



Podcast Transcript

AD-torneys@Law Episode 5: The Future of Consumer Redress after Supremes Rule in AMG Capital Management v FTC

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Lee: The Federal Trade Commission's ability to obtain headline-grabbing refunds for wronged consumers has been one of its most powerful enforcement tools for more than three decades. But, in a highly anticipated recent Supreme Court decision in the case of AMG Capital Management v. FTC, the court ruled in favor of putting the brakes on consumer redress and the Commission's ability to protect consumers from unfair or deceptive practices in the marketplace. So, what does this blow to the FTC's authority mean going forward? BakerHostetler Partner Randy Shaheen explains it all in this episode.

I'm Leeann Lee, and you're listening to AD-torneys@Law, our podcast series devoted to all things advertising, marketing, and digital media law.

Thanks for being here, Randy.

Shaheen: Yep, thank you, Leeann. Happy to join you again.

Lee: So to start us off and to lay the groundwork for our discussion, can you detail the actual issue that was before the Supreme Court in the AMG case?

Shaheen: Sure. So, since pretty much the 1970s, the FTC, as one of its enforcement tools, has used the concept of consumer redress. Essentially, making companies that they believe have violated the law disgorge or cough up the consumer dollars they obtained through whatever deception or misrepresentation was involved in the case. And originally as conceived, the FTC often limited requesting consumer

redress to cases of, kind of, outright fraud. But more and more over time, they began to use redress in just everyday common deception advertising cases. So they would file a complaint in federal court or file a settlement in federal court, seek an injunction, injunctive relief, and then also consumer redress under what we call Section 13(b). And you can see really how powerful that tool has become if you look at 2020. In 2020, the FTC returned almost half a billion dollars to consumers as part of this consumer redress program, and, you know, to get to that big of a figure, it's not surprising that there are often cases that were settled or litigated where the redress amounts were six or even seven figures. But the problem for the FTC is as they got more aggressive about seeking redress, companies pushed back, people began to take a harder look at the underlying statutes. And so this argument got advanced that while Section 13(b) clearly authorizes the FTC to get injunctive relief in court, people were not so sure that it allowed the FTC to get money, to get consumer redress, and a split developed in the Circuits, and therefore the case wound up in the Supreme Court.

Lee: So, what can you tell us about the court's decision?

Shaheen: Sure. So, I think most people probably even before the argument, but certainly listening to the oral argument, expected the FTC to lose, but perhaps not to lose unanimously, which was the outcome. Nothing much happens in D.C. unanimously anymore, so maybe we can thank the FTC for bringing people together in this one instance. But the court basically, and I believe it was Justice Breyer writing the opinion, said that the injunctive relief that's outlined in Section 13(b) does not include equitable monetary relief. And the court noted, you know, part of the argument was that after Congress added Section 13(b) to the FTC Act, two years later they added another section, Section 19, which gives the FTC a different path to get money. And so the argument that was made by the companies and others was why would Congress have gone ahead and added a path to get monetary relief two years later if they had already done that with Section 13(b). And that's the argument that basically the court embraced, and rejected the FTC's argument which in part relied on the fact of hey, we have done this, you know, literally for five decades, and don't disturb what has become what has become sort of an accepted practice.

Lee: So, does that decision mean that the FTC can no longer get consumer redress?

Shaheen: No, not necessarily, but it becomes a lot harder, procedurally, for them. So as I just mentioned, Congress added a different section to the FTC Act two years after 13(b), Section 19. And what Section 19 allows is for the FTC to first bring a case administratively. Right? The FTC, like a lot of other agencies has administrative courts. There's administrative law judges, ALJs, who can hear disputes. So the FTC can file the case administratively. A decision, the ALJ renders a decision. The parties, if they lose, they can appeal to the Commission itself, the Commission makes a decision, and then, if you're the advertiser, you're the company, you can then appeal, and you lose in front of the FTC, you can then appeal to a Federal Appeals court. So that process, in and of itself, could easily take years. If you, as the advertiser, then lose in front of the appeals court, right, you've, and maybe you try the Supreme Court, but they're not likely to hear

it. But you run out of time, you run out of rope, you can't appeal any further, the FTC can take that win and then they can go to federal court under Section 19 and ask the federal court for the additional remedy of money. It's just, that becomes a long, difficult road to travel down.

Lee: Now, what is one way the FTC responded, even before the Supreme Court decision came down?

Shaheen: So, one, well, several different ways, right. One way was the acting chairwoman, Slaughter, made clear that even though the path I just described is time consuming and lengthy, that the FTC's prepared to go that route, if need be, when they feel it's appropriate. Right? Probably, likely they won't do it every time, but when they think it's appropriate, they'll go that route. The FTC's also more aggressively tried to create rules. So they're proposing a rule for it, their Made in USA guidance, so it would go from being guidance to actually a rule, so a requirement. And they've also created a new rule-making group within the office of general counsel.

Now, why does having something as a rule matter? It's because under the FTC Statute, if you violate a rule, that becomes a civil penalty situation. So instead of asking a court for consumer redress, the FTC can seek a civil penalty for a rule violation. That amount changes over time. Currently, it's over \$40,000 per violation. Now, it's a little murky what an individual violation consists of, but I think the FTC's position would be, for example, if you advertise a product as Made in USA on a package, every package of that product sold is a separate violation. So you can see how that \$40,000-plus per violation could add up pretty quickly. And that's not impacted. The FTC civil penalty authority is not impacted by this recent Supreme Court decision.

Lee: So, with all of this mind, has the FTC said anything else about how it plans to respond?

Shaheen: Yes, they have. So, the first reaction right out of the gate was a statement by Acting Chairwoman Slaughter which read in part:

"In AMG Capital, the Supreme Court ruled favor of scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior."

So, I think it's fair to say based on that, that she was just a bit upset. Although probably, again, not surprised by the outcome. So, in addition to the steps I mentioned earlier that really preceded the decision about trying to more aggressively promulgate and enforce existing rules, the FTC has also indicated in conferences, in speeches, and so-forth, that they are also increasingly more likely to partner with state attorney generals. Now, the FTC has always brought enforcement actions, sometimes in conjunction with state attorneys general, they have a task force or multiple AGs partnering with the FTC, but they've suggested they're going to try to do that even more frequently now, mostly because, unlike the FTC, the state AGs are not encumbered in the same way and do have the ability to seek monetary redress as part of any enforcement action.

Lee: Well, knowing the FTC's position, do you anticipate that Congress will do anything to address the problem?

Shaheen: So, we'll have to see. I mean, the FTC, alright, they already got the Supreme Court to rule unanimously, so now maybe they can go one better and get Congress to act in a bipartisan manner and pass legislation here. There's already been a draft bill introduced to give the FTC back the redress authority it thought it already had, and numerous commissioners have obviously testified in favor of that. So I don't think there's any doubt that there's likely broad bipartisan support for giving the FTC this authority back. I think the only question is to what extent Congress resists the impulse to add to that. Right? Congress loves, when you have a popular bill, Congress loves to add things to it, 'cause they think they can, you know, load it up and people won't vote against it because the underlying bill is so popular. So we'll have to see whether this bill gets loaded down with other provisions, maybe other modifications or changes to the FTC authority that might not enjoy the same broad bipartisan support that could either slow this bill down or even potentially derail it.

Lee: Well, as we come to the close of our chat, can you look into your crystal ball and give us your thoughts on the likely significance of this case for companies dealing with the FTC going forward?

Shaheen: Sure. Crystal ball gazing is always a little dangerous, but that never stops lawyers from trying. I think for companies currently under investigation at the FTC, they may catch a break. Right, the FTC in the short run may not be able to do much in terms of trying to extract consumer redress from these folks, either through settlement or a court case. And we've seen some indications in cases that are currently pending in court that the FTC is backing down from requests for monetary relief. I think in the longer run, you know, you may see several things. First, as mentioned before, the FTC may look to promulgate more rules and then, in terms of the existing rules and statutes that the FTC is responsible for, if you're under investigation, staff may take a much closer look to see not only if you violated Section 5, which is the general provision about not engaging in deceptive or unfair conduct, but also whether you might be violating a rule or a statute that the FTC administers, because if they can find that kind of violation, then they can go the civil penalty route and get money from you that way. And I think in part, right, this might be a little bit of being careful what you wish for, right. It was, you know, getting the Supreme Court to rule that the FTC didn't have redress authority was kind of slaying the giant, right. Getting rid of this thorn in the side of at least, you know, some companies. But in some ways, right, civil penalties can be worse in terms of the dollar amount potentially, and then having to deal, not just with the FTC, but with the states. I mean, I once had a case where we had to negotiate with the FTC in all 50 states at once, and it was no walk in the park, right. So, companies may ultimately find themselves, you know, wishing that they had just consumer redress to deal with, and not civil penalties, and some or all of the 50 states. So, it'll be interesting to see, kind of in the long run, how this all resolves itself.

Lee: Well, this has been a great discussion, Randy. As always, we appreciate your insight.

Shaheen: Well, thank you, Leeann.

Lee: If you have any questions for Randy, his contact information is in the show notes. And if you haven't already signed up, be sure to subscribe to BakerHostetler's AD-torneys@Law newsletter and blog at bakerlaw.com.

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