FTC Authority Under Siege: Monetary and Injunctive Relief at Risk in Courts as Congress Contemplates a Response

Christopher Olsen and Stephen Schultze

A key source of the Federal Trade Commission's ability to obtain monetary relief in district court is in jeopardy. The Supreme Court recently heard arguments in *AMG Capital Management, LLC v. FTC*, a challenge to the FTC's authority to obtain equitable monetary relief under Section 13(b) of the FTC Act.[1] The decision could have broad implications for the FTC's enforcement program because 13(b) is by far the Commission's most frequently used mechanism for seeking monetary relief in consumer protection cases—especially in those alleging fraud.[2] At oral argument, the Supreme Court seemed inclined to limit the relief available under 13(b) to non-monetary injunctions.

At the same time, a complementary challenge to FTC authority is brewing in lower courts. One circuit has adopted a limited construction of the Commission's ability to obtain even injunctive relief, finding an injunction appropriate under 13(b) only if the alleged violation is ongoing or "impending."[3] If adopted more widely, this view could impact many FTC enforcement actions outside of the hard-core fraud area, given that non-fraud targets of FTC investigations often tend to cure their alleged violations while the investigation is pending.

Together these challenges carry the potential to substantially affect FTC enforcement in the years to come. They may also drive a legislative response.

Supreme Court Appears Skeptical About 13(b) Monetary Relief

For decades, the FTC has used its litigating authority under Section 13(b) of the FTC Act to obtain monetary awards of restitution or disgorgement for violations of the FTC Act. Congress added Section 13(b) in 1973 as part of the Trans-Alaska Pipeline Authorization Act.[4] It provides:

> Whenever the Commission has reason to believe—
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> (1) that any person, partnership, or corporation is violating, or is about to violate any provision of law enforced by the Federal Trade Commission, and
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> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review . . . would be in the interest of the public— The Commission . . . may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest . . . a temporary restraining order

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[1] AMG Capital Mgmt., LLC v. FTC, No. 19-508 (U.S. argued Jan. 13, 2021), https://www.c-span.org/video/?506850-1.

[2] The FTC has likewise used Section 13(b) extensively in enforcement actions for antitrust violations. *See* Gerald A. Stein, *Understanding the FTC's Monetary Equitable Remedies Under Section 13(B) for Antitrust Violations*, Antitrust, Fall 2019, at 59.

[3] FTC v. Shire Viropharma, 917 F.3d 147, 156 (3d Cir. 2019).

[4] For a comprehensive treatment of that history, see J. Howard Beales III & Timothy J. Muris. *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1 (2013). *See also* J. Howard Beales III, Benjamin M. Mundel & Timothy J. Muris, *Section 13(b) of the FTC Act at the Supreme Court: The Middle Ground* 1, Antitrust Source (Dec. 2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/dec-2020/v20_i3_dec2020_beales.pdf.

The FTC has argued, and most circuits have historically agreed, that 13(b)'s authorization of injunctive relief also authorizes courts to award all *forms of relief generally available in equity, including restitution or disgorgement.*

> or a preliminary injunction may be granted without bond . . . Provided further, that in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.[5]

The FTC has relied on the "provided further . . . permanent injunction" language to obtain relief directly in district court, independent of its administrative proceeding authority. The FTC has argued, and most circuits have historically agreed, that 13(b)'s authorization of injunctive relief also authorizes courts to award *all* forms of relief generally available in equity, including restitution or disgorgement.[6] In allowing this relief, many courts have pointed to the Supreme Court's decision in *Porter v. Warner Holding Co.*[7] There, the Court concluded that disgorgement was available as a remedy for a violation of the Emergency Price Control Act of 1942, which authorized an agency to seek a "permanent or temporary injunction, restraining order, or other order."[8] In doing so, the Court adopted an expansive view of a court's authority to award equitable relief: "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."[9] The Court continued, "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."[10]

Scholars have debated whether 13(b) can or should be used broadly to obtain monetary relief. Whereas the statute in *Porter* conferred authority to issue any "other order," 13(b) does not.[11] Tim Muris and Howard Beales have characterized the use of 13(b) for monetary remedies as a "stretch," but argued that it was warranted in fraud cases.[12] They urged that fraud cases are the "proper cases" referred to by 13(b), and that the legislative history of FTC Act revisions indicates that monetary relief under 13(b) is allowed whenever it applies.[13] David Vladeck contended that *Porter* affirms courts' broad inherent jurisdiction to wield all of their inherent equitable powers, including monetary relief.[14] He explained that, moreover, subsequent legislative history and text appears to reaffirm or ratify the notion that 13(b) provides for consumer redress.[15] He also argued that sections of the FTC Act that expressly provide for monetary relief are merely additive to Section 13(b)'s authorizations.[16]

The Tide Turns. Until *AMG*, the federal circuit courts of appeal seemed to agree with the more expansive reading of 13(b). They applied *Porter* in 13(b) cases, and granted equitable monetary relief.[17] But while the Ninth Circuit panel in *AMG* upheld the trial court's monetary relief on the ground that it was bound by circuit precedent, Judge O'Scannlain, joined by Judge Bea, specially

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5 15 U.S.C. § 53(b).

6 *See, e.g.*, FTC v. Commerce Planet, Inc., 815 F.3d 593, 598 (9th Cir. 2016); FTC v. Ross, 743 F.3d 886, 890–92 (4th Cir. 2014); FTC v. Bronson Partners, LLC, 654 F.3d 359, 365 (2d Cir. 2011); FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 15 (1st Cir. 2010); FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1314–15 (8th Cir. 1991); FTC v. United States Oil & Gas Corp., 748 F.2d 1431, 1432–34 (11th Cir. 1984).

7 Porter v. Warner Holding Co., 328 U.S. 395 (1946).

8 *Id.* at 399.

9 *Id.* at 398.

10 *Id.*

11 Nevertheless, the Court in *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291 (1960), appeared to make clear that the basis for its holding in *Porter* did not depend on the "other order" language of the statute.

12 *See* Beales & Muris, *supra* note 4, at 3.

13 *See id.* at 5, 21.

14 David Vladeck, *Time To Stop Digging: Failed Attacks on FTC Authority To Obtain Consumer Redress*, Antitrust, Fall 2016, at 89.

15 *Id.* at 93–94.

16 *Id.* at 91–93.

17 *See* cases cited *supra* note 6.

concurred to urge the court to rehear the case en banc.[18] In Judge O'Scannlain's view, 13(b)'s reference to "a permanent injunction" did not imply that courts acting under 13(b) had the authority to impose other equitable relief like disgorgement or restitution.[19] Rather, the "text and structure" of the FTC Act made clear that 13(b) was limited to injunctions.[20] For Judge O'Scannlain, the textual interpretation that "injunction" means only "injunction" made sense in the context of the "overall statutory scheme."[21] He noted that whereas Section 13(b) empowers the FTC to stop imminent or ongoing violations, Section 19 authorizes the Commission to seek backward-looking relief that "the court finds necessary to redress injury to consumers."[22]

The Ninth Circuit declined to rehear the case en banc, but soon the Seventh Circuit joined Judge O'Scannlain's view. In *FTC v. Credit Bureau Center, LLC*, the court reversed its prior holding that 13(b) provides for monetary relief, reasoning in an en banc opinion that 13(b) does not authorize relief beyond an injunction.[23]

Ominous Signs for the FTC. Chief Justice Roberts opened the questioning in *AMG* by noting that the Court has transitioned to a more "disciplined" textual approach over the past 50 years.[24] But he also acknowledged the Court's frequent use of originalist modes of statutory interpretation, including use of contemporaneous dictionaries to understand original intent.[25] Justice Alito picked up on the theme, surmising that a Congress member may have concluded that "injunction" could include monetary relief based on the definition of "injunction" in *Black's Law Dictionary* at the time: "a judicial process . . . requiring a person to whom it is directed to do or refrain from doing a particular thing"—presumably on the theory that when a court directs someone to pay money it is directing that person to do a particular thing.[26]

AMG's counsel replied that "injunction" did not traditionally encompass monetary relief in equity.[27] Moreover, he contended that the structure of the Act foreclosed such an original understanding because Section 19, enacted shortly thereafter, would have been unnecessary under such an expansive reading.[28]

Justice Gorsuch pressed the FTC on whether, from the structural textualist perspective, Sections 5 and 19 of the Act were superfluous under the FTC's interpretation.[29] The FTC argued that Sections 5 and 19 have their place, and are appropriate when a case requires "a lot of Commission expertise."[30]

Justice Thomas characteristically began his questioning of the FTC advocate with the text of 13(b), asking why backward-looking relief should be read into a provision that is triggered only upon forward-looking harm and that mentions only injunctive relief.[31]

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[18] *See* FTC v. AMG Capital Mgmt., LLC, 910 F.3d 417, 429–38 (9th Cir. 2018) (O'Scannlain, J., concurring).

[19] *Id.*

[20] *Id.* at 429.

[21] *Id.* at 430 (quoting King v. Burwell, 576 U.S. 473, 487 (2015)).

[22] *Id.* at 431.

[23] 937 F.3d 764 (7th Cir. 2019), *overruling* FTC v. Amy Travel Service, Inc., 875 F.2d 564 (7th Cir. 1989).

[24] Transcript of Oral Argument at 5, FTC v. AMG Capital Mgmt., LLC, No. 05-493 (2021), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-508_3f14.pdf.

[25] *Id.* at 7

[26] *Id.* at 14.

[27] *Id.* at 15.

[28] *Id.* at 7.

[29] *Id.* at 52.

[30] *Id.* at 51–52.

[31] *Id.* at 34.

Justice Barrett seemed focused on ensuring that if the Court did away with 13(b) relief, offenders like AMG could still be held liable under Section 19.[32]

Justice Kavanaugh inquired whether longstanding judicial endorsement of the monetary remedies—and arguably the implicit ratification by Congress through its inaction—meant that the Supreme Court ought to "leave well enough alone." But he also told the FTC that "the problem you have is the text, and in that sense this case really is a separation of powers case" because the FTC is arguably exercising authority beyond what it has been granted by the legislature.

Justice Breyer admitted that he was in equipoise.[33] Whatever the merits of AMG's arguments, he seemed somewhat concerned about the effect of their position on *stare decisis*. "[I]f we never say let bygones be bygones, I mean, we're going to be hereto Marbury versus Madison."[34] The AMG advocate noted that this was a matter of first impression for the Court,[35] and argued later on that "[l]ong-standing error doesn't make it any less error."[36]

For her part, Justice Sotomayor explained that "legislative history is not unimportant to me," but she found "nothing in the history of this bill suggesting that Congress understood that Section 13(b) authorizes monetary awards."[37]

Justice Kagan told the FTC advocate that "the best argument against your position, and []it's a strong one, comes from Section 5 and Section 19, which have these protections in them that Section 13 do[es] not."[38] In her view, the FTC's interpretation of Section 13 "makes those [other sections] pretty much entirely irrelevant."[39]

It is hard to imagine a favorable outcome for the FTC after this oral argument. The Court will probably limit 13(b) relief to injunctions, requiring the Commission to resort to cumbersome administrative proceedings to get any monetary relief. That would dramatically undermine the Commission's work over several decades to build a robust fraud program.[40] It would leave Section 5 and 19 as the only avenues for monetary relief under the FTC's general consumer protection authority. Under Section 5, the Commission may impose monetary civil penalties under some limited circumstances.[41] Under Section 19, the Commission may obtain monetary consumer redress or disgorgement but only after obtaining a final cease-and-desist order through administrative litigation and only after demonstrating that "a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent."[42] Moreover, Section 19 includes a statute of limitations whereas Section 13(b) does

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[32] *Id.* at 27.

[33] *Id.* at 10.

[34] *Id.*

[35] *Id.* at 11.

[36] *Id.* at 26.

[37] *Id.* at 45.

[38] *Id.* at 46.

[39] *Id.*

[40] *See* Beales & Muris, *supra* note 4, at 22–28.

[41] Commissioner Rohit Chopra and Samuel Levine recently advocated for reviving the Commission's "penalty offense authority" under Section 5(m)(1)(B), arguing that the FTC could avoid the "one free pass" nature of Section 5 enforcement by proactively putting whole industries on notice that certain practices are unfair or deceptive. *See* Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority* (Oct. 29, 2020), U. Pa. L. Rev. (forthcoming), https://ssrn.com/abstract=3721256. For more context, see David C. Vladeck, *Charting the Course: The Federal Trade Commission's Second Hundred Years*, 83 Geo. Wash. L. Rev. 2101, 2115–17 (2015).

[42] 15 U.S.C. 57b(a)(2).

not.[43] Thus, the FTC has strongly favored Section 13(b) actions. At oral argument, the FTC conceded that going directly to court is "more attractive in certain instances" and that the Commission brings "far more [consumer protection] cases" in court than through its own administrative proceedings.

An Unlikely Out for the FTC. It is worth noting that the Court could also rule against the FTC in a more limited way, although there was little indication at oral argument that it would. Last term, the Court held 8-1 in *Liu v. SEC* that even where a statute permitted "any equitable relief that may be appropriate," the government's equitable monetary relief could not exceed the wrongdoer's net profits.[44] Justice Sotomayor wrote for the court that the government cannot impose a "penalty" under equity; therefore actual net profits is all that restitution or disgorgement allows.[45]

If the FTC could still obtain "net profits," *AMG* would not be a total loss for the agency. AMG argued in the briefs that the Ninth Circuit "did not limit the Commission's recovery to anything close to net profits" when it awarded the FTC $1.27 billion, which was more than triple the amount that petitioners had allegedly received.[46] But the textual difference between 13(b)'s "permanent injunction" and the SEC statute's "any equitable relief that may be appropriate" makes it unlikely that the FTC will win even this less-than-half a loaf. Instead, the FTC will likely lose any ability to obtain monetary relief under 13(b). And limits to its ability to obtain even *injunctive* relief may also soon bubble up to the Supreme Court.

Even for Injunctive Relief, Lower Courts Are Reconsidering Whether Past Misconduct Is Actionable Under 13(b)

As noted above, Section 13(b) gives the FTC the authority to obtain injunctions in federal court only where a defendant "is violating, or is about to violate" the law. It is hornbook law that injunctive relief cannot be based solely on past conduct.[47] Instead, there must be a present violation or some prospect of future violation. But the circuits differ on how likely the future violation must be.

The majority view has been that 13(b) requires the typical injunction predicate—"some cognizable danger of recurrent violation, something more than the mere possibility."[48] The Ninth Circuit is a good example, having long embraced this standard in Section 13(b) cases.[49] Most of the lower courts continue to rely on the "cognizable danger" standard, with the Ninth Circuit showing no signs of altering its view.[50] This is a "likelihood of recurrence" standard, based on a factual analysis of the totality of the circumstances. On this reading, 13(b)'s "about to violate" language adds nothing to the inherent injunctive relief requirements.

Shire *Leads the Way.* The Third Circuit recently adopted a more demanding threshold. In *Shire Viropharma*, the court held that the "about to violate" provision plainly limited injunctive relief to "impending conduct."[51] The court reasoned that 13(b) "was not designed to address hypothetical

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[43] 15 U.S.C. 57b(d).

[44] Liu v. SEC, 140 S. Ct. 1936, 1942 (2020).

[45] *Id.*

[46] See Brief for Petitioners at 47, AMG Capital Mgmt., LLC v. FTC, No. 19-508.

[47] *See, e.g.*, FTC v. Evans Prods. Co., 775 F.2d 1084, 1087 (9th Cir. 1985) ("an injunction will issue only if the wrongs are ongoing or likely to recur").

[48] United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).

[49] *See, e.g.*, *Evans Products Co.*, 775 F.2d at 1087 (quoting W.T. Grant, 345 U.S. at 633).

[50] *See, e.g.*, FTC v. Elec. Payment Solutions of Am. Inc., No. 17-cv-02535, 2019 U.S. Dist. LEXIS 157978, at *25 (D. Ariz. Aug. 28, 2019); FTC v. Adept Mgmt., No. 1:16-cv-00720, 2019 U.S. Dist. LEXIS 96061, at *9 (D. Or. June 7, 2019); FTC v. Qualcomm Inc., 411 F. Supp. 3d 658, 812 (N.D. Cal. 2019), *rev'd on other grounds*, 969 F.3d 974, 1005 (9th Cir. 2020).

[51] FTC v. Shire Viropharma, 917 F.3d 147, 157–58 (3d Cir. 2019)

conduct or the mere suspicion that such conduct may yet occur"; that it is not enough for the FTC to allege a "vague and generalized likelihood of recurrent conduct."[52] Moreover, the court held that the 13(b) requirement applies "right out of the gate" at the pleading stage, rather than at a later stage when the court is considering appropriate remedies.[53] The Third Circuit thus upheld the trial court's conclusion that the FTC failed to meet the 13(b) threshold when it merely alleged that the defendant had the "incentive and opportunity" to commit violations like it had in the past.[54] The FTC did not petition for certiorari, presumably out of concern that the Supreme Court might adopt the *Shire* view.[55]

No other circuit has squarely addressed the Third Circuit's view. Some lower courts in other circuits have at least acknowledged *Shire's* holding without explicitly rejecting it.[56] Procedurally, we should expect more of these challenges to occur at the pleading stage, creating early opportunities for appellate review and Supreme Court cert petitions.[57] Indeed, even some district courts in the *Shire*-hostile Ninth Circuit have nevertheless entertained 13(b) challenges "right out of the gate" at the motion to dismiss stage.[58] Moreover, regardless of whether courts go so far as to adopt the *Shire* test, violators may sometimes be able to avoid any action under 13(b) by ceasing their violations before the FTC files suit. For example, a district court in the Ninth Circuit granted summary judgment where Amazon had ceased the alleged practice after the FTC began an administrative investigation but before the suit was filed, and the court could find no "cognizable danger of a recurring violation."[59]

A *Shire*-style defense is not just *permitted* at the pleading stage, it likely *must* be raised early otherwise it will be forfeited. The *Shire* court held flatly that "13(b)'s 'is' or 'is about to violate' requirement is non-jurisdictional."[60] This is no academic distinction. It means that a *Shire* argument might have to be raised on a motion to dismiss. The sometimes obtuse and varied rules of waiver and forfeiture may control whether a *Shire* defense has fallen out of the case.[61] While circuits do not have uniform

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[52] *Id.* at 156, 159.

[53] *Id.* at 158.

[54] *Id.* at 160.

[55] The Third Circuit endorsed the *Shire* approach in *FTC v. AbbVie Inc.*, 976 F.3d 327, 376 (3d Cir. 2020), *modified*, 2020 U.S. App. LEXIS 37857(3d Cir. Dec. 4, 2020), *mandate issued*, Mandate, FTC v. AbbVie Inc., 18-2621 (3d Cir. Dec. 14, 2020), ECF No. 261. Under the Supreme Court's current procedural order, the FTC could petition for certiorari within 150 days of the mandate. *See* Order (Mar. 19, 2020), https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

[56] *See, e.g.*, FTC v. Vyera Pharm., LLC, No. 20-cv-706, 2020 U.S. Dist. LEXIS 149542, at *20 (S.D.N.Y. Aug. 18, 2020); FTC v. Surescripts, LLC, No. 19-cv-1080, 2020 U.S. Dist. LEXIS 89517, at *14 (D.D.C. May 21, 2020); FTC v. Hornbeam Special Situations, LLC, 391 F. Supp. 3d 1218, 1223 (N.D. Ga. 2019).

[57] *See, e.g.*, FTC v. SPM Thermo-Shield, Inc., 2:20-cv-00542, No. 14 at 5 (M.D. Fla. Nov. 6, 2020) (noting that, on a motion to dismiss, *Shire* requires evaluation of the likelihood of ongoing or future violation); FTC v. AdvoCare Int'l, L.P., 4:19-cv-00715, No. 52 at 11 (E.D. Tex. Nov. 16, 2020) (noting that the FTC's factual allegations in a 13(b) complaint must make the requisite "about to violate" showing).

[58] *See, e.g.*, FTC v. Elec. Payment Solutions, 2019 U.S. Dist. LEXIS 157978, at *24 (evaluating whether the FTC pled sufficient facts to support its Section 13(b) claim).

[59] FTC v. Amazon.com, Inc., No. C14-1038-JCC, 2016 U.S. Dist. LEXIS 55569, at *5, *11 (W.D. Wash. Apr. 26, 2016) (quoting FTC v. Gill, 265 F.3d 944, 950, 957 (9th Cir. 2001)).

[60] *Shire*, 917 F.3d at 153. The court did allow the FTC to continue to pursue monetary damages.

[61] Inadvertent failure to raise a *Shire* defense is arguably a matter of forfeiture, rather than waiver. "The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous." Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 17 n.1 (2017). But for *Shire* defenses, this difference is unlikely to save the argument. As the Third Circuit has put it, "we have been slightly less reluctant to bar consideration of a forfeited pure question of law." Barna v. Bd. of Sch. Dirs. of the Panther Valley Sch. Dist., 877 F.3d 136, 147 (3d Cir. 2017). But even if a *Shire* argument could be construed as a pure question of law, a defendant may face the uphill battle of showing that ignoring the issue would result in "a miscarriage of justice or where the issue's resolution is of public importance." Id. at 148 (quoting Bagot v. Ashcroft, 398 F.3d 252, 256 (3d Cir. 2005)).

rules, they all agree that "waiver and forfeiture rules . . . ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression."[62]

Failure to timely raise a *Shire* argument has already tripped up one prominent defendant. In *FTC v. Vyera*, the Southern District of New York recently rejected a 13(b) challenge framed as an affirmative defense because "Defendants had a full opportunity to challenge the sufficiency of the pleading at the motion to dismiss stage."[63]

The potential impact of *Shire* has not gone unnoticed by consumer protection advocates. In a recent congressional hearing, one advocate argued that, under *Shire*, "wrongdoers that line their pockets with money they have illegally obtained can sail off into the sunset just as long as they retire their scams before the FTC catches up with them."[64] Jessica Rich, former Director of the FTC's Bureau of Consumer Protection, similarly noted that *Shire* limited the FTC's authority to remedy past conduct and called for Congressional action.[65]

Whether under *Shire* in the Third Circuit or under less-restrictive standards in the Ninth Circuit and elsewhere, courts' limitations on injunctive relief under Section 13(b) increasingly curtail the availability of the FTC's go-directly-to-court approach of the past few decades. Nobody would dispute that—as the Chief Justice observed at *AMG* oral arguments—an agency only has the authority delegated to it by Congress.[66] Of course, Congress may yet delegate more authority than the FTC already has.

Congressional Activity in the New Administration

In light of the incursions into the FTC's Section 13(b) authority, Congress may well expressly legislate to broaden or clarify the Commission's authority. In the last Congress, Senator Roger Wicker (R-MS) introduced a bill that would have both allowed the FTC to bring a 13(b) suit even where the offender merely "has violated" the law, and expressly allowed for "restitution for consumer loss," "rescission or reformation of contracts," and "the refund of money or return of property."[67] Such an approach would, in one fell swoop, end any uncertainty about the FTC's authority to go directly to court even for past violations and obtain monetary relief. The prospects of any such legislation are unclear, but there can be no doubt that if the Supreme Court rules in favor of *AMG*, some in Congress will seek to give the FTC more express authority. The trend in *Shire*—and even in courts with less stringent standards for injunctive relief—only adds fuel to that fire.

Back in October 2020, all five then-Commissioners urged Congress to pass legislation to "swiftly []clarify the statutory text and allow us to continue to protect consumers."[68] They warned that "13(b) is a critical tool in our enforcement mission" but that *AMG* and *Shire* were "grave" "judicial threats" to "the FTC's ability to protect consumers."[69] With a Democratic-majority FTC and

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62 Exxon Shipping Co. v. Baker, 554 U.S. 471, 487 n.6 (2008).

63 FTC v. Vyera Pharm., LLC, No. 20-cv-706, 2020 U.S. Dist. LEXIS 242740, at *6 (S.D.N.Y. Dec. 28, 2020).

64 *Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic, Hearing Before the House Comm. on Energy and Commerce, Subcomm. on Consumer Protection and Commerce*, 117th Cong. (2021) [hereinafter *Safeguarding American Consumers*] (statement of Bonnie Patten, Executive Director, TruthInAdvertising.org); https://energycommerce.house.gov/committee-activity/hearings/hearing-on-safeguarding-american-consumers-fighting-fraud-and-scams.

65 *Id.* (statement of Jessica Rich, Distinguished Fellow, Institute of Technology Law and Policy, Georgetown University Law Center).

66 Transcript of Oral Argument, *supra* note 24, at 32.

67 Setting an American Framework To Ensure Data Access, Transparency, and Accountability Act, S. 4626, 116th Cong. § 403(a) (2020).

68 Letter from Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, Commissioner Rohit Chopra, Commissioner Rebecca Kelly Slaughter, Commissioner Christine S. Wilson to the Chairmen and Ranking Members of the Senate Committee on Commerce, Science, and Transportation and the House Committee on Energy and Commerce (Oct 22, 2020), https://perma.cc/UYR7-FBFD.

69 *Id.* at 4.

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the Biden administration expected to take a forward-leaning approach on consumer protection, Congressional "clarification" would likely garner broad executive branch support.[70]

In February, the Subcommittee on Consumer Protection and Commerce of the Committee on Energy and Commerce held a hearing ostensibly focused on "Fighting Fraud and Scams During the Pandemic."[71] Discussion of *AMG*, *Shire*, and 13(b) dominated the hearing. Subcommittee Chair Janice D. Schakowsky stated that "[u]nder 13(b), the FTC can require defrauders to provide restitution (money) to individuals who have been defrauded. Unfortunately, this authority is under assault at the Supreme Court, and the FTC may find itself deprived of a critical tool."[72] She argued that "reaffirming the FTC 13(b) authority is a bipartisan issue at the Commission as it should be everywhere."[73]

While Congressional activity and interest may be easy to predict if the Court rules in *AMG* as anticipated, the outcome of that activity is entirely uncertain. Opening the FTC Act to amendment is likely to lead to a broader Congressional referendum on the Act as a whole, with various members of Congress seeking to amend the Act in ways unrelated to the 13(b) issues currently in dispute. For example, some members are likely to seek broader FTC rulemaking authority while others may use the opportunity to press for the transfer of powers from the agency to a new agency empowered to address privacy concerns or even digital markets as a whole. This will undoubtedly complicate the ability of Congress to address the relatively narrow issue teed up in *AMG* and leaves the future of FTC monetary—and potentially injunctive—relief in jeopardy. ●

ADDENDUM

On April 22, 2021, a day after this article was published, the United States Supreme Court unanimously decided *AMG Capital Management v. FTC*. That decision marks the end of the FTC's broad exercise of Section 13(b) authority to get money back from those who violate the FTC Act—for now.

In a unanimous decision written by Justice Breyer, the Supreme Court held that the statute does not authorize the FTC to seek "equitable monetary relief such as restitution or disgorgement." In essence, the Court decided that Section 13(b)'s reference to a "permanent injunction" means just that and no more. So, for monetary relief, the FTC is now left with its existing authority under Section 19 of the FTC Act.

While the Supreme Court settled an important issue in *AMG*, the law around FTC enforcement authority is in flux. Indeed, on the day before the decision, the FTC testified before Congress that "Section 13(b) is a critical tool in support of our enforcement missions, but its effectiveness is currently imperiled [by *AMG* and further curtailments by circuit courts], and this uncertainty is hurting our ongoing enforcement efforts." The Commission called for legislation, and a bill that would reverse the effect of *AMG* was introduced that same day in the House.

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[70] For a discussion of likely injunctive and monetary enforcement priorities for the Biden administration, see Randal Shaheen & Jack Ferry, *The Monetary Consequences Companies Face from a President Biden FTC Consumer Protection Bureau Might Look Very Different* 1, Antitrust Source (Oct. 2020), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2020/oct-2020/oct2020_shaheen_no_copyright.pdf.

[71] *Safeguarding American Consumers*, *supra* note 64.

[72] *Id.* at 1 (opening statement of Subcommittee Chair Janice D. Schakowsky).

[73] *Id.*