

Axinn Antitrust Insight: Supreme Court Limits FTC's Ability to Seek Equitable Monetary Relief

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In *AMG Capital Management, LLC v. FTC*, the U.S. Supreme Court unanimously held that Section 13(b) of the Federal Trade Commission Act does not authorize the FTC to seek equitable monetary relief, such as restitution or disgorgement, in federal court. While the FTC had previously relied on Section 13(b) as the basis for courts to award such relief in both consumer protection and antitrust cases, the statute neither expressly nor implicitly authorizes the FTC to do so.

Since the 1990s, the FTC has relied on Section 13(b) to seek and win equitable monetary relief in antitrust cases. In 2012, the FTC announced a policy to increase its pursuit of equitable monetary relief for antitrust misconduct. Since that policy change, the FTC has secured significant monetary relief for alleged antitrust violations, many involving the pharmaceutical industry. For example:

- In 2015, Cephalon/Teva settled a Hatch-Waxman “reverse payment” case with the FTC for \$1.2 billion after losing its argument in federal district court that the FTC was not entitled to seek equitable monetary relief under Section 13(b).
- In 2017, Mallinckrodt paid \$100 million to settle an FTC allegation of an illegal acquisition of a pipeline pharmaceutical to maintain its monopoly.
- In 2018, a federal district court ordered a \$448 million equitable relief award against AbbVie and Besins, but in 2020, the Third Circuit reversed, holding that Section 13(b) did not authorize such relief.

The Third Circuit’s decision in *FTC v. AbbVie* highlighted the circuit split the Supreme Court resolved in *AMG*, with the Third and Seventh Circuits holding that Section 13(b) does not authorize equitable monetary relief and most circuits holding that it does.

While the FTC can no longer go straight to federal court to seek monetary relief through Section 13(b), that could change soon. As the Supreme Court pointed out, Congress has recently considered a bill that would expressly grant the FTC authority to seek equitable monetary relief under Section 13 of the FTC Act. The issue has also been the subject of recent congressional hearings, in which the FTC participated and supported such legislation. Acting FTC Chairwoman Rebecca Kelly Slaughter did so most recently on April 27, 2021, in the wake of the Supreme Court's decision. The Commission voted 4-0 in support of her testimony.

Additionally, through private litigation, companies continue to be exposed to potentially significant monetary damages, including in follow-on actions based on an FTC investigation or litigation.

While the Supreme Court's *AMG* decision gives companies some relief from monetary exposure in FTC cases, it might only be temporary, and it is not complete.

