

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

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Necessary Background on the FTC Act

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Section 13(b) of the FTC Act

Whenever the Commission has reason to believe –

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final would be in the interest of the public –

The Commission . . . may bring suit in a district court of the United States to *enjoin any such act or practice*. . . . ***Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.***

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Enactment of Sections 13(b) and 19

- Section 13(b) was added to the FTC Act in 1973 to serve as a stopgap, preventative measure:
 - The major provisions of this section would . . . authorize the commission to go into federal court to seek temporary injunctions to prevent the continuation of particularly aggravated violations of the laws under its jurisdiction, pending the completion of the lengthy administrative proceedings and appeals which lead to a final cease-and-desist order. . . Each of these provisions is essentially a gap-filling measure; none would increase the commission’s substantive jurisdiction in any respect . . . 119 Cong. Rec. 36,610 (1973).
- Two years after Congress enacted Section 13(b), it enacted Sections 5 and 19 in 1975 to explicitly grant the FTC the authority to seek monetary relief for harm to consumers.

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Section 5 of the FTC Act

- Subsection (b):
 - Authorizes the FTC to conduct an adjudication before an administrative law judge if it “ha[s] reason to believe” someone “has been or is using any unfair method of competition or unfair or deceptive act or practice.”
 - If the ALJ finds that the act or practice in question is prohibited by the FTC Act, it shall issue a “cease and desist” order.
- Subsection (l):
 - Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

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Section 19 of the FTC Act

- Subsection (a):
 - (1) If any person, partnership, or corporation violates any rule under this subchapter respecting unfair or deceptive acts or practices . . . , then the Commission may commence a civil action . . . in a United States district court or in any court of competent jurisdiction of a State.
 - (2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice . . . with respect to which the Commission has issued a final cease and desist order . . . , then the Commission may commence a civil action . . . in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

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Section 19 of the FTC Act

- Relief Available Under Section 19:
 - The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers . . . resulting from the . . . unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice.
- Procedural Protections Afforded Defendants Under Section 19
 - A 3-Year Statute of Limitations applies to rule violations and actions based on cease and desist order violations:
 - No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) relates. 15 U.S.C. 57b(d).

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The FTC's Expansion of Section 13(b)

- Section 13(b) is the FTC's preferred enforcement mechanism: As of mid-2019, there were 55 cases pending in federal district courts seeking equitable monetary relief under Section 13(b).
- Since its enactment, the FTC incrementally expanded its ability to obtain monetary relief under Section 13(b), relying on two Supreme Court cases expressing an archaic view of equitable remedies:
 - *Porter v. Warner Holding Co.*, 328 U.S. 394 (1946): holding that when the government sought to enforce the law, courts had retained all its equitable powers, including restitution or disgorgement.
 - *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960): applied *Porter* in holding that courts had full equitable authority to award lost wages from wrongful termination because the statute did not expressly take away such authority.
- However, the U.S. Supreme Court departed from this traditional understanding of equitable remedies in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), and refused to find an implied restitution remedy.
 - “[W]here Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute, . . . it cannot be assumed that Congress intended to authorize by implication additional judicial remedies[.]”

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Precursor to AMG Capital Management

- *Liu v. SEC*, 140 S. Ct. 1936 (2020)
 - 15 U.S.C. § 78u(d)(5) states that in any action brought “by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.”
 - Petitioners argued that the SEC has the authority to obtain only injunctive relief and civil penalties, but not the right to obtain disgorgement.
 - Opinion issued on June 22, 2020, holding that disgorgement can be a form of “equitable monetary relief” provided the SEC checks certain boxes in obtaining it from a defendant, including:
 - Disgorgement must be calculated based on the net profits from the wrongdoing after deducting legitimate expenses.
 - Disgorged funds must be returned to wronged consumers, where feasible.
 - To avoid transforming an equitable remedy into a punitive measure, joint and several liability should be limited to “partners engaged in concerted wrongdoing.”

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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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FTC v. Credit Bureau Center, 937 F.3d 764 (7th Cir. 2019)

- According to the FTC, Credit Bureau Center automatically enrolled consumers in a \$29.94 monthly subscription for a credit-monitoring service without proper notice, allegedly violating several consumer protection laws. The FTC sued under Section 13(b) and sought a permanent injunction and restitution. The district court granted both requests.
- The Seventh Circuit affirmed the district court's judgment, except for the restitution award.
- The Seventh Circuit held that the FTC does not have authority to obtain restitution under Section 13(b) because the plain language of the statute provides only for injunctive relief.
- The Seventh Circuit reversed its previous interpretation of Section 13(b) in a previous decision, *FTC v. Amy Travel*, which held the statute authorized a court to issue equitable monetary relief.
- The Seventh Circuit relied on *Meghrig* as clarification that the Court's equitable authority is limited by the plain text of Section 13(b).

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***FTC v. AbbVie Inc.*, 976 F.3d 327 (3d Cir. 2020)**

- Background: FTC alleged that several pharmaceutical companies willfully maintained a monopoly through anticompetitive conduct, including entering into a reverse-payment agreement. After a bench trial, the district court required that AbbVie, along with a co-defendant, disgorge \$448 million of ill-gotten profits under Section 13(b).
- The Third Circuit overturned the disgorgement award, holding that it was contrary to the FTC's authority under Section 13(b) for four reasons:
 - Sections 5(l) and 19 of the FTC Act allow the FTC to obtain equitable relief, the refund of money, and the payment of damages. However, nothing in Section 13(b) “explicitly empower[s] district courts to order disgorgement.”
 - Section 13(b) was meant to remedy ongoing or imminent conduct, and disgorgement focuses on past misconduct.
 - During enactment of Section 13(b), Congress could have specifically authorized equitable monetary relief, as it did in Sections 5(l) and 19.
 - The language of Section 13(b) providing for “a permanent injunction” serves as a limitation, not an expansion, of the relief the FTC is entitled to.

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The Arguments Before the Court in *AMG v. FTC*

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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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AMG Capital Management’s Arguments

- The text and structure of Section 13(b) preclude the FTC from seeking equitable monetary relief under that provision:
- First, Section 13(b), on its face, affords the FTC the right to obtain a “permanent injunction.” AMG argues that an “injunction” is a traditional equitable tool in which a court orders a party to engage or not engage in specific activities—*not* an order to pay money.
- Second, the structure of the FTC Act supports AMG’s interpretation of Section 13(b) because the FTC’s interpretation would render the language in Section 5(l) and Section 19 of the FTC Act superfluous.
 - For example, Section 5(l)—enacted at the same time as Section 13(b)—authorizes “injunctions *and such other and further equitable relief* as [district courts] deem appropriate[.]”
 - Likewise, Section 19 of the Act explicitly authorizes monetary remedies in federal court when the FTC after obtaining, and defending on appeal, an administrative order, provided the FTC demonstrates that “a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent” in order to prevail.

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FTC's Arguments

- Foundational principles of equity, recognized in *Liu v. SEC*, that wrongdoers should not profit from their own wrongdoing, support a finding that a “permanent injunction” includes the power to order defendants to return ill-gotten gains.
- Congress, when enacting Section 13(b), understood that ancillary remedies were included in the power to order injunctions.
- Section 19, which provides the FTC with the ability to obtain relief following an administrative proceeding, does not negate its Section 13(b) authority. There are trade-offs when the FTC proceeds through administrative action or goes straight to federal court.
- Congress has ratified the FTC's interpretation by substantively amending the FTC Act after courts held that Section 13(b) authorized restorative monetary relief.
- Basic principles of equity require that the authority to issue an “injunction” includes the authority to order wrongdoers to return money unlawfully taken.

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Themes of the Justices' Questions During Oral Argument

- 1. Text versus History
 - Justices Roberts, Breyer, and Kavanaugh expressed concerns about the weight of 50 years of precedent in the FTC's favor.
 - Justice Sotomayor questioned the purpose of pursuing only injunctive relief, seeming to indicate reluctance to accept AMG's interpretation of Section 13(b) as only affording the FTC the right to obtain a permanent injunction.
 - Chief Justice Roberts asked about, with follow-up from several other justices, whether the Court should “construe this statute in the environment in which Congress passed it in light of the . . . more free-wheeling approach[.]”
 - Justice Kavanaugh is concerned that accepting the FTC's interpretation of the statute raises separation of powers concerns. Instead, the proper remedy may be to “seek this new authority from Congress[.]”

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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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Themes of the Justices' Questions During Oral Argument

- 3. Drawing the Line Between Equitable Relief and an Impermissible Penalty
 - Justice Barrett expressed concern about the FTC’s practices in collecting money from defendants pursuant to Section 13(b), questioning whether their collection efforts caused the money obtained to transform into an impermissible penalty.
 - She pointed to the fact that the FTC cannot trace the money—a common requirement for common law restitution.
 - She also noted that the FTC does not generally distribute all of the money to the allegedly wronged consumers.
 - Her line of questioning may indicate an interest in adopting a *Liu v. SEC* style test that the FTC must pass in order to demonstrate that the money it obtains is, in fact, equitable monetary relief.

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Post *AMG Capital*: Tools in the FTC's Toolbox

- Section 19 Actions
 - FTC could utilize administrative litigation to obtain cease and desist orders.
 - Limitations:
 - Cannot pursue monetary relief for violation until after obtaining, and defending on appeal, the administrative order.
 - FTC must demonstrate that “a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent” to prevail.
 - Three-year statute of limitations
 - FTC could use its rulemaking authority more aggressively and then go directly to federal court to obtain restitution and redress for violations of such rules.
 - Limitation: Three-year statute of limitations applies
- Coordinate with other agencies with overlapping enforcement authority, like the CFPB.
 - Commissioner Chopra—who Biden recently tapped to lead the CFPB—has previously advocated for precisely that approach.

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Post *AMG Capital*: Tools in the FTC's Toolbox

- Refer actions to the DOJ to seek civil penalties
 - The FTC could refer more cases to the Department of Justice (DOJ) to pursue civil penalties for rule violations and certain statutory violations that provide for civil penalties.
 - Penalties vary depending on the statute or rule involved and go all the way up to \$43,792 per violation.
- Revive the Penalty Offense Authority under Section 5(m)
 - Authorizes the FTC to seek civil penalties (directly rather than through the DOJ) against a defendant in federal court where (1) the FTC has obtained a litigated cease and desist order against another party through an administrative proceeding pursuant to Section 5(b) of the FTC Act; (2) the cease and desist order identifies a specific practice as unfair or deceptive; and (3) a party on notice of the order then engages in that same violating conduct after the order is final.
 - Limitations:
 - Cannot obtain civil penalties for violation until after obtaining a cease a desist order through administrative proceeding.
 - Must prove that the defendant in the penalty action was on notice of the order (i.e., had actual knowledge that the practice is unfair or deceptive).

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Post *AMG Capital*: Potential Impact on FTC Litigation

- How will a decision in *AMG Capital* impact pending litigation, or a monetary judgment already entered pursuant to the FTC's Section 13(b) authority?
 - The Supreme Court's decision in *AMG Capital* could apply retroactively to cases currently pending because Supreme Court decisions extend not only to cases involving future events but also to:
 - pending cases,
 - future cases involving events that predate the decision, and
 - potentially in cases pending post-trial motions or appeal of a final judgment.
- See Harper v. Va. Dep't. of Tax'n*, 509 U.S. 86, 97 (1993).

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Post *AMG Capital*: Potential Impact on FTC Litigation

- A ruling either way may hit the reset button for the FTC on forum selection.
 - Recently, the FTC has filed cases in favorable jurisdictions, such as within the Second and Ninth Circuits, avoiding the Seventh Circuit since the *Credit Bureau Center* ruling.
 - Certainty and uniformity from the opinion in *AMG Capital* will give the FTC more breadth to bring cases in different jurisdictions.

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Post *AMG Capital*: Potential Impact on FTC Litigation

- The FTC may seek a congressional fix in the event of an adverse ruling.
- On August 5, 2020, after the Supreme Court granted certiorari in *AMG Capital*, the FTC commissioners submitted testimony to the Senate Commerce Committee requesting that “Congress clarify the agency’s statutory authority to obtain complete equitable monetary relief under Section 13(b) of the FTC Act, our principal means of securing judicial orders that require this relief.”
- There’s recent precedent for this congressional intervention:
 - After the Court’s decision in *Liu*, Congress passed Section 6501 of the National Defense Authorization Act, which expanded the SEC’s authority to seek disgorgement in any action “pending on, or commenced on or after” January 1, 2021.

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Questions?



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