Reading Tea Leaves: Breaking Down Oral Argument in *AMG Capital Management, LLC v. FTC*

February 11, 2021

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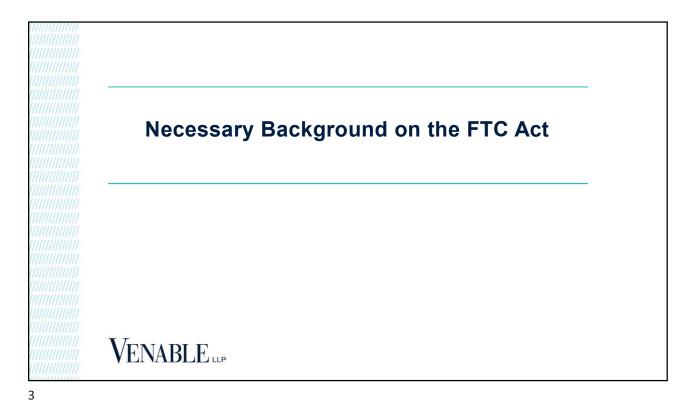
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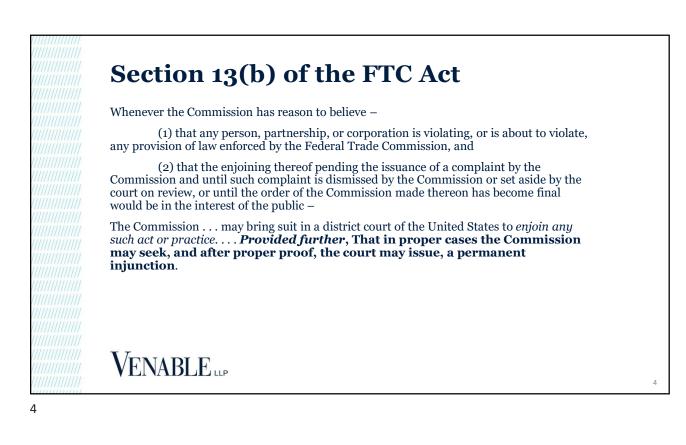
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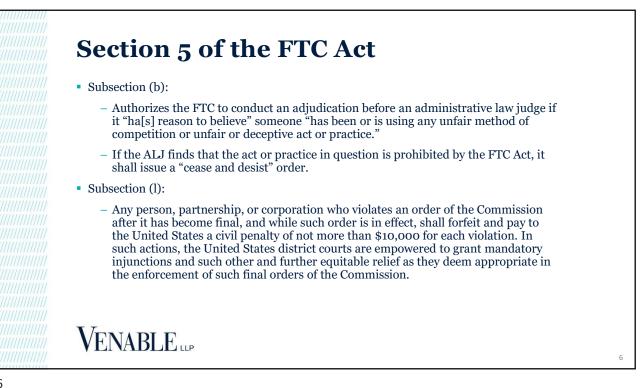
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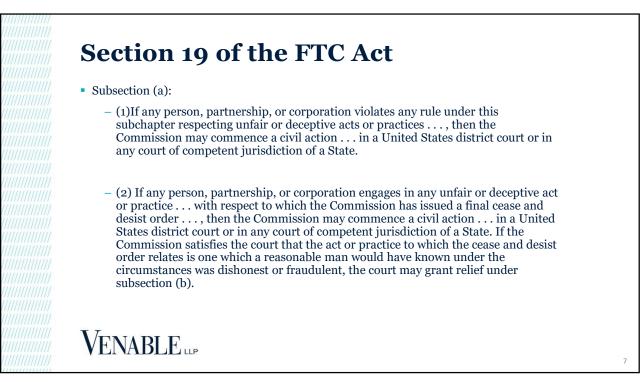
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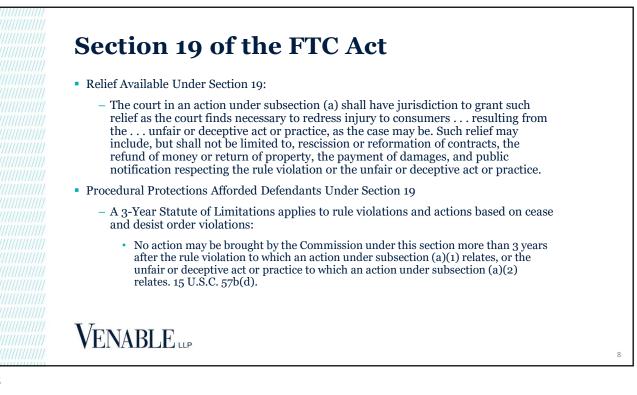


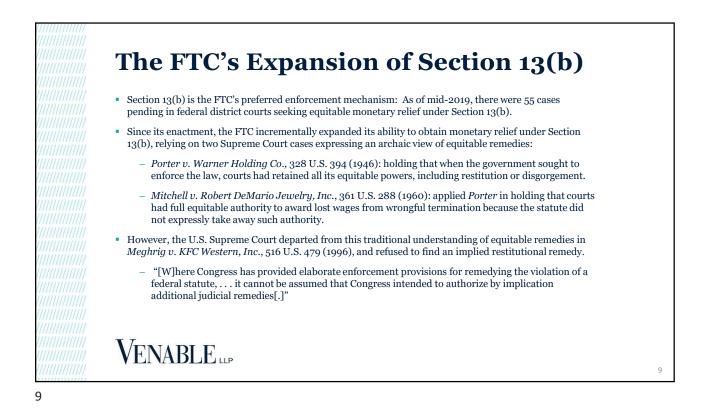
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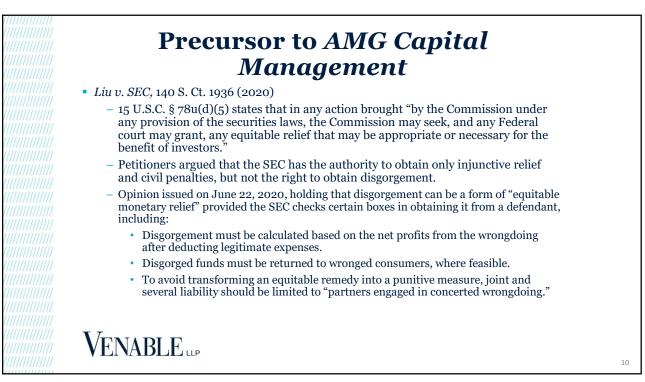








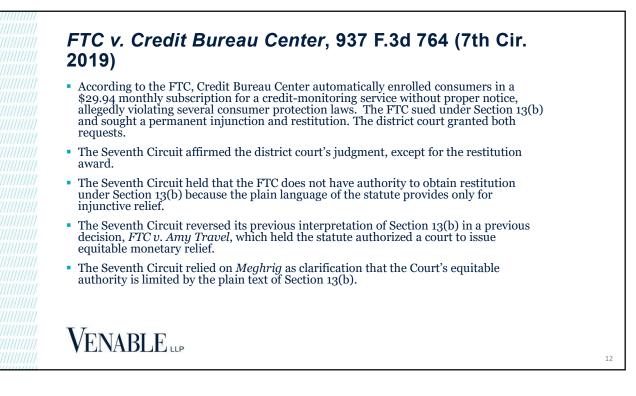


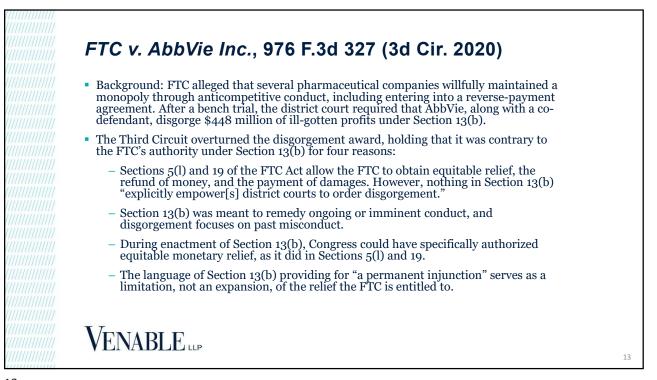


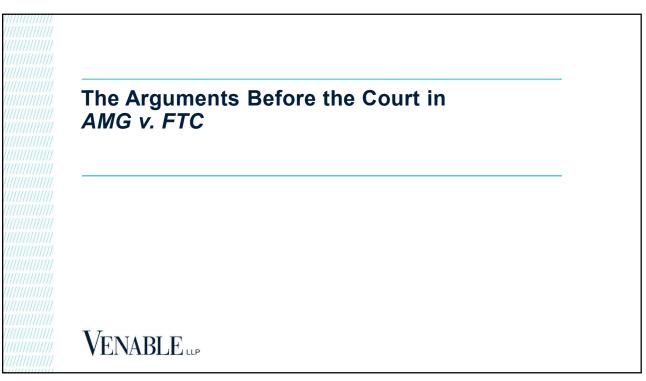
FTC v. AMG Capital Management, LLC, 910 F.3d 417 (9th Cir. 2018)

- Background: The district court held that Defendants' high-interest, short-term payday loans were "deceptive" under the FTC Act and awarded the FTC \$1.27 billion in equitable monetary relief. Defendants appealed arguing that Section 13(b) only allows for injunctions, and equitable monetary relief is not an injunction.
- The Ninth Circuit affirmed, relying on circuit precedent that "§ 13 empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution."
- Judge O'Scannlain wrote a concurring opinion, expressing skepticism of the FTC's authority under Section 13(b):
 - "[W]e have implausibly construed the word 'injunction' in § 13(b) to authorize the extensive power to order defendants to repay ill-gotten gains[,]" such that "our interpretation of § 13(b) is thus an impermissible exercise of judicial creativity[.]"
 - "These past errors, even if common, do not justify our continued disregard of the statute's text and the Supreme Court's related precedent [in *Kokesh*]."

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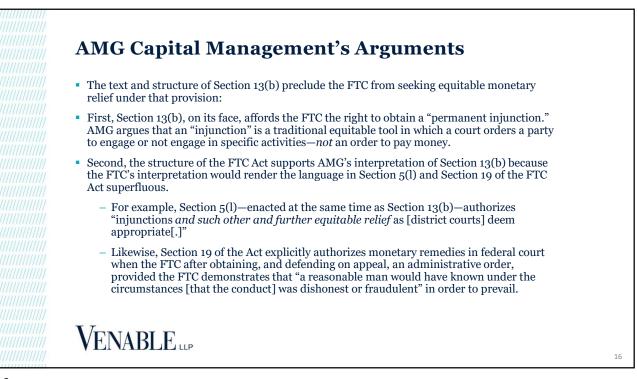


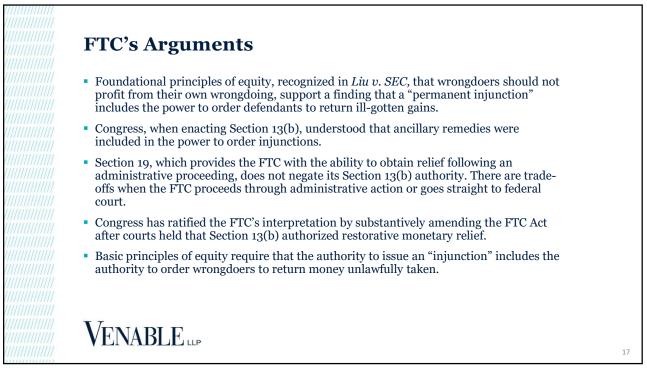


The Question Pending Before the Supreme Court

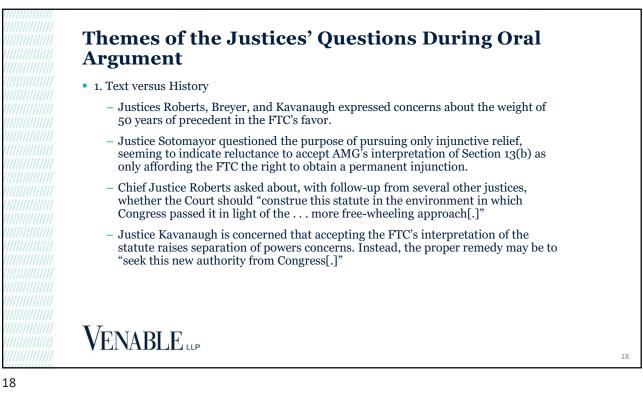
- On July 9, 2020, the Supreme Court granted certiorari in both *AMG Capital Management* and *Credit Bureau*. No. 19-825.
- After Justice Barrett, who previously participated in the *Credit Bureau* decision, was appointed to the Supreme Court, the Court rescinded its grant of certiorari in *Credit Bureau*.
- The question the Court will consider is: "Whether § 13(b) of the [FTC] Act, by authorizing 'injunction[s],' also authorizes the Commission to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief."

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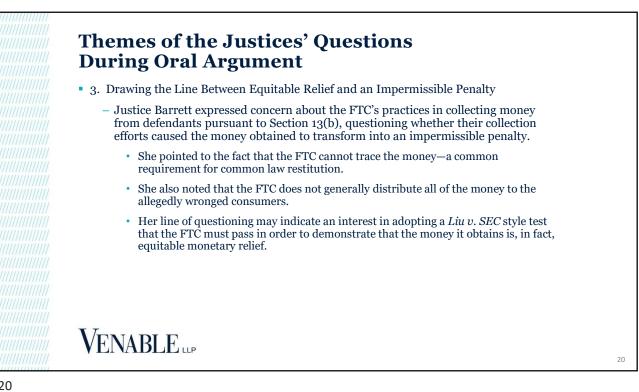


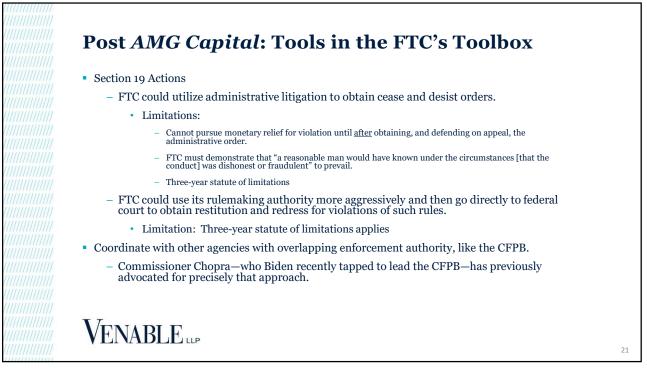


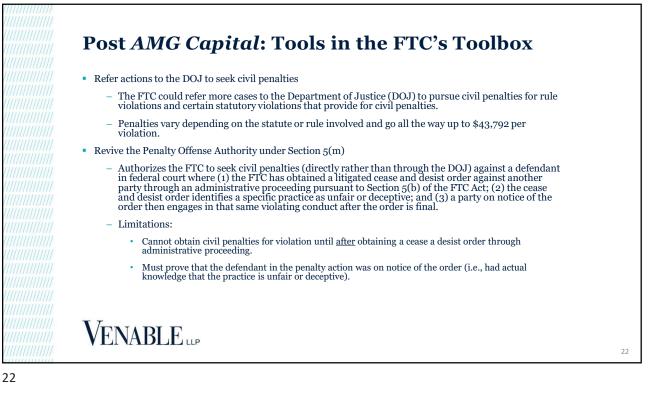
Themes of the Justices' Questions During Oral Argument

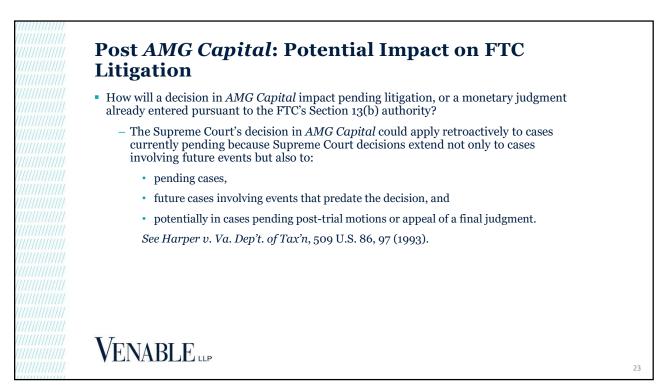
- 2. The Structure of the FTC Act and Concerns About Procedural Protections
 - Justices Breyer, Alito, Kagan, Gorsuch, and Kavanaugh questioned the parties regarding their "core concern"-whether the FTC's interpretation of Section 13(b) renders Section 19 superfluous because the FTC has no incentive to comply with the procedural protections required to proceed under Section 19.
 - Justices Alito and Kavanaugh focused on comments by former FTC official Fitzgerald regarding the FTC's historical use of, and recent preference for, Section 13(b), in which he stated that "Section 19 was too time-consuming, so it wanted – it looked for a workaround."

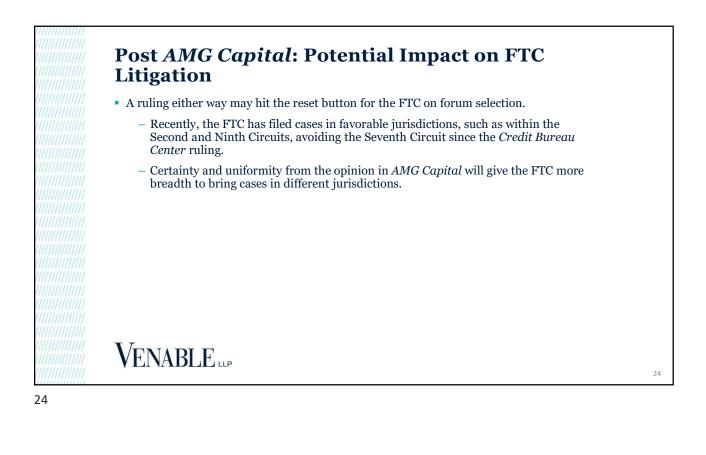
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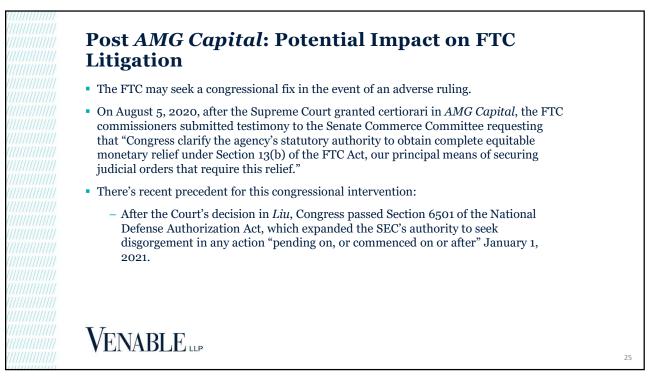














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