

What Are the Limits of the FTC's Authority under Section 13(b)? The High Stakes of *AMG Capital Management, LLC v. FTC*

Jacob Morse
Student Fellow
Institute for Consumer Antitrust Studies
Loyola University Chicago School of Law

I. Introduction

Between a global pandemic that has ravaged the economy, forcing some consumers to turn to short-term lending options, and a new administration that has brought about a change in CFPB leadership, the payday lending sphere will likely soon be at the forefront of consumer protection discourse.¹ The FTC, however, has had its sights set on these predatory short-term loans for some time.² For the past 20 years, the FTC has litigated and/or settled dozens of cases related to payday lending schemes that violated the consumer laws.³ In fact, the biggest judgment the FTC has ever obtained—\$1.3 billion in monetary restitution—came from a payday lending action.⁴ The issue, however, is that the Supreme Court appears skeptical that the Commission has the statutory authority to obtain such a judgment in the way that it did.

¹ See, e.g., Tonya Mosley & Allison Hagan, *High Interest Payday Lenders Target Vulnerable Communities During COVID-19*, WBUR (Jun. 5, 2020), <https://www.wbur.org/hereandnow/2020/06/05/payday-loans-coronavirus>; Emerald Morrow, *Uptick in payday loans amid pandemic raises concerns*, WTSP (Oct. 26, 2020), <https://www.wtsp.com/article/news/health/coronavirus/uptick-in-payday-loans-amid-pandemic-raises-concerns/67-73c1f406-f1c0-4447-940b-c0224a5e0bf1>; see also King & Spaulding, *CFPB Focus on Payday Lending: A Look Around the Corner*, JDSUPRA (Jan. 15, 2021), <https://www.jdsupra.com/legalnews/cfpb-focus-on-payday-lending-a-look-7629208/> (observing that the CFPB under President Biden is widely expected to more aggressively enforce the consumer laws, particularly in the area of payday lending).

² The earliest available press release on the FTC website indicates that the Commission alleged a Las Vegas company violated both the FTC Act and TILA in 2000 in connection with its payday lending business. See Press Release, Federal Trade Commission, Federal Trade Comm'n, Las Vegas Firm Settles FTC Charges It Misled Consumers Through Credit Line and Cash Advance Offer (Sept. 6, 2000), <https://www.ftc.gov/news-events/press-releases/2000/09/las-vegas-firm-settles-ftc-charges-it-misled-consumers-through>.

³ See generally FEDERAL TRADE COMM'N, Press Releases Tagged with payday lending (last visited Mar. 26, 2021), <https://www.ftc.gov/news-events/press-releases/terms/13407>.

⁴ Press Release, Federal Trade Comm'n, FTC and DOJ Return a Record \$505 Million to Consumers Harmed by Massive Payday Lending Scheme (Sept. 27, 2018) <https://www.ftc.gov/news-events/press-releases/2018/09/ftc-doj-return-record-505-million-consumers-harmed-massive-payday>.

In *AMG Capital Management, LLC v. FTC*, the FTC invoked its authority under Section 13(b) of the FTC Act (“Act”) to seek a permanent injunction against Scott Tucker—owner of AMG Capital and other payday loan businesses—to recover over \$1.3 billion in monies unlawfully obtained.⁵ Whether Mr. Tucker’s business practices violated the law is not at issue—they clearly did.⁶ Instead, the Supreme Court is now considering the question of whether Section 13(b) of the Act, which authorizes the FTC to seek permanent injunctions in proper cases, was intended by Congress to allow the FTC to seek monetary restitution by way of a permanent injunction issued by a district court.⁷

Following oral arguments in January 2021, the Supreme Court seems poised to rule against the FTC and hold that Section 13(b) does not authorize the Commission to seek monetary relief by way of a permanent injunction.⁸ Part II of this article will discuss the text and structure of the FTC Act as it currently stands, then it will survey how U.S. Circuit Courts of Appeals have treated the issue of Section 13(b) and monetary restitution. Next, Part III will review *AMG Capital Management, LLC v. FTC* and discuss why the Supreme Court is likely to reject the FTC’s argument that Section 13(b) authorizes such relief. Part IV will then examine the implications of this ruling and how it will affect the FTC’s ability to enforce the law against predatory lenders such as Mr. Tucker. Finally, this section will discuss why and how the FTC Act should be re-written to consolidate and clarify the FTC’s enforcement authority.

⁵ See *infra*, Section III.

⁶ *Id.*

⁷ *Id.*

⁸ *Infra*, Section III.

II. Background

a. *Structure of FTC Act*

The FTC Act has a long history. Originally enacted in 1914, it is long, deliberately vague, and has been amended a number of times.⁹ To understand the issue with Section 13(b), it is important to first examine the overall structure of the Act and review the specific sections that authorize the Commission with certain remedial powers.¹⁰ Most relevant here are Sections 5(l), 13(b), and 19. Each will be addressed in turn.

Section 5(l) empowers the Commission with a limited civil penalty authority, but only after the FTC has issued a final cease-and-desist order, which is what initially puts certain defendants on notice that their business practices are unfair or deceptive. This section provides that the FTC can bring civil actions to recover “penalties” from any entity that violates a final order of the Commission, but only up to \$10,000 for each discrete violation.¹¹ Section 5(l) further provides that federal district courts may “grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.”¹²

Section 19 allows the FTC to seek relief in federal court to redress any injury to consumers for certain past misconduct. It applies in two scenarios: (1) where the FTC can show

⁹ See Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions*, 41 AM. U. L. REV. 1139, 1144–62 (1992) (discussing the legislative history of the FTC Act, specifically focusing on the Commission’s cease-and-desist authority under Section 5’s remedial powers enacted in 1914 and subsequently amended).

¹⁰ In addition, part of the issue is that Section 5 of the Act’s prohibition of “unfair” business practices is vague, and therefore businesses might not have proper notice that their actions violate this provision. 15 U.S.C. § 45(a)(1); see also Tyler Becker, *When Congress Makes No Policy Choice: The Case of FTC Data Security Enforcement*, 120 COLUM. L. REV. FORUM 134 (2020) (commenting that private parties lack adequate notice of what the FTC considers “unfair” data security practices, and more broadly criticizing the vague nature of Section 5’s prohibition on unfair practices).

¹¹ 15 U.S.C. § 45(l).

¹² *Id.*

that an entity violated a Commission rule; or (2) where the FTC can show that an entity violated a cease-and-desist order that the Commission issued to that entity.¹³ If the FTC can prove that an entity engaged in either of these two activities, the relief specified in subsection (b) is then available. Subsection (b) under Section 19 grants a district court with broad remedial powers. Such remedies include, but are not limited to, “rescission or reformation of contracts, *the refund of money or return of property, the payment of damages*, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be” (emphasis added). As such, Section 19 explicitly authorizes a district court to order the refund of money and/or the payment of damages, but only after the Commission can show that an entity violated an existing administrative rule or cease-and-desist order.

Section 13(b) mentions only injunctive relief, enabling the Commission to seek preliminary injunctions in court and without a prior administrative determination of wrongdoing, in certain cases where an injunction would be “in the public interest.”¹⁴ This Section cabins a court’s authority, however, by specifying that the preliminary injunction will be dissolved unless the Commission files its complaint within 20 days.¹⁵ Interestingly, and perhaps cryptically, Section 13(b) goes on to state that in “proper” cases the Commission may seek a permanent injunction.¹⁶ It is this sentence that forms the basis of the controversy at the heart of the *AMG Capital Management*. Indeed, AMG Capital was not the first company required to disgorge money pursuant to an injunction issued by a district court under Section 13(b).¹⁷

¹³ 15 U.S.C. § 57b(b).

¹⁴ 15 U.S.C. § 53(b).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ This provision is interesting, and the FTC’s history (and authority) in invoking its Section 13(b) powers in attempts to get a district court to order a defendant to return money is somewhat murky. *See generally* David M. Fitzgerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act*, FEDERAL TRADE COMM’N,

b. *Circuit Split*

The FTC has long interpreted Section 13(b) as authorizing the Commission to obtain restitution awards—an interpretation that circuit courts have agreed with for decades.¹⁸ Congress first included Section 13(b) when it amended the FTC Act in 1973, but the FTC did not initially view this provision as a tool to obtain equitable monetary relief.¹⁹ Throughout the 1970s and 80s, however, the Commission began its now-regular practice of employing Section 13(b) as a means of obtaining permanent injunctions from district courts that result in restitution awards. Indeed, the FTC itself stated that pursuing monetary relief under Section 13(b) is now a cornerstone of its enforcement program.²⁰ While this outcome seems divorced from the actual text of Section 13(b), circuit courts of appeals uniformly accepted this practice until recently.²¹

The Seventh Circuit initially agreed with its sister circuits that Section 13(b) authorizes the FTC, and, correspondingly, a district court, to seek and obtain permanent injunctions for restitution awards.²² In 2019, however, the Seventh Circuit changed course and created the circuit split that would eventually set the stage for Supreme Court review.²³ In *FTC v. Credit*

https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf.

¹⁸ See *infra*, note 20.

¹⁹ Fitzgerald, *supra* note 16, at 7.

²⁰ Petition for Writ of Certiorari at 10–11, *AMG Capital Mgmt., LLC v. Federal Trade Comm’n*, No. 19-508 (U.S. argued Jan. 13, 2021) (quoting Federal Trade Commission’s Motion to Stay the Mandate at 5, *FTC v. Credit Bureau Ctr., LLC*, No. 18-2847, ECF No. 61 (7th Cir. Sept. 17, 2019)).

²¹ See, e.g., *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Ross*, 743 F.3d 886, 890-892 (4th Cir. 2014); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016); *FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996). See also Petition for Writ of Certiorari at 12, *AMG Capital Management*, No. 19-508 (U.S. argued Jan. 13, 2021).

²² See *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 571–72 (7th Cir. 1989), *overruled by* *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019).

²³ The Supreme Court initially granted the FTC’s petition for writ of certiorari in its Seventh Circuit defeat, but ultimately vacated that order and noted the case would not be consolidated with *AMG Capital Management*, likely in order to clear the way for the newly confirmed Justice Barrett to participate in *AMG Capital Management*. See Tara L. Reinhart & Jonathan Marcus, *Supreme Court Review of FTC Monetary Relief Authority Threatens Long-Standing Agency Practice*, SKADDEN (Dec. 22, 2020),

Bureau Center, LLC, the Seventh Circuit re-examined Section 13(b) and overruled its prior decision that originally agreed with the FTC’s interpretation of the statute. The court explained that after its initial approval of the FTC’s interpretation of Section 13(b), the Supreme Court in *Meghrig v. KFC Western, Inc.* subsequently instructed courts “not to assume that a statute with ‘elaborate enforcement provisions’ implicitly authorizes other remedies.”²⁴ Viewed through this lens, the Seventh Circuit noted that the FTC Act has two detailed remedial provisions—Sections 5(l) and 19—that explicitly authorize restitution if the Commission follows certain procedures.²⁵ Accordingly, the court overruled its earlier precedent and held that Section 13(b) does not authorize restitution awards, thereby creating the circuit split that set the stage for *AMG Capital Management* to reach the Supreme Court.

III. AMG Capital Management, LLC v. FTC

Scott Tucker, a somewhat notorious and outrageous figure, managed businesses that provided short-term, high interest loans to consumers over the internet. As noted by Justice Barrett during oral arguments before the Court, Tucker “has the dubious distinction of being the subject of an episode of ‘Dirty Money’ on Netflix.”²⁶ It is relatively undisputed that Tucker’s payday loan scheme misrepresented the terms of the loans and often caused borrowers to pay up to seven times the interest they were told they would pay.²⁷ Tucker’s operation brought in more than \$1.3 billion in deceptive finance charges above the amounts disclosed in the TILA box—which is also the formula the FTC used to determine the amount of restitution it sought.²⁸

<https://www.skadden.com/insights/publications/2020/12/insights-special-edition-us-supreme-court-term/supreme-court-review-ftc-monetary-relief-authority>.

²⁴ *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764, 767 (7th Cir. 2019) (internal citations omitted).

²⁵ *Id.*

²⁶ Caprice Roberts, *AMG Capital Management, LLC v. FTC*, Oral Argument 2.0, OYEZ, <https://argument2.oyez.org/2021/amg-capital-management-llc-v-federal-trade-commission/>.

²⁷ Brief for the Respondent at 2, *AMG Capital Mgmt., LLC v. Federal Trade Comm’n*, No. 19-508 (U.S. argued Jan. 13, 2021).

²⁸ *Id.* at 9–10. *See also* *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 422 (9th Cir. 2018).

The Commission sought preliminary and permanent injunctions in the District of Nevada. There, the court bifurcated the case into a liability stage and a relief stage. The court granted the FTC’s motion for summary judgment, and, in the relief stage, enjoined Tucker from assisting “any consumer in receiving or applying for any loan or other extension of Consumer Credit,” and additionally ordered Tucker to pay approximately \$1.27 billion in equitable monetary relief to the Commission.²⁹ The court further instructed the Commission to direct as much money as practicable to “direct redress to consumers,” then to “other equitable relief ... reasonably related to the Defendants’ practices alleged in the complaint,” and then to “the U.S. Treasury as disgorgement.”³⁰

On appeal to the Ninth Circuit, the court affirmed the district court’s decision, stating that Tucker’s argument that Section 13(b) does not authorize a court to award equitable monetary relief “has some force, but it is ultimately foreclosed by [Ninth Circuit] precedent.”³¹ Notably, Judge O’Scannlain concurred in the decision on the basis of stare decisis, but wrote separately to note that, in his view—and like the Seventh Circuit—the precedent finding that Section 13(b) authorizes restitution awards is plainly wrong. He opined that the text and structure of the FTC Act “unambiguously foreclose such monetary relief.”³²

The Supreme Court granted certiorari and heard oral arguments on January 13, 2021. Despite the majority of circuit court precedents finding that Section 13(b) authorizes restitution awards, all the Justices seemed decidedly skeptical of whether Section 13(b) authorizes equitable monetary relief. For example, Justice Thomas questioned why the FTC chose to employ Section

²⁹ FTC v. AMG Capital Mgmt., LLC, 910 F.3d 417, 422 (9th Cir. 2018) (citations omitted).

³⁰ *Id.*

³¹ *Id.* at 426.

³² *Id.* at 429.

13(b) over Section 19, which explicitly authorizes the FTC to obtain monetary relief.³³ Justice Sotomayor similarly questioned why Congress would use different language for injunctive relief in those same two sections.³⁴ Justice Breyer focused on the history of the FTC Act and how it was born of a compromise between progressives and a skeptical business community. Justice Breyer suggested that this history undermined the Commission’s claim to broad Section 13(b) authority.³⁵ The common theme among the Justices’ question was clear: The Court appeared hesitant to condone the FTC’s generous and atextual reading of the agency’s equitable authority under Section 13(b).

IV. Reworking the Remedies Available to the FTC

Given the skepticism expressed at oral arguments, it is not clear that the *AMG Capital Management* Court will hold that Section 13(b) authorizes the Commission to seek, and a district court to order, equitable restitution in the form of a permanent injunction. The question then becomes whether the FTC *should* have the ability to seek disgorgement as a remedy in a streamlined proceeding before a federal court, and, if so, what the best mechanism for that outcome might be. The Supreme Court’s recent decision in *Liu v. Securities Exchange Commission* is instructive here.³⁶

In *Liu*, the Court analyzed a similar provision in the Securities and Exchange Act of 1934 that empowered the SEC to seek “any equitable relief that may be appropriate or necessary for the benefit of investors.”³⁷ A nearly unanimous bench held that disgorgement is an equitable

³³ Transcript of Oral Argument at 35–36, *AMG Capital Mgmt., LLC v. Federal Trade Comm’n*, No. 19-508 (U.S. argued Jan. 13, 2021).

³⁴ *Id.* at 43–44.

³⁵ As Ronald Mann observed, it is bad news for the FTC when Justice Breyer appears to be against the Commission. Ronald Mann, *Argument analysis: Justices doubt FTC’s authority to compel monetary relief*, SCOTUSBLOG (Jan. 14, 2021) <https://www.scotusblog.com/2021/01/argument-analysis-justices-doubt-ftcs-authority-to-compel-monetary-relief/>.

³⁶ 140 S.Ct. 1936 (2020).

³⁷ 15 U.S.C. § 78u(d)(5).

remedy available to the SEC under the provision at issue because of the “foundational principle” that “it would be inequitable that [a wrongdoer] should make a profit out of his own wrong.”³⁸ Importantly, the Court went on to cabin the SEC’s disgorgement powers, criticizing the SEC for not always returning disgorged proceeds to investors and instead depositing a portion of its collections in the Treasury.³⁹ Likewise, the Court rejected the SEC’s argument that it could disgorge all revenues, and instead—relying on traditional equity practice—explained that the SEC could only disgorge net profits after deducting legitimate business expenses.⁴⁰

It is difficult to ignore the parallels between *Liu* and *AMG Capital Management*. The statutory provisions at issue are strikingly similar in that they grant the respective agencies broad (and somewhat vague) equitable authority.⁴¹ The *Liu* opinion was tethered to traditional principles of equity—undoubtedly the same principles that should guide the discussion of what the FTC’s powers are under the current FTC Act, and, moreover, the same principles that should guide Congress in amending the FTC Act to clarify this question. The *Liu* Court made clear that an agency relying on a court’s equitable powers to obtain disgorgement should obtain a remedy consistent with traditional equity practice. That is, the agency should return monies obtained to victims of wrongdoing to the extent possible, and it should be able to disgorge only net profits obtained by the wrongdoer.⁴² In *AMG Capital Management*, the district court ordered the FTC to

³⁸ *Liu*, 140 S.Ct. at 1943 quoting *Root v. Railway Co.*, 105 U.S. 189, 207 (1882).

³⁹ Ronald Mann, *Opinion analysis: Justices accept, but cabin, the SEC’s right to disgorgement in securities litigation*, SCOTUSBLOG (June 22, 2020), <https://www.scotusblog.com/2020/06/opinion-analysis-justices-accept-but-cabin-secs-right-to-disgorgement-in-securities-litigation/>.

⁴⁰ *Id.*

⁴¹ Compare 15 U.S.C. § 53(b) (“[I]n proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction”) with 15 U.S.C. 78u(d)(5) (“In any action . . . the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.”).

⁴² While *Liu* allowed the SEC to obtain disgorgement as a remedy, it cabined its authority to ensure the agency can only obtain the net profits. More specifically, the Court cautioned that it needed to circumscribe the disgorgement remedy to avoid it turning into a penalty outside of traditional equitable powers. In so doing, the Court explained that the disgorgement remedy is limited to a defendant’s net profits—meaning the agency could not pursue theories of joint and several liability with respect to obtaining monetary relief through disgorgement, and, moreover, disgorgement can only be used to obtain net profits, or the “gain made upon any business or investment, when both

return money to affected consumers first, and then deposit any remaining monies in the Treasury—a result that could fit within *Liu*'s framework.⁴³ *Liu* therefore provides a foundation for equitable disgorgement that should inform the discussion of what the FTC's available remedies should be.

With *Liu* in mind, should the FTC have the ability to seek disgorgement from a wrongdoer? The answer is plainly “yes.” In fact, Congress has already answered this question in the affirmative by promulgating Section 19. Under Section 19, the FTC already has the authority to seek disgorgement and monetary damages if it can show that an entity violated an existing Commission rule or a cease-and-desist order that the Commission issued to that entity.⁴⁴ The issue with pursuing disgorgement under Section 19 is that it would be lengthy and cumbersome, as compared to seeking a permanent injunction under Section 13(b). A Section 19 case used to obtain disgorgement would require the FTC to: (1) seek a preliminary injunction under § 13(b) to stop the wrongdoer from engaging in unlawful actions while the administrative process plays out; (2) initiate a separate administrative proceeding leading to a final rule or, more likely, a cease-and-desist order; and finally (3) initiate a Section 19 action to disgorge any profits the defendant obtained through *subsequent* violations of the FTC's rule or order.⁴⁵ By contrast, the Commission's usual practice has been to rely on Section 13(b) for an efficient and expedient way to enforce the law to greater effect; the Commission requests that a district court order a

the receipts and [expenses] are taken into the account.” See Ronald Mann, Opinion analysis: Justices accept, but cabin, the SEC's right to disgorgement in securities litigation, SCOTUSBLOG (June 22, 2020), <https://www.scotusblog.com/2020/06/opinion-analysis-justices-accept-but-cabin-secs-right-to-disgorgement-in-securities-litigation/>.

⁴³ *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 422 (9th Cir. 2018).

⁴⁴ 15 U.S.C. § 57b(b).

⁴⁵ See Fitzgerald, *supra* note 18, at 18–19.

wrongdoer to return profits from their *previous* unlawful actions by means of a permanent injunction.⁴⁶

There is no doubt that the three-part process under Section 19 would severely limit the FTC's enforcement authority and be inefficient in a case like *AMG Capital Management*. Mr. Tucker's actions so clearly violated the law that there is no clear need or benefit from engaging in formal rulemaking or adjudication. In theory, the existing rules and agency actions plainly prohibit business activities such as Mr. Tucker's. The FTC should not have to rely upon and invoke different sections of the Act to obtain equitable relief—especially so when a defendant's actions are so obviously unlawful that equitable restitution may precede a formal administrative determination of wrongdoing. If the FTC's mission is to protect consumers from deceptive and unfair business practices,⁴⁷ it follows that the agency should have disgorgement authority to address clear-cut violations of the law. Accordingly, Congress should amend the FTC Act to make clear that the Commission has the power to obtain disgorgement in a streamlined equitable proceeding directly before a district court.

On this point, it is important to balance the agency's interests in advancing its mission to protect consumers with the overarching principle of separation of powers and need for Congress to clearly authorize significant monetary relief of the sort that the FTC sought against Mr. Tucker.⁴⁸ The enforcement provisions in the FTC Act as currently written are scattered, vague, and do not offer unified tools to advance the agency's core mission. The FTC should not make potentially unconstitutional legislative policy decisions as to what remedies it can impose on

⁴⁶ *Id.* at 19.

⁴⁷ OUR MISSION, FEDERAL TRADE COMM'N, <https://www.ftc.gov/about-ftc> (last visited Mar. 22, 2021).

⁴⁸ See generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

private parties under the auspices of this ambiguous statutory scheme. Congress can and should amend the FTC Act to clearly define the scope and limits of the FTC's enforcement authority.

Congress should combine the disparate enforcement provisions in a unified section that conclusively outlines the agency's enforcement abilities. The remedies available to the FTC should be those outlined in Section 19—namely, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice.⁴⁹ In instances such as the *AMG Capital Management* case where the FTC has a good-faith basis to believe there is a clear violation of the law, the Commission should be able to obtain disgorgement directly from a district court without the need for an antecedent administrative adjudication.

Moreover, the FTC must have the ability to prevent wrongdoers from continuing to engage in deceptive or unfair business practices pending the outcome of any adjudication. While Section 13(b) arguably already authorizes this through the use of preliminary injunctions, a preliminary injunction might not last long enough for the FTC to issue a formal cease-and-desist order. The FTC should instead have the authority to seek an injunction in federal court that lasts longer than a preliminary injunction. While potential defendants would likely be concerned about issues of notice that their practices potentially violate Section 5, it is clear from Mr. Tucker's case that there are often violators who should not be entitled to additional advance notice—their actions are so plainly in violation of Section 5 that they are arguably already on notice. For instances where it is a closer call whether a defendant's actions violate the law, the Commission should proceed under what now exists as its Section 19 authority (i.e., seeking a preliminary injunction, engaging in administrative proceedings, then obtaining disgorgement).

⁴⁹ 15 U.S.C. § 57b(b).

However, in instances such as Mr. Tucker’s where the business practices at issue obviously violate the law, Congress should amend the Act to authorize retroactive monetary relief, and any monies recovered under these new enforcement provisions should go directly to affected consumers to the extent possible, then to the Treasury as disgorgement—an equation consistent with the Supreme Court’s instructions in *Liu*.⁵⁰

V. Conclusion

The current enforcement provisions in the FTC Act are confused. As currently written, the enforcement provisions provide the FTC with the proper remedial tools through Section 19, but they require a lengthy and cumbersome administrative process beforehand. Section 13(b) allows the agency to temporarily enjoin wrongdoers from continuing unlawful behavior during administrative proceedings, but the open-ended and unguided language in Section 13(b) that allows for permanent injunctions does not clearly authorize complete and retroactive equitable relief. This language is inadequate to show that Congress intended for the FTC to be able to use that Section to obtain \$1.3 billion disgorgement awards that, in part, go to the Treasury by way of a permanent injunction, as was the case in *AMG Capital Management*. It is likely that the Supreme Court will find that Section 13(b) does not authorize such an outcome, which is all the more reason that Congress should immediately begin to consider amending the FTC Act. The Act can be meaningfully revised—without substantially upsetting the status quo—so as to allow the FTC to efficiently deal with clear-cut violations of the FTC Act. These amendments would allow the FTC to protect the public by stopping wrongdoers, obtaining monetary restitution from them, and returning those sums to the clearly wronged consumers.

⁵⁰ This structure mirrors the Judge Navarro’s order when this case was before the district court. *See supra* note 40.