

**Not a One-Trick Pony:**  
**FTC Monetary Remedies Beyond Section 13(b)**

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For the past four decades, the Federal Trade Commission’s primary and most effective tool for enforcing the Federal Trade Commission Act (the Act) has been Section 13(b).<sup>2</sup> During this time, the Commission has used Section 13(b) to obtain court orders halting a wide range of unfair, deceptive, and anticompetitive conduct and awarding billions of dollars of monetary relief that the Commission has returned to consumers harmed by such conduct.<sup>3</sup>

Section 13(b) authorizes the Commission to sue defendants in federal district court for violations of the Act. The statute provides that, if the Commission can establish the violation, the district court can issue a “permanent injunction.” Beginning in the 1980s, seven of the twelve courts of appeals, relying on longstanding Supreme Court precedent,<sup>4</sup> interpreted the “permanent injunction” language in Section 13(b) to authorize district courts not only to enter a behavioral injunction prohibiting defendants from engaging in unlawful conduct but also to award the full panoply of equitable remedies necessary to provide complete relief for consumers. These equitable remedies included monetary relief that the Commission could return to consumers. For decades, no court held to the contrary.

All that changed in August 2019, when the Seventh Circuit Court of Appeals held that the “permanent injunction” language in Section 13(b) did not authorize courts to grant monetary relief.<sup>5</sup> In reaching this conclusion, the Seventh Circuit overturned three decades of its own authority and stood in contrast to every other circuit court of appeals to rule on the issue.<sup>6</sup>

The resulting circuit split drew the attention of the Supreme Court. In 2020, the Court granted certiorari in *AMG Capital Management v. FTC*,<sup>7</sup> a case in

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<sup>2</sup> 15 U.S.C. § 53(b).

<sup>3</sup> See *FTC Refunds to Consumers, Fiscal Year 2016 to 2020*, [https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds\\_1579795840200/RefundsbyDate](https://public.tableau.com/profile/federal.trade.commission#!/vizhome/Refunds_1579795840200/RefundsbyDate).

<sup>4</sup> See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

<sup>5</sup> *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019), *petition for cert. filed*, No. 19-825 (U.S. Dec. 19, 2019).

<sup>6</sup> In September 2020, the Third Circuit joined the Seventh Circuit in holding that Section 13(b) does not authorize monetary relief. See *FTC v. Abbvie, Inc.*, 976 F.3d 327 (3d Cir. 2020).

<sup>7</sup> No. 19-508 (U.S.) (argued Jan. 13, 2021).

which the Ninth Circuit had upheld the Commission's ability to obtain monetary relief in cases brought under Section 13(b). Oral argument in *AMG* took place in January 2021, and the Court is expected to rule by the middle of 2021. Although it is difficult to predict how the Court will rule based on the oral argument, many media observers have opined that the Court is poised to rule that Section 13(b) does not authorize courts to award monetary relief.<sup>8</sup>

If courts can no longer award monetary relief under Section 13(b), it undoubtedly will be a significant blow to the Commission's efforts to protect consumers from unfair, deceptive, and anticompetitive practices. But it will not be a death knell. As an initial matter, an adverse ruling in *AMG* will not affect courts' ability to issue behavioral injunctions that halt violations of the Act. And the Act provides multiple other pathways that the Commission can utilize to seek monetary remedies against defendants who engage in unlawful conduct.

To be clear, these pathways are not as effective as Section 13(b). In consumer protection cases, these pathways do provide a means for the Commission in many (but not all) cases to obtain monetary judgments that will impose financial consequences for violations of the Act and can be used to provide redress to harmed consumers. On the competition side, however, monetary remedies will only be available in a very narrow class of cases involving violations of prior Commission administrative orders.

The non-Section 13(b) monetary remedy pathways are discussed below, broken down into three broad categories of cases: (1) those involving violations of Commission rules; (2) those involving only violations of Section 5(a)(1)'s prohibition on unfair or deceptive acts or practices; and (3) those involving violations of Commission administrative orders.

## **RULE VIOLATION CASES**

The cases that will be least affected by an adverse Supreme Court ruling in *AMG* are those that involve violations of FTC consumer protection rules (e.g., the

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<sup>8</sup> Christopher Cole, *Justices Skeptical of FTC's Claim to Restitution Powers*, Law 360 (Jan. 13, 2021), <https://www.law360.com/articles/1344554/justices-skeptical-of-ftc-s-claim-to-restitution-powers>; Ronald Mann, *Argument analysis: Justices Doubt FTC's Authority to Compel Monetary Relief*, SCOTUSblog (Jan. 14, 2021), <https://www.scotusblog.com/2021/01/argument-analysis-justices-doubt-ftcs-authority-to-compel-monetary-relief/>; Evan Weinberger, *FTC Faces Narrow Supreme Court Path to Preserve Penalty Powers*, Bloomberg Law (Jan. 13, 2021), <https://news.bloomberglaw.com/banking-law/ftc-faces-narrow-supreme-court-path-to-preserve-penalty-powers>.

Telemarketing Sale Rule<sup>9</sup> or COPPA<sup>10</sup>) or specific statutes (e.g., ROSCA<sup>11</sup>) that include language that treats a statutory violation as a violation of a consumer protection rule under the Act.<sup>12</sup> In these cases (which, for ease of reference, are referred to as “rule violation cases”), the Act provides two means to obtain monetary relief. The first is Section 19(a)(1) of the Act, which authorizes courts in rule violation cases to award relief “necessary to redress injury to consumers,” including refunds and payment of damages.<sup>13</sup> The second is Section 5(m)(1)(A) of the Act, which authorizes courts to impose civil penalties in such cases.<sup>14</sup>

In rule violation cases, the Commission’s choice to pursue monetary relief under Section 19(a)(1) or Section 5(m)(1)(A) will depend on the facts of the underlying case. In cases involving an easily quantifiable consumer monetary loss, the Commission typically will seek monetary relief under Section 19(a)(1) because the Commission can distribute such relief to harmed consumers. In cases where it is difficult to quantify a monetary loss, the Commission is more likely to seek civil penalties under Section 5(m)(1)(A) because civil penalties must go to the Treasury and cannot be used to provide redress to harmed consumers. Note, however, that the two remedy pathways are not mutually exclusive—nothing prohibits a court from awarding monetary relief under Section 19(a)(1) *and* imposing civil penalties under Section 5(m)(1)(A).<sup>15</sup>

The Sections 19(a)(1) and 5(m)(1)(A) pathways for monetary relief do contain important limitations that are not present in Section 13(b) monetary relief cases. For example, in rule violation cases brought under Section 5(m)(1)(A), a court can award civil penalties only if the Commission establishes that the defendant had “actual knowledge or knowledge fairly implied” that the conduct at

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<sup>9</sup> 16 C.F.R. pt. 310.

<sup>10</sup> 16 C.F.R. pt.312.

<sup>11</sup> Restore Online Shoppers’ Confidence Act, 15 U.S.C. §§ 8401-05.

<sup>12</sup> *See, e.g., id.* § 8404(a); 15 U.S.C. § 1692l(a) (Fair Debt Collections Practices Act); 15 U.S.C. § 7706(a) (CAN-SPAM Act).

<sup>13</sup> 15 U.S.C. § 57b(a)(1), (b).

<sup>14</sup> *Id.* § 45(m)(1)(A).

<sup>15</sup> The Commission typically does not seek redress and civil penalties in the same action because in many consumer protection cases defendants do not have sufficient assets to pay both. In such circumstances, the Commission prioritizes redress that can be returned to consumers over civil penalties that would end up in the Treasury.

issue was unfair or deceptive and prohibited by the rule or statute.<sup>16</sup> In contrast, the Commission's evidentiary burden to obtain monetary relief under Section 13(b) is lower. To obtain monetary relief under Section 13(b) against an individual for deceptive conduct, the Commission must demonstrate that the individual possessed actual knowledge of the deceptive conduct, was recklessly indifferent to it, or intentionally avoided knowledge of it.<sup>17</sup> And, to obtain monetary relief against corporate defendants under Section 13(b), the Commission does not have to establish knowledge.<sup>18</sup> Given the higher knowledge standard set forth in Section 5(m)(1)(A), there may be cases in which the Commission could obtain monetary relief under Section 13(b) but will not be able to obtain civil penalties under Section 5(m)(1)(A).<sup>19</sup>

As for rule violation cases brought under Section 19(a)(1), those too will not yield the same results that the Commission has historically obtained under Section 13(b) because monetary relief under Section 19 is subject to a three-year statute of limitations,<sup>20</sup> whereas Section 13(b) monetary relief has no statutory time bar.<sup>21</sup> Section 19's three-year limitations period will limit the number of

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<sup>16</sup> 15 U.S.C. § 45(m)(1)(A).

<sup>17</sup> See *FTC v. Ross*, 743 F.3d 886, 892 (4th Cir. 2014) (holding that knowledge necessary to hold an individual liable for monetary relief under 13(b) can be established "by showing that the individual had actual knowledge of the deceptive conduct, was recklessly indifferent to its deceptiveness, or had an awareness of a high probability of deceptiveness and intentionally avoided learning the truth"); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1207 (10th Cir. 2005); *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170-71 (9th Cir. 1997).

<sup>18</sup> Nonetheless, the fair notice doctrine and due process considerations provide limits on the extent of corporate liability for monetary relief under Section 13(b). See *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 249-59 (3d Cir. 2015).

<sup>19</sup> Civil penalty actions under Section 5(m)(1)(A) often involve more time and resources. First, pursuant to Section 16 of the Act, the Commission must refer complaints seeking civil penalties to the Department of Justice (DOJ) for litigation, which adds another bureaucratic step to the process. See 15 U.S.C. § 56(a)(1). If the DOJ staff accept the case, they litigate it; otherwise, the Commission litigates the case on its own behalf. In addition, unlike Section 13(b) cases, defendants in a civil penalty action can demand a jury trial, which typically takes longer and requires more resources to litigate.

<sup>20</sup> 15 U.S.C. § 57b(d). Civil penalty claims under Section 5(m)(1)(A) are subject to a five-year statute of limitations. See 28 U.S.C. § 2462 (general five-year statute of limitations for actions seeking a civil fine or penalty).

<sup>21</sup> See, e.g., *Credit Bureau Ctr.*, 937 F.3d at 783; *FTC v. J. William Enterps., LLC*, 283 F. Supp. 2d 1258, 1262 (M.D. Fla. 2017); *FTC v. Ivy Capital, Inc.*, No. 2:11-CV-283 JCM (GWF), 2011 WL 2470584, at \*2 (D. Nev. June 20, 2011); *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1012 (N.D. Cal. 2010); *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 263 (E.D.N.Y. 1998).

consumers who are eligible for redress through a Section 19 action. Many Commission actions involve schemes that have been operating for many years, primarily because it takes several years for such schemes to generate a sufficient volume of complaints to justify the Commission's use of its limited resources to commence an investigation. As a result, by the time the Commission commences and completes its investigation and files suit, multiple years may have elapsed from the time the unlawful conduct first began. In such cases, consumers who were victimized more recently will receive redress, whereas consumers who had the misfortune of being victimized in the early days of the scheme will be left out in the cold due to Section 19's three-year limitations period.

### **NON-RULE-VIOLATION CASES**

For cases that do not involve rule violations—i.e., cases that allege only violations of Section 5(a)(1)'s prohibition on unfair or deceptive acts or practices<sup>22</sup>—a loss in *AMG* would significantly impair, but not completely eliminate, the Commission's ability to obtain monetary relief. In such cases, the Commission could initially bring an administrative action under Section 5(b) of the Act<sup>23</sup> and then, at the conclusion of the administrative proceedings (including all appeals), bring a second action in federal district court seeking monetary relief pursuant to Section 19(a)(2).<sup>24</sup> In essence, the process is a bifurcated one, with liability adjudicated in the Section 5(b) administrative proceeding and monetary relief determined in the Section 19(a)(2) district court proceeding. Monetary relief under Section 19(a)(2) is the same as it is for Section 19(a)(1) rule violation cases (relief "necessary to redress injury to consumers," including refunds and payment of damages) and is subject to the same three-year statute of limitations.<sup>25</sup>

Although Section 19(a)(2) provides a pathway to obtain monetary relief in cases that do not involve rule violations, it has several drawbacks. First, because the Commission must litigate two consecutive proceedings to obtain monetary relief via Section 19(a)(2), the process involves more time and resources than obtaining monetary relief in a single proceeding brought under Section 13(b). The Commission's enforcement action against Figgie International provides a good case study of the time and resources necessary to obtain monetary relief

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<sup>22</sup> 15 U.S.C. § 45(a)(1).

<sup>23</sup> *Id.* § 45(b).

<sup>24</sup> *Id.* § 57b(a)(2).

<sup>25</sup> *Id.* § 57b(b), (d).

under Section 19(a)(2). In *Figgie*, the Commission authorized the filing of an administrative complaint in May 1983. After a hearing before the administrative law judge, an appeal of the administrative law judge’s ruling to the Commission, an appeal of the Commission’s final order to the Fourth Circuit, commencement of a Section 19(a)(2) district court action for monetary relief, and an appeal of the district court’s monetary relief award to the Ninth Circuit, the case finally concluded in February 1994 when the Supreme Court denied *Figgie*’s petition for a writ of certiorari.<sup>26</sup> It was not until June 1995—more than twelve years after initiating the case—that the Commission began distributing the nearly \$4 million monetary relief judgment to consumers.<sup>27</sup> The Commission’s experience in *Figgie* is not an outlier.<sup>28</sup> Overall, although Section 19(a)(2) allows courts to grant monetary relief that the Commission can use for consumer redress, the process is significantly slower than Section 13(b). As a result, if monetary relief is no longer available under Section 13(b), consumers harmed by unlawful practices will have to wait longer to get refunds, and the Commission may bring fewer enforcement cases overall because each case will take more time for Commission staff to complete.

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<sup>26</sup> *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1051 (1994); *In re Figgie Int’l, Inc.* 107 F.T.C. 313 (1986) (complaint filed May 17, 1983), *aff’d sub nom Figgie Int’l v. FTC*, 817 F.2d 102 (4th Cir. 1987).

<sup>27</sup> See Press Release, Federal Trade Commission, *Figgie International, Inc.* (June 9, 1995), <https://www.ftc.gov/news-events/press-releases/1995/06/figgie-international-inc>.

<sup>28</sup> For example, in the Commission’s action against Telebrands Corporation for making false and deceptive weight loss claims, seven years elapsed between the start of administrative proceedings and the Commission’s distribution of \$7 million in refunds to harmed consumers. *In re Telebrands Corp.*, Docket No. 9313, 2003 WL 22319292 (F.T.C. Sept. 30, 2003), *aff’d sub nom Telebrands Corp. v. FTC*, 457 F.3d 354 (4th Cir. 2006); Press Release, Federal Trade Commission, *FTC to Send Refund Checks to Consumers Who Bought Bogus “Ab Force” Weight Loss Devices* (Nov. 18, 2010), <https://www.ftc.gov/news-events/press-releases/2010/11/ftc-send-refund-checks-consumers-who-bought-bogus-ab-force-weight>. The process was “faster” because Telebrands agreed to a \$7 million settlement during the pendency of the Section 19(a)(2) district court proceeding. Press Release, Federal Trade Commission, *Marketers of Ab Force Weight Loss Device Agree to Pay \$7 Million for Consumer Redress* (Jan. 14, 2009), <https://www.ftc.gov/news-events/press-releases/2009/01/marketers-ab-force-weight-loss-device-agree-pay-7-million>.

Similarly, it took ten years for the Commission to obtain monetary relief against Koskot Interplanetary, an unlawful multi-level marketing scheme. The Commission filed its administrative complaint in May 1972, and the district court granted summary judgment on the Commission’s Section 19(a)(2) monetary relief claim in December 1982. *FTC v. Turner*, No. 79-474-Orl-Civ-R, 1982 WL 1947 (Dec. 29, 1982); *In re Koscot Interplanetary*, 86 F.T.C. 1106 (1975) (complaint filed May 24, 1972), *aff’d sub nom Turner v. FTC*, 580 F.2d 701 (D.C. Cir. 1978).

The inefficiencies of Section 19(a)(2) will be exacerbated in cases in which preliminary injunctive relief is necessary. In cases involving hardcore frauds and scams, the Commission typically seeks an *ex parte* temporary restraining order that imposes an asset freeze, puts corporate defendants under the control of a court-appointed receiver, and grants the Commission access to business premises to secure documents and evidence. The Commission seeks such extraordinary preliminary relief because defendants in hardcore fraud cases often dissipate assets or destroy evidence when they learn that the FTC has brought an enforcement action against them. Currently the Commission seeks such *ex parte* relief concurrently with its action for monetary and permanent injunctive relief under Section 13(b). If the Commission loses the ability to obtain monetary relief under Section 13(b), courts can likely still award *ex parte* preliminary relief under the preliminary injunction provision of Section 13(b),<sup>29</sup> but such relief will be to maintain the status quo pending resolution of the Commission’s administrative complaint and to preserve the district court’s ability to award monetary relief in a subsequent Section 19 action for monetary relief.<sup>30</sup> Thus, in cases in which preliminary relief is warranted, the bifurcated process in a typical Section 19(a)(2) case will effectively be trifurcated: (1) the Commission will first institute a proceeding for preliminary relief in federal district court under Section 13(b) in which the Commission will have to establish, and the district court will have to assess, the Commission’s likelihood of success on the merits as a predicate to granting preliminary relief; (2) the Commission will next file and litigate the merits of its complaint in an administrative proceeding; and (3) the Commission will then return to federal district court after completion of its administrative litigation to seek monetary relief under Section 19(a)(2). This trifurcated process will be highly inefficient—the Commission and defendants will be mired in years of litigation, consumers will have to endure lengthy delays in getting monetary redress, and a district court judge will spend years overseeing an asset freeze, receivership, and preliminary injunction for a case in which the merits will be litigated in a separate administrative forum.

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<sup>29</sup> In addition to authorizing courts to grant a “permanent injunction,” Section 13(b) also authorizes courts to enter temporary restraining orders and preliminary injunctions to maintain the status quo pending the Commission’s issuance and adjudication of an administrative complaint. 15 U.S.C. § 53(b).

<sup>30</sup> See *FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 719 (5th Cir. 1982) (holding that Section 13(b) authorized preliminary injunctive relief to preserve the district court’s ability to provide consumer redress in a future Section 19 proceeding).

Another downside to Section 19(a)(2) is that it is not available for every non-rule-violation case that the Commission can bring under Section 13(b). For example, because Section 19(a)(2) only applies to cases involving “any unfair or deceptive act or practice,”<sup>31</sup> the Commission cannot seek monetary relief under that provision for cases involving unfair methods of competition. Accordingly, if monetary relief is no longer available under Section 13(b), courts will lose the ability to award monetary relief in cases involving anticompetitive conduct, and the Commission will no longer be able to provide redress to consumers who paid more for products due to anticompetitive conduct.<sup>32</sup>

Section 19(a)(2) also is not available in every case involving unfair or deceptive conduct. Under Section 19(a)(2), a court can award monetary relief only if the Commission establishes that the unfair or deceptive conduct at issue is conduct that “a reasonable man would have known under the circumstances was dishonest or fraudulent.”<sup>33</sup> To date, only a few courts have had occasion to apply this knowledge standard,<sup>34</sup> so the case law is relatively limited. At most, courts

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<sup>31</sup> 15 U.S.C. § 57b(a)(2).

<sup>32</sup> The Commission has obtained monetary relief under Section 13(b) in several competition cases involving pharmaceuticals. *See, e.g.*, Press Release, Federal Trade Commission, *Reckitt Benckiser Group plc to Pay \$50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc>; Press Release, Federal Trade Commission, *Mallinckrodt Will Pay \$100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants* (Jan. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it>; Press Release, Federal Trade Commission, *FTC Settlement of Cephalon Pay for Delay Case Ensures \$1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected By Anticompetitive Tactics* (May 28, 2015), <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill>; Press Release, Federal Trade Commission, *Generic Drug Marketers Settle FTC Charges* (Aug. 12, 2004), <https://www.ftc.gov/news-events/press-releases/2004/08/generic-drug-marketers-settle-ftc-charges> (generic manufacturers agreed to disgorge \$6.25M in illegal profits).

<sup>33</sup> 15 U.S.C. § 57b(a)(2).

<sup>34</sup> *See Figgie*, 994 F.2d at 604; *FTC v. Macmillan, Inc.*, No. 81 C 6053, 1983 WL 1858, at \*6 - \*7 (N.D. Ill. July 29, 1983) (denying Section 19(a)(2) monetary relief because defendants’ actions “were not so egregiously unconscionable or sinister as to constitute dishonesty or fraud” and were not akin to the “gross misrepresentations” at issue in *Turner*); *Turner*, 1982 WL 1947, at \*3; *FTC v. AMREP Corp.*, 705 F. Supp. 119, 127 (S.D.N.Y. 1988) (holding that the Section 19(a)(2) knowledge standard required proof that the defendants “had the specific intent to defraud, or at least engaged in conduct ‘reasonably calculated to deceive persons of ordinary prudence and comprehension.’”), *vacated in part*, No. 87-CV-4425, 1990 U.S. Dist. LEXIS 418, at \*2 (S.D.N.Y. Jan. 18, 1990).

so far have noted that “dishonest or fraudulent” conduct at a minimum encompasses conduct that is “reasonably calculated to deceive persons of ordinary prudence” and would be deemed fraudulent under the federal criminal mail fraud statute.<sup>35</sup> But beyond that, further court rulings will be necessary to further define the contours of the Section 19(a)(2) knowledge requirement. Nonetheless, because Section 13(b) does not contain an objectively dishonest/fraudulent knowledge requirement, there likely will be some categories of non-rule-violation cases in which courts could award monetary relief under Section 13(b) but cannot do so under Section 19(a)(2).

Finally, Section 19’s three-year statute of limitations also applies to Section 19(a)(2) actions,<sup>36</sup> making it an imperfect replacement for Section 13(b), which has no statute of limitations. In non-rule-violation cases, Section 19’s statute of limitations will likewise deny redress to victims of long-running schemes who suffered losses more than three years prior to the Commission’s enforcement action.

### **ADMINISTRATIVE ORDER VIOLATIONS**

The final category of cases in which courts will still be able to award the Commission monetary relief without relying on Section 13(b) is cases that involve a violation of a final Commission administrative order. Under Section 5(l) of the Act,<sup>37</sup> a party that violates a final administrative order is subject to civil penalties. Like civil penalties for rule violation cases under Section 5(m)(1)(A), civil penalties under Section 5(l) are subject to a five-year statute of limitations<sup>38</sup> and cannot be used for consumer redress.<sup>39</sup>

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<sup>35</sup> *Turner*, 1982 WL 1947, at \*3 (“Acts which are fraudulent or dishonest for purposes of consumer redress should fall at least within the scope of the activities which would be deemed fraudulent for purposes of the mail fraud statute, 18 U.S.C. § 1341. Acts within the purview of that statute need only be reasonably calculated to deceive persons of ordinary prudence and comprehension.”) (citing *Blachly v. United States*, 380 F.2d 665 (5th Cir. 1967)); accord *Macmillan*, 1983 WL 1858, at \*3; *AMREP*, 705 F. Supp. at 127.

<sup>36</sup> 15 U.S.C. § 57b(d).

<sup>37</sup> *Id.* § 45(l).

<sup>38</sup> See *supra* note 20.

<sup>39</sup> Likewise, the Commission is required to refer a Section 5(l) action seeking civil penalties to the DOJ, which has a right of first refusal to litigate the case, 15 U.S.C. §56(a)(1), and a defendant in a Section 5(l) action may demand a jury trial. See *supra* note 19.

Unlike Section 5(m)(1)(A), however, Section 5(l) also authorizes “further equitable relief” if a defendant violates an administrative order, which allows a court to award equitable monetary relief that the Commission can use to provide redress to consumers.<sup>40</sup> Moreover, unlike actions brought pursuant to Section 19, the Commission can obtain equitable monetary relief under Section 5(l) for violations of administrative orders in both consumer protection and competition cases and can do so without establishing scienter. Nonetheless, because the Commission must first obtain a final administrative order and the defendant must subsequently violate that order in order to obtain equitable relief under Section 5(l), that pathway will be available in far fewer cases, greatly reducing Section 5(l)’s ability to serve as a viable replacement for Section 13(b).

Section 5(m)(1)(B) provides another pathway for monetary relief for violations of a final administrative order.<sup>41</sup> Under that provision, courts can impose civil penalties against a party (Party B) that engages in acts or practices that the Commission has decreed to be unfair or deceptive in an administrative order entered against another party (Party A) if Party B has actual knowledge of the administrative order. Typically, the Commission establishes actual knowledge by sending copies of the final administrative order to other companies in the same industry, usually accompanied by a “synopsis” that highlights the specific act or practice that the Commission has determined in the administrative order to be unfair or deceptive. In effect, if the Commission determines that a particular act or practice is unfair or deceptive in the context of one administrative proceeding, it can send a copy of that order to others and obtain civil penalties against them under Section 5(m)(1)(B) if they engage in the same act or practice.<sup>42</sup>

There are, however, several features of Section 5(m)(1)(B) that limit its overall utility. First, violation of a *consent* administrative order cannot serve as

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<sup>40</sup> *Liu v. SEC*, 140 S. Ct. 1936 (2020)

<sup>41</sup> 15 U.S.C. § 45(m)(1)(B).

<sup>42</sup> In 2013, the Commission used Section 5(m)(1)(B) to obtain \$1.26 million in civil penalties against four retailers that falsely labeled textiles as being made of bamboo in violation of prior litigated administrative orders sent to the retailers in 2010 in which the Commission declared it an unfair or deceptive act or practice to falsely represent the material fibers contained within a textile product. See Press Release, Federal Trade Commission, *Four National Retailers Agree to Pay Penalties Totaling \$1.26 Million for Allegedly Falsely Labeling Textiles as Made of Bamboo, While They Actually Were Rayon* (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/four-national-retailers-agree-pay-penalties-totaling-126-million>.

the basis for imposing civil penalties under Section 5(m)(1)(B).<sup>43</sup> Thus, if a party settles an administrative complaint, the Commission cannot use a violation of that final consent order to obtain civil penalties pursuant to Section 5(m)(1)(B). Because most administrative cases settle before a final adjudication on the merits, the number of final orders that can potentially be used to obtain civil penalties under Section 5(m)(1)(B) is limited and dependent on a defendant who is willing to spend the time and resources necessary to fully litigate the administrative proceeding.

Second, in Section 5(m)(1)(B) civil penalty actions, the Act allows defendants to raise both factual and legal challenges to the imposition of civil penalties.<sup>44</sup> For example, defendants in Section 5(m)(1)(B) civil penalty actions are entitled to a *de novo* hearing on factual issues in which they can challenge whether their conduct is sufficiently similar to the act or practice that the Commission decreed to be unlawful in the prior administrative proceeding.<sup>45</sup> If the court concludes that the act or practice at issue is not a close enough match to the act or practice at issue in the original proceeding, the court will deny the Commission's claim for civil penalties. In addition, defendants can also challenge the Commission's legal determination that the act or practice in question was unfair or deceptive.<sup>46</sup> If the district court disagrees with the Commission's legal conclusion, the court will also deny civil penalties. Overall, the defendant's ability to raise both factual and legal *de novo* challenges in Section 5(m)(1)(B) cases adds a layer of uncertainty in using that pathway, particularly in cases that involve complicated facts or determinations of unfairness or deception that are more susceptible to legal challenge.

Finally, Section 5(m)(1)(B) is limited to violations of final administrative orders involving unfair or deceptive acts or practices—it is inapplicable in cases involving anticompetitive conduct. Moreover, unlike Section 5(l), Section

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<sup>43</sup> 15 U.S.C. § 45(m)(1)(B) (“If the Commission determines in [an administrative proceeding] that any act or practice is unfair or deceptive, and issues a final cease and desist order, *other than a consent order*, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty . . . .”) (emphasis supplied).

<sup>44</sup> *Id.* § 45(m)(2).

<sup>45</sup> *Id.* (“[I]ssues of fact in such action against such defendant shall be tried *de novo*.”).

<sup>46</sup> *Id.* (“Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission . . . that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of [Section 5(a)].”).

5(m)(1)(B) does not authorize “further equitable relief” that can be used to obtain monetary relief that can be used for consumer redress. Courts can award only civil penalties under Section 5(m)(1)(B) and, as previously discussed, such civil penalties must be sent to the Treasury and cannot be used by the Commission to provide redress to consumers.<sup>47</sup>

## CONCLUSION

If the Supreme Court rules in *AMG* that courts can no longer award monetary relief under Section 13(b), the Commission will still have options it can use in many consumer protection cases to obtain monetary judgments against those who violate the Act. But, as explained above, none of these tools is as efficient or as effective as Section 13(b), and the loss of monetary relief under Section 13(b) will hurt all stakeholders.

First and foremost, in certain classes of cases, the Commission will not be able to seek monetary relief at all, allowing defendants in such cases to keep the spoils of their unlawful conduct. This hurts not only consumers who lost money but also competitors that did not engage in illegal conduct. And, in cases where monetary relief is still viable, the Commission will have to expend far more time and resources to obtain it, which will almost certainly result in fewer Commission cases. Consumers will suffer from reduced Commission enforcement and, in the cases the Commission has the resources to bring, consumers will have to wait far longer for the Commission to obtain and distribute redress, and certain classes of consumers may not be able to get any redress at all. Courts and administrative law judges will also bear the brunt of the judicial inefficiency created by the bifurcated (and sometimes trifurcated) process for litigating monetary relief under Section 19. Many defendants will suffer too, as prolonged, multi-forum litigation will require defendants to spend more to defend themselves in FTC enforcement actions or be forced to settle to avoid the time and expense of lengthy litigation. In addition, a loss in *AMG* may force the Commission to engage in more rulemaking so that the Commission can avail itself of the more efficient monetary relief options available under Sections 19(a)(1) and 5(m)(1)(A) of the Act. But the rulemaking process set forth in Section 18 of the Act<sup>48</sup> cannot be used to promulgate rules governing anticompetitive conduct and, for unfair or deceptive

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<sup>47</sup> In addition, as with other civil penalty provisions previously discussed: the Commission must refer Section 5(m)(1)(B) civil penalty actions to the DOJ, which has a right of first refusal to litigate the case, 15 U.S.C. § 56(a)(1); defendants in such actions may demand a jury trial; and any civil penalties awarded are subject to a five-year statute of limitations. *See supra* notes 19 & 20.

<sup>48</sup> 15 U.S.C. § 57a.

conduct, the process is resource-intensive and time-consuming, so it may take several years for the Commission to promulgate rules proscribing new categories of unfair and deceptive acts and practices.

Ultimately, if the Commission loses in *AMG*, the best solution for the Commission, courts, consumers, and the regulated community would be for Congress to amend the FTC Act to make clear what has been clear for four decades—that the Commission can seek, and courts can award, equitable monetary relief under Section 13(b) of the Act.