Alert

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COZEN O'CONNOR

AMG Capital Decision May Mean More FTC Collaboration with State AGs, Increased Costs, Longer Timelines

This Alert was written in collaboration with John Villafranco of Kelley, Drye & Warren, LLP. It was prepared for and will be presented at the American Conference Institute/Council for Responsible Nutrition Legal, Regulatory, and Compliance Forum on Dietary Supplements, June 8-10, 2021, in conjunction with a panel discussion titled: Keeping the Regulators in Check: A Closer Look at the Future of Federal and State Enforcement and Consumer Protection in the Supplements Space.

The Federal Trade Commission (FTC) has, for decades, considered itself a partner of state AGs in combatting anticompetitive, unfair, and deceptive trade practices, and state AGs certainly feel the same way. In December 2020, 30 state AGs filed a bipartisan amici brief urging the Supreme Court to affirm the FTC's interpretation of its Section 13(b) authority in *AMG Capital Management LLC v. FTC* (*AMG Capital*). In that brief, the state AGs asserted that their "own enforcement efforts are fortified by having a strong federal partner in the FTC." The FTC and the state AGs regularly conduct joint investigations, share complaint data, and in many cases bring joint enforcement actions. But *AMG Capital* changed the cooperation calculus for the FTC.

FTC Will Partner More Often with State AGs

As Acting FTC Chairwoman Slaughter noted on May 11 in front of the National Association of Attorneys General (NAAG), the FTC remains hopeful that Congress will pass legislation restoring the FTC's Section 13(b) authority, but in the meantime, the FTC will be looking to partner "more frequently and more enthusiastically" with state AGs. Clearly, *AMG Capital* impacted the FTC's analysis on *why* it should partner with a state AG. It remains to be seen how the FTC might determine *who* that state AG should be when seeking consumer redress, and most importantly, whether "more frequently" really means "all the time."

While most state AGs, or a similar state agency, have statutory authority to seek restitution in cases involving unfair and deceptive trade practices, not all state consumer protection laws are created equal. Some state AGs must contend with clear statutes of limitation, while others must prove that unfair and deceptive practices were done knowingly or intentionally in order to prevail in an enforcement action. Some state consumer protection statutes exempt certain industries, such as insurance, or conduct already regulated by another state agency, such as utilities. In most cases, a state AG will only seek nationwide restitution if the defendant has a physical presence in the jurisdiction where the case is brought.

The FTC is likely well aware of these limitations and will seek to partner with state AGs in those states where: 1) the target of the investigation is physically located; and 2) the state's consumer protection claims are not barred by a statute of limitations or other textual exemption. As currently written, the FTC's Section 13(b) authority is not subject to a statute of limitation. Until a legislative solution gains traction, the FTC should be expected to partner with state AGs with authority to seek full consumer redress. And while Acting Chairwoman Slaughter will concede that a 10-year statute of limitation, as written in H.R. 2668, strikes "an appropriate balance" for the FTC, very few state AGs will concede that they are subject to a statute of limitation without express case law or statutory language establishing that fact.

The FTC is also more likely to turn to state AGs with a proven track record of successfully navigating cases with the FTC, whether through negotiated settlements or litigation. Not surprisingly, many of these states also happen to be home to one or more of the FTC's regional offices. At the top of this list are California, Florida, Illinois, North Carolina, Ohio, Texas, and Washington.

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Notably, on May 19, 2021, the FTC partnered with some of these same states and made good on its threat to bring in the state AGs when it filed a complaint against Frontier Communications Corporation. The FTC, along with the attorneys general of Arizona, Indiana, Michigan, North Carolina, Wisconsin, and California, through the district attorneys of Los Angeles County and Riverside County brought an action under Section 13(b) of the FTC Act and parallel state laws alleging Frontier deceptively advertised and sold internet service in several plans based on download speeds and that customers did not receive the speeds they purchased. The case was filed in U.S. District Court for the Central District of California, and in addition to other equitable relief, the state AGs appear to be seeking restitution for their respective consumers.

Likelihood of More Asset Freezes from the FTC and State AG Actions

In the absence of the availability of monetary restitution under Section 13(b), it is reasonable to assume that the FTC will make greater use of its remaining 13(b) powers such as the power to freeze companies' assets quickly while a Section 19 action is pending. Instead of the current Section 13(b) landscape, consisting of federal litigation taking place over a defined period of time, followed by a potential money judgment (or not), companies in such a scenario would face potentially years of Section 19 litigation at the FTC and in court while their assets have already been frozen under Section 13(b). This would have a devastating effect on a company's business.

The FTC could thereby gain tremendous leverage over companies it ends up suing for injunctive relief under Section 13(b). Many companies would likely choose to settle with the FTC rather than face an indefinite asset freeze, even in those cases where settlement might not be appropriate.

State AGs could also fill in the enforcement gap and work with the FTC when it comes to fraudsters by pursuing asset freezes. For example, in "Operation Income Illusion," the FTC worked with federal, state, and local law enforcement partners for a nationwide crackdown on scams that targeted consumers with fake promises of income and financial independence. In total, there were more than 50 different law enforcement actions against the operators of work-from-home and employment schemes, pyramid schemes, investment scams, and other schemes that cost consumers thousands of dollars. Asset freezes were a big part of this nationwide operation. The FTC and state AGs along with the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission, filed temporary restraining orders that included asset freezes with an appointment of a receiver (See e.g., *Fed. Trade Comm'n v. National Web Design et. al*, No. 2:20-cv-00846 (Dist. Utah filed Dec. 1, 2020).

State AGs can also file charges and freeze assets without the FTC. In July 2020, then California Attorney General Xavier Becerra announced arrests of Christopher Mancuso, John Black, and Joseph Tufo for allegedly running a fraud scheme that targeted more than 70 victims around the world. In the criminal complaint, the defendants are estimated to have stolen more than $10 million from victims. In conjunction with the arrests, the California Department of Justice also secured orders freezing the defendants' assets, including all of their bank accounts, cryptocurrency, and real property.

The Practical Consequences of Increasing Collaboration with State AGs

While partnering with state AGs may seem like the obvious, short-term solution to the FTC's Section 13(b) problem, the FTC's reliance on the state AGs for consumer restitution will not come without practical consequences for the FTC, state AGs, and companies facing investigation.

At the investigatory stage, the FTC's diminished role in securing restitution now calls into question whether the FTC has authority to request certain documents or information, such as customer lists and transaction records, outside a Section 19 proceeding. Even before *AMG Capital*, as the state AGs noted in their *amici* brief, certain targets of FTC investigations were filing preemptive lawsuits to curtail the agency's ability to obtain financial information in light of the Seventh and Third Circuit's holdings in *FTC v. AbbVie*, 976 F.3d 327, 379 (3d Cir. 20201) and *FTC v. Credit Bureau Center, LLC*, 937 F.3d 767, 767 (7th Cir. 2019). See, e.g., First Amended Complaint, *Complete Merchant Solutions, LLC v. FTC*, No. 2:19-cv-00963-HCN-DAO (D. Utah July 28, 2020), ECF No. 56 at 19, 34-35, 38, 41; Complaint for Declaratory & Injunctive Relief, *OTA Franchise Corp. v. FTC*, No. 1:20-cv-00802 (N.D. Ill. Feb. 4, 2020), ECF No. 1 at 1-2, 5, 19¬20, 22. Since all demands made by the FTC in a civil investigative demand (CID) must be "relevant" under 15 U.S.C. § 57b-1(c)(1), and

the relevance of the FTC's requests may be questioned now, the FTC may turn to state AGs for assistance with obtaining this information.

Delegating certain investigative tasks to the state AGs is not necessarily uncommon. On the contrary, the opportunity to collaborate in this manner is what makes these partnerships appealing — both from the FTC's and the state AG's perspective. It does, however, introduce practical consequences (and costs) for the target of an investigation. Multiple CIDs require multiple responses and, when dealing with a state AG or a group of state AGs, it also means taking the time to understand how such responses will be treated under both the federal Freedom of Information Act (FOIA), the FTC Act, and each state's open records laws or FOIA equivalent. If a state AG's open records law fails to provide adequate protection for the company's confidential information, even after the investigation concludes, the state AG may be willing to provide the company with additional confidentiality assurances.

At the FTC, pre-complaint investigations are generally non-public. However, FTC policies may allow identification of investigations if the FTC decides that disclosure is in the public interest. Generally, state AGs take a similar approach, although some state AGs' CID or subpoena statutes may explicitly foreclose disclosure of CID material, except as permitted by court order or to other law enforcement officials. If a state AG intends to share CID materials with another state AG, the company will need to analyze the other state's open records law as well. While state AGs are typically reluctant to identify when, and with whom, they share investigatory materials, the company should inquire about the possibility — especially in the context of a joint state AG and FTC investigation.

Finally, relying on the state AG's restitution authority raises the issue of *who* is best positioned to make decisions regarding restitution, including how much restitution is sufficient and the logistics of distribution. In prior cases where the FTC and state AGs secured restitution for consumers, either through settlement or litigation, the FTC typically assumed responsibility for distributing consumer redress through its Office of Claims and Refunds. After *AMG Capital*, it remains to be seen whether and how state AGs will assume this responsibility.