CLIENT ALERTS & INSIGHTS

SCOTUS Narrows FTC's Enforcement Authority-Or Does It?

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On April 22, 2021, the U.S. Supreme Court decided *AMG Capital Management v. FTC* . In a unanimous opinion, the Court narrowed the FTC's power to seek monetary relief in federal court for violations of the FTC Act-or at least appeared to.

How could this affect my business?

Suppose that the FTC comes knocking on your door, saying it has reason to believe that you have been engaged in unfair competition or deceptive practices. Before *AMG Capital Management*, the agency could tell you, "If you don't give me all the money that we think that your deceptive practices have taken from consumers"-revenue, not profits-"we'll sue you in federal court, seeking restitution in that full amount."

That procedure has been an important arrow in the FTC's quiver over the past few decades. Indeed, the agency admitted at oral argument that it pursues more claims in court than it does through its administrative process.

But now, going directly to court to seek monetary relief is no longer an option for the FTC.

So does that mean that the FTC cannot enforce statutes and rules prohibiting deceptive practices?

Hardly. Even after the Supreme Court's opinion, the FTC retains other enforcement powers:

- It can sue in federal court under FTC Act sec. 13(b) seeking prospective injunctive relief.
- It can pursue monetary relief through its administrative process. In other words, it can seek a cease-and-desist order from an administrative law judge, and then petition the Commissioners for an order enforcing that order. Once the Commission enters a cease-and-desist order, the agency can petition a federal court for an order to "redress injury to consumers" including a "refund of money or return of property." 15 U.S.C. § 57b(b).

So, fair to say that this opinion just leads to less-efficient adjudication?

Maybe. It makes the FTC go through the full administrative process before it can seek monetary relief, instead of dashing directly into federal court to obtain that relief. That might create a disincentive for the FTC to pursue monetary relief, since getting that relief will require more work. Or it might just mean that clients facing FTC charges will incur greater legal costs, because additional proceedings will be necessary to get to the same ultimate destination.

Couldn't Congress grant the FTC the power that SCOTUS just took away?

In theory, sure. But with a 50-50 Senate, that seems unlikely-all the more so since a bill amending the FTC Act to undo *AMG Capital Management* likely cannot be passed through the budget-reconciliation process.

Are there other reasons I should care about this opinion?

If you're a Court watcher, you might view the unanimous opinion as evidence that Justice Kagan was right when she said, "We're all textualists now." The petitioners argued for a narrow interpretation of the FTC Act's text. The FTC argued for an expansive interpretation, claiming that a broad reading was necessary for greater consumer protection and a more efficacious enforcement regime. The Court chose the former path unanimously, hewing closely to the text and refusing to imply powers that the text didn't directly support. That may suggest that the Court will offer narrow readings of other regulatory regimes in the future.

Where can I read more about it?

The opinion can be found here: 19-508 AMG Capital Management, LLC v. FTC (04/22/2021) (supremecourt.gov).

The SCOTUSBlog page can be found here: AMG Capital Management, LLC v. Federal Trade Commission - SCOTUSblog.

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