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FTC Antitrust Enforcement Post–AMG Capital Management, Some Assembly Required

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On April 22, 2021, the Supreme Court unanimously held in *AMG Capital Management, LLC v. FTC*,[1] that the Federal Trade Commission (FTC) cannot obtain monetary relief pursuant to § 13(b) of the FTC Act. Because § 13(b) authorizes the FTC to go directly to court for injunctive relief and does not contain exacting requirements found elsewhere in the FTC Act, § 13(b) was the FTC's preferred enforcement provision. Indeed, for around 40 years the FTC used § 13(b) to obtain equitable monetary relief, including restitution and disgorgement, which lower courts routinely granted. Unless Congress intervenes, the *AMG Capital* decision will dramatically change the FTC's enforcement practice.

AMG Capital will have a greater impact on the FTC's consumer protection cases, however, than its antitrust cases. In fiscal year 2019, the FTC brought 49 consumer protection actions in federal court pursuant to § 13(b), which resulted in $723.2 million in restitution or disgorgement. That same fiscal year, using § 13(b), the FTC filed one antitrust complaint against *Surescripts* and settled another with *Reckitt Benckiser*.[2] Since its first significant disgorgement award in 2000, the FTC has sought equitable monetary relief pursuant to § 13 in thirteen cases.[3] All of those cases are health care related, with nine of them coming after 2012, when the FTC withdrew its 2003 Policy Statement that limited the use of equitable monetary relief to redress "clear violation" of antitrust laws.[4] To the extent *AMG Capital* will affect the FTC's antitrust enforcement activity, the cases most likely to be impacted are non-merger (*e.g.*, monopolization) health care cases such as *Surescripts*.[5]

The Supreme Court's decision is rooted in a historical and textual analysis of the FTC Act. Since 1973, the FTC Act has provided the FTC with two enforcement venues. Before that, however, the FTC was confined to its own internal administrative process. That process is detailed in § 5 of the FTC Act,[6] which begins by the FTC initiating an administrative proceeding against an alleged violator before an Administrative Law Judge (ALJ) when the FTC has "reason to believe" that a party "has been or is using any unfair method of competition or unfair or deceptive act or practice."[7] If a violation is found, the ALJ orders the violator to cease and desist from engaging in the unlawful conduct.[8] The violator can then request that the FTC review the ALJ's report and order, with an adverse FTC ruling subject to deferential scrutiny in a court of appeals.[9] The administrative outcome—i.e., the report and cease and desist order—becomes final and enforceable upon either judicial review favoring the FTC or the time to request judicial review expiring.[10] This is known as a final cease and desist order.

In 1973, Congress added § 13(b) to the FTC Act.[11] That amendment authorized the FTC to go directly to federal court to obtain certain remedies: (1) a "temporary restraining order"; (2) a "preliminary injunction"; and (3) "in

proper cases" a "permanent injunction."[12] Congress again amended the FTC Act in 1975, adding § 19.[13] That amendment authorized federal courts to grant "such relief as the court find necessary to redress injury to consumers," including through "the refund of money or return of property"—i.e., restitution or disgorgement.[14] However, the relief available through § 19 applies only to: (1) any violator of any rule, except interpretive rules, "respecting unfair or deceptive acts or practices" promulgated by the FTC;[15] or (2) violators "engage[d] in any unfair or deceptive act or practice with respect to which the Commission has issued a final cease and desist order" *and* where the act or practice is one that "a reasonable man would have known under the circumstances was dishonest or fraudulent."[16] Additionally, § 19 equitable monetary relief is only available when the FTC initiates a § 5(b) administrative proceedings within three years of a "rule violation or [unfair or deceptive] act or practice" and if the federal court action is brought within one year of the cease and desist order becoming final.[17] In sum, the FTC Act authorizes the FTC to pursue violations by:

- Obtaining a final cease and desist order against unfair or deceptive conduct pursuant to § 5's administrative process;
- Obtaining § 19(b) equitable monetary relief against an unfair or deceptive act or practice rule violator, § 19(a)(1), when the FTC initiates § 5's administrative process within three years of the violation and also seeks the § 19 request within one year of the cease and desist order becoming final;[18]
- Obtaining § 19(b) equitable monetary relief against a person or entity that committed a statutory § 5 violation by specifically engaging in any unfair or deceptive act or practice that "a reasonable man would have known under the circumstances was dishonest or fraudulent," § 19(a)(2), which is the subject of a cease and desist order that became final pursuant to a § 5 administrative proceeding that the FTC initiated within three years of the act or practice and where the FTC directly requested restitution or disgorgement from a district court within one year of the cease and desist order becoming final;
- Promulgating rules and directly requesting restitution or disgorgement from a district court within three years of the violation, pursuant to § 19; or
- Obtaining a temporary restraining order, preliminary injunction, or, in "proper cases," a permanent injunction directly from a district court without use of the administrative process pursuant to § 13(b).

The FTC's claimed ability to seek monetary relief under § 13(b) was that this section authorized all forms of relief available in equity, such as restitution and disgorgement. Indeed, lower courts consistently ruled that equitable monetary relief was "ancillary relief necessary to accomplish complete justice," i.e., to effectuate the injunction.[19] Moreover, many believed Congress ratified this understanding when it reauthorized the FTC Act.[20]

Following its practice, the FTC brought a § 13(b) action in federal court against AMG Capital Management and others (AMG Capital), seeking restitution and disgorgement for alleged unfair and deceptive practices.[21] AMG Capital provided short-term payday loans during the heart of the Great Recession.[22] Using allegedly deceptive fine print, over 5 million payday loans were implemented that accrued more than $1.3 billion in "deceptive charges."[23] The FTC did not allege that AMG Capital violated any rule(s) that the Commission had promulgated.[24] The FTC won at summary judgment, and the district court entered a permanent injunction prohibiting AMG Capital from any future FTC Act violations and awarded $1.27 billion in restitution and disgorgement.[25] As is customary, the FTC was ordered to first use the funds to provide "direct redress to consumers," then "other equitable relief," and, finally, to deposit any remaining funds into the U.S Treasury as disgorgement.[26] AMG Capital appealed to the Ninth Circuit. Although the Ninth Circuit upheld the district court's ruling based on its precedent allowing equitable monetary relief in § 13(b) actions, two members of the panel expressed doubt as to § 13(b)'s implicit authorization of equitable monetary relief in direct actions.[27]

In granting certiorari, the Supreme Court viewed its task not as deciding whether the seeking of equitable monetary relief through the "substitution of § 13(b) for the administrative procedure contained in § 5 and the

consumer redress available under § 19 is desirable," but rather "to answer a more purely legal question: Did Congress, by enacting § 13(b)'s words, 'permanent injunction,' grant the Commission authority to obtain monetary relief directly from courts" so that it could "bypass[] the process set forth in § 5 and § 19?" The Court's answer: no.[28]

The Supreme Court's primary reason was the text and the history noted above. Namely, § 13(b)'s language refers only to injunctions, which "is not the same as an award of equitable monetary relief."[29] The Court explained that the words "permanent injunction" were limited in purpose because that language is "buried in a lengthy provision that focuses upon purely injunctive, not monetary, relief."[30] Thus, taking § 13(b) as a whole, it is apparent that it "focuses upon relief that is prospective, not retrospective."[31] Furthermore, other sections of the FTC Act, § 5 and § 19, explicitly authorized district courts to award restitution or disgorgement after the FTC uses its administrative process.[32] Therefore, the FTC's use of § 13(b) to obtain equitable monetary relief in actions brought directly in federal court displaced these provisions.

In response to the decision, Acting FTC Chair Rebecca Kelly Slaughter issued a strongly worded statement that the Supreme Court "ruled in favor of scam artists and dishonest corporations, leaving average Americans to pay for the illegal behavior."[33] She also lamented that the FTC is now "deprived . . . of the strongest tool [it] had to help consumers when they need it most."[34]

Leading up to the decision, the FTC put in motion various steps to blunt the effects of an adverse outcome. First, the FTC requested that Congress intervene should the Court rule against the FTC. Two days before the *AMG Capital* decision, during a hearing on April 20, 2021, Senator Maria Cantwell (D-WA), Chair of the Commerce Committee, told the FTC commissioners that lawmakers can be expected to act quickly if the FTC lost its ability to directly obtain equitable monetary relief in court.[35] Additionally, Democrats on the House Energy and Commerce Committee are working to restore the FTC's equitable monetary relief authorization.[36] However, any legislative fix is not a certainty.

In the meantime, the FTC signaled that it is working on a multipronged approach in its everyday casework. That approach includes searching its prior cases within the § 19 timeframes for rule violations, alleging more rule violations in every case, and using its administrative process. Further, Commissioner Rohit Chopra, who is nominated to lead the Consumer Financial Protection Bureau (CFPB), has advocated for coordinated enforcement activities between agencies with overlapping authority, such as the CFPB or Department of Justice.[37] Similarly, the FTC has teamed with state attorneys general in the past,[38] and could do so more frequently in the future. This could entail the FTC using its authority to request a nationwide injunction while the states provide piecemeal authorization for equitable monetary relief. This multipronged approach could then put equitable monetary relief back in play before Congress acts.

However, even if Congress enacts legislation restoring the FTC's authority to seek equitable monetary relief under § 13(b), an open question remains regarding the allowable scope of disgorgement. Indeed, disagreement on this issue already exists among the Commissioners. Commissioner Phillips is "concerned that disgorgement in particular will be used as a penalty" in certain instances and the FTC should not "punish companies under the guise of disgorgement,"[39] whereas Commissioner Chopra noted that disgorgement is not a deterrent as "the possibility of getting caught is so low," which is only amplified when considering that some companies or industries are only subject to relatively small payouts to compensate for their bad behavior.[40]

This problem was foreshadowed at *AMG Capital* oral arguments when Justice Barrett questioned whether the equitable monetary relief award should be characterized as restitution or disgorgement, noting that the latter seemed penal.[41] This is important because in *Liu v. SEC*,[42] the Supreme Court held that disgorgement, while

allowed, must be limited to a wrongdoer's net profits as opposed to their gross illicit gains. Additionally, the Court doubted whether the Securities and Exchange Commission (SEC) may obtain disgorgement in cases were funds will be remitted to the U.S. Treasury instead of used to make identifiable victims whole. While this decision involved statutes specific to the SEC, the Court's ruling is likely to guide Congress and courts as they interpret any new equitable monetary relief authority given to the FTC.

Other issues relevant to the FTC's authority are implicated by the Court's textualist approach. For example, § 13(b) authorizes the FTC to bring direct suit in federal court to obtain injunctions when the FTC has reason to believe that a defendant "is violating, or is about to violate" the FTC Act.[43] But, unlike temporary restraining orders and preliminary injunctions, § 13(b) permanent injunction can only be issued "in proper cases."[44] The FTC often seeks injunctions under § 13(b) based on past conduct.[45] Lower courts often interpret this language as requiring "some cognizable danger of recurrent violation, something more than the mere possibility."[46] However, the Third Circuit recently ruled that a more exacting standard needed to be met before an injunction issues.[47] The Third Circuit held in *Shire* that § 13(b) "was not designed to address hypothetical conduct or the mere suspicion that such conduct may occur," so the FTC's allegation of "vague and generalized likelihood of recurrent conduct" that it supported by "incentive and opportunity" to commit similar violations in the future failed to state a claim for relief.[48]

The Supreme Court expressly noted this issue but did not resolve it in *AMG Capital.* Pointing to the phrases "is violating," "is about to violate," "pending the issuance of a complaint," "until such complaint is dismissed," "temporary restraining order," and "preliminary injunction," the Court determined that these "words reflect that [§ 13(b)] addresses a specific problem . . . that of stopping seemingly unfair practices from taking place while the Commission determines their lawfulness."[49] The Court then confirmed this understanding by noting that "'permanent injunction' (as a proviso) suggests those words are related to a previously issued preliminary injunction."[50] This reading supports the argument that § 13(b) cannot be used for past conduct. On the other hand, the Court also noted that "permanent injunction" could "be read . . . as granting authority for the [FTC] to go one step beyond the [status quo maintaining relief] and ('in proper cases') dispense with administrative proceedings to seek what the words literally say (namely, an *injunction*)."[51] This reading would give courts broader authority to address conduct. Lower courts will have to address the issue of how to read § 13(b)'s permanent injunction proviso.

Surescripts will be one of the first antitrust cases to test the FTC's powers post-*AMG Capital.* After a three-year investigation, the FTC brought a § 13(b) case seeking a permanent injunction and equitable monetary relief against Surescripts for allegedly using horizontal and vertical restraints to preserve its monopoly over two e-prescription markets: routing and eligibility.[52] The routing market concerns the use of technology that enables prescriptions to be sent electronically to pharmacies and the eligibility market is a separate service that allows health care providers to determine prescription coverage or other benefits information.[53] Allegedly, Surescripts intentionally used anticompetitive exclusivity agreements, threats, and other exclusionary tactics to keep customers on both sides of each market from using other platforms.[54] With the FTC being stripped of its ability to seek § 13(b) equitable monetary relief, *Surescripts* should revolve around the FTC's injunctive authority.

Before *AMG Capital* was decided, Surescripts lost its motion to dismiss that argued that the FTC's action is not a "proper case" in which a permanent injunction can issue.[55] Surescripts argued that the FTC did not bring a "proper case" because the Commission is relying on a novel case theory. And, because the case is not proper, the action is not "appropriate[]" for federal court—i.e., there is no federal court jurisdiction.[56] The § 13(b) permanent injunction proviso states that the FTC "in proper cases . . . may seek, and after proper proof, the court may issue, a permanent injunction."[57] So, the proviso could be read as being jurisdictional, because it authorizes the FTC to "seek" a permanent injunction under a certain circumstance. But, it is unclear whether *AMG Capital's* holding was

jurisdictional or whether it held that the FTC failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) because § 13(b) cannot be the basis for district courts to grant equitable monetary relief.[58] What is clear, however, is that *Surescripts* and other cases will test the FTC's remaining authority. That includes what is a "proper case" for permanent injunction purposes and whether § 13(b) permits redress of conduct that has concluded but could occur again in the future.

The *AMG Capital* decision definitively rejected the FTC's practice of seeking equitable monetary relief in cases brought under § 13(b). However, it raises many additional issues that courts will be asked to address. Although the decision primarily impacts FTC consumer protection cases, it also affects a handful of the FTC's significant health care antitrust cases. While the FTC awaits congressional action, we will watch closely to see which tools the FTC chooses to use in replacing its lost authority to seek § 13(b) monetary relief. Those include rulemaking, alleging more rule violations, bringing more § 5 administrative actions, and teaming with state attorneys general.

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[1] *AMG Capital Management v. FTC*, No. 19-503 (U.S. Apr. 22, 2021), https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf [hereinafter, *AMG Capital*].
[2] *See* FTC, Fiscal Year 2021 Congressional Budget Justification 79-80 (Feb. 10, 2020), https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf.
[3] *FTC v. Mylan Labs, Inc.*, No. 98-cv-3114 (D.D.C. 2000); *FTC v. Hearst Trust*, No. 01-cv-734 (D.D.C. 2001); *FTC v. Perrigo Co.*, No. 04-cv-1397 (D.D.C. 2004); *FTC v. Cephalon, Inc.*, No. 08-cv-2141 (E.D. Pa. 2008); *FTC v. Lundbeck, Inc.*, No. 81-cv-156 (D. Minn. 2010); *FTC v. Abbvie Inc.*, No. 14-cv-5151 (E.D. Pa. 2014); *FTC v. Cardinal Health, Inc.*, No. 15-cv-3031 (S.D.N.Y. 2015); *FTC v. Allergan PLC*, No. 17-cv-312 (N.D. Cal. 2017); *FTC v. Shire ViroPharma Inc.*, No. 17-cv-131 (D. Del. 2017); *FTC v. Mallinckrodt ARD Inc.*, No. 17-cv-120 (D.D.C. 2017); *FTC v. Reckitt Benckiser Group PLC*, No. 19-cv-28 (W.D. Va. 2019); *FTC v. Surescripts, LLC*, No. 19-cv-1030 (D.D.C. 2019); *FTC v. Vyera Pharma., LLC*, No. 20-cv-706 (S.D.N.Y. 2020).
[4] Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45821 (emphasis omitted).
[5] *FTC v. Surescripts, LLC*, Case No. 1:19-cv-1080 (D.D.C. 2019).
[6] Codified at 15 U.S.C. § 45(b).
[7] *Id.*
[8] *Id.*
[9] *See* 15 U.S.C. § 45(c) ("findings of the Commission as to the facts," if supported by the evidence, "shall be conclusive").
[10] 15 U.S.C. § 45(g).
[11] Codified at 15 U.S.C. § 53(b).
[12] *Id.*
[13] Codified at 15 U.S.C. § 57b.
[14] 15 U.S.C. § 57b(b).
[15] 15 U.S.C. § 57b(a)(1).
[16] 15 U.S.C. § 57b(a)(2).
[17] 15 U.S.C. § 57b(d).
[18] The Commission may also obtain civil penalties directly in court for rule violations when the violator has "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." 15 U.S.C. § 45(a)(1) (codifying FTC Act § 5(m)(1)).
[19] *See, e.g.*, *FTC v. Commerce Plant, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016).
[20] *See Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 338 (1988) (holding congressional acquiescence to settled jurisprudence suggests adoption).
[21] *AMG Capital.*
[22] *See id.* at 2.
[23] *Id.*
[24] *See id.*
[25] *Id.*
[26] *See id.*

[27] *AMG Capital Management, LLC v. FTC*, 910 F. 3d 417 (9th Cir. 2018) (O'Scannlain & Bea, JJ.); *see also United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1200 (D.C. Cir. 2007) (Sentelle & Williams, JJ.; Tatel, J., dissenting) (holding "[w]hen Congress intended to award remedies that addressed past harms as well as those that offered prospective relief, it said as much.").
[28] *AMG Capital*, at 6.
[29] *Id.*
[30] *Id.* at 7.
[31] *Id.* at 8.
[32] *Id.* at 9.
[33] Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in AMG Capital Management LLC v. FTC (Apr. 22, 2021), https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us.
[34] *Id.*
[35] Strengthening the Federal Trade Commission's Authority to Protect Consumers Before S. Comm. On Commerce, 117th Cong. (April 20, 2021), available at https://www.commerce.senate.gov/2021/4/strengthening-the-federal-trade-commission-s-authority-to-protect-consumers.
[36] H.R. 2668, 117th Cong. (1st Sess. 2021).
[37] *See* Statement of Commissioner Chopra (Nov. 25, 2020), https://www.ftc.gov/system/files/documents/public_statements/1583802/chopra_statement_for_midwest_recovery_systems.pdf.
[38] *See e.g.*, *FTC v. Lundbeck, Inc.*, No. 81-cv-156 (D. Minn. 2010) (bringing suit with the state of Minnesota).
[39] *Supra* note 33.
[40] *Id.*
[41] Tr. of Oral Argument at 56-58, *AMG Capital* ("equitable remedies attempt to restore the plaintiff to the position in which the plaintiff stood before the plaintiff was defrauded. . . and the money that's gained isn't all being distributed to the plaintiffs. So it seems like it functions almost more like a fine. It doesn't really seem analogous to, say, restitution.").
[42] 140 S. Ct. 1936 (2020).
[43] 15 U.S.C. § 53(b)(1).
[44] 15 U.S.C. § 53(b)(2).
[45] *See FTC v. Facebook, Inc.*, No. 20-cv-3590 (D.D.C. 2020); *FTC v. Wyndham Worldwide Corp.*, No. 2:13-cv-1887 (D.N.J. 2012).
[46] *See, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985) (utilizing cognizable danger standard (quoting *W.T. Grant*)).
[47] *FTC v. Shire Viropharma*, 917 F.3d 147, 157-58 (3d Cir. 2019).
[48] *Id.* at 156, 159-60.
[49] *AMG Capital*, at 8.
[50] *Id.*
[51] *Id.*
[52] *FTC v. Surescripts, LLC*, No. 1:19-cv-1080 (D.D.C.).
[53] *Id.*
[54] *Id.*
[55] *Id.* [Dkt. 44] (denying [Dkt. 31-32]).
[56] *See Surescripts*, No. 1:19-cv-1080 [Dkt. 31] at 15. Just after the *AMG Capital* decision, Surescripts reiterated its jurisdictional argument, claiming the Supreme Court's decision confirmed its position. *Id.* [Dkt. 42] at 2. Similarly, Facebook filed a notice of supplemental authority after the *AMG Capital* decision arguing that the Court's opinion supports its argument that § 13(b) does not apply to past conduct. *Facebook, Inc.*, No. 20-cv-3590, Dkt. 64 (Apr. 27, 2021).
[57] While not at issue in *Surescripts* because the FTC did not seek a temporary restraining order or preliminary injunction, the district court would still be able to issue such status quo relief even if a permanent injunction was not "proper." The phrase "proper case" is only found in § 13(b)'s authorization to obtain a permanent injunction; meaning, if "proper case" has special meaning beyond the typical permanent injunction standard, it should not be applicable to the issuance of § 13(b) status quo relief. Thus, the district court would still be able to enter status quo relief to enable the FTC to determine whether the conduct at issue is lawful. *AMG Capital*, at 8 (holding that § 13(b) "addresses a specific problem . . . that of stopping seemingly unfair practices from taking place while the Commission determines their lawfulness").
[58] The uncertainty stems from where *AMG Capital's* holding and reasoning meets the Supreme Court's "drive-by jurisdiction" jurisprudence. The precise holding in *AMG Capital* is that the FTC Act does not provide the FTC "to seek, and a court to

award, equitable monetary relief" directly in district court. While the opinion is open to interpretation, the Court did not directly discuss whether § 13(b) was jurisdictional or simply placed limits on remedies. Courts are cautioned against relying on "drive-by jurisdictional rulings" that do not actually assess "whether the federal court had authority to adjudicate the claim in suit." *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). Pre-*AMG Capital*, the Third Circuit in *Shire* and the district court in *Surescripts* held that § 13(b) was not jurisdictional.

