



A POST-AMG CAPITAL UPDATE: EQUITABLE SOLUTIONS FOR LITIGATING PARTIES THAT HAVE PAST THE POINT OF NO RETURN

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The fallout from the United States Supreme Court's decision in *AMG Capital* last year continues as companies, government regulators, and even courts tackle issues of first impression. A recent decision from a federal court in the Northern District of Georgia illustrates the complex equities a court must balance when determining the impact of *AMG Capital* on a suit brought by the Federal Trade Commission where the litigation had been in progress for a significant period before the U.S. Supreme Court decided *AMG Capital*.

A Brief Recap of *AMG Capital*. Last April, the U.S. Supreme Court unanimously found the FTC lacked authority to seek monetary relief, such as restitution, for unfair or deceptive acts under Section 13(b) of the FTC Act. See *AMG Capital Management LLC v. Federal Trade Commission*, No. 19-508 594 U.S. ____ (Apr. 22, 2021). The FTC immediately decried the decision; FTC Acting Chairwoman Rebecca Kelly Slaughter stated “[w]ith this ruling, the court has deprived the FTC of the strongest tool we had to help consumers when they need it most.” While other avenues are available to the FTC to seek monetary relief, the agency had most frequently relied upon Section 13(b) and many speculated about what the agency would do both with regards to new enforcement actions, but also current enforcement actions premised upon now non-existent Section 13(b) authority.

We at Cozen O'Connor [believed](#) there would be an increased focus from the FTC on collaboration with state attorneys general on consumer protection cases, allowing the agency to continue to litigate in federal court outside of the more cumbersome administrative process available in the wake of *AMG Capital* and rely upon state AGs' redress power to seek monetary relief. While it is still too early to tell if there is a sea change like the relationship between the FTC and state AGs, federal courts and parties currently in litigation with the FTC are still trying to figure a path forward.

The *FleetCor* Case. The most comprehensive federal-court response to the fallout from *AMG Capital* so far came last month from the U.S. District Court for the Northern District of Georgia. In *Federal Trade Commission v. FleetCor Technologies, Inc. and Ronald Clarke*, Judge Amy Totenberg issued a 22-page decision denying the FTC's Motion to Stay or in the Alternative, Voluntarily Dismiss its complaint against FleetCor which the FTC had filed in the “tidal wave of change to over 40 years of prior precedent and practice” that was *AMG Capital*.

The FTC's motion asked “the Court to stay this action while it pursues claims against FleetCor and Clarke in the agency's administrative litigation process, after which the FTC would be authorized legally to return to this federal court to seek monetary relief under Section 19(a)(2) of the FTC Act.” Dkt. No. 192, Order at 2, No. 1:19-cv-5727-AT (N.D. Ga. February 7, 2022). In denying the motion, the court relied heavily on the equities at play arising from the parties' legal history as well as the FTC's stated goal of attaining financial redress for the consumers allegedly injured by the defendants' conduct.

At the Summary Judgment Phase. The FTC filed the original lawsuit against FleetCor in December 2019 alleging that the defendants made deceptive statements to consumers about, and charged hidden fees on, its products in violation of Section 5 of the FTC Act. The FTC sought both injunctive and equitable monetary relief. At the time of the *AMG Capital* decision, the parties had been engaged in significant litigation for well over a year with extensive discovery. Defendants produced over 1.4 million pages of documents, over twelve witnesses for

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deposition, and over 6,700 gigabytes of transactional data. Discovery had concluded and the FTC filed a motion for summary judgment less than a week prior to the *AMG Capital* opinion. The FTC then filed an administrative complaint against the defendants on August 11, 2021, and subsequently sought a stay on August 13, 2021, to “protect and compensate thousands of allegedly injured consumers for significant money losses.” Opinion at 6.

Court Sympathetic but Ultimately Denied Motion to Stay. While the court was sympathetic to the FTC’s motive for requesting a stay, it questioned some of the FTC’s expectations including the timeline for the case if the stay were to be granted and the FTC pursued administrative action before returning to the court to seek monetary relief. The court ran through all the potential stages needed before the case could be reopened, including that:

the agency proceeding would have to be reopened; the agency would then be required to rule on a potential motion to dismiss in the administrative action; the parties might have to engage in additional discovery; the parties would have to brief, and the agency then decide, summary judgment; a trial would have to be conducted in the administrative proceeding; and then any appeals of the agency’s determination would have to be heard and decided by an appellate court.

Opinion at 8. The court concluded this could take years, not the seven months the FTC anticipated before the case was ripe for monetary relief. Because the FTC’s stated goals were to protect and compensate consumers, the court did not understand why the FTC could not accomplish those same goals through litigation on the merits in federal court and then the subsequent pursuit of an agency cease-and-desist order to be followed by court proceedings to ensure monetary relief. As such, the court denied the FTC’s motion to stay as it could easily become a stay of indefinite duration in the absence of a pressing need that would necessarily harm the FTC’s stated goals. *Id.*

Court Found the Defendants Would Suffer Substantial Loss. The defendants argued that they would suffer prejudice if the court granted the FTC’s motion to dismiss without prejudice. The defendants argued, among other reasons, that a dismissal without prejudice would unfairly burden them considering the advanced stage of the litigation and unfairly benefit the FTC by allowing it to restart its case in a new forum with knowledge of the defendants’ defensive strategy. Dismissal without prejudice, the defendants claimed, would also deprive them of a neutral decision-maker.

The court considered these arguments because of the “peculiar circumstances presented.” The court acknowledged that the FTC filed the administrative complaint after the completion of discovery and after the filing of summary judgment briefs. The court would not, however, assume bias on the part of the Commission members who are to play the role of the neutral decision-maker. *Id.* at 15. The defendants’ argument on the advanced stage of the litigation and the costs of litigation did sway the court, though. The court also noted the differences in legal standards, procedures, and claims between a civil complaint in federal court and those of an administrative proceeding under Section 19 of the FTC Act, which would require defendants in many cases to relitigate much of the work they had already performed.

The court did not find the FTC acted in bad faith in filing the motion to dismiss despite its filing delay of four months post-*AMG Capital*. “The Court reiterates its understanding that *AMG Capital* was a major change in the law and that all parties are attempting to find their footing in response to this change, with the FTC rightly motivated by its congressionally established purpose of advocating for alleged injured customers.” Indeed, the court found that the FTC would best protect consumers if it moved forward with the litigation of the merits.

The court found the defendants would suffer the loss of substantial rights if the court were to dismiss without prejudice. As such, the most equitable course, as determined by the court, was to move forward with adjudication of the merits.

The Path Forward Is Still Uncertain. As the FTC pivots from *AMG Capital*, it is clear the agency is still uncertain as to the best path forward. Section 19 actions require an extensive administrative process, which as pointed out by the court in *FleetCor*, can move very slowly. In response to this ruling and others to come, the FTC will be thinking creatively about the potential avenues that are available for litigation in the future. Businesses must be well prepared to address the potential inequities that might exist in these new creative proposals as well as offer potential workarounds to their benefit. In *FleetCor*, the defendants remained in the same position they were in despite *AMG Capital*, which might not be a win, but certainly beat the alternative.