

29 States File Amicus Brief Supporting FTC's Authority to Obtain Monetary Relief in the Supreme Court

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On December 7, 2020, Illinois led 29 states and the District of Columbia (States) in filing an amicus brief in *AMG Capital Management, LLC, et al. v. Federal Trade Commission*, No. 19-508 to support the Federal Trade Commission (FTC) and urge the Supreme Court to affirm the Ninth Circuit's decision, which held that the FTC has the authority to seek restitution under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) (FTC Act).[1]

Although the majority of circuits that examined the issue held that the FTC has the authority to seek monetary relief under Section 13(b), the Third and Seventh Circuits recently ruled against the FTC, creating a split among the circuits. The Supreme Court granted certiorari on July 9, 2020 to decide the most significant challenge to the FTC's authority in decades.[2]

The underlying case involved a series of companies controlled by Scott Tucker that offered high-interest, short term loans.[3] In 2012, the FTC filed suit against Tucker alleging that he violated Section 5 of the FTC Act's prohibition against "unfair or deceptive acts or practices" because his loan notes did not disclose the terms that Tucker actually enforced.[4] The FTC asked the court to "permanently enjoin Tucker from engaging in consumer lending and to order him to disgorge ill-gotten-monies." [5] The district court ultimately determined that Tucker must pay \$1.27 billion to the FTC.[6] Tucker appealed to the Ninth Circuit and argued that the district court "did not have the power to order equitable monetary relief under §13(b)." The Ninth Circuit acknowledged that "Tucker's argument has some force," but found that prior precedent supported the FTC's position.[7]

In their amicus brief, the States specifically argue that for decades, lower courts have held that the FTC can seek restitution as a form of relief under Section 13(b).[8] The Supreme Court itself noted that "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." [9] Only recently have courts like the Third Circuit and Seventh Circuit held that Section 13(b) does not provide for such relief.[10]

The States highlight the benefits they receive as a result of the FTC's restitution authority. They note that three avenues exist through which the FTC and the state regulators can remedy anticompetitive, unfair, and deceptive trade practices: (1) state enforcement actions; (2) Section 13(b) actions initiated by the FTC; and (3) collaborative actions brought by the FTC under Section 13(b) and the States under their own statutes.[11] The States argue that stripping the FTC of its ability to seek restitution would weaken two of these three avenues.

The States specifically argue that although they have their own enforcement mechanisms, the residents of their states benefit most when the FTC has the ability and the resources to pursue standalone actions. Between fiscal year 2016 and fiscal year 2019, the FTC “secured the return of more than \$10 billion to more than 9 million consumers in every State, the District of Columbia, and Puerto Rico.”^[12] Stripping the FTC of its ability to recoup these ill-gotten gains “would allow perpetrators of anticompetitive, unfair, and deceptive practices to profit from their wrongdoing and require States to fill the gap left by the FTC’s inability to make victims whole.”^[13]

The States characterize the FTC’s authority as a “critical supplement” to state enforcement, and noted that state enforcers must “show that the defendant’s conduct affected consumers within its own borders,” a stark contrast to the FTC’s nationwide jurisdiction.^[14] The States also argue that in many instances, the FTC Act is broader than a state’s individual antitrust or unfair and deceptive trade practices statutes, so the FTC’s restitution powers ensure that a State’s residents are made whole.^[15]

The States further argue that the FTC is a “crucial partner” in this arena, and that if the FTC loses its ability to seek restitution, “the States would lose the ability to avail themselves of the FTC’s critical resources in pursuing full relief for their residents in cases where the States and the FTC would ordinarily work together.”^[16]

Given the interplay between the FTC and state enforcers, the outcome of this case will have an enormous impact on state enforcement priorities in years to come. The case is set for argument on January 13, 2021.

^[1] *AMG Capital Management, LLC, et al. v. Federal Trade Commission*, No. 19-508, Amicus Brief filed by Illinois, Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, and Wisconsin in support of Respondent Federal Trade Commission (Dec. 7, 2020), available at https://www.supremecourt.gov/DocketPDF/19/19-508/162874/20201207152632568_AMG%20v.%20FTC%20Illinois%20Amicus%20Brief%20Final%20to%20File.pdf (States Amicus Brief).

^[2] *AMG Capital Management, LLC, et al. v. Federal Trade Commission*, No. 19-508, Petition for Writ of Certiorari filed by AMG Capital Management, LLC; Black Creek Capital Corporation; Broadmoor Capital Partners, LLC; Level 5 Motorsports, LLC; Scott A. Tucker, Park 269 LLC; and Kim C. Tucker (Oct. 18, 2019), available at https://www.supremecourt.gov/DocketPDF/19/19-508/119538/20191018161100345_Tucker%20Cert%20Petition%20PDF.pdf.

^[3] *Federal Trade Commission v. AMG Capital Management, LLC*, 910 F.3d 417, 421 (9th Cir. 2018).

^[4] *Id.* at 421-22.

^[5] *Id.* at 422.

^[6] *Id.* at 426.

[7] *Id.*

[8] States Amicus Brief at 3.

[9] *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946).

[10] *FTC v. AbbVie, Inc.*, 976 F.3d 327, 379 (3d Cir. 2020); *FTC v. Credit Bureau Center*, 937 F.3d 764, 767 (7th Cir. 2019).

[11] States Amicus Brief at 4.

[12] *Id.* at 5.

[13] *Id.* at 6.

[14] *Id.* at 6-7.

[15] *Id.* at 9.

[16] *Id.* at 11-12.

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