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Brave New Agency: The FTC's Expanded Powers in the Eleventh Circuit

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I. INTRODUCTION

In Aldous Huxley's seminal novel "Brave New World,"[1] a futuristic society grapples with the consequences of technological advancements and the ethical dilemmas they pose. The Federal Trade Commission (FTC) finds itself in a "Brave New World" of its own, particularly in the Eleventh Circuit. The case *FTC v. Simple Health Plans, LLC*[2] is a potential watershed moment, redefining the scope and authority of the FTC to impose equitable damages. It serves as a pivotal juncture, not just for the agency, but also for consumer protection laws, monopolistic businesses, and what remedies courts may provide. The decision potentially leads to harsher punishments and injunctions for monopolistic businesses engaged in "unfair or deceptive acts or practices."[3] It is a clarion call for a stricter interpretation of consumer protection laws, providing judges with a broader arsenal of remedies. Moreover, the penalties imposed may serve as a benchmark for future awards, deterring other companies from similar malfeasance due to the severe financial risks involved.

II. FACTUAL BACKGROUND

In the bustling landscape of the American healthcare industry of 2019, the FTC found itself locking horns with Steven J. Dorfman and his six

*I extend my deepest gratitude to my wonderful wife, Mallory Green, whose unwavering support is the cornerstone of all my achievements. I am also thankful to Professor Hunt, whose expertise, meticulous editing, and invaluable mentorship have been instrumental in refining this Casenote.

1. ALDOUS HUXLEY, BRAVE NEW WORLD (1932).
2. 58 F.4th 1322, 1325 (11th Cir. 2023).
3. 15 U.S.C. § 45 (2006).

Florida-incorporated limited liability companies—including the titular Simple Health Plans, LLC—all of which were offering "health insurance" plans to consumers.[4] The case unfolded when the FTC initiated an investigation into Simple Health Plans' business practices, suspecting deceptive and unfair trade practices.[5] The FTC's inquiry revealed that Simple Health Plans was marketing its insurance products as comprehensive health plans, complete with a full range of benefits. However, upon closer inspection, these "health insurance" plans were found to have limited benefits and lacking in essential coverage for critical medical services. Consumers, many of whom were in dire need of comprehensive healthcare, were misled into purchasing these plans, only to find out later that they were inadequately covered and had to foot the bill for any medical bills outside the ordinary. The plans operated more like discount cards rather than proper comprehensive insurance plans. Consumers "retain[ed] the risk of catastrophic medical bills," leaving them surprised by medical bills that were significantly higher than they expected.[6]

In its investigation, the FTC scrutinized Dorfman's companies' marketing materials, both online and offline.[7] The FTC found that Simple Health Plans, employed aggressive and misleading advertising tactics, including lying salespeople and deceptive visual aids, to lure consumers into purchasing their minimal and subpar insurance plans. The company's website and customer service agents further contributed to the deception by providing similarly ambiguous and confusing information. Aggressive and misleading marketing strategies resulted in Dorman's companies receiving over $180 million in commissions on the health plans.[8]

In October 2018, after gathering sufficient evidence, the FTC filed a lawsuit against Simple Health Plans and the rest of Dorfman's companies in the District Court for the Southern District of Florida, alleging violations of § 5(a) of the FTC Act, which broadly prohibits "unfair or deceptive acts or practices in or affecting commerce."[9] Following hearings and motions, the district court granted a preliminary injunction against Simple Health Plans and its sister companies

4. *Simple Health Plans, LLC*, 58 F.4th at 1325; FTC v. Simple Health Plans, LLC, No. 18-cv-62593, 2019 WL 8357129, *1–2 (S.D.Fla.).

5. *Simple Health Plans, LLC,* 58 F.4th at 1325.

6. *Id.*

7. *Id.*

8. *Id.* at 1325–26.

9. *Id.* at 1326 (citing 15 U.S.C. § 45).

effectively halting its operations.[10] The injunction "froze" assets connected with Dorfman and imposed a temporary receivership in compliance with 15 U.S.C. § 53(b).[11] Dorfman made multiple appeals in an attempt to reverse the injunction but his efforts were dismissed by the United States Court of Appeals for the Eleventh Circuit.[12]

The litigation was still pending in 2021, when the Supreme Court of the United States decided *AMG Capital Mgmt., LLC v. FTC*.[13] The Court narrowed the relief available under Section 13(b)[14] of the FTC Act by removing the possibility of monetary damages under the statute.[15] Sensing the decision provided a basis to remove the injunction which had hamstrung his business, Dorfman immediately filed a motion to throw out the injunction.[16] The district court denied this motion, relying on the remedies provided in 15 U.S.C. § 57b[17] (commonly known as§ 19 of the FTC Act).[18] Dorfman appealed, bringing the case to the Eleventh Circuit in 2023.[19]

III. LEGAL BACKGROUND TO *SIMPLE HEALTH PLANS, LLC*

A. The Regulatory Landscape: FTC Act and §§ 13(b) & 19.

The Federal Trade Commission Act (FTC Act) serves as the cornerstone of federal consumer protection in the United States.[20] Enacted in 1914, the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."[21] This broad mandate allows the FTC to regulate a wide range of business activities, including telemarketing,

10. *Id.*

11. *Id.*; 15 U.S.C. § 53 (1973). "A temporary receiver is a temporary custodian of the property and an agent of the court . . . . The function of the temporary receiver is limited to preserving the property during litigation . . . ." Matter of Othmer, No. 5101/95, 2004 N.Y. Misc. LEXIS 10, 50–51 (Sur. Ct. 2004).

12. *Simple Health Plans LLC*, 58 F.4th at 1326–27.

13. 141 S. Ct. 1341, 1344 (2021).

14. 15 U.S.C. § 53(b).

15. *Simple Health Plans LLC*, 58 F.4th at 1327; 141 S. Ct. at 1344.

16. *Simple Health Plans LLC*, 58 F.4th at 1327.

17. 15 U.S.C. § 57b(b) (1938).

18. *Id.*

19. *Id.*

20. 15 U.S.C. §§ 41–58; Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 TENN. L. REV. 131, 133 (2006).

21. 15 U.S.C. § 45; Tod H. Cohen, *Double Vision: The FTC, State Regulation, and Deciding What's Best for Consumers*, 59 GEO. WASH. L. REV. 1249, 1251 (1991).

healthcare, and technology companies.[22] Failure to comply with the FTC Act's regulations can result in civil penalties, injunctions, and even criminal prosecutions.[23] The FTC Act and regulations adopted under it form a comprehensive legal framework that aims to balance the interests of businesses and consumers in industries where deceptive and unfair activities are more common.[24]

Section 13(b) of the FTC Act, enacted in 1973, was originally designed to grant the FTC the authority to seek preliminary injunctions against ongoing or imminent violations.[25] It granted the FTC an ability "to quickly enjoin ongoing or imminent illegal conduct."[26] Over time, courts began to interpret § 13(b) as allowing the FTC to seek permanent injunctions, thereby stopping deceptive or unfair practices indefinitely.[27] In the late 1970s and 1980s, the FTC, bolstered by favorable court decisions, also began to use § 13(b) to obtain monetary remedies, including restitution or disgorgement, even though the statute's text did not explicitly grant this power.[28] The FTC's interpretation was based on the premise that once the authority to grant a permanent injunction was recognized, courts could also employ traditional equitable principles to order monetary relief.[29]

For decades this expansive view of § 13(b) remedies was upheld by multiple circuit courts, and the Supreme Court, making it a primary enforcement tool for the FTC and related agencies.[30] The governmental agencies were able to halt fraudulent practices and sought the return of ill-gotten gains, otherwise known as disgorgement damages,[31] to better protect victims' right of recovery.[32] However, eventually disagreement emerged among the federal appellate courts regarding the scope of § 13(b)'s powers.[33] The split became particularly pronounced in 2019 when the United States Court of Appeals for the Seventh Circuit, in *FTC*

22. Cohen, *supra* note 20, at 1253.

23. 15 U.S.C. § 45; Cohen, *supra* note 20, at 1279.

24. 15 U.S.C. § 45.

25. 15 U.S.C. § 53(b).

26. FTC v. Shire ViroPharma, Inc., 917 F.3d 147, 155 (3d Cir. 2019).

27. FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020,1021 (7th Cir. 1988).

28. FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982).

29. FTC v. Com. Planet, Inc., 815 F.3d 593, 602 (9th Cir. 2016).

30. *See* FTC v. Febre, 128 F.3d 530, 534 (7th Cir. 1997).

31. "Disgorgement is an equitable remedy that forces a defendant to give up the amount of money equal to the defendant's unjust enrichment." Cernelle v. Graminex, LLC, 437 F. Supp.3d 574, 594 (E.D.Mich., 2020) (citations omitted).

32. *See* FTC v. Direct Mktg. Concepts, 624 F.3d 1, 15 (1st Cir. 2010).

33. FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764 (7th Cir. 2019).

v. Credit Bureau Center, LLC,[34] reversed its own long-standing precedent.[35] The court held that § 13(b) did not grant the FTC authority to seek monetary remedies, given § 13(b)'s sole express remedial scheme of injunction.[36] This was a significant departure from the same court's earlier decisions and from the prevailing view in other circuits.[37]

In 2022, the United States Court of Appeals for the Third Circuit followed, in *FTC v. AbbVie Inc*,[38] using the same reasoning to reject the notion that the FTC could seek monetary relief using a provision that only mentioned injunctive relief.[39]

B. The Supreme Court's Decision in AMG Capital Management, LLC v. Federal Trade Commission

With the federal appellate courts in disagreement, the stage was set for the Supreme Court of the United States resolve the scope of remedies under § 13(b) of the FTC Act. In *AMG Capital Management, LLC v. Federal Trade Commission*, the U.S. Supreme Court held the scope of the FTC's authority under § 13(b) was limited to equity injunctions.[40] The central issue was whether the FTC could seek monetary relief, such as restitution or disgorgement, in addition to injunctive relief against businesses engaging in illegal and deceptive practices.[41] The case arose after the FTC charged AMG Capital Management with deceptive payday lending practices, alleging undisclosed and inflated fees.[42] The district court ruled in favor of the FTC, and the United States Court of Appeals for the Ninth Circuit affirmed, leading to a restitution and disgorgement order of $1.27 billion against AMG Capital Management.[43]

The Supreme Court, in a unanimous decision penned by Justice Breyer, held that § 13(b) does not authorize the FTC to seek, or courts to award, monetary relief.[44] The Court's rationale was grounded in the statutory language, which only expressly provided for injunctive relief and did not expressly mention monetary remedies.[45] This decision

34. *Id.*
35. *Id.* at 767.
36. *Id.* at 775.
37. *Id.* at 767.
38. 976 F.3d 327 (3d Cir. 2020).
39. *Id.* at 374 (citing 15 U.S.C. § 53(b)).
40. 141 S. Ct. at 1344.
41. *Id.*
42. *Id.* at 1345.
43. *Id.*
44. *Id.* at 1348.
45. *Id.* at 1348–49.

significantly curtails the FTC's enforcement capabilities, as the agency had relied for decades on § 13(b) as providing authority for monetary relief.[46] The Court explained that because in 1973 Congress gave explicit authority for the courts to impose monetary penalties in § 5 and § 19 of the FTC Act, Congress must have chosen not to do the same in § 13(b).[47] The ruling emphasizes the importance of express statutory authorization for agency actions and for agencies, including the FTC, to read statutes as part of a coherent scheme.[48]

C. The Ripple Effects: Impact on FTC Enforcement

Since the Supreme Court's ruling in 2021, the *AMG* decision has effected rulings in federal courts.[49] For example, the United States Court of Appeals for the Ninth Circuit, which had previously upheld the FTC's authority to seek monetary relief under § 13(b), found itself compelled to reverse its stance in the aftermath of the Supreme Court's *AMG* decision.[50] Likewise, the United States Court of Appeals for the Fourth Circuit, confronted with cases where the FTC sought both equitable and monetary redress, remanded cases for reconsideration in alignment with the Supreme Court's *AMG* precedent.[51]

Similarly, the United States Court of Appeals for the Eleventh Circuit found its hands tied when it came to § 13(b). In *FTC v. On Point Capital Partners, LLC*,[52] the Eleventh Circuit addressed allegations that On Point Capital Partners and its associated entities engaged in "unfair or deceptive" business practices.[53] The trial court had granted a § 13(b) preliminary injunction against On Point Capital Partners, which had forced the defendants to freeze all their assets. The assets were then put into a receivership to prevent mismanagement of funds and enjoined the defendants from selling consumer information. The defendants contested and appealed the trial court's result.[54] The Eleventh Circuit noted that before *AMG Capital Management*, such equitable relief—asset freezes

46. *Id.* at 1346–47.

47. *Id.* at 1349.

48. *Id.*

49. 141 S. Ct. 1341.

50. *See* FTC v. AMG Capital Mgmt., LLC, 998 F.3d 897 (9th Cir. 2021); *AMG Capital Mgmt.*, 141 S. Ct. at 1349.

51. FTC v. Pukke, 53 F.4th 80, 110 (4th Cir. 2022); *AMG Capital Mgmt.*, 141 S. Ct. at 1349.

52. 17 F.4th 1066 (11th Cir. 2021).

53. *Id.* at 1071.

54. *Id.* at 1075–76.

and other preventive measures—was legal.[55] But after *AMG*, they are no longer allowed.[56] Monetary relief is no longer an option under § 13(b), therefore "there is no need to preserve resources for a future judgment."[57] Under the new remedy paradigm set by *AMG Capital Management*, the Eleventh Circuit decided that it would be inappropriate to impose an asset freeze or receivership based solely on the equitable relief granted by § 13(b).[58] It remanded the case to be reviewed according to the standards for remedies set in *AMG Capital Management*.[59]

D. The Lesser Brother: § 19 of the FTC Act.

Like many administrative statutes, § 19 came about from the FTC struggles with a specific type of problem, and was designed to solve it.[60] Historically, the FTC faced challenges in addressing fraud due to its restricted enforcement tools.[61] Fraudsters often disregarded the rules without fear of significant repercussions.[62] The agency's primary tool, in 1975, was the cease-and-desist order, which did not address the financial advantages gained from committing fraudulent activities.[63]

To address these shortcomings, in 1975, Congress amended the FTC Act to enhance the agency's ability to secure monetary remedies.[64] However, given the broad and vague nature of the FTC Act's guidelines against unfair and deceptive actions, Congress was cautious.[65] Congress introduced specific measures, including § 19, which empowered the FTC to seek financial compensation for consumers through federal courts, but only after a formal administrative evaluation or when the suit involved activities which were "dishonest or fraudulent."[66]

Section 19 of the FTC Act, codified at 15 U.S.C. § 57b in 1975, operates similarly to § 13.[67] While § 13(b) addresses violations of "any provision of

55. *Id.* at 1078; 141 S. Ct. 1341.

56. *On Point Cap.*, 17 F.4th at 1078.

57. *Id.*

58. *Id.*

59. *Id.* at 1084; 141 S. Ct. 1341.

60. Howard Beales & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L. J. 1, 2 (2013).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 17.

65. *Id.* at 18–20.

66. *Id.* at 17.

67. Beales & Muris, *supra* note 60, at 17; Daniel Kaufman, *Taking Another Look at Courts Interpreting Section 19 of the FTC Act*, BakerHostetler (July 5, 2022), https://www.jdsupra.com/legalnews/taking-another-look-at-courts-

law enforced by the Federal Trade Commission,"§ 19 permits the FTC to start a civil case only when a defendant contravenes a "rule under this subchapter about unfair or deceptive acts or practices" or when a final cease-and-desist order related to an unfair or deceptive act is obtained by the FTC.[68] More importantly, § 19 gives courts the "jurisdiction to grant such relief as the court finds necessary to redress injury to consumers."[69] Notably, the section does not have the limiting language about injunctions present in § 13.[70] However, § 19's broad remedies are only available in narrower situations compared to § 13, which has limited remedies, but for broadly applicable areas of law.

Because § 19's remedies are only available for violations of statutes involving unfair or deceptive practices or after the issuance of a final cease-and-desist order relating to an unfair or deceptive act, the FTC has used § 19 sparingly compared to § 13. This was caused by § 13's ability to be used in almost any situation where there was a reasonable possibility of continued illegal activity, and because the federal courts had read its injunction ability broadly.[71] It was not until after *AMG Capital Management, LLC v. Federal Trade Commission*, that the FTC began consistently employing § 19 in litigation.[72]

IV. COURT'S RATIONALE IN SIMPLE HEALTH PLANS, LLC

A. The Interpretation of the FTC's Authority Under §§ 13 and 19 in Simple Health Plans, LLC

In a decision authored by Judge Britt C. Grant, the United States Court of Appeals for the Eleventh Circuit delved into the FTC's enforcement powers under 15 U.S.C. §§ 53 and 57b—otherwise known as §§ 13 and 19 of the FTC Act, respectively.[73] In the district court, the FTC had sought and received the following equitable remedies: preliminary injunction against Dorfman and his six companies from selling consumer data, an asset freeze on the companies and Dorfman's related accounts, and the appointment of a receiver to manage the companies' assets during the litigation.[74] The United States Court of Appeals for the

7576665/#:~:text=Section%2019%C20provides%C20that%20in, as%20the%C20case%C20may%20be [https://perma.cc/M8YE-UNEA].

68. *Simple Health Plans LLC*, 58 F.4th at 1328; *See also* Kaufman, *supra* note 67.

69. 15 U.S.C. § 57b(b).

70. Beales & Muris, *supra* note 60, at 17.

71. *Shire ViroPharma, Inc.*, 917 F.3d at 155.

72. Kaufman, *supra* note 67; 141 S. Ct. 1341.

73. *Simple Health Plans LLC*, 58 F.4th at 1324.

74. *Id.* at 1326.

Eleventh Circuit had previously employed these equitable remedies, as seen in *On Point Capital Partners, LLC*.[75] However, the asset freeze and appointment of the receiver are types of equitable relief that are not specifically mentioned in the empowering statute, § 13 of the FTC Act, as required in *AMG Capital Management*.[76]

The Eleventh Circuit concluded that the FTC's authority is not merely confined to injunctive relief, as suggested in *AMG Capital Management*. Instead, the FTC's authority extends to other forms of equitable relief, including asset freezes and the appointment of receivers as long as they "point to" the appropriate section such as § 19 which provides the court the ability "to grant such relief as the court finds necessary," such as prospective damages.[77] The court relied on the legislative history of the FTC Act and noted that Congress intended to provide the agency with broad enforcement powers to protect consumers from deceptive and unfair practices.[78]

The court's rationale for affirming the preliminary injunction, asset freeze, and receivership was deeply rooted in the facts of the case.[79] The FTC had presented compelling evidence that the company had engaged in deceptive marketing tactics, including false advertising and misleading product claims, which violates Telemarketing Sales Rule which puts the Defendants action under the purview of § 19's remedies.[80] As a result, The Eleventh Circuit found the equitable relief "necessary to preserve funds for a future monetary judgment . . . ."[81] This led the court to conclude that these extraordinary measures, otherwise known as prospective injunctions, were also necessary to prevent further harm to consumers, to preserve the integrity of the marketplace, and to ensure that the consumers were able to recover in the event of a judgment.[82]

In response to the defendants' appeal to vacate specific parts of the trial court's injunction, the Eleventh Circuit also reexamined the implications of the *AMG Capital Management* decision.[83] The defendants focused on the trial court's prohibition against future misrepresentations and the use or disclosure of customer data.[84] Emphasizing the distinction

75. *On Point Cap.*, 17 F.4th at 1078.
76. *Simple Health Plans LLC*, 58 F.4th at 1327; 141 S. Ct. 1341.
77. *Simple Health Plans LLC*, 58 F.4th at 1327–28.
78. *Id.*
79. *Id.* at 1329.
80. *Id.*
81. *Id.* at 1330.
82. *Id.* at 1331.
83. *Id.* at 1330; 141 S. Ct. 1341.
84. *Simple Health Plans LLC*, 58 F.4th at 1330.

between injunctive relief related to future actions and relief related to monetary aspects, the Eleventh Circuit reiterated that *AMG Capital Management* did not bar the former.[85] Drawing from the precedent set in its *On Point Capital* opinion, the Eleventh Circuit clarified that while the FTC's ability to seek monetary relief under § 13(b) was curtailed by *AMG Capital Management*, the provision still permitted prospective injunctive relief against deceptive actions, and other remedies are available if the defendants actions fall under the jurisdiction of other remedy focused statutes such as § 19.[86]

As a result, the Eleventh Circuit upheld the district court's decision to enforce the preliminary injunction against future misrepresentations as well as the unauthorized use or disclosure of customer information.[87] By doing so, the court decided not to construe § 13(b) narrowly, but instead to read the statute as giving the FTC the broad ability to request injunctions on actions, and to ask for other damages, equitable or otherwise, as long the FTC cites to § 13 with another related statute. Here, the defendants had violated the Telemarketing Sales Rule, which concerns itself with unfair or deceptive acts or practices, and therefore, § 19 and its associated remedies applied in this case.[88]

The Eleventh Circuit carefully evaluated the FTC's arguments and evidence.[89] It acknowledged that the FTC convincingly met its burden of proof, demonstrating a strong likelihood of success on the merits of its claims.[90] This proof was pivotal, as it formed the foundation for the court's decision to impose the remedies sought by the FTC in § 19.[91] Delving deeper into the specifics, the Eleventh Circuit emphasized the critical nature of the asset freeze.[92] It was not just a punitive measure; it was also a strategic move to ensure that, once the case reached its conclusion, there would be sufficient funds conserved to address and redress any consumer grievances or injuries.[93] The Eleventh Circuit's focus was clear: to balance the need for justice with the practicalities of ensuring consumers could be compensated for any proven harm.[94] To allow the defendants to continue to violate the Telemarketing Sales Rule,

85. *Id.* at 1330; 141 S. Ct. 1341.

86. *Simple Health Plans LLC*, 58 F.4th at 1330; *On Point Cap.*, 17 F.4th at 1079; 141 S. Ct. 1341.

87. *Simple Health Plans LLC*, 58 F.4th at 1330.

88. *Id.*;16 C.F.R. § 310.3(a)(2)(iii) (2015).

89. *Simple Health Plans LLC*, 58 F.4th at 1327.

90. *Id.* at 1330.

91. *Id.*

92. *Id.* at 1329–30.

93. *Id.* at 1330.

94. *Id.*

would be in violation of both § 13 and § 19 and therefore, the asset freeze, the receivership, and other remedies were proper in order to maintain a source of assets from which the victims could recover from.[95]

Finally, the Eleventh Circuit grappled with the implications of the *AMG Capital Management* decision on the interpretation of the FTC Act as a whole.[96] The defendants posited that *AMG Capital Management* should be perceived as a directive to curtail the FTC's expansive powers.[97] However, the Eleventh Circuit disagreed, emphasizing that the primary lesson from *AMG Capital* was the need to interpret the FTC Act in its literal and textual sense, ensuring that the Act is understood to "mean what it says."[98] The Eleventh Circuit underscored that while *AMG Capital Management* confined the scope of § 13(b) to purely injunctive relief, it did not negate or limit the broader remedies available under § 19 or other sections of the FTC Act.[99] The court stated that § 19 empowers the district court and the FTC itself to provide necessary relief to rectify harm to consumers when the FTC enforces a rule or statute.[100] In this context, the FTC's move to freeze the defendants' assets and establish a receivership over the defendants' enterprises was deemed appropriate, given that such measures were in line with the consumer protection mandate of § 19.[101] Consequently, the court upheld the district court's decision, affirming the broad relief measures ordered under § 19.[102]

V. IMPLICATIONS

A. FTC v. Simple Health Plans, LLC as Precedent

The United States Court of Appeals for the Eleventh Circuit's decision in *FTC v. Simple Health Plans, LLC*, could serve as a watershed moment for cases involving deceptive or unfair actions by corporations against consumers.[103] The Eleventh Circuit's opinion, which affirmed the FTC's authority to impose preliminary injunctions, asset freezes, and receiverships, provides a robust set of remedies for dealing with businesses engaged in "unfair or deceptive acts or practices," and in some ways returns the FTC to where it was before *AMG Capital Management*

95. *Simple Health Plans LLC*, 58 F.4th at 1330.
96. *Id.* at 1331; 141 S. Ct. 1341.
97. *Simple Health Plans LLC*, 58 F.4th at 1331.
98. *Id.* (citing *AMG Capital Management*, 141 S. Ct. at 1349).
99. *Id.*
100. *Simple Health Plans LLC*, 58 F.4th at 1331; 15 U.S.C. § 57b(a)–(b).
101. *Simple Health Plans LLC*, 58 F.4th at 1331.
102. *Id.*
103. 58 F.4th 1322.

was decided.[104] This is especially impactful due to the slew of cases following *AMG Capital Management* which were focused on limiting the power and options of the FTC.[105]

The *Simple Health Plans, LLC*, decision could lead to a broader interpretation of consumer protection laws, especially in the Eleventh Circuit. The Eleventh Circuit's willingness to affirm the FTC's enforcement powers, including the ability to freeze assets and appoint receivers, signals a shift towards a more aggressive stance against deceptive business practices. Perhaps this case is a sign for the FTC to bring more actions in the district courts within the Eleventh Circuit where the "defendant violates a rule about 'unfair or deceptive acts or practices'" created by § 19.[106] This decision provides the FTC and judges with a greater scope of remedies to use when dealing with businesses or other entities that violate consumer protection laws.[107]

Moreover, the penalties imposed in this case could serve as both incentives and disincentives for future litigation. If a court can impose severe penalties for deceptive practices, it may act as a deterrent for other companies contemplating similar actions. The financial and reputational consequences of such penalties could be significant, making companies think twice before engaging in deceptive or unfair practices. Being cut off from their source of income, Defendants would be left essentially immobile as their assets are maintained to provide a well-spring for injured consumers to receive verdicts from. This fear would likely drive business owners to negotiate with the FTC in order to maintain the business's cashflow.

Furthermore, the repercussions of the penalties imposed in this case may extend far beyond the immediate parties involved, potentially setting a precedent for subsequent legal disputes. The court's decision to impose stringent penalties showed a reading of the FTC Act focused on upholding consumer rights and ensuring fair business practices. If this trend of imposing heavy penalties persists, it could send a clear message to the corporate world about the excessive costs associated with deceptive practices, and what potential injunctions they may be faced with. Essentially, the FTC could return to the days before the debate around § 13(b) began and start using broad equitable relief once more. Such a stance could serve as a powerful deterrent, discouraging other businesses from venturing down a similar path. This heightened sense of corporate

104. 15 U.S.C. § 45(a); 141 S. Ct. 1341.

105. 141 S. Ct. 1341.

106. 15 U.S.C. § 57b(b).

107. Kaufman, *supra* note 67.

responsibility could lead to a more trustworthy and ethical business environment, benefiting both consumers and the broader industry.

B. Reinvigorating the Role of the FTC and Consumer Protection Laws

The period leading up to *AMG* witnessed a succession of federal court decisions that incrementally curtailed the enforcement prowess of the FTC. Congress was unable or unwilling to slow down the weakening of the FTC's enforcement powers, while academics, such as Daniel Kaufman, worried about how far the FTC's power would eventually be reduced.[108] For if the FTC was unable to maintain a source of recovery, it was likely businesses would simply move assets around to prevent ever having to pay for any verdicts against them.[109] These rulings, in essence, chipped away at the agency's authority, rendering it less formidable in its consumer protection mandate. However, the case of *Simple Health Plans, LLC*, potentially marks a pivotal juncture, signaling a potential reversal of this trend and a resurgence of the FTC's enforcement capabilities. This revitalization is particularly significant under the leadership of the current Chairwoman of the FTC, Lina Khan. Khan, known for her critical stance on big tech monopolies and her advocacy for stronger antitrust enforcement, is making concerted efforts to reestablish both the political and legal influence of the FTC, as seen in her recent public lawsuits against tech giants, Meta and Microsoft, which incorporate consumer deception elements which would bring into effect § 19.[110] Her tenure, combined with recent court decisions, possibly mark a new era for the agency's more aggressive enforcement capabilities.[111]

The FTC's enforcement policies will have to make significant changes in the adjustment from using § 13 to using § 19. One departure from using § 13(b) is the manner in which consumer redress is handled. Under § 19, courts might require a more direct approach to redress, such as having consumers request refunds rather than automatically receiving them from FTC enforcement. Any remaining funds, instead of going to the U.S. Treasury as was customary under § 13(b), could possibly be returned to the defendants if left unclaimed. Because of § 19's relatively

108. *Id.*; Kasey A. West, *Goodbye to Greenwashing in the Fashion Industry: Greater Enforcement and Guidelines*, 101 N.C. L. REV. 841, 868 (2023).

109. *Id.*

110. David McCabe & Cecilia Kang, *One of big tech's biggest critics is now its regulator*, N.Y. TIMES (June 16, 2021), https://www.nytimes.com/2021/06/16/technology/lina-khan-big-tech.html [https://perma.cc/9DR7-MQ22]; Mary Jalomick & Matt O'Brien, *House Republicans interrogate FTC's Khan over regulation of Big Tech*, AP NEWS (July 13, 2023, 12:07 AM), https://apnews.com/article/republicans-ftc-khan-technology-companies-41610756160e10732f7ded6c587cec0e [https://perma.cc/2RYL-L5QX].

111. McCabe & Kang, *Supra* note 10.

limited case law, large portions of the statute have only been litigated in the last two years.[112] Currently, there are no existing bright-line rules about how § 19's remedies are limited. For example, the court in *FTC v. Noland*[113] suggested that the application of § 19 might vary based on the specific facts of each case and the court's interpretation of whether the remedy was "necessary to redress injury to consumers."[114]

In the long run, as the FTC continues to navigate the post-*AMG* landscape, it is likely that we will see a surge in litigation centered around § 19. This will inevitably lead to a richer tapestry of case law, offering clearer guidelines on its application. However, businesses should be prepared for a more complex regulatory environment, where the boundaries of consumer protection and business interests are continually being redefined. The evolving interpretations of § 19 underscore the dynamic nature of consumer protection law and the need for businesses to stay abreast of these changes.

The Eleventh Circuit's decision to uphold the FTC's authority to enforce asset freezes and appoint receiverships stands out as a significant judicial development in the realm of consumer protection law. This affirmation is grounded in the court's interpretation of § 19 of the FTC Act, which provides the legal basis for broad equitable remedies. In fact and perhaps ironically, the Eleventh Circuit's reading of § 19 appears to be more expansive and more empowering to the FTC than the broad interpretation of § 13(b) that the Supreme Court of the United States rejected in its *AMG Capital Management* decision.[115] The Supreme Court's ruling in *AMG Capital Management* serves as a contrasting backdrop to the Eleventh Circuit's embrace of the agency's remedial powers under § 19 of the FTC Act.[116] This juxtaposition underscores the evolving and dynamic nature of judicial interpretations surrounding the FTC's enforcement capabilities.

C. Implications for Consumer Awareness and Legal Reforms

In the wake of the decision, there is potential for this new way for the FTC to seek remedies to act as a catalyst for legal reforms that prioritize consumer protection. Legislators, both at the state and federal levels, may closely examine the court's broad interpretation of the FTC's

112. *See* FTC v. Walmart Inc., No. 22-CV-3372, 2023 WL 2646741 (N.D. Ill. Mar. 27, 2023); FTC v. RCG Advances, LLC, No. 20-CV-4432, 2023 WL 6281138 (S.D.N.Y. Sept. 27, 2023); FTC v. Hewitt, 68 F.4th 461 (9th Cir. 2023).

113. No. CV-20-00047, 2023 U.S. Dist. LEXIS 83248 (D. Ariz. May 11, 2023).

114. *Id.* at *162.

115. *Simple Health Plans LLC*, 58 F.4th at 1331; 141 S. Ct. 1341.

116. 141 S. Ct. 1341.

authority under § 19. This scrutiny could and has led to discussions and subsequent introduction of bills aimed at modifying the agency's enforcement capabilities instead of allowing courts to define the FTC Act for themselves.[117] Such legislative actions could not only reinforce the FTC's mandate but also create a more robust and comprehensive legal framework dedicated to combating deceptive and unfair business practices. In turn, this would provide consumers with enhanced safeguards, ensuring they are less susceptible to fraudulent activities.

On the other hand, while the *Simple Health Plans, LLC*, decision marks a pivotal moment for consumer protection, it also brings to the forefront a complex debate about the equilibrium between safeguarding consumer rights and ensuring fair treatment of businesses. The Eleventh Circuit's wide-ranging interpretation of the FTC's powers might spark concerns among the business community, particularly regarding potential regulatory overreach and the implications for the due process rights of business entities. As Dorfman stated in his appellate reply brief, the FTC has and will continue to "unilaterally expand[] its enforcement authority without legislative action to systemically seize property from United States citizens without due process of law and without just compensation."[118] Such concerns could lead to discussions about the boundaries of regulatory authority of Agencies like the FTC and the potential for unintended consequences on legitimate business operations. Nevertheless, the Eleventh Circuit's opinion attempts to address these concerns.[119] The Eleventh Circuit underscored the paramount importance of robust consumer protection but was also aware of the need to prevent undue regulatory encroachments on lawful businesses.[120]

VI. CONCLUSION

The Eleventh Circuit's ruling in *FTC v. Simple Health Plans, LLC,* sets a new trajectory for the FTC's enforcement capabilities, and offers potential for reshaping the landscape of consumer protection law.[121] While bolstering the FTC's arsenal against deceptive business practices, the decision also serves as a testament to the evolving nature of judicial interpretation of the FTC Act, and the profound implications for both

117. The Consumer Protection and Due Process Act, S. 1076, 118th Cong. (2023) (This amendment would allow Congress to clearly define what equitable relief means in the context of § 13).

118. Reply Brief of Appellant at 1, FTC v. Simple Health Plans LLC, 58 F.4th 1322 (2023) (No. 21-13116).

119. *Simple Health Plans LLC*, 58 F.4th at 1329.

120. *Id.*

121. *Id.* at 1322.

consumers and businesses. As the FTC, under the leadership of Chairwoman Lina Khan, embarks on an updated mission to safeguard consumer interests, businesses must remain vigilant, adapting to this changing legal environment. The broader interpretation of the FTC's powers, as endorsed by the court, underscores the judiciary's commitment to upholding the principles of consumer protection.

However, the decision also serves as a reminder of the delicate balance that must be struck between ensuring robust consumer safeguards and preserving the due process and property rights of businesses. Moving forward, it will be crucial for all stakeholders—regulators, businesses, and consumers alike—to engage in constructive dialogue, ensuring that the spirit of the law aligns with the evolving needs of society. The Eleventh Circuit's decision is not just a legal precedent. It is also a call to action, urging all parties to work collaboratively towards a more transparent, fair, and accountable business ecosystem.