Calculating FTC Section 19 Monetary Relief After AMG

By **Christopher Leach and Kevin Healy** (August 15, 2022)

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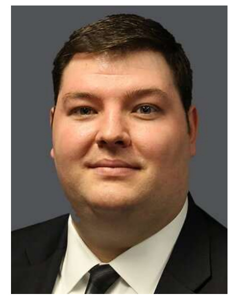

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The Federal Trade Commission has been rethinking how it can obtain money in its enforcement actions.

Last year, the U.S. Supreme Court upended the FTC's four-decade-old enforcement program, holding that the agency could not obtain so-called equitable monetary relief for first-time violations of Section 5 of the FTC Act — the agency's generic authority to prosecute unfair and deceptive acts and practices.

But that decision left intact the agency's authority under Section 19 of the FTC Act, which allows the FTC to obtain consumer refunds, among other things, for violations under a more narrow set of circumstances.

With that development now more than a year in the rearview mirror, courts have had an opportunity to assess monetary relief under Section 19 standing alone — in prior cases, Section 19 almost always was paired with a Section 5 violation.

Courts have divided in the limited universe of cases — some courts that improbably hold that nothing has changed, whereas other courts have taken a harder look at whether consumers actually were injured by the practices at issue. This is an area that is developing, but presents attorneys in FTC cases with some new ammunition to push back against FTC money demands, whether in court or in pre-suit settlement talks.

The Ancien Régime of Equitable Monetary Relief

Settlements — and litigated orders — with the FTC include two parts: (1) conduct relief that restricts the company's actions going forward and (2) money, if the agency can get it.

On money, for the past four decades, the FTC had relied on court interpretations of Section 13(b) of the FTC Act holding that, when the FTC sued to obtain an injunction in connection with first-time violations of Section 5 of the FTC Act, courts also could order companies to pay equitable monetary relief, even though the statute said nothing about money.

Over time, federal courts developed a two-step framework for calculating this monetary relief:

First, the FTC had to prove that its calculation was a reasonable approximation of the defendant's unjust gains, which in most cases for consumer goods would be measured by net revenues — price paid minus refunds and chargebacks.

Second, if the FTC made that showing, the burden then shifted to the defendant to show that the FTC's calculations overstated the amount of any unjust gains, with defendants bearing any risk of uncertainty.

This framework was disturbed briefly with the U.S. Supreme Court's 2020 Liu v. SEC decision, which held, among other things, that the U.S. Securities and Exchange

Commission's disgorgement remedies should be limited to a firm's net profits, taking into account not only revenues, but also corporate expenses.

Courts divided on whether Liu's holding applied to FTC actions under Section 13(b), some holding yes, others no.

In the five years before April 2021, the FTC collected more than $11 billion using this authority.

We reference April 2021 because that was when the U.S. Supreme Court upended this enforcement program: In AMG Capital Management LLC v. FTC, the high court held unanimously that Section 13(b) authorized the FTC to obtain only an injunction, and not monetary relief.

Section 19 of the FTC Act

The AMG decision addressed only suits under Section 13(b) and left untouched the FTC's other key tool to obtain money relief in enforcement actions: Section 19 of the FTC Act.

That provision allows the FTC to seek a specific list of remedies:

- Rescission or reformation of contracts;
- The refund of money or return of property;
- The payment of damages; and
- Public notification respecting the rule violation or the unfair or deceptive act or practice.

And it contains a three-year statute of limitations.

What triggers these penalties? Notably, not a bare first-time violation of Section 5's prohibition on unfair or deceptive acts or practices. Rather, the FTC can seek these penalties for two buckets of violations, outlined in Section 19(a).

First, the FTC can seek these penalties for violations of "any rule under this subchapter respecting unfair or deceptive acts or practices."

In practice, this wordy category includes — by operation of interlocking definitions — numerous specific statutes that the FTC enforces, including the Fair Debt Collection Practices Act, the Equal Credit Opportunity Act and the Restore Online Shoppers Confidence Act.

The category also includes rules passed by the FTC — e.g., the Telemarketing Sales Rule and the Made in USA Rule.

Second, the FTC can seek money penalties in connection with first-time violations of Section 5 in a federal court action if the FTC:

- Has first issued a final administrative cease-and-desist order; and

- Can prove to the federal court that the practice subject to the cease-and-desist order is one that a "reasonable man would have known under the circumstances was dishonest or fraudulent."

Notably, the FTC has been relying on this theory to obtain money penalties in settlements for first-time violations of the FTC Act without first obtaining the administrative order, even though AMG would seem to preclude that outcome.

Calculating Redress Under Section 19

With Section 19 now the FTC's main route to obtaining monetary relief, the obvious question is, is this just same book, different jacket?

On timeliness, Section 19 is more restrictive, providing the FTC with a three-year statute of limitations.

Actions under Section 13(b) had no textual statute of limitations, though the FTC had been applying a five-year limitations period after the Supreme Court's 2017 Kokesh v. SEC decision held that disgorgement remedies were a penalty covered by the general federal limitations period under Title 28 of the U.S. Code, Section 2462.

Less settled, however, is how to calculate the relief under Section 19. In the over a year since the AMG decision, courts seem to have divided roughly into two camps — one more favorable to the FTC, and one less.

Old Boss, Same as the New Boss

Some courts addressing the issue have treated Section 19 remedies as essentially interchangeable with Section 13(b) equitable monetary relief.

For example, in the September 2021 FTC v. Credit Bureau Center LLC,[1] the U.S. District Court for the District of Illinois revisited an earlier award under Section 13(b) in light of AMG.

Although the original complaint alleged violations of Section 19-triggering statutes, including the Restore Online Shoppers Confidence Act, in addition to Section 5, the original money award was based only on Section 13(b).

When revisiting its prior award of injunctive and monetary relief under section 13(b), the court concluded that the alleged violation of the Restore Online Shoppers Confidence Act allowed the FTC to seek monetary relief for violations of this act under section 19(b) of the FTC Act.

But the court did not recalculate relief. Rather, the court simply amended its prior judgment to reflect that the authority stemmed from Section 19, rather than 13(b) — the alleged scam only lasted three years, so there seemed not to be an issue with the statute-of-limitations difference.

In doing so, the court rejected the defendant's argument that the damages should be limited to the net profits based on Liu. According to the court, Liu addressed only the remedy of disgorgement, which the court held had no applicability to the restitution that the FTC sought under Section 19, citing to two district court cases that had previously declined to apply Liu to the FTC's "equitable monetary relief" in the year between Liu and AMG.

The U.S. Court of Appeals for the Ninth Circuit reached the same — albeit nonprecedential — result in the June 9 FTC v. Elegant Solutions Inc. decision.[2]

The district court had awarded relief based on the defendants' net revenue — gross receipts minus customer refunds and payments to customers' lenders — defendants were operating a student loan management company.

The Ninth Circuit affirmed, holding that the district court correctly based the calculation on consumer loss, as opposed to net unlawful profits, because Section 19(b) allows for the refund of money.

The case was not a total FTC victory — relying on prior Ninth Circuit precedent that Section 19 prohibits "disgorgement that exceeds redress to consumers," the court ordered that the district court amend the remedial order to strike a provision requiring any money not used for equitable relief to be deposited with the U.S. Treasury.

New Sheriff in Town?

In the second set of cases, the courts have complicated the FTC's efforts to obtain monetary relief by focusing not only on defendants' revenues, but also on whether consumers actually were injured.

The most striking example comes from the U.S. District Court for the District of Arizona in the November 2021 FTC v. Noland decision.[3]

There, the FTC had already won summary judgment on liability, with the district court finding that the defendants had violated the Mail, Internet, or Telephone Order Merchandise Rule by failing to comply with shipping-time rules and by failing to offer refunds for delayed products.

But the district court denied the FTC's summary judgment motion on monetary relief because the FTC's calculation — using its standard net-revenue formula — "fail[ed] to account for the inherent value of the product that consumers ultimately received, even if the product was shipped late."

The court's analysis focused on Section 19(b)'s requirement for relief to be "necessary to redress injury to consumers." The all-or-nothing calculation was viewed as a potential windfall for consumers without an analysis of which consumers were dissatisfied and would have requested a refund if they had known a refund was available.

The district court ultimately placed the burden on the FTC to prove each individual consumer's injury and provide the specifics to redress that injury without regard for the FTC's concerns of the burdensomeness of such an approach.

And two recent decisions ended in a similar place — incorporating consumer satisfaction in remedy analysis — approached the issue from a different angle.

FTC v. QYK Brands in the U.S. District Court for the Central District of California[4] and FTC v. American Screening in the U.S. District Court for the Eastern District of Missouri[5] also concerned shipping delays in violation of the MITOR rule, but both courts ultimately adopted the FTC's net-revenue calculation.

Distinguishing Noland, the courts explained that, unlike in Noland, the law violations they faced involved deceptive statements made prior to the purchase of the goods in question. In other words, the deceptive statement induced the purchase in the first place.

But the courts then took an unexpected path. Normally, when the FTC can identify customers — as it likely could in these cases with defendants' own records — the FTC often simply divides the monetary award into pro rata checks for each customer and sends those in the mail.

Instead, the courts incorporated the lesson from Noland that customers might have been satisfied and required the FTC to restructure its redress to require customers to make refund requests, rather than receiving refund checks outright. The remaining funds would return to defendants.

The differences between Noland, and QYK and American Screening are significant. The Noland model puts a much greater burden on the FTC outside of outright scams, where consumers literally got nothing in the transaction.

But while the QYK and American Screening cases would require defendants to pay more upfront, the district court's refund-request model could result in a significant portion of the monetary relief reverting back to defendants — a better result than was typical prior to AMG.

Conclusion

So, what do we make of this competing case law? This area is still developing, and courts are going to have to figure out the extent to which Liu's limitations on equitable relief apply to Section 19 remedies, and also the extent to which the FTC actually will be required to prove consumer injury.

Until then, the case law leaves company counsel with a number of additional arguments against the FTC's money calculations — in litigation and in pre-suit negotiations — which likely will remain based on the pre-AMG net-revenue model.

Liu obviously injects the concept of costs into the picture — arguing that, whatever the appropriate loss figure, the FTC must subtract relevant corporate expenses. And the new cases, Noland in particular, also open the door to creative arguments to reduce calculations of consumer injury with evidence of consumer satisfaction.

To be sure, FTC practitioners have been making these arguments in settlement negotiations for years. But these new decisions provide company counsel with additional leverage.

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[1] FTC v. Credit Bureau Ctr., LLC, No. 17 C 194, 2021 WL 4146884 (N.D. Ill. Sep. 13, 2021).

[2] FTC v. Elegant Sols., Inc., 20-55766, 2022 WL 2072735 (9th Cir. June 9, 2022).

[3] FTC v. Noland, CV-20-00047-PHX-DWL, 2021 WL 5493443 (D. Ariz. Nov. 23, 2021); see also FTC v. Netforce Seminars, 00-cv-2260, 2022 WL 845189 (D. Ariz. Mar 22, 2022) (ruling by same judge in a related case).

[4] FTC v. QYK Brands, LLC, SACV201431PSGKESX, 2022 WL 2784416 (C.D. Cal. June 21, 2022).

[5] FTC v. Am. Screening, LLC, 4:20-CV-1021 RLW, 2022 WL 2752750, at *1 (E.D. Mo. July 14, 2022).