



Consumer Protection/FTC ADVISORY ■

APRIL 27, 2021

Supreme Court Slashes FTC's Favored Route to Consumer Redress and Disgorgement

By [Kathleen Benway](#), [Robert Poole](#), and [Jenna Jones](#)

Late last week, the Supreme Court issued a unanimous decision in [AMG Capital Management LLC v. FTC](#) invalidating the Federal Trade Commission's (FTC) favored route to obtain monetary relief—Section 13(b) of the Federal Trade Commission Act. The decision deals a strong blow to the FTC's enforcement program and guts its ability to obtain consumer redress and disgorgement. Stripped of its simplest method for obtaining monetary relief, the FTC has turned to Congress to request a quick legislative fix to restore its once-presumed authority.

Background

Section 13(b) authorizes the FTC to obtain, "in proper cases," a "permanent injunction" against "any person, partnership or corporation" that it believes "is violating, or is about to violate, any provision of law," that the FTC enforces. As we previously outlined in an [earlier advisory](#), over the past four decades, 13(b) has been the almost exclusive vehicle the FTC has used to obtain redress in its consumer protection cases in federal district court.

Indeed, over the past five years alone, the FTC has used Section 13(b) to obtain \$11.2 billion in consumer redress. While the FTC typically uses 13(b) to obtain consumer redress in consumer protection cases, its use of disgorgement in pharmaceutical antitrust highlights the power of the remedy in competition cases, as well. For example, the FTC used 13(b) to obtain a historic district court award in June 2018, which ordered disgorgement of \$448 million in profits from AbbVie for allegedly using sham lawsuits to prevent generic entry of AndroGel. Although the disgorgement award was overturned late last year by the Third Circuit for the same reason found by the Supreme Court last week, it highlights how the Supreme Court's decision will impact the agency's ability to obtain relief not only in consumer protection cases but in pharmaceutical cases as well, where the agency has [publicly touted its success](#).

Although other sections of the FTC Act—namely Section 5(l) and Section 19—do provide an avenue for consumer relief, the FTC almost never proceeds under these sections due to their lengthy and cumbersome processes. Section 5(l), for example, requires the FTC to complete the entire administrative process and issue a final cease and desist order before it can seek civil penalties. Section 19 similarly requires that a party first be under an FTC order and then violate that order before a district court may issue monetary damages. This essentially gives violators "one free bite at the apple" before they would be subject to an order of restitution (compensation to address consumer

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

injuries) or disgorgement (forfeiture of ill-gotten profits). In stark contrast, the FTC used Section 13(b)'s authority as a means to skip the administrative process and request restitution and disgorgement in the first instance of violation of the FTC Act.

The Supreme Court's Decision

In *AMG Capital Management*, the Supreme Court addressed head-on a circuit split on whether Section 13(b)'s authorization for seeking a permanent injunction allowed the FTC to seek retrospective monetary relief for consumer injuries. While the Ninth Circuit has adhered to precedent allowing the FTC to seek monetary relief through 13(b), the Third and Seventh Circuits had held the opposite, finding no authority to seek restitution in 13(b). In *AMG Capital Management*, the Supreme Court reversed the Ninth Circuit's decision and agreed with the Third and Seventh Circuits:

- **Language of Section 13(b).** The language of Section 13(b)'s afforded relief refers only to "injunctions," which differ from an award of equitable monetary relief like restitution or disgorgement. Furthermore, the structure of Section 13(b) more generally confirms that "permanent injunction" is to be construed narrowly. Section 13(b) gives the FTC the power to go to a district court to obtain a permanent injunction to enjoin any person who "is violating, or is *about* to violate," Section 5 of the FTC Act. This language, the Court held, evidences Congress's intent to empower the FTC with *prospective*, not retrospective, relief. The Court reasoned that the authority of Section 13(b) was intended to address a specific problem: "stopping seemingly unfair practices from taking place while the Commission determines their lawfulness." The Court concluded that allowing the FTC to interpret Section 13(b)'s use of the term "injunction" to include equitable monetary relief "would allow a small statutory tail to wag a very large dog."
- **The structure of the FTC Act.** The enforcement regime of the FTC Act as a whole further indicates that Congress did not intend to grant the FTC such broad authority to seek monetary relief through Section 13(b). The Court compared Section 13(b) with Sections 5(l) and 19 of the FTC Act, which allowed the FTC to request from district courts monetary relief in cases where the FTC had already issued cease and desist orders after engaging in administrative proceedings. The limitations and conditions found in these latter provisions were not found in Section 13(b). The Court concluded that Congress would not have enacted a provision for monetary relief with conditions and limitations while at the same time enacting Section 13(b) with no such limitations. This was evident in the terminology used in Sections 5(l) and 19, which explicitly provide for "other and further equitable relief" and the "refund of money or return of property"—language absent from Section 13(b). In all, the Court found that the FTC's interpretation of Section 13(b) would allow it to use that provision as a substitute for Sections 5 and 19, bypassing the administrative process and the conditions and limitations the FTC Act otherwise places on the access to monetary relief.

All Eyes on Congress

In the wake of the Supreme Court's decision, it is up to Congress to amend Section 13(b) or to otherwise explicitly grant the equitable authority the FTC presumed to have had for the past 40 years under 13(b). On April 20, 2021, just two days before the Supreme Court's decision, acting chairwoman Rebecca Kelly Slaughter joined fellow Democratic commissioner Rohit Chopra and Republicans Noah Phillips and Christine Wilson in testifying before the Senate Committee for Commerce, Science, and Transportation—the FTC's authorizing committee. The hearing focused on options for strengthening the FTC's authority to protect consumers with the looming Supreme Court *AMG* decision specifically in mind. The chair of the Commerce Committee, Senator Maria Cantwell (D-WA), made it clear that she intended to move swiftly to do "everything we can to protect" the FTC's interpretation of 13(b).

Ranking member Roger Wicker (R-MS) echoed Cantwell and supported empowering the FTC with the ability to seek consumer redress. Statements and questions from Senators on both sides of the aisle demonstrated that the FTC's ability to seek redress for consumers harmed by unfair and deceptive practices is a bipartisan issue—especially given the rise in COVID-19-related fraud cases.

The apparent bipartisan support does not necessarily foretell a speedy congressional response to the Supreme Court's decision, however. While both parties support bestowing the FTC access to broader civil penalties, the legal framework needed for establishing that authority was far from clear. Specifically, commissioners were asked about their diverging views on what relief Congress should grant the FTC specifically. While Slaughter advocated for the ability to seek disgorgement of all ill-gotten gains, Phillips emphasized the need to focus on making consumers whole through restitution rather than inappropriately punishing businesses. Chopra countered, agreeing with Slaughter and emphasizing the need to punish businesses that egregiously violate the law. In her testimony, Wilson stated that legitimate concerns about the FTC's requested authority may be addressed by establishing a statute of limitations and clear rules on when disgorgement is available. The fact that there is disagreement within the FTC on the scope of new authority portends likely disagreement in the Senate as well. Senators Cantwell and Wicker agreed that the FTC would benefit from a document clearly delineating the differences among the commissioners.

The same day the Senate held its hearing, across the Hill in the House of Representatives, Representative Tony Cárdenas (D-CA) introduced the Consumer Protection and Recovery Act (H.R. 2668), which would explicitly empower the FTC with the equitable relief needed to pursue restitution and disgorgement. The bill would also allow the FTC to target past conduct within a statute of limitations of 10 years. Furthermore, the bill seeks to apply its provisions retroactively—effectively neutralizing any leverage businesses may assert against the FTC today while its 13(b) authority is minimized pending congressional action. Cárdenas's proposal is set for a hearing on April 27 before the Consumer Protection and Commerce Subcommittee of the House Committee on Energy and Commerce.

Where Does This Leave the FTC's Enforcement Program?

While we do expect that Congress will step in and provide the FTC with additional equitable authority under Section 13(b), it is unclear what form of authority Congress will grant or how fast it will do so. Furthermore, as Representative Cárdenas's bill emphasizes, unless specifically stated otherwise, any legislative fix would be prospective, applying to future conduct only.

In the meantime, businesses should continue to ensure they are in compliance with all applicable rules and statutes enforced by the FTC. Section 13(b) was not the FTC's only tool for seeking monetary relief. Importantly, the agency still has the ability to obtain civil penalties of up to \$43,280 *per* violation of either (1) an FTC Trade Regulation Rule; or (2) a statute that provides civil penalties. These include, for example, the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN SPAM) Act, Children's Online Privacy Protection Act (COPPA), Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA), Restore Online Shoppers' Confidence Act (ROSCA), Telephone Consumer Protection Act (TCPA), and Telemarketing Sales Rule (TSR). The FTC has already ramped up allegations of these types of violations in its recent complaints, which could amount to significant penalties. For example, the FTC obtained a record-setting \$168 million civil penalty against Dish Network for violation of the TSR. And although not nearly as concerning as the possibility of being ordered to pay consumer redress for an un-cabined period of backward-looking time, we can expect the FTC to become more aggressive with its civil penalty enforcement.

You can subscribe to future *Consumer Protection/FTC* advisories and other Alston & Bird publications by completing our [publications subscription form](#).

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Kathleen Benway
202.239.3034
kathleen.benway@alston.com

Alexander G. Brown
404.881.7943
alex.brown@alston.com

Kristine McAlister Brown
404.881.7584
kristy.brown@alston.com

James A. Harvey
404.881.7328
jim.harvey@alston.com

Donald Houser
404.881.4749
donald.houser@alston.com

Joseph H. Hunt
202.239.3278
404.881.7811
jody.hunt@alston.com

Amy S. Mushahwar
202.239.3791
amy.mushahwar@alston.com

Kimberly Kiefer Peretti
202.239.3720
kimberly.peretti@alston.com

T.C. Spencer Pryor
404.881.7978
spence.pryor@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2021

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: One South at The Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
FORT WORTH: 3700 Hulen Street ■ Building 3 ■ Suite 150 ■ Fort Worth, Texas, USA, 76107 ■ 214.922.3400 ■ Fax: 214.922.3899
LONDON: 5th Floor, Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 1950 University Avenue ■ Suite 430 ■ East Palo Alto, California, USA 94303 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333