

## Client Alert

### The Supreme Court Limits FTC's §13(b) Powers

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Last week the Supreme Court unanimously held that §13(b) of the Federal Trade Commission Act does not give the Federal Trade Commission the power to seek equitable monetary relief such as disgorgement or restitution. The Court's opinion in *AMG Capital Management LLC v. Federal Trade Commission* removes a powerful tool that the FTC has long relied on to pursue monetary relief for consumers in both consumer protection and competition matters.

By way of background, the FTC has authority to protect consumers from unfair or deceptive acts or practice ("UDAP") and unfair methods of competition ("UMC") with an overlapping but distinct set of tools it can use to pursue its dual consumer protection and competition missions:

- **Administrative Proceeding:** The FTC can initiate an administrative proceeding to seek a cease and desist order for either a UDAP or UMC violation from an administrative law judge. If necessary, the FTC can later bring a contempt proceeding in federal court seeking to enforce the terms of an administrative order. A defendant may respond by arguing that it has "substantially complied" with the terms of the order. If the FTC prevails in such a case, it can seek civil penalties and other equitable relief necessary to enforce the order (however monetary relief only applies to UDAP violations).
- **Rulemaking:** The FTC has authority to promulgate rules that define UDAP with specificity. Generally, this requires a lengthy, formal rulemaking process that allows for public comment, and a final rule can be challenged in federal court. If a defendant later violates a duly enacted UDAP rule, the FTC can seek civil penalties for a knowing violation. The FTC can also file suit in federal court and obtain monetary relief "to redress consumer injury," including an order compelling "refund of money or return of property," but only if "a reasonable man would have known under the circumstances [that the challenged conduct] was dishonest or fraudulent."
- **Federal Court:** The FTC can sue in federal court under §13(b) of the FTC Act to enjoin a defendant when the defendant "is violating, or is about to violate" a law that the FTC enforces and such an injunction is in the public's interest. While courts have historically read §13(b) as giving the FTC an implied right to recover equitable monetary relief in addition to injunctive relief, the Supreme Court's ruling now limits the FTC to seeking injunctive relief only.

Because §13(b) does not take as long or contain the same prerequisites before seeking monetary relief as these other tools, the FTC has heavily relied on an implied reading of §13(b) to obtain disgorgement, restitution, or other forms of monetary relief. While the FTC has been criticized for years for this practice, the practice has not successfully been challenged on this basis until now.

In a 9-0 decision written by Justice Stephen Breyer, the Court held that the statutory language of §13(b) did not authorize the FTC to seek equitable monetary relief, including disgorgement and restitution. First, while the statute does allow the FTC to seek an injunction, the Court noted that equitable monetary relief is not a form of injunctive relief. Additionally, the Court stated that §13(b) is aimed at prospective relief (because the FTC can sue when a defendant is “violating, or about to violate” the law), and not the retrospective relief that equitable monetary relief provides. Finally, the Court stated it is unlikely that Congress’s intent in placing restrictions on the FTC’s ability to seek equitable monetary relief through internal enforcement actions or rulemaking would permit FTC to sidestep those restrictions via §13(b). The Court rejected the FTC’s policy argument that §13(b) is a critical tool in the FTC’s enforcement arsenal, instead noting that the FTC is free to petition Congress for further remedial authority.

The case itself focuses on race car driver Scott Tucker, who owned several businesses that provided borrowers with short-term payday loans over the internet. The loans came with fine print that automatically renewed the loans unless borrowers took affirmative steps to opt out. From 2008 to 2012, these lenders issued more than 5 million payday loans, and took in well over \$1 billion, relying on renewals authorized by this method of disclosure. In 2012, the FTC accused Tucker and his businesses of violating the FTC Act’s UDAP provisions. As the FTC has done in numerous other enforcement actions, it sought restitution and disgorgement of the profits Tucker and his companies obtained through the challenged practices. When Tucker and his businesses challenged the FTC’s power to do so at the trial and circuit court, they lost, and were ordered to pay \$1.27 billion in restitution. They petitioned to the Supreme Court, and ultimately the restitution order was overturned.

Where does this ruling leave the FTC today? The following sections address the major areas of enforcement likely to be affected by the Supreme Court ruling.

### **Consumer Protection**

Where the FTC has relied on §13(b) to secure monetary relief for consumers in a range of false advertising cases, those activities will end, at least temporarily. However, violations of an established FTC rule can still subject a company to civil penalties. Under §18 of the FTC Act, the FTC is authorized to prescribe “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” within the meaning of §5(a)(1) of the Act. Once the FTC has promulgated a trade regulation rule, anyone who violates the rule “with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule” is **liable for civil penalties** for each violation. Under §5(m)(1)(A) of the FTC Act, the FTC can obtain such penalties by filing a suit in federal district court. In practice, the FTC may issue more warning letters to put corporations on notice of similar consent judgments or rules in order to impose civil penalties for ongoing violations.

In addition, any person who violates a rule (irrespective of the state of knowledge) is liable for injury caused to consumers by the rule violation. The Commission may pursue such recovery in a suit for consumer redress under §19 of the FTC Act. However, these procedures will apply only to rules with respect to UDAP promulgated under authority of the FTC Act.

While the Supreme Court ruling has limited the FTC's enforcement powers, the FTC may strengthen existing rules and undertake new UDAP rulemakings. Perhaps in anticipation of the outcome of the *AMG* case, the FTC announced in a [March 25, 2021 press release](#), that it would seek to ramp up its rulemaking efforts, which have in recent years been infrequent.

## Privacy

The FTC is the chief federal agency on privacy enforcement. In recent years, the FTC has relied on §13(b) to obtain significant monetary relief for privacy violations. One of the most notable examples is the FTC's complaint against Equifax. In the complaint, the FTC alleged that Equifax's inadequate data privacy policies and procedures led to the disclosure of personal information of more than 147 million people. The complaint sought monetary relief pursuant to §13(b) of the FTC Act and the [settlement](#) between the FTC and Equifax that arose out of that dispute totaled at least \$575 million. While Equifax's particular privacy violations are not unusual (failing to patch well-known software vulnerabilities; failing to segment its database servers; and storing personal information in an unencrypted format), they are no longer directly prohibited by rule, and therefore in cases like Equifax, the FTC will be hard-pressed to obtain relatively quick monetary relief.

However, by no means does the Supreme Court's recent decision wholly defang the FTC from seeking monetary penalties for a company's failure to secure the personal information of users, or a company's misrepresentations about the steps it has taken to secure personal information. The FTC still has the authority to obtain civil monetary penalties for privacy violations under several federal statutes, including the Children's Online Privacy Protection Act, the Fair Credit Reporting Act, the Telemarketing Sales Rule, the Fair Debt Collection Practices Act, and the Controlling the Assault of Non-Solicited Pornography and Marketing Act. The FTC also has the authority to seek civil penalties for a company's failure to comply with consent orders, which typically run for twenty years. And, as the Supreme Court notes in its opinion, the FTC can still obtain monetary relief by first invoking its UDAP rulemaking authority and pursuing administrative procedures and then redress provisions under §19. Thus, the end result may be the same, but the agency will likely be forced to go through a much slower process to ultimately seek monetary penalties, which will likely affect the FTC's bargaining position in any settlement negotiation.

## Antitrust

Along with the Department of Justice and its Antitrust Division, the FTC is one of the two agencies responsible for the enforcement of antitrust and competition laws at the federal level. Historically, the FTC had not often sought equitable monetary relief in antitrust and competition law cases. In 2003, the FTC issued a policy statement saying that it would only seek monetary relief in antitrust and competition cases in "exceptional cases" involving a "[c]lear [v]iolation" of the antitrust laws.

But in 2012, a majority of the FTC withdrew this policy statement and the limitations it set forth, stating that this policy statement created "an overly restrictive view of the [FTC's] options for equitable remedies." In the wake of this withdrawal, the FTC began seeking equitable monetary relief for past violations of antitrust and competition laws more frequently. For example, in June 2018, the FTC won a trial court decision awarding \$448

million in monetary relief to consumers in *FTC v. AbbVie*. There, the FTC accused AbbVie Inc. of illegally blocking consumers' access to lower-cost alternatives to AbbVie's Androgel by filing baseless patent infringement lawsuits against potential generic competitors. The court order obtained by the FTC was the largest monetary award ever in a litigated FTC antitrust and competition case.

Even before the Supreme Court's decision, however, the FTC's ability to seek such equitable monetary relief in antitrust cases has been called into question. In 2019, the Third Circuit in *FTC v. Shire Viropharma, Inc.* affirmed the trial court's dismissal of an FTC complaint seeking monetary relief for alleged antitrust violations, based on the FTC's failure to show that this challenged anticompetitive conduct was ongoing or imminent. And in the still ongoing *FTC v. Surescripts* case in the U.S. District Court for the District of Columbia, Surescripts has maintained that the FTC does not have the power to seek equitable monetary relief through §13(b) in antitrust cases. The Supreme Court's decision affirms this position, barring further Congressional intervention.

### **What to Expect**

Reaction from the FTC to the Supreme Court's ruling was swift. FTC Acting Chairwoman Rebecca Slaughter issued a statement accusing the Supreme Court of ruling "in favor of scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior." She further argued that "the Court has deprived the FTC of the strongest tool [it] had to help consumers when they need it most." Consistent with the Court's directive, Chairwoman Slaughter urged Congress to restore and strengthen the FTC's ability to seek equitable monetary relief. This is consistent with the testimony Chairwoman Slaughter and FTC Commissioners Noah Phillips, Rohit Chopra, and Christine Wilson gave just a few days ago on April 20 in a hearing before the Senate Committee on Commerce, Science and Transportation entitled "Strengthening the Federal Trade Commission's Authority to Protect Consumers." Perhaps sensing the impending decision against the FTC in *AMG Capital Management LLC*, the commissioners argued for increased enforcement authority from Congress.

In the meantime, one immediate change we may see is an uptick in FTC rulemaking in an effort to allow it to speed the administrative litigation process and expand the scope of monetary relief in both consumer protection and competition cases. However, that will not be a quick or easy process. While the FTC has well-articulated UDAP rulemaking authority, it is a time-consuming process, with meaningful procedural hurdles, and any final rules can be challenged in federal court. The FTC's authority to promulgate competition rules is more controversial. The agency has used that authority only once in its history and has not tested that authority again for decades. We will also be watching to see how courts apply this decision to existing consent judgments, contested judgments, and ongoing proceedings. It seems unlikely that there would be any challenge to a prior settlement with the FTC, as those settlements usually involve reciprocal waivers of claims and defenses. However, prior judgments may be open to reconsideration.

There may be trickle down effects on similar state law statutes and remedies. For example, some states that have similar language in their statutes may now be rethinking whether monetary relief is available or if the available remedy should be limited to an injunction.

In the event that the FTC seeks and obtains a Congressional “fix” to restore its ability to seek restitution, there may be ambiguity regarding the retroactive impact of such new legislation on settlements, judgments and investigations that commenced prior to the fix. We will be assessing those issues in future alerts.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Raija Horstman**

Counsel – Los Angeles

Phone: +1.213.443.5530

Email: [rhorstman@crowell.com](mailto:rhorstman@crowell.com)

**Helen O. Ogunyanwo**

Counsel – Washington, D.C.

Phone: +1.202.624.2585

Email: [hogunyanwo@crowell.com](mailto:hogunyanwo@crowell.com)

**Jacob Canter**

Associate – San Francisco

Phone: +1.415.365.7210

Email: [jcanter@crowell.com](mailto:jcanter@crowell.com)