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Supreme Court to Determine Whether FTC Can Obtain Monetary Restitution in Federal Court

On July 9, 2020, the Supreme Court granted review in ***AMG Capital* v. *Federal Trade Commission*** and ***Federal Trade Commission* v. *Credit Bureau Center*** to decide whether a federal court can award monetary relief in the form of restitution in an action brought by the FTC under Section 13(b) of the FTC Act. The decision could have significant ramifications for FTC enforcement actions moving forward.

Background

The FTC Act prohibits "unfair methods of competition" and empowers the FTC to prevent the use of "unfair or deceptive acts or practices" in or affecting commerce.[1] Under Section 13(b) of the FTC Act, the FTC can file an action in federal court seeking a "permanent injunction" against a person who is violating the Act.[2]

In both *AMG Capital* and *Credit Bureau Center*, the FTC filed suit against the defendants under Section 13(b), and the district courts ultimately ordered the defendants in both cases to pay significant amounts in restitution for unlawful gains from consumers. On appeal, the defendants challenged the restitution orders as exceeding the district court's authority under Section 13(b). The courts of appeals in the two cases reached opposite results. In *AMG Capital*, the Ninth Circuit affirmed, relying on prior precedent to hold that the restitution order was permissible under the district court's authority to award permanent injunctive relief.[3] In *Credit Bureau Center*, the Seventh Circuit reversed, overruling its prior precedent and holding that, under the plain meaning of Section 13(b), it was "obvious" that "[r]estitution isn't an injunction."[4]

In *Credit Bureau Center*, the FTC invoked its independent authority and sought Supreme Court review without the support of the U.S. Solicitor General. The defendant in *AMG Capital* sought Supreme Court review as well. The Court granted both petitions and consolidated the cases.[5]

Issue Presented

The question presented at the Supreme Court is whether district courts may award monetary relief under Section 13(b) of the FTC Act, which authorizes them to issue "permanent injunction[s]." The federal courts of appeals are currently divided on that question. The conflict stems primarily from a dispute about the applicability of two Supreme Court decisions: *Porter* v. *Warner Holding Co.* (1946)[6] and *Mitchell Robert DeMario Jewelry, Inc.* (1960).[7] In *Porter*, the Court interpreted a federal rent-control statute that permitted the issuance of a "permanent or temporary injunction, restraining order, or other order" as authorizing district courts to invoke their inherent equitable authority to order the return of illegally collected rent. In *Mitchell*, the Supreme Court applied the reasoning in *Porter* to a provision in the Fair Labor Standards Act.

Eight circuits have applied *Porter* and *Mitchell* to the FTC Act and interpreted Section 13(b) to include implied authority for district courts to order monetary relief in the form of restitution; the Seventh Circuit, as a result of its decision in *Credit Bureau Center*, is the sole outlier—although at least one other circuit has recently narrowed its interpretation of Section 13(b) as well.[8] In *Credit Bureau Center*, the Seventh Circuit reconsidered an earlier decision and held that "[S]ection 13(b)'s grant of authority to order injunctive relief does not implicitly authorize an award of restitution."[9] In doing so, it relied heavily on the Supreme Court's decision in *Meghrig* v. *KFC Western* (1996),[10] in which the Court interpreted a provision authorizing injunctive relief in a different statute as permitting *only* forward-looking equitable remedies—and not monetary restitution. The Seventh Circuit ultimately held in *Credit Bureau Center* that, due to "clear incompatibilities with the [FTC Act's] text and structure, *Meghrig*, and the Supreme Court's broader refinement of its implied remedies jurisprudence," Section 13(b) of the FTC Act does not permit restitution awards.[11] At the Supreme Court, the private parties argue that *Meghrig* is controlling and that the majority interpretation of Section 13(b) creates redundancy with other provisions of the FTC Act that permit the FTC to seek money damages under certain circumstances. The FTC maintains that *Porter* is the controlling precedent and that the other sections of the FTC Act cited by the defendants are not redundant but instead provide the agency with flexibility when determining how to enforce the Act.

Implications

The Supreme Court's decision could have significant implications on the FTC's enforcement options moving forward. For decades, the Commission has relied on Section 13(b) as a mechanism through which to obtain equitable monetary relief. A ruling for the private parties would thus significantly impede its ability to obtain such relief.

The cases are set to be heard in the upcoming Supreme Court term, which begins in October.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Craig A. Benson
+1-202-223-7343
cbenson@paulweiss.com

Joseph J. Bial
+1-202-223-7318
jbial@paulweiss.com

Andrew C. Finch
+1-212-373-3417
afinch@paulweiss.com

Andrew J. Forman
+1-202-223-7319
aforman@paulweiss.com

Jonathan S. Kanter
+1-202-223-7317
jkanter@paulweiss.com

Jane B. O'Brien
+1-202-223-7327
jobrien@paulweiss.com

Jacqueline P. Rubin
+1-212-373-3056
jrubin@paulweiss.com

Charles F. (Rick) Rule
+1-202-223-7320
rrule@paulweiss.com

Kannon K. Shanmugam
+1-202-223-7325
kshanmugam@paulweiss.com

Aidan Synnott
+1-212-373-3213
asynnott@paulweiss.com

Steven C. Herzog
+1-212-373-3317
sherzog@paulweiss.com

Associates William T. Marks and Julie L. Rooney, and summer associate Colleen Anderson, contributed to this client memorandum.

1 15 U.S.C § 45(a)(2).

2 15 U.S.C. § 53(b).

3 *FTC* v. *AMG Capital Mgmt., LLC*, 910 F.3d 417, 427, 428 (9th Cir. 2018).

4 *FTC* v. *Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 & n.1, 773 (7th Cir. 2019).

5 Nos. 19-508 & 19-825.

6 328 U.S. 395.

7 361 U.S. 288.

8 *FTC* v. *ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

9 *Credit Bureau*, 937 F.3d at 786.

10 516 U.S. 479.

11 *Credit Bureau*, 937 F.3d at 786.