

AGs To Fill Void As Justices Say FTC Can't Impose Restitution

By **Alissa Gardenswartz and Mark Pryor** (April 22, 2021)

As was widely predicted based on oral arguments in *AMG Capital Management LLC v. Federal Trade Commission*, the U.S. Supreme Court has determined that Section 13(b) of the Federal Trade Commission Act does not authorize the Federal Trade Commission to seek equitable monetary relief.

Lest companies breathe a sigh of relief, they should know that this decision will not lead to the end of sizeable monetary awards in consumer protection cases.

All states have a functional equivalent of the FTC Act in their unfair and deceptive acts and practices laws, and all of these laws expressly allow for consumer restitution and other equitable relief.[1]

State attorneys general have deployed these laws over the past several years to secure significant monetary awards in several cases. From 2000 to 2019, there were approximately 644 multistate actions that obtained a total of \$105.9 billion in monetary relief, and only about a third of those actions included a federal partner.

During that same time period, states brought over 7,600 actions individually and obtained \$37 billion in monetary relief.[2]

It is likely that, in the wake of the Supreme Court's ruling, state attorneys general will emerge as even more influential consumer protection enforcers, and that federal-state partnerships in enforcement actions will take a different form, with the states taking the lead in obtaining monetary relief.

FTC and State Attorneys General Enforcement Pre-AMG Capital Management

In cases impacting consumers in multiple jurisdictions, it has been common for the FTC to obtain and administer monetary relief for consumers.

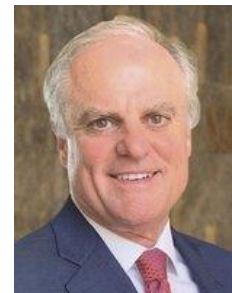
For example, although 42 states and the District of Columbia investigated Volkswagen AG for violations of their respective UDAP laws related to selling vehicles with emission defeat devices, it was a settlement with the FTC and related class actions that provided the mechanism for consumer restitution in that matter — state attorneys general received payments related to civil penalties and investigative costs.[3]

Similar approaches were taken in cases involving data breaches and "mobile cramming," where third-party charges were added to mobile bills without consumer consent.[4]

However, many enforcement efforts have facilitated consumer restitution and other monetary relief through multistate action alone. For example, in 2018, 51 attorneys general reached a settlement with Wells Fargo & Co. for \$575 million related to allegations that it had engaged in a variety of deceptive practices, including opening unauthorized accounts and force-placing insurance.[5]



Alissa Gardenswartz



Mark Pryor

And, in February of this year, McKinsey & Co. paid close to \$600 million to 49 states to settle claims that its advice to opioid manufacturers violated consumer protection laws and contributed to the nationwide opioid crisis.[6]

FTC and State Attorneys General Enforcement Partnership Post-AMG Capital Management

Now that the FTC is limited to seeking only injunctive relief under Section 13(b), the FTC will have to rethink how to obtain restitution and disgorgement absent a change to the FTC Act, which contemplates the FTC bringing an action in federal district court when it believes that violations of any laws enforced by the FTC are occurring such that the practices should be enjoined pending the commission issuing an administrative complaint.

The FTC is now only able to obtain consumer redress by first initiating an administrative action and waiting until after the issuance of a final cease-and-desist order to file an action for consumer redress in federal district court.

The statute does not reference disgorgement, but does specify that remedies in the section are in addition to "any other remedy or right of action" provided by state or federal law under Title 15 of the U.S. Code, Section 57b(e).

One of the measures the FTC will have to consider, given this framework, is increased coordination with state attorneys general, not just on matters that touch multiple jurisdictions, but also on matters where the FTC would normally act on its own and not necessarily engage a state partner.

The commission could still leverage the threat of its ability to ultimately seek consumer redress, as well as the costs of an injunctive proceeding in district court and protracted administrative litigation, to obtain a monetary settlement.

However, it is also likely that, in an effort to get money to consumers more quickly or to guard against assets being dissipated during litigation, the FTC will turn to state attorneys general and their UDAP laws to bring additional pressure on companies.

As discussed above, the threat of multistate action has resulted in sizeable monetary awards, and states have demonstrated that their ability to obtain large judgments on their own is not to be underestimated either.[7][8]

Another reason that multistate actions may emerge as the primary vehicle for leveraging significant settlement amounts is that unlike antitrust actions, where the FTC and states can proceed in the same federal court under the Sherman Act, state consumer protection actions proceed under each state's UDAP law in state court, forcing companies to litigate in multiple jurisdictions and to weigh those costs against a settlement.

Consequently, companies should anticipate a multifront approach if they become the subject of an FTC investigation.

Depending upon the jurisdiction in which a business operates, it should assume that one or more state attorneys general may be investigating the same conduct with an eye toward obtaining monetary relief under their respective laws, including restitution, disgorgement and civil penalties.

Additionally, companies should not assume that they are in the clear if the FTC chooses to

resolve an investigation through a settlement or without taking further action.

The FTC and state attorneys general already work together regularly and understand where one agency may have the authority or resources to accomplish what the other may not. If the FTC does not see a clear path to settlement in an investigation, and needs the additional leverage of an imminent action for monetary relief, it will not hesitate to call upon state partners to step into the void.

The irony in this potential shift is that the AMG Capital Management case is the exception that establishes a new rule.

The states could not have brought the same action the FTC brought against AMG Capital Management under their respective UDAP laws, because AMG Capital Management and its associated entities were affiliated with a Native American tribal entity.

The Colorado attorney general attempted to investigate AMG Capital Management's predecessor entities for possible violations of its consumer lending laws, but was thwarted at the investigative stage by its Supreme Court determining that tribally operated entities could not be subject to state administrative process due to sovereign immunity.[9]

AMG Capital Management raised similar arguments in the FTC's action against it, and the district court found that the FTC had authority to regulate tribally operated entities as well as their employees and contractors, as they are subject to federal laws of general applicability.[10]

The particular circumstances of the AMG Capital Management case aside, most companies that face FTC scrutiny in the future should not presume that the FTC is now operating without a significant tool in its toolbox. They should expect state attorneys general to be wielding the hammer instead.

Alissa Gardenswartz and former Sen. Mark Pryor, D-Ark., are shareholders at Brownstein Hyatt Farber Schreck LLP.

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[1] Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws, Appendix C, <https://www.nclc.org/images/pdf/udap/udap-appC.pdf>.

[2] Bipartisan Corporate Crime Fighting by the States, <https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/StateAGs.pdf>

[3] <https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating>

[4] https://www.ftc.gov/system/files/documents/cases/172_3203_equifax_order_signed_7-23-19.pdf; <https://www.ftc.gov/system/files/documents/cases/141008attstip2.pdf>

[5] <https://www.stopfraudcolorado.gov/about-consumer-protection/press-releases/2018->

12-28-000000/wells-fargo.html.

[6] <https://www.nytimes.com/2021/02/03/business/mckinsey-opioids-settlement.html>.

[7] <https://www.reuters.com/article/us-johnson-johnson-settlement-mesh/johnson-johnson-agrees-to-pay-about-117-million-to-settle-u-s-states-mesh-probe-idUSKBN1WW2EK>.

[8] <https://oag.ca.gov/system/files/attachments/press-docs/Statement%20of%20Decision.pdf>.

[9] *Cash Advance & Pref. Cash Loans v. State ex rel. Suthers*, 242 P. 3d 1099 (Colo. 2010).

[10] Order Affirming Lower Court Ruling Finding that American Indian Tribes are Subject to the FTC Act.