

# Supreme Court Vacates its Prior Grant of the FTC's Petition for Certiorari in *FTC v. Credit Bureau Center, LLC*: What Does it Mean for Section 13(b) and *AMG Capital Management, LLC v. FTC*?

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## Section 13 (b)log



This morning, in a brief line order, the Supreme Court vacated its prior grant of the Federal Trade Commission's petition for certiorari in *Federal Trade Commission v. Credit Bureau Center, LLC* ("*Credit Bureau*"). Justice Barrett did not take part in the decision to vacate the grant of certiorari. None of the remaining Justices dissented from the order.

As we explained [in a prior post](#), in *Credit Bureau*, the Seventh Circuit reversed its prior precedent, concluding that Section 13(b) of the FTC Act does not authorize the FTC to obtain monetary restitution. In doing so, the *Credit Bureau* court admonished that Section 13(b) must be taken on its own terms. "By its terms, section 13(b) authorizes only restraining orders and injunctions," not restitution. 937 F.3d 764, 767.

The Supreme Court's action will not prevent this issue from being litigated at the High Court. *Credit Bureau* had been consolidated with another case, *AMG Capital Management, LLC v. Federal Trade Commission* ("*AMG*"). *AMG* is in many ways a parallel case to *Credit Bureau*, with similar facts leading to an opposite outcome. In *AMG*, a Ninth Circuit panel disapproved of the broad and atextual reading of Section 13(b) allowing for monetary restitution, but concluded that it "remain[ed] bound by" the ample Ninth Circuit precedent broadly construing Section 13(b). 910 F.3d 417, 427. *AMG* remains before the Supreme Court, and oral arguments will be heard sometime in the first half of 2021.

While the Supreme Court's vacation of the grant of certiorari in *Credit Bureau* cannot be viewed as a

definitive endorsement of the Seventh Circuit's position, it certainly comes close. While not an outright affirmance on the merits, the vacation signals that the Supreme Court is comfortable with the Seventh Circuit's *Credit Bureau* holding. When the Supreme Court vacates grants of certiorari, it will often do so with the brief explanation that the original grant of certiorari was "improvidently granted," meaning that the Supreme Court no longer believes the case merits review. The Supreme Court did not do that here. Instead, the High Court simply vacated the grant. This, along with the continued presence of *AMG* on the Supreme Court's docket, signals that the Supreme Court does think the issues in *Credit Bureau* merit review, but the Court no longer believes *Credit Bureau* is the best vehicle to review the issue of monetary restitution under Section 13(b).

While the Supreme Court's line order does not specify why the Court vacated the grant of certiorari, we believe there is one likely reason. Justice Barrett (who did not participate in the vacation of the grant of cert) was a member of the Seventh Circuit when *Credit Bureau* was decided. While then Judge Barrett was not on the *Credit Bureau* panel, the panel's decision was reviewed by the entire Seventh Circuit because it overturned prior Seventh Circuit precedent. While some members of the Seventh Circuit dissented from the panel's *Credit Bureau* decision, Judge Barrett did not. Judge Barrett's decision to allow *Credit Bureau* to stand while she was on the Seventh Circuit certainly qualifies as participation in a lower court's case before it made its way to the Supreme Court. Many believe that it would have been an ethical conflict for Justice Barrett to participate again in a review of *Credit Bureau*—effectively reviewing her own decision.

The Supreme Court's decision to vacate the grant of certiorari in *Credit Bureau* thereby allows Justice Barrett to participate in the *AMG* case on the merits while avoiding any ethical issues. The eight members of the Court who chose to vacate the grant of certiorari *Credit Bureau* are signaling that they want Justice Barrett to participate in the proceedings.

This, in turn, seems like a strong signal that the Supreme Court may reverse the Ninth Circuit's decision in *AMG*, concluding that Section 13(b) does not allow for the FTC to obtain monetary restitution. If the High Court agrees with the Seventh Circuit's *Credit Bureau* decision and reverses the Ninth Circuit's contrary *AMG* decision, there is no real need to review the Seventh Circuit's decision on the merits. The Supreme Court's reversal of the Ninth Circuit's *AMG* decision will, of course, be precedential nationwide. And, the Supreme Court will thereby effectively affirm *Credit Bureau*, allowing Justice Barrett to participate in its *AMG* decision while bypassing any ethical quagmires.

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