

Antitrust Law Daily Wrap Up, TOP STORY: FTC argues before Supreme Court that Sec. 13(b) authorizes monetary relief, (Jan. 13, 2021)

Antitrust Law Daily Wrap Up

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By [Jeffrey May, J.D.](#)

The Ninth Circuit decision at issue upheld a \$1.27 billion award for restitution.

Today, the U.S. Supreme Court heard arguments on the issue of whether Section 13(b) of the FTC Act authorizes the agency to seek a court order requiring a defendant to return money unlawfully taken from consumers as part of the requested relief. At issue is a [decision](#) of the Ninth Circuit, affirming a federal district court order requiring payday lenders to pay \$1.27 billion in equitable monetary relief. The petition for review of the Ninth Circuit ruling followed a Seventh Circuit [decision](#) creating a circuit split on whether Section 13(b) authorizes an award of restitution. Based on the argument, conservative members of the Court could be looking to rein in the power of the FTC; however, 50 years of uniform application of the provision and past precedents raise hurdles for overturning the Ninth Circuit decision. A number of pending FTC enforcement actions would be impacted by a reversal (*AMG Capital Management, LLC v. FTC*, Dkt. 19-508).

"The FTC Act's test, structure, and purpose make clear that when Section 13(b) authorizes the Commission to seek a permanent injunction, it means just that, a permanent injunction as traditionally understood," argued Michael Pattillo of MoloLamken LLP for petitioner AMG Capital Management, LLC. "It does not mean injunctions and all equitable relief or injunctions and monetary relief for past harms."

He contended that Congress's intent can be determined by looking at the words on the page.

Interpreting Congress's understanding of Sec. 13(b). According to Pattillo, Section 13(b) is a "narrow supplement for threatened harm" that should be used by the agency when it needs to go to court to stop unlawful conduct quickly. A reading of Sections 5(l) and 19, which specify certain types of equitable remedies for FTC Act violations, supports this position, in Pattillo's view.

Section 5(l) authorizes civil penalties for the violation of a Commission cease-and-desist order. Section 19 authorizes monetary relief after finding in an administrative proceeding that a defendant engaged in unfair or deceptive practices. AMG takes issue with the Commission's arguments that Congress intended Section 13(b) to implicitly authorize the very same remedies expressly authorized in Section 19, without imposing preconditions such as a statute of limitations provision and notice requirement.

Both Chief Justice John Roberts and Justice Elena Kagan questioned whether the statute should be construed not so much on the specific language but in light of what Congress had in mind at the time the legislation was passed. The FTC argued that Congress had a broader reading in mind at the time the law was passed.

"We're supposed to be looking at what Congress thought in 1973 given the backdrop of all of our precedents," said Kagan.

In response to suggestions that a broader reading of Section 13(b) was warranted, Pattillo argued that the other relief provisions of the FTC Act could not be reconciled with the notion that Congress somehow thought the word "injunction" itself automatically included all equitable relief.

Controlling precedent. Justice Brett Kavanaugh pointed out that AMG's argument was strikingly similar to the argument advanced in the dissents in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), which held that judicial authority to enter a permanent injunction includes the authority to require the return of wrongfully obtained money. The FTC has argued that *Porter* and *Mitchell* control this case.

Kavanaugh asked Pattillo how *Porter* and *Mitchell* should be handled if the case is decided in AMG's favor. Pattillo responded that *Porter* and *Mitchell* were entirely distinguishable based on the statutory scheme.

Practical reasons for affirming FTC authority. Justice Stephen Breyer questioned whether too much time had passed to take away a remedy that the courts had accepted for decades even if it was a mistake. Breyer noted that Section 13(b) has been around for 50 years and that there had been "pretty uniform interpretation before the Seventh Circuit" decision rejecting the FTC's restitution authority under the provision. Kavanaugh also inquired whether *Porter* and *Mitchell*, combined with ratification by the courts of appeal and Congress warranted leaving well enough alone.

"Long-standing error doesn't make it any less error," said Pattillo. "The statute is still the statute, and now that the issue is before this Court, it's the Court's duty to give the correct interpretation of the statute, notwithstanding a long history of error."

FTC argument. Joel Robert Marcus, arguing for FTC, contended that courts have long recognized that the equitable power to issue an injunction, such as provided for in Section 13(b), inherently includes the power to order the return of unlawful gains. Further, Marcus rejected the notion that Sections 5(l) and 19 of the FTC Act created an "unmistakable inference"—the standard required under *Porter*—that Congress intended to limit traditional equitable powers when the Commission chooses instead to proceed in court.

In response to the chief justice's questioning of the FTC's broad reading of "injunction," Marcus said that it was sufficient that the Commission can invoke a court's equitable authority. However, Roberts was not so sure that it followed that an agency had the same authority that a court had. Rather, a court can enforce whatever authority the agency has, said Roberts.

Legislative history. Justice Sonia Sotomayor asked the attorney for the FTC to explain why the legislative history does not suggest that Congress understood that Section 13(b) authorized monetary awards.

Marcus responded that there is a presumption that Congress legislates against the backdrop of the law and that "the backdrop of the law of injunction really couldn't be clearer."

Restitution vs. fine. In the underlying case, the FTC obtained a \$1.3 billion judgment against a number of defendants. Apparently, some money—tens of millions of dollars—remains in an account and is being held for possible redress should the Commission ultimately wind up with the ability to distribute it.

Justice Amy Coney Barrett suggested that the monetary relief functioned more like a fine than restitution. "It seems to me that equitable remedies attempt to restore the plaintiff to the position in which the plaintiff stood before the plaintiff was defrauded," said Barrett. "This money isn't traceable back to the FTC. And the money that's gained isn't all being distributed to the plaintiffs."

Marcus responded that the money that is recovered would be distributed to victims. According to Marcus, AMG asks the court to disregard the principle of equity that wrongdoers have to give back the money that they took unlawfully. He encouraged the Court to uphold that a permanent injunction includes the power to restore a victim's money that was taken from them.

Easy path. In his rebuttal, Pattillo argued that the FTC is using Section 13(b) to avoid the safeguards under Sections 5(l) and 19.

"Of course, it's going to be more attractive for the Commission to proceed under Section 13 than Section 19 where it doesn't have to comply with, for example, the heightened proof requirement, where it doesn't have to comply with the limitations period," said Pattillo. "I didn't hear a single response to why Congress would have intended to allow the same relief under two pathways, yet only provides protections in one but not the other." He added that the FTC sat on its hands for a decade before acting in this case.

"The structure of the Commission's mission is being altered by choosing to go down the easy path of racking up huge judgments under 13(b) without the protections that Congress provided under Section 19," Pattillo concluded in urging reversal of the Ninth Circuit decision.

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