

## Revealing Potential New Strategy, FTC Teams Up with States After Supreme Court Rules Agency Not Authorized to Seek Monetary Remedies Under Section 13(b) of the FTC Act

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### Key Points

- Last month the Supreme Court dismantled a longstanding FTC enforcement tool in a unanimous decision holding that the FTC Act does not permit the agency to use its authority to seek injunctive relief under Section 13(b) as a means to pursue monetary remedies against wrongdoers.
- In its first major use of Section 13(b) since that decision, the FTC has enlisted the aid of states whose competition laws authorize restitution, disgorgement, and other monetary remedies.
- Notwithstanding this potential new strategy, the FTC continues to urge Congress to act to restore its power under Section 13(b).

### The History of Section 13(b)

In 1973, Congress amended the Federal Trade Commission Act of 1914 (“FTC Act”) by adding Section 13(b), which granted the agency the authority to seek injunctions in federal district court to halt unfair and deceptive practices. Despite referencing injunctive relief, Section 13(b) became a well-established FTC tool for seeking ancillary relief, including monetary remedies for consumers. Using Section 13(b) to obtain monetary remedies allowed the FTC to shortcut an otherwise protracted process in which the FTC has to litigate and win multiple separate actions under its separate Section 19 authority. For example, in the most famous use of the FTC’s Section 19 authority, *United States v. Figgie Int., Inc.*, 994 F.2d 595 (9th Cir. 1993), the FTC spent ten years in litigation to ultimately get \$4 million in refunds for consumers. During that time, the FTC obtained a cease and desist order under Section 5 of the FTC Act, prevailed in an administrative trial, prevailed in an appeal to the FTC Commissioners and prevailed on an appeal to the 4th Circuit. Only then was the FTC able to file a Section 19 action seeking consumer redress. In that action, the FTC prevailed on summary judgment at the District Court and won on appeal to the 9th Circuit. Notably, the 9th Circuit cautioned that Section 19 does not necessarily follow

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from Section 5 liability, meaning that the FTC had to prevail at every turn to ultimately get consumer redress under Section 19.

To avoid that process, the FTC has relied on Section 13(b), actively using it to get monetary awards in settlements and through the courts. Despite becoming common practice, use of Section 13(b) to get monetary damages has long been criticized, and over the last several years critics started to gain traction with the courts. In *FTC v. AMG Capital Mgmt, LLC*, 910 F.3d 417, 421 (9th Cir. 2018), the 9th Circuit upheld the FTC's authority to seek monetary remedies under Section 13(b) based on past 9th Circuit precedent, but two of the panel judges issued a concurrence that called into question the correctness of the precedent. Then, in 2019 and 2020, the 7th Circuit and the 3rd Circuit, respectively, both held that the FTC Act does not authorize the agency to obtain monetary relief under Section 13(b). With a Circuit split firmly in place, the Supreme Court granted cert in *AMG Capital Mgmt*.

## The SCOTUS Decision

*AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), involved deceptive payday lending practices. In the case, the FTC relying solely on a Section 13(b) sought a permanent injunction to prevent the business owner from committing future violations as well as over one billion dollars in restitution and disgorgement. The District Court granted the relief and the 9th Circuit upheld it. A unanimous Supreme Court disagreed. Justice Breyer wrote for the Court. In a concise opinion, he explained that the language of Section 13(b) focuses on relief that is "prospective, not retrospective" and that the statutory provisions of the FTC Act, in particular the monetary relief authorized in Section 19, confirm that Congress did not intend to grant the FTC the authority to obtain equitable monetary relief directly in court in the first instance.

## Consequences and the Road Ahead

Acting Chairwoman Rebecca Slaughter was quick to express her displeasure with the Court's decision. She described the Court as having "ruled in favor of scam artists and dishonest corporations" and of thereby "depriv[ing] the FTC of the strongest tool we had to help consumers when they need it most." The Acting Chair and the other Commissioners had urged Congress even before the decision (in a November 22, 2020, letter and in Hill testimony on April 20, 2021) to ensure the FTC's power to obtain monetary remedies under Section 13(b) by amending Section 13(b) to make clear that it provides for monetary relief. On April 27, 2021, just five days after the *AMG* decision, Acting Chairwoman Slaughter was again on the Hill speaking in favor of proposed legislation that would do exactly that. While there is bipartisan support at the FTC in support of amending Section 13(b), the current proposed legislation named the "Consumer Protection and Recovery Act" does not have any Republican co-sponsors and it is unclear whether corrective legislation will pass this year. That said, we expect that Section 13(b) will eventually be amended to give the FTC the right to seek some form of monetary relief.

Stripped of a long-used tool, the FTC now is attempting to work around the Supreme Court's decision by joining with states who can seek monetary relief under state statutes to challenge allegedly unfair and deceptive conduct. In a complaint filed earlier this week in California against an internet service provider, the FTC joined with

five states (Arizona, Indiana, Michigan, North Carolina, Wisconsin) and the counties of Los Angeles and Riverside in California seeking injunctive relief under Section 13(b) and seeking monetary relief pursuant to the various states' laws authorizing "restitution, the refund of monies paid, disgorgement of ill-gotten monies, and other equitable relief [including civil penalties and attorneys' fees], to prevent and/or to stop ongoing deception or unfair acts or practices caused by Defendants' state law violations." *Fed. Trade Comm'n et al v. Frontier Commc'ns Corp.* In the complaint, the plaintiffs assert that the court has supplemental jurisdiction over the different state law claims; arguments about whether that is correct could complicate and prolong litigation. Regardless of the outcome, the FTC's chosen path will almost certainly be faster and easier than the *Figgie International* outcome discussed above.

Even as the FTC attempts to work around the *AMG* decision, there is no doubt that the Supreme Court has severely hampered the FTC's ability to secure monetary relief against companies accused of unfair or deceptive practices. Until Section 13(b) is revised, companies facing such allegations will have more bargaining power in settlement talks, but the *Frontier* complaint makes clear that the FTC has not given up on consumer redress.

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