

Court Considers FTC's Ability to Seek Monetary Relief Post-AMG

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Earlier this year, we [blogged about](#) the Supreme Court's decision in [AMG v. FTC](#), which significantly curtailed the FTC's ability to seek monetary restitution under Section 13(b) of the FTC Act. One quick update there: The U.S. House of Representatives [recently voted](#) to restore the FTC's Section 13(b) disgorgement powers. For now, though, in the absence of any action by the Senate, the FTC remains without that power.

Recently, Judge Dolly M. Gee of the District Court of the Central District of California considered the FTC's post- *AMG* ability to seek monetary relief under a *different* provision of the Act. Though the court ultimately found the FTC could not do so on the particular facts of the case, Judge Gee's decision left open the possibility that the FTC may, in theory, seek monetary relief under Section 19 of the FTC Act for violations of the Restore Online Shoppers' Confidence Act ("ROSCA"). [FTC v. Cardiff, No. 18-cv-2104 \(C.D. Cal. June 29, 2021\)](#). However, because ROSCA claims are fairly limited in scope, this decision does not create the possibility of rendering the Supreme Court's *AMG* decision a dead letter; there still exist substantial categories of FTC suits for which monetary relief is not permitted, absent an act of Congress.

The FTC alleged defendants, the marketers of smoking cessation products, enrolled consumers who purchased their products in a "monthly autoship program," through which defendants shipped (and charged customers for) products without their consent. Based on these allegations, the FTC sued defendants under ROSCA, which prohibits charging consumers for goods sold online through an opt-out program unless consumers receive clear notice and a simple mechanism to cancel. Noting "[c]onsumers had to take an affirmative step to cancel the autoship program, and even when they took this step, they were not always able to effectuate a cancellation," the court previously granted summary judgment to the FTC on its ROSCA claim. In the instant proceeding, the court considered damages owed to the FTC.

While the Supreme Court's decision in *AMG* curtailed the FTC's ability to seek restitution under Section 13(b), the FTC argued it could still seek monetary relief under Section 19. Section 19 authorizes the FTC to sue directly in federal court to obtain relief for unfair or deceptive acts or practices. Observing that Section 19 defines the available relief broadly, so as to include "the refund of money or return of property" and "the payment of damages," the court agreed that the language in Section 19 plainly authorizes the FTC to seek equitable monetary relief to redress consumer injury resulting from ROSCA violations. It also noted that the Supreme Court's decision in *AMG* explicitly stated that "[n]othing" in the decision "prohibits the Commission from using its authority under § 5 and § 19 [of the FTC Act] to obtain restitution on behalf of consumers."

However, the court nonetheless denied the FTC's ability to recover monetarily under Section 19 in this particular case, on the ground that the FTC failed to timely disclose its only evidence in support of its computation of ROSCA damages. The court noted that in its papers, the FTC only cited to Section 13(b) of the Act (not Section 19), and did not offer a separate calculation of damages for violations of ROSCA or any other statutes or rules. Finding that the FTC had put "all its eggs in the Section 13(b) basket," the court determined it was too late for the FTC to pivot to Section 19 to recover damages.

Although the FTC did not succeed in obtaining monetary relief, it did succeed in obtaining injunctive relief against the defendants. The Court held that the FTC was permitted to seek a permanent injunction against defendants under Section 13(b) without first initiating administrative proceedings, because *AMG* only curtailed its ability to seek *monetary* relief under Section 13(b). Watch this space for further developments.

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