



# THE RECEIVER

OFFICIAL PUBLICATION OF THE NATIONAL ASSOCIATION OF FEDERAL EQUITY RECEIVERS

This article originally appeared in the July 2021 | Issue 12 publication. For more information about NAFER, visit [www.NAFER.org](http://www.NAFER.org)

## The AMG Capital Decision and Its Impact on FTC Enforcement

By Kevin B. Duff

In April, the United States Supreme Court decided one of the most important cases involving the Federal Trade Commission in decades. The Court unanimously held in *AMG Capital Management, LLC v. Federal Trade Commission* that the FTC lacks legal authority to seek restitution for injured consumers under section 13(b) of the Federal Trade Commission Act.<sup>1</sup> For years, the FTC had relied on Section 13(b) to recover money and impose permanent injunctions as remedies for deceptive trade practices. With this decision, the Court removed an important equitable arrow from the FTC's quiver as it takes aim to protect consumers through regulatory enforcement actions.<sup>2</sup>

The immediate effect of the Court's opinion is to overturn lower court decisions under Section 13(b) that ordered monetary relief, including in cases where district courts have appointed federal receivers but where the money has not yet been collected.

But the breadth of *AMG Capital's* impact will not be fully known until post-*AMG Capital* motion practice generates new decisions. In this regard, the battle lines are still being drawn in pending lower court cases. In the long run, the Supreme Court's decision may encourage the FTC to seek the appointment of receivers earlier in the enforcement process in conjunction with permanent injunctions that remain allowed under Section 13(b). The decision may also result in legislation that codifies previous FTC practices. Unless Congress changes the statute, the FTC now must change tacks to employ other district court strategies or go through its traditional administrative process of hearings and cease and desist orders *before* seeking restitution and disgorgement of ill-gotten profits.

### The Supreme Court's Decision

In *AMG Capital*, the Court found that Congress did not intend the permanent injunction language of Section 13(b)

to allow the FTC to seek equitable monetary relief. The decision foreclosed a path through federal district courts that the FTC had used in recent decades to recover billions of dollars through restitution and disgorgement orders. The FTC also lost the deterrent effect that came from such potential relief.

But did *AMG Capital* gut FTC enforcement or did it simply force the FTC to tie its shoes before marching on in its efforts against deceptive trade practices?

Although there has been hand-wringing in the consumer protection and regulatory enforcement community from recent Supreme Court decisions limiting regulatory enforcement authority,<sup>3</sup> a closer reading of *AMG Capital* shows it is a product of careful attention to statutory language rather than judicial activism. There is no doubt that the Court's decision curtailed FTC enforcement efforts, but the Court's reasoning emanated from

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### About The Author

#### Kevin B. Duff

Kevin B. Duff is a partner at Rachlis Duff & Peel, LLC, in Chicago, Illinois. Within his complex commercial litigation practice, Mr. Duff serves as a federal equity receiver and counsel to federal equity receivers. He is the Immediate Past President of the National Association of Federal Equity Receivers. [kduff@rdaplawn.net](mailto:kduff@rdaplawn.net).

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what the FTC Act says and, equally important, what it does not say in Section 13(b).

To put the impact of *AMG Capital* in perspective, it is helpful to review the legal context in which the *AMG Capital* decision arose – and particularly with respect to historical FTC enforcement practices, the language of Section 13(b) itself, and the Supreme Court’s recent prior decisions in *Kokesh v. SEC* and *Liu v. SEC*.

### The FTC’s Enforcement Mechanisms

The mission of the FTC, created in 1914, is to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.<sup>4</sup> The FTC Act provides it with three principal avenues of enforcement:

- administrative adjudication and enforcement of final Commission orders under Section 5(l);
- permanent injunctive relief in proper cases to prevent deceptive practices under Section 13(b);<sup>5</sup> and
- consumer redress through civil penalties<sup>6</sup> in federal court under Section 19.<sup>7</sup>

Beginning in the late 1990s, the FTC began to enlarge its enforcement efforts under Section 13(b) to seek monetary relief – beyond injunctive relief.<sup>8</sup> At first, the FTC limited use of Section 13(b) monetary relief to exceptional cases involving clear antitrust violations.<sup>9</sup> Then, in 2012, the FTC withdrew its policy statement that imposed limitations on the use of Section 13(b).<sup>10</sup> Since then, and up until the *AMG Capital* decision, the FTC used Section 13(b) in dozens of cases annually to seek and obtain equitable monetary relief in federal district courts.<sup>11</sup> The result of that practice was the FTC used Section 13(b) as its “strongest tool” to collect billions of dollars in court-ordered restitution and disgorgement, and thereby avoid lengthier and cumbersome administrative procedures codified by the FTC Act.<sup>12</sup>

But in more recent years, decisions from the Supreme Court and certain U.S. Courts of Appeals signaled skepticism about allowing agencies to seek restitution in the absence of clear statutory authority. In particular, in *Kokesh* and *Liu*, the Supreme Court cut back on the enforcement authority of the Securities and Exchange Commission in decisions that some saw as a harbinger of changes coming to FTC practices.<sup>13</sup>

In *Kokesh*, the Court determined, in connection with a statute of limitations analysis, that disgorgement is form of civil penalty.<sup>14</sup> However, it was not until its 2020 decision in *Liu v. SEC* that the Supreme Court took up the question of “whether courts possess authority to order disgorgement in SEC enforcement proceedings.”<sup>15</sup> In *Liu*, the Court ruled the SEC may only seek disgorgement of excess profits and may not obtain joint and several disgorgement orders against multiple defendants.<sup>16</sup>

In addition, the notion that FTC’s practices for obtaining monetary relief under Section 13(b) might not be permissible began to appear in federal appellate decisions.<sup>17</sup> Even the FTC recognized that the winds had changed, as reflected by its public comments and legislative efforts even before the Supreme Court issues its decision in *AMG Capital*.<sup>18</sup>

### The Court’s Reasoning

In *AMG Capital*, the Supreme Court considered whether Section 13(b) authorizes the FTC to seek equitable monetary relief such as restitution or disgorgement.<sup>19</sup> *AMG Capital* involved a deceptive scheme involving payday loans orchestrated by petitioner Scott Tucker and his affiliated companies. The case reached the Supreme Court after the district court<sup>20</sup> had granted the FTC injunctive relief and ordered the defendants to pay \$1.27 billion in restitution and disgorgement, and the Ninth Circuit had affirmed the lower court decision.<sup>21</sup> The Ninth Circuit found that Section 13(b) “empowers district courts to grant ‘any ancillary relief necessary to accomplish complete justice,’ including restitution.”<sup>22</sup>

But the Supreme Court did not approach its analysis in *AMG Capital* from the standpoint of whether the FTC’s practice of seeking monetary relief through Section 13(b) was fair, equitable, or provided redress to consumers that justified seeking such relief. Nor, ultimately, did the Court’s reasoning turn on whether FTC practices under Section 13(b) had become historically ingrained or effective at deterring deceptive schemes.<sup>23</sup>

In framing the question before it, and at the same time illuminating alternative remedial paths, the Court made clear that the question it was addressing was simply whether “Congress, by enacting § 13(b)’s words, ‘permanent injunction,’ grant the Commission authority to obtain monetary relief directly from courts, thereby effectively bypassing the process set forth in § 5 and § 19?”<sup>24</sup>

The Court found that the language of the statute does not support authorization of obtaining court-ordered monetary relief under Section 13(b). Rather, the Court noted that the language of the section “reflects that the provision addresses a specific problem, namely, that of stopping seemingly unfair practices from taking place while the Commission determines their lawfulness.”<sup>25</sup> In addition, the Court found that the language and the structure of the statute, taken together, do not support a monetary remedy, particularly as the “permanent injunction” language which the FTC had used as the hook for seeking monetary relief is “buried in a lengthy provision” that focuses on prospective injunctive, and not retrospective monetary, relief.<sup>26</sup>

The Court also found support for its interpretation of Section 13(b) in two other parts of the FTC Act: Sections 5(l) and 19, the other tools on in the FTC’s arsenal. While Section 13(b) does not expressly provide for monetary relief, Sections 5(l) and 19 do allow the FTC to obtain monetary relief. The presence of monetary relief in other statutory provisions supported the Court’s finding that Congress did not intend for monetary relief to be sought and obtained through Section 13(b), which does not mention such relief.<sup>27</sup> The Court explained that “to read § 13(b) to mean what it says, as authorizing injunctive but not monetary relief, produces a coherent enforcement scheme: The Commission may obtain monetary relief by first invoking its administrative procedures and then § 19’s redress provisions (which include limitations). And the Commission may use § 13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief.”<sup>28</sup> Punctuating this point, the Court made clear that “[n]othing [in its decision] ... prohibits the Commission from using its authority under § 5 and § 19 to obtain restitution on behalf of consumers.”<sup>29</sup>

While some practitioners and observers, and even the FTC itself,<sup>30</sup> have portrayed the *AMG Capital* decision as a loss for the FTC, the decision is best understood as a trimming of an enforcement remedy that emanated from an evolution in practice rather than express language in the statute.<sup>31</sup> The *Liu* case, by comparison, involved a determination of the scope and curtailment of a statute that expressly allowed the SEC to seek equitable relief. In *AMG Capital*, however, the Court determined that a provision regularly invoked by the FTC to seek equitable monetary relief did not allow for such a remedy in the first instance. The Court's virtual unanimity in *AMG Capital*, *Liu*, and *Kokesh* demonstrates a unified vision, and not merely a conservative bent, when it comes to regulatory enforcement actions and the availability and scope of equitable relief.<sup>32</sup> As a result, *AMG Capital* is more likely the product of statutory textualism and not an overarching effort to curtail regulatory enforcement authority.<sup>33</sup>

### The Impact of *AMG Capital*

The FTC's immediate reaction to the decision was swift, strong, and stern. FTC Acting Chairwoman Rebecca Kelly Slaughter described it as favoring "scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior.... With this ruling, the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most."<sup>34</sup> The FTC has also said that, without the ability to use Section 13(b) as a sharp stick against wrongdoers, it also is hampered in settlement negotiations.<sup>35</sup> "Targets of FTC investigations now routinely argue that they are immune from suit in federal court because they are no longer violating the law, despite a likelihood of re-occurrence, and they make these arguments even when they stopped violating the law only after learning that the FTC was investigating them."<sup>36</sup>

Not surprisingly, courts and litigants have begun taking steps to address the impact of *AMG Capital* in pending actions where Section 13(b) monetary relief had been sought or awarded.<sup>37</sup> The impact is not only prospective by precluding the FTC from bringing future bring actions seeking equitable monetary relief under Section 13(b). The Court's opinion will also likely prevent the FTC from enforcing judgments under Section 13(b) where such monetary awards have been achieved but have not yet been collected.<sup>38</sup> But the FTC can still be expected to take steps to attempt to enforce such judgments by other means including, for example, seeking to modify judgments pursuant to Federal Rules of Civil Procedure 54(c) and 59(e) to allow recovery under other available statutory provisions that allow for monetary relief.<sup>39</sup> In addition, sparring can be expected over whether the decision's impact is limited to Section 13(b) monetary judgments or has broader implications on FTC enforcement actions.<sup>40</sup>

Moving forward, practitioners also can expect to see the FTC shift toward other enforcement paths and remedies, including Sections 5(l) and 19, which still allow the FTC to obtain monetary relief. For example, Section 19(a)(1) authorizes the FTC to initiate suits in district courts and to obtain monetary relief to redress injury to consumers resulting from rule violations or deceptive acts or practices.<sup>41</sup> But other avenues will result in a longer path to monetary recovery, as they will require the FTC to first go through its administrative proceedings. In addition, the FTC's penalty offense authority under Section 5(m)(1)(B) may see increased use. That section is a tool that Congress gave the FTC in 1975, following

a period in which the FTC had received criticism for not sufficiently pursuing monetary penalties to deter deceptive practices and recover funds to benefit consumers.<sup>42</sup> After a finding in an administrative proceeding that a practice is unfair or deceptive and after issuance of a final cease and desist order, the FTC may seek civil penalties from non-respondents who subsequently violate FTC standards. In such an effort, the FTC must show "actual knowledge that such act or practice is unfair or deceptive and is unlawful."<sup>43</sup> Section 5(m)(1)(B) was one of the most effective weapons in the FTC arsenal before the FTC shifted its focus to enforcement and collection of monetary relief using Section 13(b).<sup>44</sup>

In *AMG Capital*, "the Court also observed that §19 of the Act expressly authorizes district courts to award monetary relief 'to redress injury to consumers' in cases where the Commission has *first* engaged in administrative proceedings."<sup>45</sup> The Court explained that "reading § 13(b) to mean what it says, that is, as authorizing injunctive but not monetary relief, produces a coherent enforcement scheme, allowing the Commission to obtain monetary relief by first invoking the Act's § 5 administrative procedures and then its § 19 redress provisions, and to use § 13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief."<sup>46</sup>

### Increase in Multi-State and Collaborative Enforcement Actions

Following *AMG Capital*, and as a way to circumvent the limitation of actions under Section 13(b), there may be increased enforcement activity from state attorneys general. States, who have the authority under consumer protection laws to obtain equitable monetary relief, already collaborate with each other and the FTC on consumer protection investigations and enforcement litigation.<sup>47</sup> It is reasonable to expect the FTC and states attorneys general to redouble their collaborative efforts against deceptive trade practices.

### Legislative Efforts

Even before the Supreme Court issued its decision in *AMG Capital*, the FTC asked Congress to make express the equitable monetary relief that it has been previously seeking and obtaining as a matter of course.<sup>48</sup> Those efforts have continued in the wake of *AMG Capital*, in which the Court observed that the FTC "is 'of course, free to ask Congress to grant it further remedial authority."<sup>49</sup>

Just days after the decision, the FTC asked Congress to pass legislation providing authority for the FTC to return to its former practice of seeking monetary equitable relief in federal court.<sup>50</sup> And Acting FTC Chairwoman Slaughter immediately urged Congress "to act swiftly to restore and strengthen the powers of the agency...."<sup>51</sup> There may be cause for optimism that these efforts will be successful. In the wake of *Liu* and *Kokesh*, Congress passed legislation authorizing the SEC to seek disgorgement of unjust enrichment for certain violations.<sup>52</sup>

### Impact on Receivers

The FTC Act still allows, and the FTC will still continue to seek, injunctive relief. Any time injunctive relief is sought to prevent substantial harm to consumers, the FTC will need to consider the effect of an injunction on businesses and assets. This may include

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seeking replacement of a bad actor and appointment of a receiver over a fraudulent enterprise or assets associated with a fraud or other violative conduct. Although monetary relief is no longer an option under Section 13(b), the Supreme Court did not express any limitations as to the FTC's practice of seeking the appointment of a receiver in connection a temporary restraining orders or a permanent injunctions. One could perceive the Court's narrowing of avenues for monetary relief under the FTC Act as heightening the need for injunctive relief to be coupled with appointment of a receiver. As with other regulatory enforcement actions, receivers can complement FTC efforts to preserve, recover, and maximize assets for the benefit of consumer victims and other creditors.

As noted above, the path to equitable monetary remedies can no longer go through Section 13(b). The FTC and receivers appointed in enforcement actions may encounter increased opposition to efforts to seize, freeze, recover, and distribute funds where a permanent injunction has been achieved through a Section 13(b) action or actions seeking relief through Sections 5 and 19. *AMG Capital* also may limit the ability of receivers to recover and distribute money for injured consumers in certain circumstances. And it may impact the types of lawsuits that receivers can bring, absent new clarity on the FTC's statutory authority. Legislative developments may bring clarity or new options to enforcement remedies and practices. Receivers and their retained professionals will need to continue to stay abreast of the latest decisions and developments.

*Note: This article has been prepared for informational purposes. It is not intended as and should not be construed to be legal, investment, or tax advice.* 🏠

## ENDNOTES

- <sup>1</sup> *AMG Capital Mgt., LLC v. FTC*, 141 S. Ct. 1341 (2021); 15 U.S.C.A. § 53 (West).
- <sup>2</sup> *AMG Capital Mgt., LLC v. FTC*, 141 S. Ct. 1341 (2021) (Breyer, J.); see also, e.g., *Liu v. SEC*, 140 S. Ct. 1936 (2020) (Sotomayor, J.); see also *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (Sotomayor, J.).
- <sup>3</sup> See Vladeck, D., "The Erosion of Equity and the Attack on the FTC's Redress Authority," 82 Mont. L. Rev. 159, 173 (2021) (describing the history of the FTC's enforcement powers, pre-*AMG Capital*).
- <sup>4</sup> Section 5(a) of the FTC Act provides that "unfair or deceptive acts or practices in or affecting commerce ... are ... declared unlawful." 15 U.S.C. § 45(a)(1); see also Vladeck, *supra* note 3.
- <sup>5</sup> 15 U.S.C.A. § 53. The salient language of Section 13(b) is:  
"Whenever the Commission has reason to believe—  
(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and  
(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission ... may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted ... [and] Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."

- <sup>6</sup> See FTC Rule 1.98(d), 16 C.F.R. Sec. 1.98(d).
- <sup>7</sup> See, e.g., Federal Trade Commission (Revised, October 2019) "A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority." Available at: <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.
- <sup>8</sup> *AMG Capital*, 141 S. Ct. at 1346-47. Some observers have noted that the FTC's practice of using Section 13(b) for court-ordered equitable monetary relief goes back nearly half a century. See, e.g., Keats, M., Nigro, Jr., B., & Turner, R. (May 2021), "U.S. Supreme Court Curtails FTC's Ability to Seek Restitution and Disgorgement in Consumer and Antitrust Cases." 25 No. 5 GLWSLAW-NL 1 (Westlaw).
- <sup>9</sup> *AMG Capital*, 141 S. Ct. at 1347 (quoting and citing Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45821 (emphasis deleted)).
- <sup>10</sup> *Id.* (citing Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47071).
- <sup>11</sup> *Id.*
- <sup>12</sup> See, e.g., Keats, et al., *supra* note 8. See also Federal Trade Commission. (April 22, 2021). Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC* [Press release]. Available at: <https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us> ("Over the past four decades, the Commission has relied on Section 13(b) of the Federal Trade Commission Act to secure billions of dollars in relief for consumers in a wide variety of cases, including telemarketing fraud, anticompetitive pharmaceutical practices, data security and privacy, scams that target seniors and veterans, and deceptive business practices, among many others. More recently, in the wake of the pandemic, the FTC has used Section 13(b) to take action against entities operating COVID-related scams. Section 13(b) enforcement cases have resulted in the return of billions of dollars to consumers targeted by a wide variety of illegal scams and anticompetitive practices, including \$11.2 billion in refunds to consumers during just the past five years.").
- <sup>13</sup> M. Sean Royall, Richard H. Cunningham & Ashley Rogers, "Are Disgorgement's Days Numbered? *Kokesh v. SEC* May Foreshadow Curtailment of the FTC's Authority to Obtain Monetary Relief," *Antitrust*, Spring 2018, at 94-100 (2018).
- <sup>14</sup> *Liu v. SEC*, 140 S. Ct. 1936, 1941 (2020) (quoting and citing *Kokesh*, 137 S. Ct. at 1643-44). *Kokesh* has been described as "set[ting] out a three part test: *Kokesh* set out a three-part test:

(a) a disgorgement order is a penalty when it addresses wrongs to the public, not individuals; (b) a disgorgement order imposed for deterrence and not compensatory relief is also a penalty; and (c) a disgorgement order is a penalty unless it is targeted for compensatory purposes.” Vladeck, *supra* note 3, at 169.

<sup>15</sup> *Liu v. SEC*, 140 S. Ct. 1936, 1941 (2020) (quoting and citing *Kokesh*, 137 S. Ct. at 1642 n.3).

<sup>16</sup> Shari Ross Lahlou, Greg Luib, Michael Weiner, “High Stakes at the High Court: The FTC’s Disgorgement Authority Comes Before the Supreme Court,” *Antitrust*, Fall 2020, at 71, 75 (2020); *see also Liu*, 140 S. Ct. at 1941; Slovic, D., “What the Liu Decision Means for Federal Equity Receivers,” *The Receiver* (NAFER), Issue 11, at 1, 3-6, December 2020.

<sup>17</sup> *Federal Trade Commission v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019) (“permanent injunction” provision in Section 13(b) did not imply FTC may obtain restitution), cert. granted, 141 S. Ct. 194, 207 L. Ed. 2d 1118 (2020), vacated sub nom. *FTC v. Credit Bureau Ctr.*, No. 19-825, 2020 WL 6551765 (U.S. Nov. 9, 2020), and cert. denied, 141 S. Ct. 195, 207 L. Ed. 2d 1118 (2020); *see also Federal Trade Commission v. Abb Vie, Inc.*, 976 F.3d 327 (3d Cir. 2020) (disgorgement not available under Section 13(b) because express restitution remedies in Sections 5 and 19 indicated Congressional intent to limit equitable remedies under Section 13(b) to injunctive relief).

<sup>18</sup> Federal Trade Commission. (April 20, 2021). “FTC Testifies Before Congress on its Work to Protect Consumers from COVID-19 Scams, and Threats to its Ability to Return Money to Victims of Illegal Conduct” [Press release]. Available at: <https://www.ftc.gov/news-events/press-releases/2021/04/ftc-testifies-congress-its-work-protect-consumers-covid-19-scams> (“In its testimony, the Commission also reiterated its call for Congress to pass legislation reaffirming that the agency has authority to prohibit unlawful conduct and seek monetary relief for consumers who have lost money from illegal conduct. The FTC’s 13(b) authority to secure relief for consumers, including those harmed by scammers seeking to exploit the pandemic, has been put at risk by recent federal court rulings. While the issue is currently pending before the U.S. Supreme Court, the testimony noted that the uncertainty created by the recent court rulings has affected some pending enforcement cases. The FTC has used its authority under Section 13(b) of the FTC Act to return billions of dollars to consumers targeted by a wide variety of scams and anticompetitive practices.”).

<sup>19</sup> *See AMG Capital*, 141 S. Ct. at 1344.

<sup>20</sup> While the FTC Act authorizes the FTC to enforce the FTA Act through its own administrative proceedings, in *AMG Capital*, the FTC brought its enforcement action in the district court. An advantage of bringing the action before a district court is that, whereas an administrative law judge can issue a cease and desist order, Section 13(b) of the FTC Act enables the FTC to obtain permanent injunctive relief “in proper cases.” *Compare* 15 U.S.C. § 45(b) *with id.* § 53(b); *see AMG Capital*, 141 S. Ct. at 1346.

<sup>21</sup> “Between 2008 and 2012, Tucker’s businesses made more than 5 million payday loans, amounting to more than \$1.3 billion in deceptive charges.” *AMG Capital*, 141 S. Ct. at 1345.

<sup>22</sup> *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016)

(quoting *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (quoting *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)).

<sup>23</sup> *Compare, e.g.*, FitzGerald, D.M., “The Genesis Of Consumer Protection Remedies Under Section 13(B) Of The FTC Act,” at 18-20. Available at: [https://www.ftc.gov/sites/default/files/documents/public\\_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf).

<sup>24</sup> *AMG Capital*, 141 S. Ct. at 1347.

<sup>25</sup> *Id.* at 1348 (citing 15 U.S.C.A. § 53(a)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1348-49.

<sup>28</sup> *Id.* at 1349.

<sup>29</sup> *Id.* at 1352.

<sup>30</sup> *E.g.*, Federal Trade Commission (April 22, 2021), *supra* note 12.

<sup>31</sup> *See FitzGerald, supra* note 23.

<sup>32</sup> The Court was unanimous in both *AMG Capital* and *Kokesh*, while *Liu* was an 8-1 decision with only Justice Thomas dissenting. *AMG Capital*, 141 S. Ct. 1341; *see also, e.g., Liu*, 140 S. Ct. 1936; *see also Kokesh*, 137 S. Ct. 1635. Notably, Justice Thomas did not disagree with reversing the Ninth Circuit, but rather he “disagree[d] with the Court’s decision to vacate and remand for the lower courts to ‘limi[t]’ the disgorgement award.” *Liu*, 140 S. Ct. at 1950.

In this regard, Justice Thomas made clear his view that, “[d]isgorgement can never be awarded under 15 U. S. C. §78u(d) (5). That statute authorizes the Securities and Exchange Commission (SEC) to seek only ‘equitable relief that may be appropriate or necessary for the benefit of investors,’ and disgorgement is not a traditional equitable remedy.” *Id.*

<sup>33</sup> Garner, B. (April 1, 2019) “Old-fashioned textualism is all about interpretation, not legislating from the bench,” *ABA Journal*. Available at: <https://www.abajournal.com/magazine/article/textualism-means-what-it-says>. *See also* The National Law Review (June 3, 2021). “The Supreme Court Rules that Disgorgement is not an Available Remedy Under the FTC Act – What Comes Next?” Vol. XI, No. 154 (credit to Epstein Becker & Green, P.C.). Available at: <https://www.natlawreview.com/article/supreme-court-rules-disgorgement-not-available-remedy-under-ftc-act-what-comes-next>. *See also Snyder, J.* (2019) “How Textualism Has Changed the Conversation in the Supreme Court,” *University of Baltimore Law Review*: Vol. 48: Issue 3, Art. 4. Available at: <https://scholarworks.law.ubalt.edu/ublrvol48/iss3/4> (discussed Justice Kagan remark, “we’re all textualists now”). “This norm [for how the Court interprets statutes] demonstrates a (sic) interpretative shift from context and purpose to the words themselves *tout court.*” *Id.*

<sup>34</sup> Federal Trade Commission (April 22, 2021), *supra* note 12.

<sup>35</sup> Federal Trade Commission. (April 27, 2021). *FTC Asks Congress to Pass Legislation Reviving the Agency’s Authority to Return Money to Consumers Harmed by Law Violations and Keep Illegal Conduct from Reoccurring* [Press release]. Available at: <https://www.ftc.gov/news-events/press-releases/2021/04/ftc-asks-congress-pass-legislation-reviving-agencys-authority>.

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- <sup>36</sup> *Id.*
- <sup>37</sup> See, e.g., *Publishers Business Services, Inc. v. FTC*, --- S. Ct. ---, No. 19-507, 2021 WL 1725144 (Sup. Ct. May 3, 2021) (granting petition for writ of certiorari, vacating judgment entered pursuant to Section 13(b), and remanding to the Ninth Circuit for consideration in light of *AMG Capital*); *FTC v. VPL Med., Inc.*, 846 Fed. Appx. 561 (9th Cir. 2021) (unpublished) (vacating preliminary injunction and remanding the action to the District Court for proceedings consistent with *AMG Capital*); *FTC v. Noland*, No. CV-20-00047-PHX-DWL, 2021 WL 2187021, \*1 n.1 (D. Ariz. May 28, 2021) (notes that the parties are “briefing the legality of the receivership and asset freeze and the form, if any, they should take in the wake of the Supreme Court’s decision in *AMG Capital*”); *FTC v. Quincy Bioscience Holding Co.*, No. 17 Civ. 124 (LLS), 2021 WL 1608953 (S.D.N.Y. April 26, 2021) (noting that defendants do not have a Seventh Amendment right to a jury trial in an action brought by the FTC under Section 13(b), in light of the holding in *AMG Capital* that Section 13(b) does not authorize equitable monetary relief and, as a result, only equitable relief was available); *In re Sanctuary Belize Litig.*, No. 18-cv-3309 (D. Md. Apr. 23, 2021) (ECF No. 1205) (ordering expedited supplemental briefing on the issue of consumer redress following *AMG Capital*); see also, e.g., *FTC v. National Urological Group, Inc.*, No. 04-cv-3294, ECF No. 1101-1, at 17-18 (N.D. Ga. May 13, 2021) (listing cases addressing impact of *AMG Capital*). For additional proceedings addressing the impact of *AMG Capital*, see <https://www.jdsupra.com/legalnews/post-amg-scorecard-the-ftc-is-required-8950927/>.
- <sup>38</sup> See, e.g., *FTC v. National Urological Group, Inc.*, No. 04-cv-3294, ECF No. 1101-1 (memorandum of law in support of defendants’ motion for relief from a judgment and for an accounting), at 13-19 (N.D. Ga. May 13, 2021) (requesting a court order requiring the FTC to cease all garnishment and collection efforts to enforce a \$40 million judgment).
- <sup>39</sup> See, e.g., *FTC v. Credit Bureau Center, LLC*, No. 17-cv-194, Dkt. No. 275 (FTC’s Motion for Amended Judgment and Other Relief) (N.D. Ill. May 6, 2021) (seeking to modify judgment to allow relief under Section 19 of FTC Act and Section 4 of the Restore Online Shoppers’ Confidence Act, 15 U.S.C. § 8403).
- <sup>40</sup> See, e.g., *FTC v. Hoyal & Assocs., Inc.*, No. 19-35668, Dkt. No. 57 (Appellants’ Supplemental Brief) (9th Cir.) (addressing impact of *AMG Capital* on Section 13(b) injunctive relief); *FTC v. Reality Kats, LLC*, No. 19-35669, Dkt. No. 71 (FTC’s Supplemental Brief) (9th Cir. May 7, 2021) (same); *FTC v. Hoyal & Assocs., Inc.*, Nos. 19-35668, 19-35669, 2021 WL 2399707 (9th Cir. June 11, 2021) (“the district court did not err in concluding that this is a ‘proper case’ for the issuance of a permanent injunction under 15 U.S.C. § 53(b)”).
- <sup>41</sup> 15 U.S.C.A. § 57b. See also, e.g., *FTC v. Simple Health Plans LLC*, No. 18-cv-62593, Dkt. No. 433 (FTC Supplemental Brief in Opposition to Defendant Dorfman’s Motion to Dissolve) (providing the FTC perspective on available enforcement mechanisms, including injunctive relief, following *AMG Capital*).
- <sup>42</sup> The Capitol Forum (February 16, 2021) “Transcript of Conference Call to Discuss Law Review Article About Resurrecting the FTC Act’s Penalty Offense Authority with Samuel Levine,” Vol. 9, No. 51, at 1. Available at: [https://www.ftc.gov/system/files/documents/public\\_statements/1582322/ftc\\_policy\\_transcript\\_20210216.pdf](https://www.ftc.gov/system/files/documents/public_statements/1582322/ftc_policy_transcript_20210216.pdf).
- <sup>43</sup> 15 U.S.C. Sec. 45(m)(1)(B); see Federal Trade Commission (revised October 2019) “A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority,” Section II(A)(4) (Civil Penalty Enforcement Against Non-Respondents in Consumer Protection Matters). Available at: <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>. See also The Capitol Forum, *supra* note 43. Section 5(l) also authorizes district courts “to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.” 15 U.S.C.A. § 45.
- <sup>44</sup> The Capitol Forum, *supra* note 43, at 2.
- <sup>45</sup> Keats, et al., *supra* note 8 (quoting the Court’s decision in *AMG Capital*). “The Court noted, however, that § 19 applies only when the Commission begins the administrative process within three years of the underlying violation, seeks monetary relief within one year of any resulting final cease and desist order, and proves the conduct at issue was ‘dishonest or fraudulent.’” *Id.* “To obtain relief under § 19, the Commission must show that ‘a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent.’” *Id.*
- <sup>46</sup> “Supreme Court Nixes Restitution Under § 13(b) of FTC Act” (Thompson Reuters), 05-5-21 West’s Bankr. Newsl. 1 (citing *AMG Capital*) (Westlaw).
- <sup>47</sup> Keats, et al., *supra* note 8.
- <sup>48</sup> *AMG Capital*, 141 S. Ct. at 1352; see also, e.g., Keats, et al., *supra* note 8 (“The prospect of this decision had already prompted the FTC to seek legislative relief from Congress, which remains under review.”); see also Federal Trade Commission (April 22, 2021), *supra* note 12 (noting that, on April 20, 2021, just days before the Supreme Court issued *AMG Capital*, the FCT provided testimony in the U.S. Senate on the need for new Section 13(b) legislation.).
- <sup>49</sup> Keats, et al., *supra* note 8.
- <sup>50</sup> Federal Trade Commission (April 27, 2021), *supra* note 35.
- <sup>51</sup> Federal Trade Commission (April 22, 2021), *supra* note 12.
- <sup>52</sup> Aberg, S. & Borsch, C., “Legislation Misses Mark To Expand SEC Disgorgement Powers” (March 21, 2021). Available at: <https://www.law.com/newyorklawjournal/2021/03/15/legislation-misses-mark-to-expand-sec-disgorgement-powers/>.