

FTC Can No Longer Seek Monetary Penalties for Violations of Unfair or Deceptive Practices

The Bottom Line

- The Supreme Court's decision took away one of the FTC's most valuable tools in enforcing Section 5 of the FTC Act, and may take a toll on monetary relief that the FTC can obtain in the near term.
- However, between the FTC's other monetary remedies and proposals in Congress to codify the FTC's ability to obtain monetary remedies under Section 13(b), Section 5 remains alive and well.

The Supreme Court has found that the Federal Trade Commission (FTC) can no longer rely on Section 13(b) of the Federal Trade Commission Act (FTC Act) in order to seek monetary penalties for violations of Section 5 of the FTC Act for "unfair methods of competition" and "unfair or deceptive acts or practices."

At least for now, this decision will have significant effects on the FTC's ability to obtain consumer redress in cases brought under Section 5.

Background on Section 13(b)

In 1973, the United States Congress added Section 13(b) to the FTC Act, which gives the FTC authority to:

1. File suit in federal court when it believes or has reason to believe that a violation of the FTC Act is occurring, and
2. The right to seek injunctive relief.

Beginning in the late 1970s, the FTC began relying on the latter provision in seeking to recover illegally obtained funds, and has since brought dozens of cases annually, including cases involving antitrust violations, data security and privacy, telemarketing, and consumer fraud.

Although this was common practice for a number of years, the United States Court of Appeals for the Seventh Circuit and the Third Circuit recently found that the FTC could not

rely on Section 13(b) in obtaining monetary remedies. However, the Ninth Circuit found the opposite in *FTC v. AMG Capital Management, LLC*, declaring that the FTC could rely on Section 13(b) in seeking monetary relief, and affirming a \$1.27 billion judgment against AMG. Given that these decisions resulted in a circuit split, the Supreme Court granted certiorari.

In a unanimous decision, the Supreme Court found that the United States Congress did not intend for Section 13(b) to give the FTC the right to seek monetary remedies, and therefore reversed the Ninth Circuit's decision and the \$1.27 billion judgment.

What the New Decision Means

The FTC has relied on Section 13(b) in obtaining billions of dollars in consumer redress, with \$11.2 billion being returned to consumers in just the last five years. Acting FTC Chairwoman Rebecca Kelly Slaughter has since stated that the Supreme Court "has deprived the FTC of the strongest tool we had to help consumers when they need it the most."

However, it is important to note that the FTC still has a number of mechanisms to obtain relief. The FTC can:

1. Use Section 13(b) to obtain injunctions when enforcing Section 5 of the FTC Act.
2. Seek monetary remedies with Section 19, though that section requires the FTC to bring an action within three years and only applies where "a reasonable man would have known under the circumstances was dishonest or fraudulent."
3. Collect civil penalties of \$43,792 per violation where a defendant violates an order or knowingly violates an existing rule.
4. Seek monetary settlements when negotiating consent orders, though the loss of monetary relief under Section 13(b) may well take away some of their bargaining power (or require them to compromise in other areas, like the breadth of settlements).

The decision may result in the FTC increasing its cooperation with state attorneys general, given that many states' consumer protection laws – known as "little FTC Acts" – grant state attorneys general with significant authority to collect monetary penalties.

The Supreme Court's decision may also result in legislative action. Just after the decision was handed down, Senator Maria Cantwell (D-WA), the Chair of the Senate Committee on Commerce, Science, and Transportation, stated that "[w]e are working to move legislation immediately to make sure this authority is properly protected." Legislation has also been introduced by the House Consumer Protection and Commerce Subcommittee that would grant the FTC with the ability to obtain monetary relief under Section 13(b).

Seeing as how Congress recently passed the 2021 COVID-19 Consumer Protection Act – which grants the FTC the right to obtain monetary relief over deceptive advertising claims involving COVID-19 – there may be a broader appetite in Congress to follow suit and maximize the FTC’s enforcement authority.

For More Information

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