

Dissenting Statement of Commissioner Christine S. Wilson

Notice of Penalty Offenses Concerning Substantiation of Product Claims

March 31, 2023

The Commission has voted to issue a Notice of Penalty Offenses Concerning Substantiation of Product Claims.¹ This vote closed on March 31, 2023, the day my tenure on the Commission concluded. This Notice is prompted by the fact that our remedial authority is limited. The Commission cannot obtain civil penalties for first-time violations of Section 5 of the FTC Act, and the Supreme Court’s decision in *AMG* ended the Commission’s use of Section 13(b) to obtain equitable monetary relief.² I applaud staff’s efforts to use every tool in the FTC’s toolbox to obtain monetary relief for consumers subjected to unlawful conduct, and I support the Commission’s ability to seek equitable monetary relief *in appropriate cases* and to challenge conduct that wrongdoers have halted. I have urged Congress to revise 13(b) to confirm this authority with appropriate guardrails.³

When the Commission first began to use Section 13(b) of the FTC Act to seek equitable monetary relief in federal district court cases in 1982, its use was focused on fraud cases.⁴ The defendants in these cases were highly unlikely to stop their unlawful conduct voluntarily. Thus, the ability to freeze assets and preliminarily enjoin ongoing unlawful conduct, pending adjudication of the case on the merits, was an essential element in stopping fraud. Upon prevailing in litigation, if appropriate, the FTC could seek an order directing that the frozen assets be returned to consumers in conjunction with the issuance of a permanent injunction.⁵ I support this use of 13(b). During the Obama Administration, the Commission expanded the use of 13(b) to seek consumer redress even against legitimate companies. Some of these cases were premised on challenges to substantiation for claims made as part of national advertising campaigns. This expansion of the program prompted many FTC scholars and practitioners to begin questioning the FTC’s authority to seek monetary equitable monetary relief under Section 13(b).⁶ Ultimately, challenges to this authority reached the Supreme Court, which subsequently issued the *AMG* decision.

¹The announcement of this Commission action will not be made until after my departure. I do hope that the accompanying press release makes clear my vote was not a “zombie vote,” a courtesy promised in the Passport Auto case to Commissioner Noah Phillips and then not fulfilled following his departure.

² *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

³ See, e.g., Oral Statement of Christine S. Wilson, Before the U.S. House Committee on Energy and Commerce (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592954/2021-07-28_commr_wilson_house_ec_opening_statement_final.pdf.

⁴ See J. Howard Beales and Timothy J. Muris, Section 13(b) of the FTC Act at the Supreme Court: The Middle Ground, George Mason University Law & Economics Research Paper Series, 20-34 (Dec. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3750787.

⁵ *Id.*

⁶ *Id.*

I believe that the cleanest argument for Section 13(b) authority can be found in the early foundations of the fraud program. I am wary of a 13(b) fix that would afford the Commission significant latitude to seek equitable monetary relief in all substantiation cases, many of which involve complex and nuanced issues and dueling experts. For related reasons, it seems inappropriate for the Commission to seek civil penalties in substantiation cases.⁷

Even if I were to set aside those concerns, I am dubious that this initiative is an efficient use of scarce and finite resources. The Commission has issued notices in three other program areas in the wake of the *AMG* decision – Notice of Penalty Offenses Concerning Deception or Unfair Conduct for Money-Making Opportunities, Notice of Penalty Offenses Concerning Deception or Unfair Conduct around Endorsements and Testimonials, and Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct in the Education Marketplace.⁸ I supported the issuance of those notices because the types of marketing claims covered by those Notices present largely clear-cut violations of the FTC Act that, in many cases, constitute outright fraud or patently false statements. The subject matter of this Notice, as discussed above, is markedly different.

This Notice explains, in pertinent part, that the Commission has found that the following acts or practices used in the advertising or promotion of products are deceptive or unfair:

- It is an unfair or deceptive act or practice for an advertiser to make an objective product claim without having a reasonable basis, at the time the claim is made, consisting of competent and reliable evidence.
- It is an unfair or deceptive act or practice for an advertiser to make a claim relating to the health benefits or safety features of a product without possessing and relying upon competent and reliable scientific evidence that has been conducted and evaluated in an objective manner by qualified persons and that is generally accepted in the profession to yield accurate and reliable results, to substantiate that the claim is true.

Determining whether an advertiser has a reasonable basis for claims and whether the evidence upon which the advertiser relied is competent and reliable scientific evidence requires a complex, nuanced, fact-based evaluation. In our investigations and at trial, the FTC and the parties typically rely on experts for these determinations.

The FTC website explains that “the Commission can seek civil penalties if it proves that (1) the company knew the conduct was unfair or deceptive in violation of the FTC Act and (2) the FTC had already issued a written decision (see below) that such conduct is unfair or deceptive.”⁹ To show that the proposed defendant had knowledge that its conduct was unlawful, and therefore

⁷ The Commission has brought cases involving egregious disease claims unsupported by any scientific evidence. Those cases involve outright lies, and the conduct seems tantamount to fraud. Those cases differ significantly from substantiation cases in which companies rely on studies subsequently found by FTC experts to fall short of the requisite “competent and reliable scientific evidence.” In these cases, injunctive relief is more appropriate.

⁸ <https://www.ftc.gov/enforcement/penalty-offenses>.

⁹ *Id.*

establish that the conduct is subject to civil penalties, the Commission must demonstrate that the conduct of the proposed defendant is sufficiently similar to the litigated cases cited in the Notice. This showing will prove to be far more complex and uncertain for substantiation cases than for other areas in which Notices have been issued recently. Indeed, I anticipate that relatively few cases in this topic area will result in civil penalties. But identifying recipients, transmitting the Notices, and monitoring firms' conduct will consume significant resources.

I would note, however, that the practices described in this Notice present the framework the Commission has employed to evaluate substantiation for many years – an approach that has garnered wins at trial. Accordingly, I recommend that marketers review this Notice and the cases it cites, and tailor their claims accordingly. And I commend, as always, staff's vigorous commitment to executing our mission to protect consumers.