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The Future of FTC Equitable Monetary Relief after AMG Capital Management
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The U.S. Supreme Court's just-published unanimous decision in *AMG Capital Management LLC v. FTC*—holding that Section 13(b) of the Federal Trade Commission Act does not authorize the commission to obtain court-ordered equitable monetary relief (such as restitution or disgorgement)—is not surprising. Moreover, by dissipating the cloud of litigation uncertainty that has surrounded the FTC's recent efforts to seek such relief, the court cleared the way for consideration of targeted congressional legislation to address the issue.

But what should such legislation provide? After briefly summarizing the court's holding, I will turn to the appropriate standards for optimal FTC consumer redress actions, which inform a welfare-enhancing legislative fix.

The Court's Opinion

Justice Stephen Breyer's opinion for the court is straightforward, centering on the structure and history of the FTC Act. Section 13(b) makes no direct reference to monetary relief. Its plain language merely authorizes the FTC to seek a "permanent injunction" in federal court against "any person, partnership, or corporation" that it believes "is violating, or is about to violate, any provision of law" that the commission enforces. In addition, by its terms, Section 13(b) is forward-looking, focusing on relief that is prospective, not retrospective (this cuts against the argument that payments for *prior* harm may be recouped from wrongdoers).

Furthermore, the FTC Act provisions that specifically authorize conditioned and limited forms of monetary relief (Section 5(l) and Section 19) are in the context of commission *cease and desist orders*, involving FTC administrative proceedings, unlike Section 13(b) actions that avoid the administrative route. In sum, the court concludes that:

> [T]o read §13(b) to mean what it says, as authorizing injunctive but not monetary relief, produces a coherent enforcement scheme: The Commission may obtain monetary relief by first invoking its administrative procedures and then §19's redress provisions (which include limitations). And the Commission may use §13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief. By contrast, the Commission's broad reading would allow it to use §13(b) as a substitute for §5 and §19. For the reasons we have just stated, that could not have been Congress' intent.

The court's opinion concludes by succinctly rejecting the FTC's arguments to the contrary.

What Comes Next

The Supreme Court's decision has been anticipated by informed observers. All four sitting FTC Commissioners have already called for a Section 13(b) "legislative fix," and in an April 20 [hearing of Senate Commerce Committee](), Chairwoman Maria Cantwell (D-Wash.) emphasized that, "[w]e have to do everything we can to protect this authority and, if necessary, pass new legislation to do so."

What, however, should be the contours of such legislation? In considering alternative statutory rules, legislators should keep in mind not only the possible consumer benefits of monetary relief, but the costs of error, as well. Error costs are a ubiquitous element of public law enforcement, and this is particularly true in the case of FTC actions. Ideally, enforcers should seek to minimize the sum of the costs attributable to false positives (type I error), false negatives (type II error), administrative costs, and disincentive costs imposed on third parties, which may also be viewed as a subset of false positives. (See my 2014 piece "[A Cost-Benefit Framework for Antitrust Enforcement Policy]()."

Monetary relief is most appropriate in cases where error costs are minimal, and the quantum of harm is relatively easy to measure. This suggests a spectrum of FTC enforcement actions that may be candidates for monetary relief. Ideally, selection of targets for FTC consumer redress actions should be calibrated to yield the highest return to scarce enforcement resources, with an eye to optimal enforcement criteria.

Consider consumer protection enforcement. The strongest cases involve hardcore consumer fraud (where fraudulent purpose is clear and error is almost nil); they best satisfy accuracy in measurement and error-cost criteria. Next along the spectrum are cases of non-fraudulent but unfair or deceptive acts or practices that potentially involve some degree of error. In this category, situations involving easily measurable consumer losses (e.g., systematic failure to deliver particular goods requested or poor quality control yielding shipments of ruined goods) would appear to be the best candidates for monetary relief.

Moving along the spectrum, matters involving a higher likelihood of error and severe measurement problems should be the weakest candidates for consumer redress in the consumer protection sphere. For example, cases involve allegedly misleading advertising regarding the nature of goods, or allegedly insufficient advertising substantiation, may generate high false positives and intractable difficulties in estimating consumer harm. As a matter of judgment, given resource constraints, seeking financial recoveries solely in cases of fraud or clear deception where consumer losses are apparent and readily measurable makes the most sense from a cost-benefit perspective.

Consumer redress actions are problematic for a large proportion of FTC antitrust enforcement ("unfair methods of competition") initiatives. Many of these antitrust cases are "cutting edge" matters involving novel theories and complex fact patterns that pose a significant threat of type I error. (In comparison, type I error is low in hardcore collusion cases brought by the U.S. Justice Department where the existence, nature, and effects of cartel activity are plain). What's more, they generally raise extremely difficult if not impossible problems in estimating the degree of consumer harm. (Even DOJ price-fixing cases raise non-trivial measurement difficulties.)

For example, consider assigning a consumer welfare loss number to a patent antitrust settlement that may or may not have delayed entry of a generic drug by some length of time (depending upon the strength of the patent) or to a decision by a drug company to modify a drug slightly just before patent expiration in order to obtain a new patent period (raising questions of valuing potential product improvements). These and other examples suggest that only rarely should the FTC pursue requests for disgorgement or restitution in antitrust cases, if error-cost-centric enforcement criteria are to be honored.

Unfortunately, the FTC currently has nothing to say about when it will seek monetary relief in antitrust matters. Commendably, in 2003, the commission issued a Policy Statement on Monetary Equitable Remedies in Competition Cases specifying that it would only seek monetary relief in "exceptional cases" involving a "[c]lear [v]iolation" of the antitrust laws. Regrettably, in 2012, a majority of the FTC (with Commissioner Maureen Ohlhausen dissenting) withdrew that policy statement and the limitations it imposed. As I concluded in a 2012 article:

> *This action, which was taken without the benefit of advance notice and public comment, raises troubling questions. By increasing business uncertainty, the withdrawal may substantially chill efficient business practices that are not well understood by enforcers. In addition, it raises the specter of substantial error costs in the FTC's pursuit of monetary sanctions. In short, it appears to represent a move away from, rather than towards, an economically enlightened antitrust enforcement policy.*

In a 2013 speech, then-FTC Commissioner Josh Wright also lamented the withdrawal of the 2003 Statement, and stated that he would limit:

> *… the FTC's ability to pursue disgorgement only against naked price fixing agreements among competitors or, in the case of single firm conduct, only if the monopolist's conduct has no plausible efficiency justification. This latter category would include fraudulent or deceptive conduct, or tortious activity such as burning down a competitor's plant.*

As a practical matter, the FTC does not bring cases of this sort. The DOJ brings naked price-fixing cases and the unilateral conduct cases noted are as scarce as unicorns. Given that fact, Wright's recommendation may rightly be seen as a rejection of monetary relief in FTC antitrust cases. Based on the previously discussed serious error-cost and measurement problems associated with monetary remedies in FTC antitrust cases, one may also conclude that the Wright approach is right on the money.

Finally, a recent article by former FTC Chairman Tim Muris, Howard Beales, and Benjamin Mundel opined that Section 13(b) should be construed to "limit[] the FTC's ability to obtain monetary relief to conduct that a reasonable person would know was dishonest or fraudulent." Although such a statutory reading is now precluded by the Supreme Court's decision, its incorporation in a new statutory "fix" would appear ideal. It would allow for consumer redress in appropriate cases, while avoiding the likely net welfare losses arising from a more expansive approach to monetary remedies.

Conclusion

The *AMG Capital* decision is sure to generate legislative proposals to restore the FTC's ability to secure monetary relief in federal court. If Congress adopts a cost-beneficial error-cost framework in shaping targeted legislation, it should limit FTC monetary relief authority (recoupment and disgorgement) to situations of consumer fraud or dishonesty arising under the FTC's authority to pursue unfair or deceptive acts or practices. Giving the FTC carte blanche to obtain financial recoveries in the full spectrum of antitrust and consumer protection cases would spawn uncertainty and could chill a great deal of innovative business behavior, to the ultimate detriment of consumer welfare.

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