ABA Antitrust Spring Meeting: John Villafranco On Monetary Redress and FTC Enforcement Post-AMG

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Q: It has been nearly a year since the Supreme Court's decision in *AMG Capital Management, LLC v. FTC* foreclosed the FTC's ability to pursue monetary remedies under Section 13(b) of the FTC Act. How has AMG affected the FTC's enforcement program, particularly in consumer protection cases?

A: As an initial matter, it's Important to emphasize that the Supreme Court did not take any authority away from the FTC; it concluded 9-0 that the FTC did not have the authority in the first place. Justice Breyer put it this way: Section 13(b) produces a "coherent enforcement scheme. The Commission may obtain monetary relief by first invoking its administrative procedures and then Section 19's redress provisions; it can use Section 13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief."

The inability to obtain equitable monetary relief under Section 13(b) has taken away the FTC's weapon of choice, but it has not left it without other means to carry the attack, and it continues to push the boundaries of its authority. Chair Khan has made clear that it will litigate on principle, and that often means without regard for litigation risk. In many ways, the agency is less predictable and, from a respondent's or defendant's perspective, dangerous. I had expected more restraint, given the AMG decision.

During oral argument, Justice Kavanaugh commented that, as former Executive Branch employee, he understands how "with good intentions the agency pushes the envelope and stretches the statutory language to do the good or prevent the bad – the problem is it results in a transfer of power from Congress to the Executive Branch."

I heard something similar from Commissioner Wilson, in her concurring opinion in Resident Home. There, she said that AMG "should have been a wake-up call, a reminder to the Commission that, no matter how egregious the conduct or righteous our cause, the Commission is not entitled to go beyond the bounds of what the law permits." Despite these warnings, in response to AMG, continues to explore the frontiers of its authority.

This means that the FTC has assumed an aggressive adversarial position, using all means at its disposal in an attempt to redress what it perceives to be consumer injury, even if it means advancing a litigation position that is ultimately unsuccessful. In short, I doubt that companies currently adverse to the FTC consider the agency to be compromised to any significant extent – in many ways, it is emboldened.

Q: Last Spring, many practitioners speculated that the FTC would shift strategies in

existing cases and new matters by tying their requests for relief to different statutory provisions like ROSCA or TCPA or focus enforcement activity on statutory violations that provide for monetary relief. Has this happened?

A: One of the first cases was FTC v. Cardiff. There, the FTC attempted to pursue monetary relief post-AMG by way of a different statute: The Restore Online Shoppers' Confidence Act (ROSCA). While the court agreed with the FTC that it could have pursued monetary relief under ROSCA, it held the FTC had waived the right to request such relief by not including the ROSCA theory of recovery in its Rule 26 disclosures, and had only disclosed its ROSCA expert after discovery closed (and, conveniently, after AMG was decided).

While the defendants in Cardiff were no doubt pleased with the result, what is really important here is the ROSCA allegation. This case signaled that the FTC would stretch for any plausible authority that will allow the agency to pursue monetary relief. Could be ROSCA, TCPA, HBNR, etc.

And it is exactly what they did in the MoviePass settlement, which was the first time the Commission alleged a violation of ROSCA when the "undisclosed material terms do not relate specifically to the negative option feature but, instead, to the underlying good or service marketed through the feature."

In his MoviePass dissent, Commissioner Phillips commented that the Commission's decision to apply ROSCA broadly and expand its reach "comes just weeks after the Supreme Court's decision in AMG" but the FTC's "loss of authority under one statute does not somehow create authority elsewhere."

Interestingly, the Cardiff case recently settled. In its press release, the FTC pulled no punches, expressly stating that, despite having presented evidence that consumers lost $18.2 million, no money could be returned to consumers, because of last year's ruling in AMG Capital. A message that seemed intended for Congress.

Q: What can we expect with regard to Section 19 actions?

A: There is very little law that helps us understand the contours of Section 19 for a simple reason: the FTC has not historically relied on Section 19 to obtain monetary relief – they have relied almost exclusively on Section 13(b). That is all about to change, and we have already seen some interesting developments.

For example, in FleetCor [Disclosure: I am counsel to the CEO in FleeetCor], with discovery complete in federal court litigation and summary judgment motions on Judge Tottenberg's desk, the Commission voted to file an administrative complaint under Section 19, while moving to stay or dismiss without prejudice the federal court complaint. The FTC intended to then file for summary judgment in the administrative proceeding, which would be heard by virtually the same Commission that voted out the complaint in the first place. They would then pursue redress under Section 19.

Judge Tottenberg denied the FTC's request, stating that "under the totality of the circumstances, the most equitable course is to promptly move forward with adjudicating the merits in the proceeding." Despite the FTC's efforts to put the case on an administrative fast-track, where it would hope to establish liability and then pursue redress under Section 19, the case remains in federal court, with trial scheduled to begin first week of June.

There is also the issue of what measure of damages is appropriate under Section 19, with disagreement among Commissioners on display in statements issued in Resident Home: In simple terms, Chair Khan, along with Commissioners Chopra and Slaughter, asserted that Section 19

expressly authorizes payment of redress and damages, including consequential damages to consumers and "honest businesses that lose out on sales." The Commission did not deem proof of injury to be a necessary predicate for monetary penalties.

Commissioners Wilson and Phillips disagreed with the majority's position. In dissent, the two Commissioners contended that Section 19 does not permit the Commission to accept monetary remedies in an administrative settlement. More specifically, according to Commissioners Wilson and Phillips, the settlement amount "exceeds any injury suffered by those consumers who saw the deceptive statement and purchased a DreamCloud mattress or any reasonable estimate of damages." The dissenting commissioners highlighted the absence of evidence of injury to "other persons," rendering the payment a penalty or disgorgement of ill-gotten gains, which the Commission has no authority to obtain under the applicable statute.

Another Section 19 issue that I expect will be hotly contested concerns the Section 19 "dishonest or fraudulent" standard, more specifically, whether conduct could be "dishonest" without being "fraudulent," and if so, how would "dishonest" be defined. Defendants will argue that the terms should be read together to set a single standard, and there is support for that contention. In Figgie, the Ninth Circuit described a fraudulent scheme – the marketing of heat detectors as equal in efficacy to smoke detectors – in order to define "dishonest," and goes on to state that such conduct would be either "dishonest or fraudulent."

Similarly, Macmillian and Turner both hold that "fraudulent or dishonest" conduct must, at a minimum, fall "within the scope of the activities which would be deemed fraudulent for purposes of the mail fraud statute" and must be "calculated to deceive." The case law is consistent with the dictionary definitions of dishonest conduct, which are defined interchangeably with "fraudulent. This strongly suggests that, for purposes of Section 19, the inclusion of "dishonest" is not intended to establish a separate lower standard, but is meant to be read in conjunction and interchangeably with the term "fraudulent."

Finally, with regard to Section 19, the Intuit (Turbo Tax) filing last week is of note. There, the FTC is pursuing its case in under Section 19, while simultaneously seeking a temporary restraining order (TRO) under Section 13(b) – exactly the "coherent enforcement scheme" Justice Breyer and his Supreme Court colleagues believed Congress intended. It will be interesting to see how the court rules on the motion for a TRO, given that the FTC's filing was almost certainly pre-dated by a lengthy Part 2 investigation, which may cause the court to question whether harm is actually imminent, thus justifying extraordinary relief.

Q: When the Supreme Court determined that that the FTC didn't have authority to obtain equitable monetary relief under Section 13(b), many expected Congress to implement a fix. Why hasn't this occurred?

A: There was a whole lot of momentum in Congress immediately after AMG, with Commissioners beating the drum on the Hill and Democrats empowered, while Republicans were not paying close attention. Many, including me, thought that legislation would come quickly, providing the FTC with even more authority under Section 13(b).

It seemed so certain that Congress would act, in the aftermath of AMG, that a principal question was whether Congress would make the amendment retroactive -- allow for monetary remedies against companies whose alleged wrongful actions pre-dated the statutory change? This was a big deal for the defendants in the approximately numerous pending federal court cases that alleged Section 13(b) violations.

We even saw the Commission in Quincy (disclosure, our case) unsuccessfully urge a judge Louis Stanton in the SDNY to exercise "discretion" and not rule on motions to dismiss pending what Complaint Counsel hoped would be passage of a bill by Congress that would authorize the FTC to obtain monetary relief to redress consumer injury.

But the Republicans woke up and, like so many issues in Congress, nothing is moving on 13(b) reform now. Many Republicans are asking why a 13(b) fix is even necessary, given the muscularity and dexterity shown by this Commission in seeking other ways to pursue monetary remedies by relying on existing statutes, coordinating with State AGs, and loudly proclaiming its Penalty Offense Authority through the issuance of nearly 2,000 notices to U.S. businesses.

Q: Many practitioners speculated that the FTC will engage in more rulemaking under Section 18, which would give the FTC the ability to seek redress, damages and penalties. The FTC indicated in its 2022 Statement of Priorities that rulemaking will be high priority for the FTC with no Congressional fix in sight. What is the outlook?

A: The FTC's July rule changes stripped away some steps that had been added to the statutory requirements – including the need for a written staff report and provisions allowing the presiding officer to compel in-person attendance and production of documents and written answers to questions. Even without these added steps, however, Mag-Moss remains a long road, especially for (1) complex rules with dozens of mandates, each of which must be shown to be unfair or deceptive, as well as prevalent and (2) controversial matters, which are likely to prompt multiple requests for hearings, cross examinations, rebuttals, exemptions, and court review.

Q: Do you expect the FTC to rely on its recently issued Penalty Offense Authority notice letters in an enforcement matter?

A: I can't imagine the FTC would start down this road and issue nearly 2,000 notices and not test this authority. I expect that many of these notices were precursors to Part 2 investigations, which are currently underway. My guess is that they are carefully considering their targets right now, looking for the lowest hanging fruit. Whoever that may be, they will not be without available defenses. We would expect these companies to allege a lack of due process. FTC case decisions are not written like a rule, and facts are contested and often complex. One would expect subsequent defendants to distinguish the underlying case – some dating back to the 1940s! -- and claim that it did not give them adequate notice that their activity was also unlawful.

Also, keep in mind that, unlike 13(b) actions, which the FTC can bring on its own, it will have to persuade DOJ to bring civil penalty cases. And as we know, there is not always agreement between the FTC and DOJ.

In practical terms, however, these notices likely have their greatest value in consent negotiations. The FTC will dangle the sword of the synopses and astronomical penalties ($43,280 for every time a false or deceptive claim is made) over everyone who received the notice and whose claims vaguely resemble the generic nuggets the Commission delivered. But I do think that we can expect that these efforts could generate more Hopkins and AMG-like decisions if the Commission attempts to press its position in the courts.

Q: Many consumer protection lawyers also speculated that the FTC would increase coordination with state attorneys general. Has this happened?

A: We saw this in Frontier, where the Commission filed a complaint in California federal court along

with Attorneys General from six states. That did not work out too well, at least in terms of FTC/multi-state cooperation, as the claims made by five states other than California based on pendent jurisdiction were dismissed. It now appears that that case is headed for settlement. In mid-March, the court entered an order to continue the case pending the Commission's review of a proposed settlement.

Q: Final thoughts?

A: There is an expression, understood to have originated as a Chinese curse, "may you live in interesting times." Well, from the perspective of FTC enforcement, we are doing just that.