

Almost 13 years ago, the Federal Trade Commission (FTC) filed a federal court enforcement action in the U.S. District Court for Nevada against an Ohio-based, family-owned magazine subscription company alleging deceptive telemarketing sales practices. The FTC sued the company, Publishers Business Services, its founder Ed Dantuma, along with most of his immediate family, including his then 75 year-old wife Persis, and his children Dirk, Dries, Brenda, and Jeff. In 2010, the FTC obtained summary judgment against defendants finding that the company engaged in deceptive practices under the FTC Act and related Telemarketing Sales Rule, although customers received all terms of purchase before any monies were paid and everyone who paid for magazines received them (some even got free magazines).

After summary judgment, Homer Bonner came on the case to fight the scope of permissible monetary relief. The FTC wanted an outrageous \$34 million as supposed equitable disgorgement under § 13(b) of the FTC Act, representing virtually any monies received by the company during the pertinent period. Defendants believed the FTC was owed far less, if anything, because the underlying statutory authority for the FTC to obtain monetary relief was lacking. A five-day bench trial on damages followed, and the District Court largely sided with the family, awarding only about \$191,000 to the FTC and refusing to enter any liability against most of the family members. That judgment was fully paid.

However, the FTC appealed. And over the course of the following decade, the parties continued to heavily litigate the scope of permissible monetary relief, including engaging in extensive expert and damages discovery, two separate trips to the U.S. Court of the Appeals for the Ninth Circuit, and even an unsuccessful trip to the U.S. Supreme Court, before ultimately a judgment of about \$24 million was entered against defendants.

The last possible option was another trip to the U.S. Supreme Court. This time, armed with amicus support, a new Circuit Court of Appeals split on the issue of equitable monetary relief, and a strategically filed petition submitted alongside an unrelated but companion FTC enforcement action seeking to challenge a similar equitable monetary award, albeit one that exceeded a *billion dollars*, there was renewed optimism.

That optimism was finally realized. The U.S. Supreme Court granted certiorari in the companion case, *AMG Capital Management, LLC v. FTC*, while holding over our clients' case pending a ruling. And, on April 22, 2021, the U.S. Supreme Court entered its decision in *AMG Capital* ruling 9-0 that the FTC lacks the ability to seek or obtain any monetary relief under § 13(b) of the FTC Act.

On May 3, 2021, the U.S. Supreme Court granted certiorari in our case, *Publishers Business Services, Inc. v. FTC*, No. 19-507, vacated the \$24 million judgment, and remanded the case to the U.S. Court of Appeals for the Ninth Circuit for continued proceedings consistent with its *AMG Capital* opinion.

The FTC took this remand as an opportunity to claim in the U.S. Court of Appeals for the Ninth Circuit that, notwithstanding the Grant of Certiorari, Vacate, and Remand issued by the U.S. Supreme Court, defendants had supposedly "waived" their challenge to the \$24 million judgment. On June 10, 2021, the Ninth Circuit unambiguously rejected the FTC's waiver contention, found that *AMG Capital* "precludes the equitable monetary relief awarded in this case," vacated the

district court's judgment, and remanded the case to U.S. District Court for the District of Nevada for further proceedings.

While we are in uncharted waters concerning the future steps in this case, let alone concerning the future of FTC enforcement, the fantastic result in *Publishers Business Services* is an unequivocal victory for the clients that was over 13 years in the making. Congratulations to Peter W. Homer, Christopher J. King, and Howard S. Goldfarb on their consequential and hard-fought victory.