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Fix the FTC Act By Making Firms Pay That Cause Harm

By [James Cooper](#) & [Joshua Wright](#) June 14, 2021

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The Supreme Court handed the FTC a stinging defeat last month in *AMG Capital v. FTC*. Justice Breyer, writing for a unanimous court, declared that the FTC lacked the power to obtain monetary remedies in federal court under Section 13(b) of the FTC Act—a power it had been using for the past 40 years.

All eyes are now on Congress to “fix” Section 13(b). We agree that Congress should act. But it should do so in a way that eliminates the FTC’s ability to abuse 13(b) going forward, which is what landed the FTC in this position in the first place.

To chart a course forward requires understanding how the FTC got here. As originally conceived by Congress, the FTC was supposed to develop rules of the road for business through administrative adjudication—with the FTC conducting trials and hearing appeals. Importantly, because this process was designed to provide guidance on what type of business practices are “unfair” or deceptive, Congress withheld the power to collect monetary remedies from first-time violators.

In the late 1970s, however, the FTC discovered that it could use a newly created part of its statute—Section 13(b), which allowed it to ask federal courts for injunctions—to also get money from defendants. Federal courts initially bought into this interpretation without much scrutiny at least in part because the FTC was careful to target this power sparingly and at the worst offenders. Over time, however, the FTC grew more aggressive with this authority, and 13(b) became the near-exclusive vehicle for consumer protection enforcement, targeting both hard-core fraudsters and legitimate firms that may have overpromised in some of their ads.

The FTC created the 13(b) mess by treating legitimate firms the same way it treated hard-core fraudsters, demanding they return all revenues from the product in question. This remedy makes perfect sense when a huckster dupes people into buying useless products—every penny consumers spend on fake diet pills or worthless lottery tickets is consumer harm. But what about cases when the defendant is selling a product that consumers actually want, but used some ad copy that may have inadvertently misled some consumers? The FTC’s 2015 case against Direct-TV is the poster-child for how this approach can go wrong when applied outside the context of pure fraud. Alleging that Direct-TV failed adequately to disclose terms related to an introductory offer, the FTC asked for nearly *\$4 billion* in restitution based upon the fiction that every single Direct-TV customer who saw one of the 40,000 allegedly flawed ads was fooled into subscribing into an entirely worthless service. The FTC dropped this case after a skeptical judge threw most of it out, but other companies have not been so lucky. The FTC takes this aggressive “all revenue” approach in many cases

and investigations.

So where does Congress go from here? While the FTC's fraud program overstepped its legal authority, it gave the FTC an important tool to address truly harmful conduct. It does not make sense for Congress to just turn the clock back to the pre-AMG world, as the recently-introduced Cardenas bill would do, without solving the overreach problems. Rather, Congress should take the opportunity to calibrate remedies available under 13(b) to consumer harm. This approach would fully restore the FTC's pre-AMG powers to deal with hard-core fraudsters, but also protect consumers by providing important guardrails that would prevent the FTC from using its powers to deter business conduct that makes them better off.

It's important to explain that linking FTC remedies to consumer harm is no gift to firms. The point of consumer protection enforcement is to ensure that firms do not engage in conduct that generates more harms than benefits for consumers. A penalty based on harm (with appropriate adjustments for imperfect detection) accomplishes this goal. Penalties greater than consumer harm risk deterring conduct that actually benefits consumers. That isn't consumer protection in any sense of the term. For example, when legitimate firms risk billion dollar liability when even a single deceptive ad copy could potentially mislead some consumers, it's only rational to hold back on advertising or in some cases, or to withhold a product entirely. Neither serves consumer interests.

As we see it, Congress can take one of two paths: limiting the remedies available to the FTC or limiting the cases in which the FTC can seek monetary relief.

We recommend the first path. By amending the FTC Act to explicitly and strictly tether remedies to consumer harm, Congress could assure that legitimate firms pay for the harm they cause, but do not have to worry about draconian remedies for accidental missteps. We think the best approach would be to give the FTC civil penalty authority, requiring calculations to be based on, and limited to, consumer harm. Although simply clarifying that 13(b) includes the power to obtain restitution and disgorgement limited to consumer harm might be a cleaner fix, civil penalty authority would avoid the confines of equitable remedies, which prevent the FTC from reaching consumer harm caused by third parties, such as hackers who take advantage of firms' unreasonable data security practices.

Congress could alternatively fix the overreach problem by explicitly limiting monetary remedies to situations involving hard-core fraud, a stricture that is consistent with other parts of the FTC Act. An important downside of this approach, however, is that it leaves the FTC unable to secure monetary penalties for consumer harm from shoddy data practices—such as identity theft or privacy invasions—that are the product of negligence rather than fraud.

Regardless of which path Congress chooses, it absolutely should not apply retroactively to cases pending at the time of AMG. It offends basic notions of due process and fairness to have Congress amend the law to help the government *during the trial*. Defendants made good faith litigation decisions based on 13(b)'s perceived infirmities (which turned out to be true)—Congress shouldn't let the FTC have a do-over.

FTC overreach led to the current crisis. Congress can solve it, avoid a future one, and get the FTC back to its important work by imposing a fix that focuses the consumer protection agency's authority on the harm actually experienced by consumers.

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