

Services

Advertising &
Marketing

Antitrust &
Competition

Antitrust Counseling
& Compliance

Antitrust Litigation

International Trade &
Supply Chain

Professionals

WENDY K. ARENDS
MADISON:
608.258.7382
WENDY.ARENDS@
HUSCHBLACKWELL.COM

HARVEY M. TETTLEBAUM
JEFFERSON CITY:
573.761.1107
HARVEY.TETTLEBAUM@
HUSCHBLACKWELL.COM

MARK B. TOBEY
AUSTIN:
512.479.9740
MARK.TOBEY@
HUSCHBLACKWELL.COM

Supreme Court Curbs Consumer Relief: Enforcement Implications of *AMG Capital v. FTC*

The U.S. Supreme Court's unanimous decision on April 22, 2021, in *AMG Capital Management LLC v. Federal Trade Commission* curtails the authority of the Federal Trade Commission (FTC) to seek equitable monetary relief in federal court under Section 13(b) of the FTC Act (the Act). While Congress may step in to restore its authority, the FTC in the interim must rely on its unwieldy administrative process to provide monetary relief or may turn to state attorneys general (AGs) or other federal agencies to pick up the baton.

Background

AMG petitioned the Court contending the FTC did not have authority to seek equitable monetary relief after the Ninth Circuit affirmed the district court's order that AMG pay \$1.27 billion for failing to disclose the terms of payday loans. Section 13(b) authorizes the FTC to seek injunctive relief in federal court, but it does not contain an express provision for equitable monetary relief. Until *AMG Capital*, the FTC and many courts interpreted Section 13(b) to allow the FTC to seek consumer redress, including disgorgement and restitution. Eight courts of appeals upheld this interpretation until 2019 when the Seventh Circuit disagreed in *FTC v. Credit Bureau Center* and the Third Circuit in *FTC v. AbbVie et al.* came to a similar conclusion a year later.

Even though the Court recognized the FTC's desire to seek monetary relief directly from courts, the Court stated the key inquiry is whether Congress granted the FTC authority to bypass the administrative process by including the words "permanent injunction" in Section 13(b). The addition to Section 5 in the 1970s authorizing the FTC to seek court orders to stop violative behavior through "permanent injunction" does not authorize it to obtain court-ordered monetary relief. The Court further explained that because Sections 5 and 19 of

the Act expressly authorize “other and further equitable relief,” as well as “refund of money or return of property,” that Section 13(b) is not meant to include equitable relief.

FTC can seek redress through administrative process

While the Court made clear that the FTC can seek restitution and disgorgement using the Act’s administrative and consumer redress procedures, this process is longer and less efficient for the agency and alleged violators. While the process applies more broadly to advertising, consumer protection, privacy and data security, and antitrust cases, as well as deceptive or unfair business practices, the standard is higher than under Section 13(b). After the FTC obtains a final cease and desist order, it must demonstrate under section 19 that “a reasonable [person] would have known under the circumstances [that the conduct at issue] was dishonest or fraudulent,” to obtain monetary relief.

FTC calls on Congress to act

Acting FTC Chair Rebecca Slaughter testified before Congress asking it to pass legislation to expressly provide it with the authority to recover money for harmed consumers in federal court. The Court stated if the FTC believes its administrative processes are “too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority.” Slaughter underscored the FTC’s reliance on Section 13(b) during the past five years to secure \$11.2 billion in refunds to consumers and highlighted its importance during COVID-19. She said, “the Court has deprived the FTC of the strongest tool [it] had to help consumers,” and “urge[d] Congress to act swiftly to restore and strengthen the powers of the agency.” Legislation to authorize the FTC to seek consumer relief is currently pending in Congress, but the timeline for enactment is uncertain.

What this means to you

Other enforcers may step up consumer redress actions. Notwithstanding the FTC’s current inability to seek monetary relief on behalf of consumers, companies should continue to be vigilant with respect to consumer protection compliance. The FTC may also seek relief under the COVID-19 Consumer Protection Act and refer matters to other agencies such as the Consumer Financial Protection Bureau (CFPB), the Federal Communications Commission (FCC) or the U.S. Department of Justice (DOJ). Likewise, state AGs may pick up the slack to bring additional consumer protection enforcement actions and seek consumer relief through their state statutes.

Contact us

If you have questions about the FTC Court decision or how consumer redress actions might impact your business, contact Wendy Arends, Harvey Tettlebaum, Emily Lyons, Mark Tobey or your Husch Blackwell attorney.