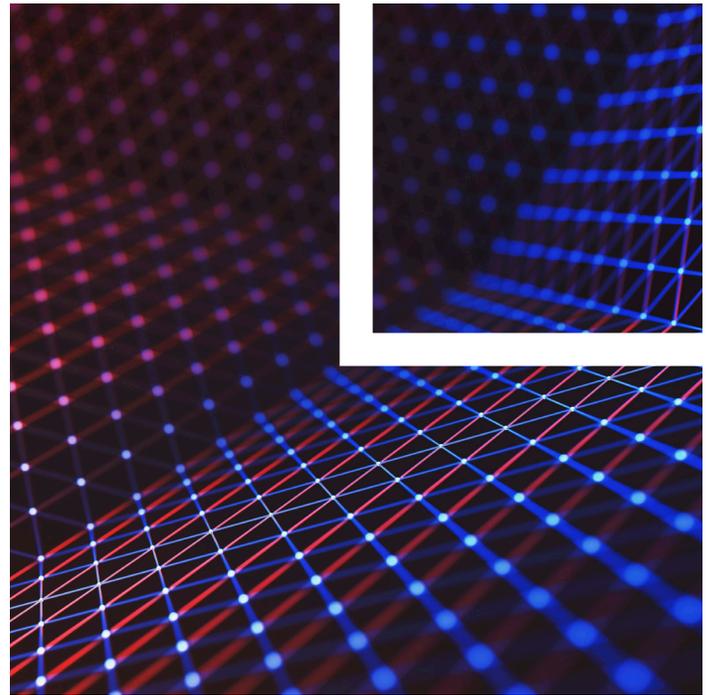
High Court Ruling Curbs FTC's Authority to Obtain Restitution

In a closely watched case involving the extent of the Federal Trade Commission's authority, the U.S. Supreme Court has reined in the FTC's ability to obtain restitution or disgorgement as monetary penalties in federal district courts. The high court's unanimous April 22 ruling resolves a circuit court split on the scope of Section 13(b) of the Federal Trade Commission Act (FTCA), which authorizes the FTC to obtain a court-ordered permanent injunction against individuals and companies for violations of the law.

In an opinion authored by Justice Stephen G. Breyer, the Court concluded in *AMG Capital Management LLC v. FTC* (No. 19-508) that the "permanent injunction" language of FTCA Section 13(b) does not authorize the FTC to go directly to federal court to seek equitable monetary relief against defendants. Compared with the broad range of activities covered by "unfair or deceptive acts or practices" that are potentially open for FTC enforcement under Section 5, the decision confirms a very narrow interpretation of Section 13(b). The FTC may still seek monetary penalties and restitution from companies alleged to have violated Section 5, but only in limited circumstances after first obtaining a final cease and desist order. So while the ruling came out of a Ninth Circuit decision involving allegedly deceptive payday lending practices, it has far broader implications for the FTC's consumer protection and antitrust enforcement efforts going forward.

\$1.27 Billion Penalty

The FTC filed a complaint in 2012 against race car driver Scott Tucker and his companies in a Nevada federal district court alleging deceptive payday lending practices in violation of Section 5(a) of the FTCA. According to



the complaint, the companies' online loan terms misled borrowers into thinking they could repay the loan in one payment. The fine print explained, however, that the loan would be automatically renewed unless the borrower took affirmative steps to opt out.

The district court granted the FTC's request for a permanent injunction and substantial penalties and ordered Tucker to pay \$1.27 billion in restitution and disgorgement under Section 13(b) of the FTCA. The Ninth Circuit affirmed that decision, even though other circuit courts, such as the Seventh Circuit, have construed Section 13(b) as narrowly as the Supreme Court proceeded to do in this case. The Supreme Court pointed out that an "injunction" is not the same as an award of equitable monetary relief. "The language and structure of §13(b), taken as a whole, indicate that the words 'permanent injunction' have a limited purpose—a purpose that does not extend to the grant of monetary relief," it held.

FTCA Amendments

Since the FTC's creation in 1914, it has been authorized to enforce the FTCA through its own administrative

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proceedings. Congress authorized the FTC in the 1970s to seek additional remedies in federal court and added Section 13(b) to the FTCA, allowing the FTC to go directly to federal district court to obtain a temporary restraining order or preliminary injunction. In some cases, the FTC may obtain a permanent injunction.

Congress also enacted Section 19 of the FTCA, which authorizes federal district courts to grant “such relief as the court finds necessary to redress injury to consumers,” including through the “refund of money or return of property.” Congress specified that the Section 19 consumer redress option could be pursued only against defendants who engaged in unfair or deceptive acts or practices after the FTC issued a final cease and desist order.

Since the 1990s, the FTC has been increasingly relying on Section 13(b) to win the return of illegally obtained funds directly in federal court.

In reversing and remanding to the Ninth Circuit for further proceedings, the Supreme Court pointed out: “Nothing we say today, however, prohibits the Commission from using its authority under [Section] 5 and [Section] 19 to obtain restitution on behalf of consumers. If the Commission believes that authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority.”

FTC Response

FTC Acting Chairwoman Rebecca Kelly Slaughter criticized the Supreme Court’s decision.

“In *AMG Capital*, the Supreme Court ruled in favor of scam artists and dishonest corporations, leaving average

Americans to pay for illegal behavior,” she said in a statement. “With this ruling, the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most. We urge Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole.”

The FTC has been urging Congress to revise Section 13. Slaughter is scheduled to appear before the Subcommittee on Consumer Protection and Commerce of the House Committee on Energy and Commerce on April 27 to promote H.R. 2668, the Consumer Protection and Recovery Act, which would clarify the FTC’s authority to seek permanent injunctions and other equitable relief for violations of the FTCA.

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