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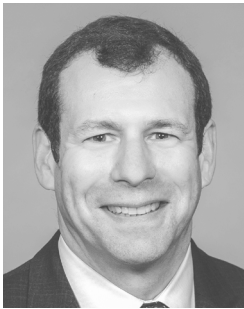
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REPORT

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THE POST-AMG LANDSCAPE: FTC ENFORCEMENT POWER UNDER SECTION 13(b)



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In *AMG Capital Management LLC v. FTC*, 141 S. Ct. 1341 (2021) the Supreme Court unanimously held that the Federal Trade Commission does not have authority under Section 13(b) of the Federal Trade Commission Act (15 U.S.C. § 53) to obtain monetary relief. The FTC, however, still has certain powers to obtain injunctive relief under Section 13(b). This article will focus on the circumstances, if any, under which the FTC can obtain injunctive relief based solely on past conduct.

Background: The rise and fall of monetary relief under Section 13(b)



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Section 13(b) of the FTC Act was enacted in 1973. For several decades following its enactment, the FTC rarely sought monetary relief. Indeed, in 2003, the FTC issued a policy statement providing that the agency did “not view monetary disgorgement or restitution as routine remedies” under Section 13(b) and would only seek such relief in “exceptional cases.” Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45821 (Aug. 4, 2003). But the 2003 Policy Statement was withdrawn in 2012. Press Release, Fed. Trade Comm’n, FTC Withdraws Agency’s Policy Statement on Monetary Remedies in Competition Cases; Will Rely on Existing Law (July 31, 2012), <https://www.ftc.gov/news-events/press-releases/2012/07/ftc-withdraws-agencys-policy-statement-monetary-remedies> [<https://perma.cc/YKM5-RUA5>]. Since then, the FTC has

recovered well over \$11 billion in monetary relief. See Fed. Trade Comm’n, *FTC Refunds to Consumers*, TABLEAU (July 30, 2021), https://public.tableau.com/app/profile/federal.trade.commission/viz/Refunds_15797958402020/RefundsbyCase [<https://perma.cc/AZ99-M838>]. In light of *AMG*, however, the FTC has acknowledged in the vast majority of its pending Section 13(b) cases that monetary relief is not available to it. See, e.g., *FTC v. Am. Future Sys., Inc.*, No. 20-2266, 2021 U.S. Dist. LEXIS 140330, *1 n.1 (E.D. Pa. July 26, 2021); *FTC v. Elec. Payment Solutions of Am., Inc.*, No. CV-17-02535-PHX-SMM, 2021 U.S. Dist. LEXIS 155081, *21, *47 (D. Ariz. Aug. 11, 2021); Lauren Margolies et al., *Post-AMG Scorecard (Updated): Different Roads Forward for the FTC in Pending Cases*, JD SUPRA (June 18, 2021), <https://www.jdsupra.com/legalnews/post-amg-scorecard-updated-different-9567684/> [<https://perma.cc/92P8-R98M>]. (However, there is legislation pending in Congress that would grant the FTC authority to seek monetary relief under Section 13(b). See H.R. 2668, which was passed by the US House of Representatives on July 20, 2021.)

Injunctive Relief under Section 13(b)

Section 13(b) authorizes the FTC to seek injunctive only where a defendant “is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission.” 15 U.S.C. § 53(b)(1). It is well established that injunctive relief cannot be based solely on past conduct. Injunctions are only authorized under the statute when there is “ongoing or imminent illegal conduct.” *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147, 155 (3d Cir. 2019). Indeed, in *AMG* the Supreme Court recognized that the FTC Act “focuses upon relief that is prospective, not retrospective,” and it noted “the words ‘is violating’ and ‘is about to violate’ (not ‘has violated’) setting forth when the Commission may request injunctive relief.” *AMG*, 141 S. Ct. at 1348 (2021); see also *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 774 (7th Cir. 2019) (“Section

13(b) serves a . . . forward-facing role: enjoining ongoing and imminent future violations.”); *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985) (holding that Section 13(b) “contemplate[s] ongoing or future violations” and thus “an injunction will issue only if the wrongs are ongoing or likely to recur”). Section 13(b)’s focus on ongoing or imminent conduct requires the FTC to come forward with “some evidence that the defendant ‘is’ committing or ‘is about to’ commit a[] violation” of the FTC Act before it may obtain injunctive relief. *Shire*, 917 F.3d at 156.

While it is statutorily clear that the FTC may only obtain injunctive relief when a defendant “is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission,” there is disagreement among courts regarding the circumstances under which past conduct will meet the threshold for injunctive relief. On the one hand, the Ninth Circuit, for example, has long relied on a “cognizable danger” standard for such injunctive relief. *See, e.g., Evans Prods. Co.*, 775 F.2d at 1087. Under this standard, injunctive relief is available if there is “some cognizable danger of recurrent violation.” *See, e.g., id.*; *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). On the other hand, the Third Circuit’s recent decision in *Shire* announced a higher standard for the FTC. In *Shire*, the Third Circuit held that Section 13(b)’s “about to violate” language requires the FTC to establish “impending conduct” and not a “mere suspicion that such conduct may yet occur.” *Shire*, 917 F.3d at 156.

The impact of the differing standards for injunctive relief used by, for example, the Ninth Circuit and Third Circuit is currently playing out in various district courts across the country. For example, the United States District Court for the District of Columbia recently partially granted a motion to dismiss touching on this issue in *FTC v. Facebook, Inc.*, ___ F.Supp. 3d ___, 2021 WL 2643627 (D.D.C. June 28, 2021). In *Facebook*, the FTC filed an antitrust action against Facebook challenging Facebook’s “policies that prevent[ed] interoperability between Facebook and certain other apps that it saw as threats, thereby impeding their growth into viable competitors.” *Facebook* at *1. In addition to other remedies, the FTC sought injunctive relief. *Id.* Facebook, however, had discontinued the practices in question in 2013. *Id.* In partially granting Facebook’s motion to dismiss, the district court held that even if such conduct by Facebook were actionable, “it occurred nearly eight years ago, rendering an injunction under Section 13(b) unavailable as a matter of law.” *Id.* at *8.

Conversely, in *FTC v. Neora LLC*, No. 3:20-cv-1979 (N.D. Tex. Aug. 2, 2021), 2021 WL 3398153, the United States District Court for the Northern District of Texas recently applied a more lenient standard to the FTC’s claim for injunctive relief. In *Neora*, the defendant argued that as a matter of law the FTC was not entitled to injunctive relief for conduct that had ceased six years earlier. In denying the defendant’s motion for judgment on the pleadings, the district court ruled that the FTC need only establish that the defendant’s past conduct gives rise “to a ‘fair inference of a reasonable expectation of continued violations’ absent restraint.” *Neora* at 6 (citing *Federal Trade Commission v. Southwest Sunsites, Inc.*, 665 F.2d 711, 723 (5th Cir. 1982)). The court went on to rule that “past conduct can give rise to a reasonable inference of current or future violations, either in conjunction with other circumstances or where the past violations are extensive.” *Neora* at 6.

While it is always difficult to litigate against the FTC, the *AMG* decision makes clear that the FTC’s authority to pursue what it believes are violations under the FTC Act is limited. For more than a decade the FTC successfully fought off efforts by defendants to curtail its perceived right to pursue monetary relief under Section 13(b), notwithstanding that its overreach was so blatant it culminated in a unanimous Supreme Court curtailing future violations of its authority. It appears the next round of challenges to the FTC’s overreach of authority under 13(b) will focus on the FTC’s use of 13(b) to obtain permanent injunctions against defendants based solely on historical conduct. Given the clear language of 13(b) itself, which expressly applies only to current and future conduct and the pending conflict between the circuits, this will likely be the next opportunity for the Supreme Court to rein in the FTC and preclude it from exercising powers Congress has not authorized.

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