

July 13, 2020

U.S. SUPREME COURT TO WEIGH FTC RESTITUTION AUTHORITY

To Our Clients and Friends:

On Thursday, July 9, 2020, the U.S. Supreme Court consolidated and agreed to review two closely watched cases, *FTC v. Credit Bureau Center, LLC* (case number 19-825) and *AMG Capital Management, LLC v. FTC* (case number 19-508), concerning whether Section 13(b) of the Federal Trade Commission Act (“FTC Act”) authorizes the FTC to seek an award of restitution.[1] With this grant of certiorari, the Court will address a circuit split that developed in August 2019, when the Seventh Circuit in *FTC v. Credit Bureau Center, LLC* broke with eight other circuits and explicitly overturned its own long-standing precedent in holding that the FTC *cannot* seek restitution under Section 13(b) of the FTC Act.

The implications of this review are significant. The FTC claims broad authority to regulate consumer protection violations, has increasingly targeted industry-leading companies in headline-grabbing matters, and regularly secures massive monetary remedies under Section 13(b). *Credit Bureau Center* calls the viability of the FTC’s approach into question, and if the Supreme Court affirms the decision, the FTC would be required to navigate a more complex procedural process in order to obtain monetary relief.

Section 13(b) provides that the FTC “may seek, and after proper proof, the court may issue, a permanent injunction” and does not reference monetary relief. Nevertheless, until the Seventh Circuit’s decision in *Credit Bureau Center*, every circuit court to consider the issue (including the Seventh Circuit thirty years ago in *FTC v. Amy Travel Service, Inc.*[2]) had held that Section 13(b) *implicitly* authorizes a wide range of equitable remedies, including restitution, rescission, and disgorgement involving monetary relief, through the word “injunction.” Many such courts have invoked the Supreme Court’s 1946 decision in *Porter v. Warner Holding Co.*, which held in the context of a separate federal statute that a reference to “permanent or temporary injunction, restraining order, or other order” permitted district courts to use “all inherent equitable powers,” including monetary remedies such as restitution.[3]

When a panel of the Seventh Circuit reversed *Amy Travel* in *Credit Bureau Center*, it explained that “[a]n implied restitution remedy doesn’t sit comfortably within the text” of Section 13(b), contrasting restitution with injunctions, and describing the latter as forward-facing and the former as a “remedy for past actions.”[4] The panel noted that unlike two remedial provisions in the FTC Act that expressly authorize restitution when the FTC follows specific procedures, Section 13(b) lacks similar language, and to impliedly authorize restitution under Section 13(b) would render the other provisions “largely pointless.”[5] With respect to the decision’s departure from *Amy Travel*, the panel explained that in the ensuing three decades, “the Supreme Court has clarified that courts must consider whether an implied

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equitable remedy is compatible with a statute’s express remedial scheme” and instructed courts “not to assume that a statute with ‘elaborate enforcement provisions’ implicitly authorizes other remedies.”[6]

In contrast, in *FTC v. AMG Capital Management, LLC*, the Ninth Circuit held in December 2018 that Section 13(b) does, in fact, authorize monetary relief. Notably, Ninth Circuit Judge Diarmuid O’Scannlain issued a special concurrence to the majority opinion, calling on the court to hear the case *en banc* to reconsider its prior holding that Section 13(b) authorizes monetary relief, but the Ninth Circuit denied AMG’s petition for rehearing *en banc* in June 2019.[7]

Court watchers will not be surprised by the grants of *certiorari*, given this clear circuit split and the Court’s recent willingness to examine the disgorgement authority of the Securities and Exchange Commission (“SEC”) in *Liu v. Securities and Exchange Commission*,[8] decided only three weeks ago. In *Liu*, the Court held that even though the SEC Act of 1934 does not expressly permit disgorgement, this remedy is nonetheless available because the statute permits the SEC to obtain “equitable relief.”[9] The Court, however, also held that any disgorgement remedy must conform with principles of equity, identifying three ways in which the SEC’s disgorgement practices may test the bounds of equity practice: (1) ordering the proceeds of fraud to be deposited in Treasury funds instead of disbursing them to victims; (2) imposing joint and several liability; and (3) declining to deduct even legitimate expenses from the receipts of fraud.[10]

Following the decision in *Liu*, Credit Bureau Center and AMG each submitted a supplemental brief to the Court regarding *Liu*’s implications, both arguing that *Liu* does not conflict with their position because Section 13(b) of the FTC Act, unlike the SEC Act, does not authorize “equitable relief,” and instead speaks only in terms of an “injunction.”

If the Court sides with Credit Bureau Center and AMG, the decision will have significant practical consequences for the FTC. Without legislative intervention, to obtain restitution the agency would largely have to turn to Section 19 of the FTC Act, which explicitly authorizes the agency to obtain monetary relief including restitution, but sets forth a cumbersome and lengthy process, requiring the FTC to first prevail in an administrative proceeding and then seek legal and equitable relief (including restitution) in federal court thereafter.

The FTC has already issued a statement in response to the Court’s announcement that it will review these cases, stating that the Commission “look[s] forward to proving to the Supreme Court that the FTC Act empowers [the FTC] to fully protect consumers by ensuring that money unlawfully taken from them is rightfully returned.”[11] Interestingly, however, in January, FTC Chairman Joseph Simons stated that he would like Congress to clarify that Section 13(b) allows for monetary relief,[12] at least suggesting that the statute is not crystal clear on this issue. And in May 2019, FTC Commissioner Christine S. Wilson requested in congressional testimony that Congress clarify the FTC’s powers under Section 13(b).[13]

Despite the FTC’s stated optimism, several Justices have taken public positions suggesting that they may be open to the Seventh Circuit’s position. In a past oral argument, Justice Gorsuch stated that the Court had never approved lower-court precedent permitting an implied disgorgement remedy stemming from

an injunction, and there was no statute governing this remedy, so the Court was “just making it up.”^[14] Chief Justice Roberts and Justice Sotomayor have questioned the SEC’s authority to impose monetary penalties, specifically including disgorgement.^[15] And in *Liu*, Justice Thomas argued in his dissent that disgorgement was not an available form of equitable relief in English Chancery Court at the time of the founding, and therefore should not be read into a statute permitting only “equitable relief.”^[16]

On the other hand, as reflected in *Liu*, the Court appears willing to limit the enforcement authority of executive agencies, but reluctant to *categorically* take remedies off of the table. It is, of course, difficult to predict the how the Court might come out, but this is certainly a case worth watching.

The cases are set for argument in the Court’s October 2020 term. Our experienced teams of FTC, appellate, and trial lawyers—which have litigated these and similar issues in forums across the country—will continue to monitor the cases closely, and are available to discuss these and any related issues.

[1] 591 U.S. 2.

[2] 875 F.2d 564 (7th Cir. 1989).

[3] 328 U.S. 395 (1946).

[4] 937 F.3d 764, 772 (7th Cir. 2019).

[5] *Id.* at 774.

[6] *Id.* at 767.

[7] 910 F.3d 417, 429-37 (9th Cir. 2018).

[8] 140 S. Ct. 1936 (2020).

[9] 15 U.S.C. § 78u(d)(5).

[10] *Liu*, 140 S. Ct. at 1946.

[11] Statement of Alden F. Abbott Regarding Supreme Court Orders Granting Review of Two FTC Matters (July 9, 2020), [here](#).

[12] Matthew Perlman, FTC’s Antitrust Powers Under Indirect Attack, *Law 360* (Jan. 21, 2020) *available at* <https://www.law360.com/articles/1236118/ftc-s-antitrust-powers-under-indirect-attack>.

[13] Oral Statement of FTC Commissioner Christine S. Wilson Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (May 8, 2019), [here](#).

[14] *See* Transcript of Oral Argument at 52, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

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[15] *Id.* at 7:20-8:2; 9:5-11; 33:12-18.

[16] 140 S. Ct. at 1950.



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