Insider Trading and Strategic Disclosure

By Joshua Mitts

Biden and the SEC: Some Possible Agendas

By John C. Coffee, Jr.

The Role of Institutional Investor Regulation in Restoring a Fair, Sustainable Economy

By Leo E. Strine, Jr.

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Skadden Discusses Supreme Court Review of FTC Monetary Relief Authority

By Tara Reinhart, Jonathan Marcus and Daniel O'Connell January 14, 2021

Comment

On January 13, 2021, the U.S. Supreme Court heard a case, AMG Capital Management, LLC v. FTC, that could substantially curtail the primary authority the Federal Trade Commission (FTC) relies on to seek monetary relief from defendants in federal court. For decades, the FTC has used Section 13(b) of the Federal Trade Commission Act of 1914 (FTC Act) to seek billions in restitution and disgorgement in a wide range of actions, including cases concerning telemarketing and online frauds, deceptive business practices, data security and privacy breaches, and conspiracies to monopolize in pharmaceutical markets.

Section 13(b) authorizes the FTC to seek injunctive relief "whenever the Commission has reason to believe … that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission," if an injunction would be in the public interest. It does not provide for monetary relief explicitly. Two other provisions of the FTC Act do authorize the agency to seek monetary relief, but both involve cumbersome and time-consuming processes. Thus, the FTC routinely invokes Section 13(b) to seek monetary relief and historically has done so successfully. Perhaps the most well-known award is the order to disgorge $1.2 billion in profits in the 2015 pharmaceutical "reverse payments" case FTC v. Cephalon, Inc. Were the court to hold that the FTC lacks such authority under Section 13(b), it would deal a severe blow to one of the agency's most significant enforcement tools.

Legal challenges have arisen over the years, likely due in large part to the success the FTC has had in obtaining monetary relief in Section 13(b) actions. According to the FTC, from 2016 to 2019, the agency returned $977 million directly to consumers in Section 13(b) actions, with billions more returned directly from defendants. At least seven circuit courts have ruled in the FTC's favor, finding that authority to seek a permanent injunction implicitly allows the FTC to seek any form of equitable relief. But in February 2020, in FTC v. Credit Bureau Center, LLC, the U.S. Court of Appeals for the Seventh Circuit overturned its own precedent on the question. The Seventh Circuit panel noted that the FTC Act explicitly provides for monetary remedies in two other provisions, but not in Section 13(b), and it found that Section 13(b) was intended to address "ongoing" or "imminent" violations of the law, not to punish past behavior. (Since Credit Bureau Center, the U.S. Court of Appeals for the Third Circuit has adopted the Seventh Circuit's reasoning and, in FTC v. AbbVie Inc., overturned its own precedent that had favored the FTC.)

In AMG Capital Management, however, the Ninth Circuit had ruled that the FTC could use Section 13(b) to seek monetary relief. The Supreme Court granted the FTC's petition for a writ of certiorari on Credit Bureau Center on July 9, 2020, and on the same day granted the petition in AMG Capital Management, consolidating the two matters for argument.

A recent procedural twist suggests that the Court may side with the Seventh Circuit's view and eliminate the FTC's preferred avenue to monetary relief. On November 9, 2020, the Court vacated its previous order granting the FTC's petition for a writ of certiorari in Credit Bureau Center and noted that the case would no longer be consolidated with AMG Capital Management. The Court did not explain its reasoning, but we believe a likely explanation is that the Court wanted to clear the way for recently confirmed Justice Amy Coney Barrett to participate in deciding AMG Capital Management. Having that case consolidated with Credit Bureau Center posed a potential recusal issue for Justice Barrett, who sat on the Seventh Circuit at the time that court considered Credit Bureau Center. She reviewed the panel decision along with the rest of the court to determine whether it should be reheard en banc, and although the decision overruled circuit precedent, she and the court concluded no rehearing was necessary. The Supreme Court's decision to vacate the order granting certiorari in Credit Bureau Center thus removes a potential ground for Justice Barrett's recusal, freeing her to participate in hearing AMG Capital Management and potentially provide a vote against the FTC. (As a matter of practice, justices who have been elevated from courts of appeals generally do not participate in hearing cases that they decided in their former position. For instance, Chief Justice John G. Roberts, Jr. did not participate in hearing

Hamdan v. Rumsfeld in 2006, since he had participated in deciding the case in the U.S. Court of Appeals for the District of Columbia Circuit the year before. But this practice does not extend to cases presenting the same or similar issues that a justice decided in his or her prior role.)

While a number of independent agencies have the ability to seek relief through both administrative processes and civil actions filed in federal court, the relief they can seek in federal court varies based on each agency's authorizing statute. For example, the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) can obtain monetary relief directly in federal court for injured investors and customers. The Securities Exchange Act of 1934 provides that in any action or proceeding the SEC brings under the federal securities laws, the SEC may seek "any equitable relief that may be appropriate or necessary for the benefit of investors." The Supreme Court recently held in Liu v. SEC that such "equitable relief" includes disgorgement of a defendant's wrongfully obtained profits, subject to certain limitations. Similarly, the CFTC may seek equitable relief, specifically including both restitution and disgorgement, under Section 6c of the Commodity Exchange Act.

On October 22, 2020, the FTC asked Congress via letter to amend Section 13(b) to make clear that the provision authorizes redress, specifically including monetary relief, for past conduct, in order to codify the FTC's long-held interpretation. With the path cleared for Justice Barrett to participate in hearing AMG Capital Management, it seems increasingly likely that the FTC will lose its preferred avenue to monetary relief without congressional intervention and will have to resort to more procedurally burdensome means of obtaining such relief.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "Supreme Court Review of FTC Monetary Relief Authority Threatens Long-Standing Agency Practice," dated December 22, 2020, and available here.

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