

ARTICLE

## The Limits of Antitrust Remedies: *Brunswick v. Pueblo Bowl-O-Mat* for the FTC

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For over four decades, the FTC successfully obtained equitable monetary remedies in federal courts using Section 13b of the Federal Trade Commission (FTC) Act, until it didn't.<sup>1</sup> In *AMG Capital Management v. FTC*, the U.S. Supreme Court unanimously held that Section 13b of the FTC Act did not allow the FTC to obtain equitable monetary remedies—such as disgorgement or restitution—in federal court.<sup>2</sup> While *AMG Capital* was a consumer protection case, the Court's decision also affected the FTC's ability to use Section 13b to obtain equitable monetary remedies in antitrust cases.<sup>3</sup> Viewed through the lens of optimal deterrence, *AMG Capital* could be seen as *Brunswick v. Pueblo Bowl-O-Mat*<sup>4</sup> for the FTC, placing substantive limits on remedies that alter firms' incentives to engage in conduct that

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<sup>1</sup> 15 U.S.C. §53(b). See generally, 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).

<sup>2</sup> 141 S. Ct. 1341 (2021), 593 U.S. \_\_ (2021).

<sup>3</sup> Indeed, the recent challenges to the FTC's 13b power began in an antitrust case, with the Third Circuit Court of Appeals holding that the "clear text" of Section 13(b) of the FTC Act limits the FTC to challenging conduct that is ongoing or imminent. *FTC v. Shire ViroPharma, Inc.*, 910 F.3d 417 (3d Cir. 2019). The same appeals court subsequently held that Section 13b did not allow the FTC to obtain monetary remedies such as disgorgement or restitution in another antitrust case, a decision that was "effectively affirmed" by the Court in *AMG Capital*. *FTC v. Abbvie*, 976 F.3d 327 (3d Cir. 2020). See Federal Trade Commission Withdraws Remaining Case against AbbVie after Supreme Court Decision Strips Consumers of Relief, available at <https://www.ftc.gov/news-events/news/press-releases/2021/07/federal-trade-commission-withdraws-remaining-case-against-abbvie-after-supreme-court-decision-strips>.

<sup>4</sup> 429 U.S. 477 (1977) (*placing substantive limits on private antitrust plaintiffs' ability to recover damages by requiring proof of antitrust injury*).

might be subject to an FTC challenge, as well as the FTC’s incentives to transform antitrust law through litigation.<sup>5</sup>

Thus, after *AMG Capital*, if the FTC chooses to challenge conduct it believes is anticompetitive in federal court under Section 13(b), its remedies are limited to a preliminary injunction and, in “proper cases,” a permanent injunction.<sup>6</sup> Alternatively, the Commission can challenge anticompetitive conduct through administrative litigation and, if successful, obtain a cease-and-desist order.<sup>7</sup> In either case, direct monetary remedies would not be available to the FTC for first-time violations.<sup>8</sup> FTC leadership quickly condemned *AMG Capital* and called for Congress to pass legislation to restore the status quo.<sup>9</sup> Despite these pleas, Congress has not moved, and the FTC remains unable to obtain equitable monetary remedies in federal court for first-time violations of the FTC Act.<sup>10</sup> In this short article, we examine the implications of limiting the FTC’s ability to obtain equitable monetary relief in Federal Court to address conduct that the FTC believes is anticompetitive and suggest potential legislative approaches to restoring the Commission’s ability to obtain equitable monetary remedies in proper antitrust cases.

To do so, we must first distinguish between two types of cases brought by the FTC under Section 13b. The first set of cases are those that also would violate the Sherman Act. The Supreme Court has held that all violations of the Sherman Act also violate

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<sup>5</sup> See John E. Lopatka & William H. Page, Brunswick at 25: Antitrust Injury and the Evolution of Antitrust Law, 17 Antitrust 20 (2002) (Noting that Brunswick “has had an equally profound, if less obvious, effect in prompting the transformation of substantive rules”).

<sup>6</sup> See generally, William E. Kovacic & Marc Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 76 Antitrust L.J. 929 (2010).

<sup>7</sup> 15 U.S.C. §45(b).

<sup>8</sup> The FTC can impose civil penalties for violations of cease-and-desist orders. See 15 U.S.C. 21(l) (the maximum penalty for violations of cease-and-desist orders issued under Clayton Act Section 11(b) is \$26,628 per violation after the 2023 adjustments for inflation). The FTC Act also contains a provision under Section 19 of the FTC Act that would allow the FTC to recover monetary remedies in federal court after successfully litigating an administrative action. See 15 U.S.C. §57b. The FTC must demonstrate, however, that a reasonable man would have known under the circumstances that the conduct was “dishonest or fraudulent.” As a result, except in cases where deception creates market power, Section 19 is unlikely to apply to antitrust cases. For an example of deception-based antitrust claims, see Bruce H. Kobayashi & Joshua D. Wright, Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup, 5 J. Comp. L. & Econ. 464, 489-501 (2009).

<sup>9</sup> Prepared Statement of the Federal Trade Commission: The Urgent Need to Fix Section 13(b) of the FTC Act, [https://www.ftc.gov/system/files/documents/public\\_statements/1589400/p180500house13btestimony04272021.pdf](https://www.ftc.gov/system/files/documents/public_statements/1589400/p180500house13btestimony04272021.pdf).

<sup>10</sup> The House passed H.R. 2668, the Consumer Protection and Recovery Act on July 20, 2021, but no bill has passed the Senate. See John E. Villafranco & Maggie C. Crosswy, FTC Uses AMG Anniversary to Push for a Bipartisan 13(b) Legislative Fix in an Increasingly Partisan Environment, Ad Law Access (April 28, 2022), <https://www.adlawaccess.com/2022/04/articles/ftc-uses-amg-anniversary-to-push-for-a-bipartisan-13b-legislative-fix-in-an-increasingly-partisan-environment/>.

the FTC Act.<sup>11</sup> While the FTC does not directly enforce the Sherman Act,<sup>12</sup> it uses the FTC Act's prohibition of "unfair methods of competition" (UMC) to address those activities that would also violate the Sherman Act.<sup>13</sup> *AMG Capital*, perhaps accidentally, could be seen as a way to harmonize FTC and DOJ remedial powers for conduct that would violate the Sherman Act. Prior to *AMG Capital*, the FTC could—and on some occasions did—seek equitable monetary relief for conduct that would violate the Sherman Act, contrary to the Antitrust Division's practice.<sup>14</sup> Now, the FTC is limited to obtaining permanent injunctions in "proper cases", which brings it in line with the DOJ as long as federal courts adopt a definition of "proper cases" that is coincident with the courts' remedial decisions under the Sherman Act.<sup>15</sup>

Although *AMG Capital* could bring FTC and DOJ antitrust remedies into harmony, there could nonetheless be a gap when one considers private antitrust remedies. In particular, Section 4(a) of the Clayton Act creates a private right of action with treble damages and attorney fee shifting for prevailing plaintiffs alleging violations of the Sherman Act.<sup>16</sup> In addition to these incentives for private parties to file antitrust suits, Section 5(a) of the Clayton Act attempts to further increase the effect of these incentives<sup>17</sup> by allowing private plaintiffs to benefit from collateral estoppel when bringing follow-on suits to successful DOJ enforcement actions.<sup>18</sup> The availability of such actions arguably explains the DOJ's decision not to pursue equitable monetary relief in Sherman Act cases, as the enhanced potential for the

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<sup>11</sup> *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941).

<sup>12</sup> 15 U.S.C. §§ 1 - 7.

<sup>13</sup> 15 U.S.C. § 45(a)(1) (2012).

<sup>14</sup> U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008), Chapter 9, [www.usdoj.gov/atr/public/reports/236681.htm](http://www.usdoj.gov/atr/public/reports/236681.htm).

<sup>15</sup> For a comparison, see A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority, Appendix A, Synopsis of Antitrust Enforcement Authority Under the FTC, Clayton, and Sherman Acts, at <https://www.ftc.gov/about-ftc/mission/enforcement-authority>.

<sup>16</sup> 15 U.S.C. § 15(a) (1982).

<sup>17</sup> 15 U.S.C. § 16(a) (1914). As originally enacted, Section 4 provided that "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any such action or proceeding brought by any other party against such defendant under said laws, as to all matters respecting which said judgment or decree would be an estoppel as between parties thereto." The effect of Section 5(a) of the Clayton Act was subsequently limited by the Court, with the limits determined by "reference to the general doctrine of estoppel." *Emich Motors, Inc. v. General Motors, Inc.*, 340 U.S. 558, 568 (1951).

<sup>18</sup> Under the non-mutual offensive collateral estoppel set out by the Court in *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979), an issue that is actually litigated and necessary to the judgment in the DOJ case cannot be relitigated by the antitrust defendant in a subsequent case involving private plaintiffs. See Michael E. Jacobs, Non-Mutual Offensive Collateral Estoppel in Private Antitrust Litigation: Lessons from the Microsoft Cases (2012), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2160052](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2160052).

recovery of treble damages by private plaintiffs can serve to deter businesses from engaging in anticompetitive conduct.<sup>19</sup>

While there is no private right of action under Section 5 of the FTC Act, a private plaintiff can still challenge conduct that would violate the Sherman Act, even though the FTC brought it under Section 5. The crucial difference comes from the fact that private plaintiffs in Sherman Act cases challenging the same conduct challenged by the FTC under Section 5 of the FTCA are not able to invoke collateral estoppel when the FTC obtains a judgment.<sup>20</sup> To the extent that the additional cost of proving a case deters private litigation, one could argue that the use of equitable monetary remedies by the FTC may have served to fill the void generated by the reduction in the relative number of private cases that follow successful FTC actions. Thus, a desire to offset this loss of deterrence may explain the FTC’s use of equitable monetary relief in some cases.<sup>21</sup> Under these circumstances, the Court’s *AMG* decision may make overall remedies and deterrence in FTC cases weaker than in similar DOJ cases,<sup>22</sup> although there is no a priori way to know whether this facet moves the FTC closer to or further away from optimal deterrence.<sup>23</sup>

The second set of competition cases that *AMG Capital* impacts are those where the FTC Act reaches other practices that harm competition but that may not fit neatly into the categories of conduct formally prohibited by the Sherman Act.<sup>24</sup> In cases that would also violate the Sherman Act, those subject to the antitrust laws can rely on extensive Sherman Act precedents and judicial experience, as well as extensive government and private litigation experience as a guide to complying with the antitrust laws. As many have pointed out, no similar body of law and experience exists for either past or potential future FTC Act Section 5 stand-alone cases.<sup>25</sup> Robust enforcement of stand-alone FTC Section 5 cases that are untethered from the Sherman Act and accompanied by the potential for equitable monetary remedies,

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<sup>19</sup> See note 13, *supra*.

<sup>20</sup> Congress amended section 5(a) in 1980 to make clear that the provision did not “impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 of this title which could give rise to a claim for relief under the antitrust laws.” 15 U.S.C. § 16(a) (1980).

<sup>21</sup> See, e.g., Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45820 (Aug. 4, 2003), <https://www.federalregister.gov/documents/2003/08/04/03-19722/policy-statement-on-monetary-equitable-remedies-in-competition-cases>, noting that “[d]isgorgement is an equitable monetary remedy “designed to deprive a wrongdoer of his unjust enrichment and to deter others” from future violations.”

<sup>22</sup> Private plaintiffs in cases that follow successful FTC enforcement actions can rely on the persuasive effect of the FTC’s case, but the issues determined in the FTC action, even if actually litigated and necessary to the judgment, are not given a preclusive effect and can be relitigated.

<sup>23</sup> See Lopatka & Page, *supra* note 4.

<sup>24</sup> *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

<sup>25</sup> See Kovacic & Winerman, *supra* note 5.

such as disgorgement, would generate substantial legal uncertainty and plausibly lead to overdeterrence.<sup>26</sup>

In the past, the FTC has mitigated the potential for such overdeterrence effects through written policy statements limiting both the scope of stand-alone FTC Act cases<sup>27</sup> and the use of equitable monetary remedies in Section 5 UMC cases.<sup>28</sup> The FTC's 2015 Statement on Enforcement Principles sought to align Section 5 with the Sherman and Clayton Acts by seeking to promote consumer welfare, challenging conduct that is likely to cause harm to competition, and evaluating conduct under the rule of reason.<sup>29</sup> The 2003 Statement on Monetary Equitable Remedies in Competition Cases set out a policy where the FTC would seek disgorgement or restitution in a competition case only when the underlying violation was clear and where there was a reasonable basis for calculating the amount of a remedial payment. The policy also would have the FTC also consider the marginal value of seeking such remedies taking into account other remedies available in the matter.

But in recent years, the FTC has taken steps to remove these limits. The FTC withdrew the 2015 statement in 2021<sup>30</sup> and replaced it in 2022 with a policy that announced an expansive and unbounded approach to Section 5 UMC cases.<sup>31</sup> The

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<sup>26</sup> See James C. Cooper & Bruce H. Kobayashi, *Equitable Monetary Relief Under the FTC Act: An Opportunity for a Marginal Improvement*, 83 *Antitrust L.J.* 645, 684-7 (2021) (discussing the effect of legal uncertainty). See also Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 *J.L. Econ. & Org.* 279 (1986); Robert Cooter, *Prices and Sanctions*, 84 *Colum. L. Rev.* 1523 (1984).

<sup>27</sup> Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, (August 13, 2015), (2015 Statement), [https://www.ftc.gov/system/files/documents/public\\_statements/735201/150813section5enforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf)

<sup>28</sup> Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 *Fed. Reg.* 45820 (Aug. 4, 2003), <https://www.federalregister.gov/documents/2003/08/04/03-19722/policy-statement-on-monetary-equitable-remedies-in-competition-cases>.

<sup>29</sup> 2015 Statement, *supra* note 26.

<sup>30</sup> FTC Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf)

<sup>31</sup> Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission File No. P221202, available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf). Commissioner Wilson, in dissent, described the 2021 Statement as announcing "that the Commission has the authority summarily to condemn essentially any business conduct it finds distasteful." Dissenting Statement of Commissioner Christine S. Wilson, Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act", Commission File No. P221202 November 10, 2022, at 1-2. [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf).

Commission withdrew the Statement on Monetary Equitable Remedies in Competition Cases in 2012<sup>32</sup> and it has not been replaced.<sup>33</sup>

In a broad sense, the Court’s *AMG Capital* decision can be viewed as a substitute for the latter withdrawn statement, leaving the current FTC with broad powers but weak remedies. The structure is consistent with recent economic theory on the design of legal rules, which suggests efficiency in bundling weak remedies with uncertain legal norms.<sup>34</sup> Indeed, Kovacic & Winerman argue that this was part of the original design of the FTC, noting that “*the FTC’s administrative powers under Section 5 incorporated a significant trade-off. The Commission’s power to shape doctrine would be relatively broad and would include the authority to arrest conduct not previously condemned by prevailing interpretations of the Sherman Act. Its remedial authority would be relatively light-handed and include the capacity to impose only equitable remedies.*”<sup>35</sup> The light-handed remedial structure, where the FTC only has the power to issue an injunction or cease-and-desist order, is designed to ameliorate the social costs of uncertainty over what conduct might violate Section 5. Not only are firms not over-deterred from engaging in conduct that might violate Section 5, but the ability to have a relatively free bite-at-the-apple also encourages companies to engage in conduct, including litigation, that will elucidate the true legal standard.<sup>36</sup> Once the standard is clarified, violations of cease-and-desist orders face civil penalties if the order clearly defines the line between legal and illegal conduct.<sup>37</sup>

<sup>32</sup> Statement of the Commission, Effecting the Withdrawal of the Commission’s Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47070 (July 31, 2012), <http://www.ftc.gov/os/2012/07/120731commissionstatement.pdf>.

<sup>33</sup> For contemporaneous criticisms of the lack of guidance, see Remarks of Joshua D. Wright, Commissioner, Federal Trade Commission at the 18th Annual Competition Law and Policy Workshop European University Institute Department of Law, The Federal Trade Commission and Monetary Remedies, Florence, Italy (July 19, 2013), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/federal-trade-commission-monetary-remedies/130719monetaryremedies.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-monetary-remedies/130719monetaryremedies.pdf). See also Separate Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright, Federal Trade Commission v. Cephalon, Inc. <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/separate-statement-commissioners-maureen-k-ohlhausen-joshua-d-wright-federal-trade-commission-v>.

<sup>34</sup> Cooper & Kobayashi, *supra* note 25 at 691-2. See generally, Omri Ben-Shahar, Playing Without a Rulebook: Optimal Enforcement When Individuals Learn the Penalty Only by Committing the Crime, 17 Int’l. Rev. L. & Econ. 409 (1997); Surajeet Chakravarty, David Kelsey, & Joshua C. Teitelbaum, Tort Liability and Unawareness (2022), <https://ssrn.com/abstract=3179753>.

<sup>35</sup> Kovacic & Winerman, *supra* note 5 at 932.

<sup>36</sup> Cooper & Kobayashi, *supra* note 25 at 692. See also Separate Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright, Federal Trade Commission v. Cephalon, Inc., *supra* note 32, (noting that “the incentive to pursue monetary remedies more frequently, particularly in other cases without a clear violation, may cause the Commission to neglect its special mission to develop the antitrust laws through Part III litigation and other unique tools.”).

<sup>37</sup> See note 8, *supra*. In addition, under Section 5m(1)(b) of the FTC Act, the FTC can seek civil penalties against a business that was not a party in the FTC administrative litigation and engages in conduct with actual knowledge that the conduct has been determined unlawful in an adjudicated Commission order.

The Court's decision in *AMG Capitalis* is similar in this respect to its earlier announcement of the antitrust injury doctrine in *Brunswick Corp v Pueblo Bowl-O-Mat Inc.*<sup>38</sup> Antitrust injury is as often described as a standing doctrine, but the holding in *Brunswick* is a limitation on remedies under Section 4 of the Clayton Act.<sup>39</sup> These limits, in turn, promoted the transformation of antitrust rules by altering the incentives of plaintiffs to bring cases in a way that is more consistent with optimal deterrence.<sup>40</sup> More generally, both cases highlight the numerous important and understudied effects of the incentive function provided by remedies.<sup>41</sup>

Finally, the analysis above suggests the following path for restoring the FTC's ability to obtain equitable monetary relief. Unlike the proposed statutes that were introduced after the Court's decision in *AMG Capital*,<sup>42</sup> the ability for the FTC to obtain equitable monetary relief in competition cases in federal court would be limited to clear violations and subject to the other limitations contained in the FTC withdrawn 2003 Policy Statement,<sup>43</sup> including relief that would mimic the deterrent effect of follow-on Sherman Act cases. Such relief would not be available for stand-alone Section 5 violations that have not been clarified through administrative litigation.<sup>44</sup>

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15 U.S. Code § 45(m)(1)(B). Actual notice is accomplished through the publication and dissemination of Notices of Penalty Offenses. See <https://www.ftc.gov/enforcement/penalty-offenses>. Use of this rule would go beyond what is allowed under the doctrine of collateral estoppel, which in the offensive case does not apply to non-party defendants and has not been used in any recent UMC cases. Our approach would limit the application of FTC administrative outcomes to conduct by non-party defendants only when the conduct has been shown through repeated litigation to be anticompetitive in all or almost all cases. See, e.g., Alex Raskovich, et. al., Always or Almost Always Anticompetitive? The Global Antitrust Institute's Comment on the FTC's Proposed Rule Banning Non-Compete Clauses in Employment Contracts, George Mason Law & Economics Research Paper No. 23-08, (2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4421548](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4421548) (discussing this standard in the context of FTC rulemaking).

<sup>38</sup> 429 U.S. 477 (1977).

<sup>39</sup> The Court held that the plaintiff's injury was not the type of injury forbidden by the antitrust laws and thus would not be compensable under the remedial provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15.

<sup>40</sup> See Lopatka & Page, *supra* note 4; William H. Page, Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury, 47 U. Chi. L. Rev. 467 (1980).

<sup>41</sup> Lopatka & Page, *supra* note 4.

<sup>42</sup> See note 9, *supra*.

<sup>43</sup> See note 27, *supra*.

<sup>44</sup> See note 36, *supra*.

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