

# Amici Line Up Behind the FTC: Warn of Doom if the Supreme Court Rules Against the Commission in AMG Capital Management

John E. Villafranco

December 11, 2020



## Section 13 (b)log



As the parties prepare for oral argument before the Supreme Court on January 13 in *AMG Capital Management LLC et al. v. FTC*, case number [19-508](#), amicus briefs in support of the Commission's position have been filed this week, with most warning of dire consequences for consumers and competition if the case does not break the Commission's way:

1. The National Consumer Law Center, UC Berkeley Center for Consumer Law and Economic Justice, Center for Consumer Law and Education, Housing Clinic of Jerome N. Frank Legal Services Organization at Yale Law School, and Professor Craig Cowie

"Absent a 'clear and valid legislative command' to the contrary, Congress does not impliedly impinge on the equitable powers of a court...Consumer redress through Section 13(b) actions, as envisioned by Congress and provided by the court, continues to protect American consumers and promote a fair marketplace. Stripping the courts of their equitable power to provide redress would create perverse market forces that would expose vulnerable populations to fraud while putting lawful market actors at a competitive disadvantage." (3-4)

"Incomplete justice against deceptive practices only serves to mar the reputation of legitimate members of the free market and perpetuate harm against the American public." (28)

2. Public Citizen

"If, as petitioners contend, federal courts lack the authority to award complete relief in a § 13 action, and may only halt unlawful conduct prospectively, scam artists and other wrongdoers will have a green light to engage in prohibited conduct that harms consumers, secure in the knowledge that they are likely to retain the economic fruits of their unlawful ventures. The end result will be to

increase the financial harms experienced by American consumers, while curtailing the relief that consumers may obtain after unlawful actors are caught.” (2)

### 3. 29 State AGs

“Stripping the FTC of its authority to seek restitution under Section 13(b) would weaken its efforts to combat unfair and deceptive practices, which, in turn, would frustrate federal-state collaboration and require States to divert resources away from other consumer-protection efforts to perform the duties previously fulfilled by the FTC.” (2)

“Without such authority [to return ill-gotten gains to victims], consumers and businesses in the amici States will be deprived of what is rightfully theirs, wrongdoers will be allowed to profit from their illegal conduct, and markets will become less fair and competitive.” (22)

### 4. Open Markets Institute

“Besides overthrowing the established meaning of an injunction and rewriting the statutory text, the arguments of AMG and its *amici* would also encourage corporate lawbreaking at the expense of consumers, workers, rivals, and independent businesses.” (2)

### 5. Truth in Advertising, Inc.

“The Section 13(b) regime petitioners urge the Court to tear down also harnesses another historic hallmark of equity jurisdiction – its focus on making relief effectual, a vital priority where defendants have the means and inclination to dissipate assets and frustrate judicial remedies.” (5)

“This Court should not credit petitioners’ and *amici*’s assurances – based on the continued availability of parallel state-law remedies – that imposing their ‘narrow construction’ of Section 13(b) would not adversely affect consumer protection. That claim ignores the central lesson of experience under consumer protection law: Remedies that are expansive on paper often prove ineffectual in practice. It takes nothing away from state enforcers to recognize that their efforts are not substitutes for those of the Commission, which has vast expertise, national jurisdiction, and global reach and is unimpeded by structural and legal complexities that challenge state-level efforts to address nationwide and global misbehavior.” (7)

“Hundreds of pages of briefing cannot obscure the glaring reality that a rule giving the worst wrongdoers an absolute right to retain funds they took from unwitting victims will make consumers and the economy more vulnerable to harm.” (32)

### 6. The American Antitrust Institute

“the goals of U.S. antitrust law will be significantly impaired if the Federal Trade Commission is unable to prevent unfair methods of competition by seeking disgorgement in appropriate antitrust cases under Section 13(b) of the Federal Trade Commission Act.” (1)

“If the FTC cannot seek disgorgement in those cases, anticompetitive conduct will continue to pay. And the Commission will be hard-pressed to prevent it.” (3)

“If Section 13(b) prohibited traditional equitable remedies, the agency’s – and courts’ – only option for ensuring that a company will be able to divest its illegally-acquired assets would be to block a merger or acquisition outright. And so the agency would always be forced to forego a more targeted remedy – with less impact on the regulated business – in favor of the most drastic alternative, even when the Commission itself believes it is unnecessary to do so.” (24)

## 7. 43 Professors of Remedies, Restitution, Antitrust, and Intellectual Property Law

“An overly rigid conception of the statutory injunction power as including only a command to act or not act, but not the adjunct authority to order an accounting of profits or restitution of ill-gotten gains, belies the historic meanings and uses of injunctive authority. Such a strict and formalistic view ignores the long history of injunctions and incident authority also to order restitution, even when the statute provides for injunctions without explicitly listing other remedies.” (3)

“Eliminating the ability of courts to award restitution in §13(b) cases would cause serious harm in many cases. It would unjustly enrich defendants, leave wrongdoing under-deterred, and fail to carry out the very purposes of the FTC Act – protecting against exactly this type of wrongful profiting from consumers.” (26)

8. And finally, a group of nine former FTC officials, all of whom helped advance the FTC’s consumer fraud program through aggressive use of Section 13(b) authority at various times between 1995 and 2020. These nine officials include one former commissioner (Mozelle W. Thompson, 1997-2004); three former Directors of the Bureau of Consumer Protection (the legendary Jodie Bernstein, 1995-2001, David C. Vladeck, 2009-2012, and Jessica Rich 2013-2017); and five other former prominent FTC consumer protection attorneys (Eileen Harrington, Mary K. Engle, C. Lee Peeler, Teresa Schwartz, and Joel Winston).

“Make no mistake, Section 13(b) remains the FTC’s most important enforcement tool” (3)

“Unless Section 13(b) authorizes equitable remedies, including the appointment of receivers, accountings, and the imposition of asset freezes, the FTC would have little power to prevent asset dissipation and consumer redress would often be a fantasy.” (4)

---

[Sign up for our Ad Law News and Views newsletter](#) to get more on 13(b) and to stay current on advertising law and privacy law matters.

