# AMG Capital Management, LLC v. Federal Trade Commission: No Money for You! Supreme Court Holds FTC Cannot Obtain Equitable Monetary Relief Without First Going Through Its Administrative Adjudication Process

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In *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021) ("*AMG Capital*"), the Supreme Court held that the Federal Trade Commission (FTC) cannot obtain equitable monetary relief, such as disgorgement or restitution, when it pursues district court litigation directly under § 13(b) of the Federal Trade Commission Act (FTC Act or the Act). Rather, to obtain such relief, FTC must first follow its administrative adjudication procedures under § 5 of the Act.

## WHY IT MADE THE LIST

*AMG Capital* directly applies to several categories of Food and Drug Administration (FDA)-regulated entities because § 12 of the FTC Act, 15 U.S.C. § 52, makes it unlawful to disseminate false advertising about cosmetics, drugs, food, and medical devices. Further, the Court's analysis and reasoning appear to apply with equal force to civil litigation brought by the FDA (through the Department of Justice) under § 302 of the Federal Food, Drug, and Cosmetics Act (FDCA), 21 U.S.C. § 332.

## DISCUSSION

### *Question Presented*

Justice Breyer wrote the opinion for the unanimous Court. He began by noting that § 13(b) of the Act authorizes FTC to obtain, "in proper cases," 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. He then stated the question presented as whether this statutory language authorizes FTC to seek, and a court to award, equitable monetary relief such as disgorgement or restitution.

### *Factual and Procedural Background*

Scott Tucker controlled several companies in the short-term payday lending business. When the companies explained the terms of their loans, they misled many customers. The companies' written explanations appeared to say that customers could repay a loan by making a single payment. When doing so, a person who, for example,

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had borrowed $300 would owe an extra $90, for a total of $390. In fine print, however, the loan agreements said that the loans would automatically renew unless the customer took affirmative steps to opt out. Thus, unless the customer who borrowed $300 was aware of the fine print and actively prevented the loan's automatic renewal, he or she could end up having to pay $975, not $390. Between 2008 and 2012, Tucker's businesses made more than 5 million payday loans, resulting in more than $1.3 billion in deceptive charges.

In 2012, FTC filed suit and claimed that Tucker and his companies were engaging in "unfair or deceptive acts or practices in or affecting commerce," in violation of § 5(a) of the Act, 15 U.S.C. § 45(a)(1). FTC did not first use its own administrative proceedings to assert that Tucker's practices were likely to mislead consumers. Rather, it filed a complaint against Tucker directly in federal court, pursuant to § 13(b), and asked the court to issue a permanent injunction to prevent Tucker from committing future violations of the Act. Relying on the same provision, FTC also asked the court to order monetary relief, in particular, disgorgement and restitution. The district court granted a motion for summary judgment filed by FTC, granted its request for an injunction, and directed Tucker to pay $1.27 billion in disgorgement and restitution.

Congress added § 13(b) to the FTC Act in 1973. Section 13(b) permits FTC to proceed directly to court (prior to issuing a cease and desist order) to obtain a "temporary restraining order or a preliminary injunction," and also allows FTC to obtain a court-ordered permanent injunction. In the same legislation, Congress also amended § 5(l) of the Act to authorize district courts to award civil penalties against respondents who violate final cease and desist orders and to "grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission." Two years later, Congress authorized district courts to grant "such relief as the court finds necessary to redress injury to consumers," including through the "refund of money or return of property." Congress specified, however, that the consumer redress could be sought only against those who have "engage[d] in any unfair or deceptive act or practice . . . with respect to which the Commission has issued a final cease and desist order which is applicable to such person."

### *Court's Analysis*

Justice Breyer wrote that several considerations convinced the Court that § 13(b)'s "permanent injunction" language does not authorize FTC directly to obtain monetary relief. First, the language refers only to injunctions. It says, "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent *injunction*." It does not mention monetary relief. Further, the language and structure of § 13(b), taken as a whole, focuses upon relief that is prospective, not retrospective. Those words are buried in a lengthy provision that focuses upon purely injunctive, not monetary, relief.

Moreover, the Court found that the structure of the Act beyond § 13(b) confirms this conclusion. In §§ 5(l) and 19, Congress gave district courts the authority to impose limited monetary penalties and to award monetary relief in cases where FTC has *issued cease and desist orders*, i.e., where FTC has engaged in administrative proceedings. Because Congress explicitly provided in these provisions for "other and further equitable relief," 15 U. S. C. § 45(l), and for the "refund of money or return of property," § 57b(b), it likely did not intend for § 13(b)'s narrower "permanent injunction" language to have similarly broad scope.

The Court also found that to read § 13(b) to mean what it says, as authorizing injunctive but not monetary relief, produces a coherent enforcement scheme. FTC may obtain monetary relief by invoking its administrative procedures first and then § 19's redress provisions (which include limitations). In addition, FTC 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, FTC's broad reading of § 13(b) would allow it to use that section as a substitute for §§ 5 and 19. Referencing the venerable maxim that "Congress does not hide elephants in mouseholes," the Court concluded that could not have been Congress' intent.

In short, based on the language of § 13(b) itself, and the overall language and structure of the FTC Act, the Court unanimously concluded that § 13(b) does not authorize FTC to recover equitable monetary relief, such as disgorgement and restitution. Rather, if FTC wants such relief, it must first complete its administrative adjudication proceedings and issue a cease and desist order and then seek enforcement in a district court.

It is now time to consider how *AMG Capital* applies to FDA. Section 302 of the FDCA, 21 U.S.C. § 332, states: "The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown to restrain violations of section 301 of this title, except paragraphs (h), (i), and (j)." As most FDLI members are likely aware, § 301 of the FDCA includes a lengthy list of prohibited acts. In other words, just as § 13(b) of the FTC Act authorizes FTC to seek permanent injunctions, § 302 of the FDCA authorizes the FDA to seek injunctions "to restrain violations of section 301." And just as § 13(b) of the FTC Act is silent about monetary relief, equitable or otherwise, so is § 302 of the FDCA. So far, the applicability of *AMG Capital* to FDA is clear.

*AMG Capital*'s application to FDA becomes even clearer when one considers other provisions of the FDCA. Section 303 of the FDCA includes several subsections that authorize a court to impose criminal fines or civil penalties for violations of various provisions. Section 518 of the FDCA authorizes FDA to order refunds or reimbursements to people who have been damaged by a recall of a medical device. Just as the Court found in *AMG Capital* that the fact Congress explicitly provided monetary relief in other sections of the FTC Act meant that it likely did not intend for § 13(b)'s narrower "permanent injunction" language to have similarly broad scope, the Court would likely find that the FDCA's express provision of monetary relief in §§ 303 and 518 means that § 302 does not authorize such relief.

Overall, the conclusion that *AMG Capital* precludes FDA from seeking monetary relief, equitable or otherwise, under § 302 is compelling.

## IMPACT

The author's research has not uncovered any express and official public reaction to *AMG Capital* by FDA. It seems likely FDA is less-than-thrilled by it because, beginning in the 1990s, FDA and DOJ began pursuing disgorgement and/or restitution in certain consent decrees. The agencies argued that disgorgement and restitution are equitable remedies that may be imposed in equitable proceedings like injunctions. Over the years, they have had considerable success, including some nine-figure recoveries. They were also successful in persuading some courts of appeals to affirm awards of disgorgement and restitution. Going forward, they may no longer be able to achieve these results, reducing their own recoveries and those for consumers. In some

cases, FDA and DOJ may be able to continue recovering monetary relief for the government and consumers by joining claims under the FDCA with claims under other laws, such as the False Claims Act.

In appropriate cases, the agencies may be able to pursue monetary relief under the various provisions of § 303 of the FDCA, generally discussed above. For the criminal fines made available under § 303, the agencies will have to satisfy the highest burden of proof, beyond a reasonable doubt, rather that the preponderance of the evidence standard applicable in civil matters. Presumably, that will lessen the number of such cases they can pursue under that section. Further, both the criminal fines and civil penalties available under § 303 are subject to various limitations and may not compare to disgorgement or restitution. Although § 518 provides for reimbursement to certain parties in the distribution chain, including consumers, it is limited to medical devices.

In sum, *AMG Capital* is likely to hamper severely FDA's ability to recover equitable monetary relief, specifically disgorgement and restitution, for violations of the FDCA, absent congressional action. Congress is certainly aware of *AMG Capital* given that the Senate Commerce Committee held a hearing the day before the Supreme Court's decision was handed down during which it discussed the case and its potential impact on FTC's ability to obtain monetary relief for consumers. After the decision, remedial legislation has been considered, but so far not adopted. It is anyone's guess if and when Congress will be able to agree on amendments to the FTC Act, FDCA, and potentially other statutes authorizing litigation by other federal agencies, that address the issue.