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The FTC's Punctuated Equilibrium

BY M. SEAN ROYALL

DARWIN THEORIZED THAT biological evolution is an inherently gradual process that proceeds "only by short and slow steps."[1] More recently, many scientists have come to believe that evolutionary change is characterized by long periods of stasis interrupted by occasional "bursts"—a concept known as "punctuated equilibrium."[2]

Federal agencies evolve over time, too. In the hundred-plus-year life of the Federal Trade Commission (FTC), there have been extended periods in which the agency proceeded about its business with relatively little change, even amidst leadership transitions and shifts of political party control over the Commission's majority. There have also been periods of more rapid change, perhaps none more pronounced than the past two years.

In early 2021, two events occurred that continue to redefine the FTC's powers, policies, and enforcement programs, albeit in very different ways. The first was the Supreme Court's April 2021 unanimous decision in *AMG Capital Management v. FTC*,[3] which stripped the Commission of one its most potent and frequently invoked remedial powers—the ability (based on previous statutory interpretations) to proceed directly to federal court and obtain equitable monetary relief for violations of any provision of law the FTC enforces. Weeks later, in June 2021, the FTC was rocked by a second major event when Lina Khan, a progressive antitrust scholar, took the helm as the agency's newly appointed Chair, armed with a fairly revolutionary agenda for remaking the institution in her own image.

As I and co-authors predicted in these pages shortly after the Supreme Court's *AMG* decision,[4] the Court's curtailment of the FTC's remedial powers has prompted the agency to expand enforcement in other ways, including through increased reliance on administrative litigation. Yet very recently, also in a unanimous decision—*Axon Enterprise, Inc. v. FTC*[5]—the Supreme Court dealt the agency another major setback. The Court held that parties targeted for such administrative proceedings are free to launch collateral federal court challenges to the constitutionality of the FTC's administrative litigation process, with no requirement to first raise such issues before the FTC itself. The decision did not reach the merits of that constitutional law question but did facilitate future challenges, which could interfere with the FTC's post-*AMG* efforts to leverage administrative litigation as an alternative, albeit less direct, path to obtaining monetary relief.

Recent court-imposed limits on the FTC's authority have been headline news and are part of a broader judicial trend involving closer scrutiny of the powers of independent federal agencies.[6] But in other headlines one commonly hears mention of the FTC boldly expanding its reach. There are myriad examples, including new proposed FTC rules, expansive Commission policy statements that reject prior bipartisan positions, and unprecedented enforcement actions testing the limits of the agency's authority.

What we are witnessing is a departure from the FTC's usual, more gradual trajectory. The pace and scope of change are more than incremental and cut across multiple dimensions, affecting policy, process, and enforcement, and impacting the FTC's dual missions—that is, both antitrust and consumer protection. Whether and to what extent these changes will be permanent is unclear; some could be undone by courts, future FTC leaders, or Congress. The point of this article is to explore some of what has transpired, or is transpiring, in this relatively volatile period in the FTC's history, focusing on three areas in particular: (1) the FTC's increased emphasis, post-*AMG*, on rule-based enforcement and rulemaking; (2) its increased reliance on administrative litigation and the potential impact of *Axon*; and (3) FTC efforts to set aside previous policies imposing prudential limits on the agency's powers.

New Emphasis on Rule-Based Enforcement

For decades leading up to the Supreme Court's *AMG* decision, most lower courts indulged the FTC's expansive interpretation of Section 13(b) of the FTC Act. Although that provision only empowers the FTC to obtain temporary restraining orders or "permanent injunction[s],"[7] the agency read these two words to authorize imposition of broad equitable monetary relief (including disgorgement and restitution) against parties found to have violated antitrust or consumer protection standards enforced by the FTC. To

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say that the FTC leaned heavily on that authority would be an understatement. In the six years before *AMG* was decided, the FTC used Section 13(b) as a vehicle to collect over $11.2 billion dollars, much of that obtained through voluntary settlements.[8] The FTC's authority to obtain such relief was seemingly so inviolate that many companies made the calculated decision to negotiate large-dollar settlements rather than face potentially larger-dollar judgments in court. Then suddenly poof! The illusive power went away.

Sticking with the evolutionary metaphor, it was as if a catastrophic meteor slammed into FTC headquarters that day in June 2021, and the dust has yet to settle.[9] One thing is clear: there will not be a quick legislative fix. Initial attempts to rally congressional support for rebooting the FTC's lost monetary relief authority faltered and there are no apparent signs of revival.[10] Legislative solutions being unavailing, the agency has pursued various other paths to reposition itself and utilize its remaining arsenal of remedies. As discussed below, one workaround has involved an increased reliance on administrative litigation as a predicate for seeking monetary relief in federal court under a different provision of the FTC Act—a process the Supreme Court in *AMG* rightly labeled as "cumbersome."[11] But another somewhat less cumbersome path for the FTC to obtain monetary relief from parties subject to its oversight involves rules—that is, formally promulgated rules (or statutes given the same legal effect as rules) the FTC is empowered to enforce—and *AMG* did nothing to limit the FTC's authority in this regard. Examples of FTC-enforced rules include the rule implementing the Children's Online Privacy Protection Act (COPPA), the Telemarketing Sales Rule, and the Restore Online Shoppers Confidence Act (ROSCA).[12]

Section 5(m)(1)(A) of the FTC Act allows the agency, through a federal court action,[13] to obtain civil penalties for violations of most FTC-enforced rules where the defendant committed the rule violation "*with actual knowledge* . . . that such act is unfair or deceptive and is prohibited by such rule," or where such knowledge can be "fairly implied on the basis of objective circumstances."[14] The maximum amount the FTC can seek in civil penalties adjusts annually but is currently $50,120 per violation.[15]

Even at levels far below the maximum, monetary exposure tied to civil penalties can be significant in rule-based FTC enforcement actions. For instance, in the case of a large technology company with millions of users or subscribers, in a rule-violation case the FTC typically would argue that each relevant consumer account or transaction involves a separate discrete violation and, depending on the theory and facts, the FTC may assert that individual users or consumers were impacted by multiple separate violations. Where there is a "continuing" violation of an FTC rule, the FTC Act provides that civil penalties may be calculated on a per-day basis[16]—although whether and when this may serve to cap civil penalty exposure remains unclear from the limited case law applying that provision.[17]

Many FTC consumer protection cases involve conduct that is alleged to be deceptive or unfair in violation of the FTC Act *and* alleged to violate one or more FTC rules. Pre-*AMG*, in such cases the FTC typically did not prioritize civil penalties, as Section 13(b) provided the easiest path to obtaining a large-dollar settlement or judgment. Section 13(b) was interpreted to allow the FTC to prove certain conduct unfair or deceptive and claim very large amounts in equitable monetary relief in one federal court action—often basing such relief on total revenues earned by the defendant, without any offset for the value of the products or services that were sold.[18] By comparison, proving rule violations and reaching comparable dollar amounts in civil penalties can be more complicated. Each rule has its own proof requirements, and as discussed in another recent article, there are often ambiguities in those terms, which can make the FTC's burden of proof more challenging and give rise to defenses.[19] Moreover, when the FTC brings an action seeking civil penalties it has a statutory obligation to refer the matter to the DOJ, giving the DOJ the option to take the lead in bringing the case for the government, even when the claims are settled and never litigated.[20] Such referrals can involve ceding control of the action to the DOJ, which the FTC may be loath to do. But when the FTC relied solely upon Section 13(b) as its authority for obtaining monetary settlements, this complication was removed.

These factors in the past influenced the FTC's case selection, the most attractive cases often being ones where persuasive arguments could be made about high levels of monetizable injury, regardless of the number of potential rule violations. But with Section 13(b) no longer being a viable means for obtaining monetary relief, civil penalties have become a key focus, and it appears the FTC is now prioritizing cases where the volume of potential rule violations may be quite substantial.

The attraction of rule-violation cases to the FTC extends beyond the availability of civil penalties. Section 19(a)(1) of the FTC Act also allows the agency, in a federal court action, to seek broad forms of redress, including damages, for "injury to consumers . . . resulting from the rule violation."[21] In the pre-*AMG* environment where Section 13(b) reigned supreme, this provision was seldom invoked. But now it provides the closest analogue to the types of monetary relief formerly available through Section 13(b), albeit predicated upon proof of rule violations and subject to other injury and causation showings.[22]

Rule violations are now where the money is. And this helps explain why the FTC, beyond enforcing existing rules with increased vigor, is also working feverishly to promulgate new rules. Under Chair Khan's leadership, the FTC has embarked upon a spree of new and wide-ranging rulemaking activities, not only on consumer protection issues (the focus of most existing rules) but also in the competition arena. For example, in the past year the FTC announced that it is exploring rules to limit junk fees both in the auto

industry[23] and more generally.[24] In August 2022, the agency provided notice of a significant proposed rulemaking cracking down on commercial surveillance and lax data security.[25] In May 2023, the FTC proposed expanding the Health Breach Notification Rule.[26] Another new proposed FTC rule would revamp and expand the Commission's existing rule on so-called "negative option" marketing practices.[27] And yet another recently proposed rule would ban marketers from using deceptive review and endorsement practices, such as publication of fake reviews, suppression of negative reviews, and payment in exchange for positive reviews.[28]

Most notably, earlier this year the FTC proposed an expansive new competition rule that would broadly prevent employers from entering into non-compete clauses with workers and require that existing non-competes be rescinded—a rule the FTC estimates could affect 30 million employer-employee relationships.[29] If the FTC adopts such a rule, it is certain to be the subject of numerous court challenges. More generally, as the FTC ramps up its rulemaking activity and shifts to heavier reliance on rule-based enforcement, litigation over FTC rules and related enforcement may become the new normal.[30]

Increased Reliance on Administrative Litigation

Where the FTC seeks to challenge conduct that does not involve a rule violation (or violation of a prior FTC order[31]), it no longer has the ability to go *directly* to federal court and seek monetary relief of any kind. But there is a more circuitous path.

As explained in *AMG*, Section 19 of the FTC Act authorizes the Commission to seek consumer redress in federal court for unfair or deceptive acts or practices for conduct that violates a prior cease and desist order, provided the defendant had cause to know its conduct was "dishonest or fraudulent."[32] This is the process for obtaining monetary relief that *AMG* described as "cumbersome,"[33] and indeed it is. Depending how one counts, it involves three or four steps. The FTC first must file a complaint before an FTC administrative law judge (ALJ) seeking a cease-and-desist order. The ALJ's initial decision is then "appealed" to the Commission, which issues its own decision. Any Commission decision issuing a cease-and-desist order would then be appealable to a federal appeals court. Only if the FTC prevails on the appeal would the agency then be permitted to file a federal court action under Section 19 seeking monetary relief.

It's no wonder, prior to *AMG*, that the FTC almost never invoked this process, opting for the streamlined one-step process then available through Section 13(b). What is perhaps more surprising (given the time and resources involved) is that the Commission post-*AMG* is bringing cases like this, which will take years to litigate to conclusion if not settled in the interim.[34] This is a sign of how limited the FTC's options are. But in truth, the FTC must bring cases like this if it hopes to continue obtaining significant monetary settlements from companies charged with unfair or deceptive practices that do not involve rule violations. For such matters, the threat to commence a multi-phase, multi-year litigation potentially culminating in a Section 19 federal court action for monetary relief is the closest thing the FTC now has to the Section 13(b) weapon the FTC has lost.

Further indicating that the FTC intends to avail itself more often of this previously dormant remedial path, the Commission very recently announced proposed changes to its Rules of Practice that would, among other things, technically eliminate any "appeal" of ALJ decisions to the Commission, making ALJ decisions more akin to "recommendations."[35] What remains to be seen is how *Axon* may impact this.

The FTC's administrative litigation process has long been criticized. One federal judge described the FTC's process as a "legal version of the Thunderdome in which the FTC has rigged the rules to emerge as the victor every time."[36] As a former Commissioner years ago put it, the process effectively makes the FTC "investigator, prosecutor, judge, and jury."[37] *Axon* involved two consolidated cases—one arising from an FTC administrative litigation, and another arising from an administrative litigation before the Securities and Exchange Commission (SEC). The respondents in both matters claimed that the agencies' ALJs are insufficiently accountable to executive oversight, violating separation-of-powers principles. To the extent it involved the FTC, the question before the Supreme Court in *Axon* was a narrow one: namely, whether constitutional challenges to the FTC's structure and administrative litigation framework may be heard in the first instance by federal district judges as opposed to the Commission itself, to which the Court answered "yes."[38] Narrow though the question may have been, Justice Kagan, who wrote for the unanimous Court, rightly observed that the underlying substantive challenges "are fundamental, even existential."[39] Among other things, the Court held that such constitutional questions are "outside the [FTC's] expertise,"[40] adding: "The Commission knows a good deal about competition policy, but nothing special about the separation of powers."[41]

Just as the underlying substance of these constitutional questions was beyond the scope of the *Axon* decision, they are beyond the scope of this article.[42] What is clear, however, is that the FTC's in-house litigation process is now under the microscope, and federal court constitutional challenges facilitated by *Axon* already have begun. Thus, at the very moment that the Commission is moving to place heavier reliance upon this aspect of its enforcement program, the continued viability of that process is an open question—yet another indication of what a dynamic time this is in the agency's evolution.

Indeed, as this article was being finalized for publication, the Supreme Court announced that in the 2023-24 term it will hear a case that squarely presents the question

of whether the SEC's reliance upon agency-employed ALJs to resolve disputed claims against private parties violates the Constitution.[43] Given the close overlap between the SEC's and FTC's approaches to administrative litigation, the Court's decision in that case could have wide-ranging impacts on the FTC as well.

Exploration of the Outer Limits of FTC Statutory Authority

Stepping in when she did, Lina Khan's tenure as FTC Chair might have been largely defined by efforts to navigate around *AMG*, but her ambitions are far greater. She is a leading voice behind what some have labeled as a "Neo-Brandeisian Revolution," which posits that the FTC in modern times has been an abysmal failure.[44] One prescription for that perceived problem is to free the agency from constraints that might keep it from "employing all the tools available to the FTC."[45] As Chair Khan stated not long after assuming her new role: "There has been a bit of a missed opportunity, especially over the last few decades, to take full advantage of the institutional tools that Congress granted the agency."[46] Chair Khan came to liberate the FTC, and for better or worse it seems she has.

In Chair Khan's view, part of what has been holding the FTC back has been the agency's own prior policy statements and guidelines. In September 2021, months after arriving at the FTC, Chair Khan, joined by the two other Democratic Commissioners, announced that the FTC was withdrawing its approval for the 2020 Vertical Merger Guidelines, expressing the view that the Guidelines were "flawed," particularly in how they accounted for potential efficiencies from vertical transactions.[47] Since then, the Commission has taken prominent action to challenge two vertical mergers,[48] and more challenges may follow.

Meanwhile, the antitrust bar has been anxiously awaiting the issuance of widely anticipated new DOJ/FTC merger guidelines. As this article went to press, the FTC and DOJ jointly released their proposed updates to the Merger Guidelines and solicited public comments on the proposals.[49] In announcing the long-awaited updates, Chair Khan stated: "With these draft Merger Guidelines, we are updating our enforcement manual to reflect the realities of how firms do business in the modern economy. Informed by thousands of public comments—spanning healthcare workers, farmers, patient advocates, musicians, and entrepreneurs—these guidelines contain critical updates while ensuring fidelity to the mandate Congress has given us and the legal precedent on the books."[50] Further signaling the agencies' clear departure from the approach of enforcing antitrust laws with a singular focus on consumer welfare, the press release announcing the updates emphasized that the "[p]roposed guidelines would address the many ways mergers can weaken competition, harming consumers, workers, and businesses."[51]

The Khan Commission's prompt withdrawal of the Vertical Merger Guidelines was notable, but even more notable was Chair Khan's withdrawal of the FTC's 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (2015 Policy Statement).[52] Chair Khan was sworn in on June 15, 2021. Less than three weeks later, on July 1, 2021, she led the Commission's new Democratic majority in rescinding the 2015 Policy Statement[53]—which had been adopted under a previous Democratic Chair with support from one of the then two sitting Republican Commissioners.[54] The 2015 Policy Statement outlined principles governing when and under what circumstances the FTC would exercise its authority to bring "standalone" actions under Section 5 of the FTC Act challenging "unfair methods of competition." In line with modern consensus thinking of both Republican and Democratic FTC leaders (at least as of that time), the 2015 Policy Statement signaled that any use of the FTC's powers in this regard would be "guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare," and would be consistent with the "spirit" of the Sherman and Clayton Acts.[55] In revoking the 2015 Policy Statement, Chair Khan and her colleagues sent a clear signal that "tethering Section 5 to the Sherman and Clayton Acts" was in effect an abdication of the FTC's unique institutional role as an administrative agency with the power to adjudicate cases ranging well beyond the limits of established antitrust law.[56] This was followed, in November 2022, by issuance of a new Section Policy Statement, which embodies a vision for using Section 5 in ways that "may depart from prior precedent based on the provisions of the Sherman and Clayton Acts."[57]

How exactly the Commission intends to use this broadly conceived authority remains to be seen, although the 2022 Policy Statement provides some clues. In a "non-exhaustive" list of examples of how it might see to invoke Section 5, the FTC references these practices, among others:

- mergers or acquisitions that may not violate the Clayton or Sherman Acts but might nonetheless "have [a] tendency to ripen into violations of the antitrust laws";
- a "series" of mergers, acquisitions, or joint ventures, none of which "individually" violate the antitrust laws, but that "tend to bring about the harms that the antitrust laws were designed to prevent";
- acquisitions "of a potential or nascent competitor that may tend to lessen current or future competition";
- uses of "market power in one market to gain a competitive advantage in an adjacent market"; and
- loyalty rebates, tying, bundling, and exclusive dealing arrangements that are beyond the reach of established antitrust standards, but again "have the tendency to ripen into violations of the antitrust laws."[58]

This is a bold enforcement agenda, and it is emblematic of how quickly and significantly the FTC, under present leadership, is evolving in new directions. As with other developments in the FTC's enforcement approaches, the courts will also likely play a role here.

Conclusion

Change is inevitable and does not always occur in a standard or predictable fashion. There are intervals in time when evolutionary patterns can be sped up. As relates to the FTC, we may be living through such a moment now. There are different catalysts at work placing pressure on the agency to reposition itself in varied ways. Some of that change emanates from within the agency, and some externally, creating actions and reactions. Like an organism fighting to survive and thrive in a disrupted environment, the FTC is in the process of remaking itself, it seems, and it will be interesting to discover what lies ahead when the current dynamic period gives way to some form of new equilibrium. ■

[1] Charles Darwin, On the Origin of Species 409 (1859).

[2] *See, e.g.*, C. Venditti & M. Pagel, *Speciation and Bursts of Evolution*, 1 Evo Edu Outreach 274 (2008).

[3] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021).

[4] *See* M. Sean Royall, et al., *A Watershed Moment? What Comes Next for the FTC in the Wake of AMG*, Antitrust, Summer 2021, at 103; *see also* M. Sean Royall, et al., *Seventh Circuit Sets Up Potential Supreme Court Review of FTC Monetary Relief Authority*, Antitrust, Fall 2019, at 54; M. Sean Royall, et al., *Are Disgorgement's Days Numbered? Kokesh v. SEC May Foreshadow Curtailment of the FTC's Authority to Obtain Monetary Relief*, Antitrust, Spring 2018, at 94.

[5] Axon Enter., Inc. v. FTC, 143 S. Ct. 890 (2023).

[6] *See, e.g.*, *SEC v. Jarkesy*, No. 22-859 (S. Ct. 2023) (challenging constitutionality of SEC's use of agency-employed ALJs to adjudicate claims against private parties); Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., No. 21-50826 (S. Ct. 2022) (challenging constitutionality of CFPB's funding).

[7] 15 U.S.C. § 53(b).

[8] Fed. Trade Comm'n, *Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina M. Khan Regarding Section 13(b) of the FTC Act, Open Meeting of the Commission* 1 (Apr. 28, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Comm%27r%20Slaughter%20Joined%20by%20Chair%20Khan%20Regarding%20Section%2013%28b%29%20of%20the%20FTC%20Act_April%202022.pdf.

[9] This is not to say that the outcome in *AMG* was unforeseeable. In 2017, the Supreme Court ruled in *Kokesh v. SEC* that disgorgement remedies sought by the SEC under provisions similar to Section 13(b) of the FTC Act represented a "penalty" subject to a five-year statute of limitations, and not an equitable remedy. 581 U.S. 455, 457 (2017). *See* M. Sean Royall, et al., *Are Disgorgement's Days Numbered? Kokesh v. SEC May Foreshadow Curtailment of the FTC's Authority to Obtain Monetary Relief*, Antitrust, Spring 2018, at 94; *see also* M. Sean Royall, et al., *Seventh Circuit Sets Up Potential Supreme Court Review of FTC Monetary Relief Authority*, Antitrust, Fall 2019, at 54.

[10] The bill, titled the "Consumer Protection Remedies Act of 2022," was introduced in the Senate on May 11, 2022 by Senator Cantwell, and remains in Committee.

[11] *AMG*, 141 S. Ct. at 1352.

[12] While ROSCA is a statute, not a rule, Section 5(a) of ROSCA provides that any violation shall be treated as a violation of a rule under the FTC Act. 15 U.S.C. § 8404(a).

[13] When the FTC seeks civil penalties, it must first give notice to and consult with the Department of Justice (DOJ), and essentially give the DOJ a right of first refusal to bring the case on behalf of the FTC.

[14] 15 U.S.C. § 45(m)(1)(A) (emphasis added). *See also, e.g.*, United States v. Dish Network, L.L.C., No. 09-3073, 2016 WL 97688, at *1 (C.D. Ill. Jan. 7, 2016) ("A person knowingly violates an FTC rule if, under the circumstances, a reasonable, prudent person would have known of the existence of the rule and that his or her acts or practices violated the rule."); United States v. Cornerstone Wealth Corp., 549 F. Supp. 2d 811, 822 (N.D. Tex. 2008) ("[B]efore . . . conduct can serve as a basis for imposing a civil penalty under § 5(m)(1)(A), the government must prove that the violations were committed knowingly or with knowledge fairly implied based on objective circumstances.").

[15] *See* Adjustments to Civil Penalty Amounts, 88 Fed. Reg. 1499, 1499-1500 (Jan. 11, 2023) (to be codified at 16 C.F.R. pt. 1), https://www.federalregister.gov/documents/2023/01/11/2023-00382/adjustments-to-civil-penalty-amounts.

[16] 15 U.S.C. § 45(m)(1)(C) ("In the case of a violation through continuing failure to comply with a rule . . . , each day of continuance of such failure shall be treated as a separate violation . . . .").

[17] *See, e.g.*, United States v. Dish Network L.L.C., 954 F.2d 970, 976 (7th Cir. 2020) (in context of a Telemarking Sales Rule claim, rejecting defense argument that 15 U.S.C. § 45(m)(1)(C) "capped" civil penalties by requiring imposition of penalties on a per-day, versus a per-call, basis).

[18] *See, e.g.*, FTC v. Figgie Int'l, Inc., 994 F.2d 595, 606 (9th Cir. 1993) (addressing why in some deception cases full customer refunds are warranted without any offset for "the value of the thing sold").

[19] *See* M. Sean Royall, *The FTC's COPPA Conundrum: Ambiguities in the Rule and a Dearth of Authoritative Guidance Leave the Agency Vulnerable to Legal Challenges*, Antitrust, Spring 2022, at 83.

[20] *See* 15 U.S.C. § 56(a)(1).

[21] 15 U.S.C. § 57b(b).

[22] Unlike civil penalties, to obtain consumer redress under Section 19 "the Government need only prove the existence of rule violations, with no state-of-mind requirement." United States v. MyLife.com, Inc., 567 F. Supp. 3d 1152, 1170 (C.D. Cal. 2021). On the other hand, damages under this provision require a more specific showing of consumer harm and causation. *See, e.g.*, FTC v. Zurixx, LLC, No. 19-cv-7132021, WL 5179139, at *6 (D. Utah Nov. 8, 2021) ("Section 19 offers the FTC a significantly different type of damages," compared to damages previously available under Section 13(b), in that "the FTC must "show the extent to which each consumer was harmed from the [rule] violations, not merely gross revenues."); *Figgie*, 994 F.2d at 605 ("there may be no redress without proof of injury caused by those practices," and "the relief must be necessary to redress the injury").

[23] Press Release, Fed. Trade Comm'n, *FTC Proposes Rule to Ban Junk Fees, Bait-and-Switch Tactics Plaguing Car Buyers* (June 23, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-proposes-rule-ban-junk-fees-bait-switch-tactics-plaguing-car-buyers.

[24] Press Release, Fed. Trade Comm'n, *Federal Trade Commission Explores Rule Cracking Down on Junk Fees* (Oct. 20, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/10/federal-trade-commission-explores-rule-cracking-down-junk-fees.

[25] Press Release, Fed. Trade Comm'n, *FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices* (Aug. 11, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-explores-rules-cracking-down-commercial-surveillance-lax-data-security-practices.

[26] Press Release, Fed. Trade Comm'n, *FTC Proposes Amendments to Strengthen and Modernize the Health Breach Notification Rule* (May 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-proposes-amendments-strengthen-modernize-health-breach-notification-rule.

[27] Press Release, Fed. Trade Comm'n, *Federal Trade Commission Proposes Rule Provision Making it Easier for Consumers to "Click to Cancel" Recurring Subscriptions and Memberships* (Mar. 23, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/03/federal-trade-commission-proposes-rule-provision-making-it-easier-consumers-click-cancel-recurring.

[28] Press Release, Fed. Trade Comm'n, *Federal Trade Commission Announces Proposed Rule Banning Fake Reviews and Testimonials* (June 30, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-proposed-rule-banning-fake-reviews-testimonials?utm_source=govdelivery.

[29] Press Release, Fed. Trade Comm'n, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm* Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

[30] Although the issue has received relatively little attention by courts, to obtain civil penalties for a rule violation the FTC must prove a *knowing violation*, and this state-of-mind proof requirement may prove to be an obstacle in some matters, particularly where the FTC's arguments rest on novel rule interpretations or involve areas where the agency has failed to publish clear, authoritative guidance. *See* Royall, *supra* note 19, at 83.

[31] Section 5(*l*) of the FTC Act authorizes civil penalties for violations of FTC orders. 15 U.S.C. § 45(*l*).

[32] 15 U.S.C. § 57b(a)(2).

[33] *AMG*, 141 S. Ct. at 1352.

[34] One example of such a case that did recently settle after the administrative litigation commenced involved HomeAdvisor, a home service provider affiliated with Angie, formerly known as "Angie's List." Press Release, Fed. Trade Comm'n, *FTC Order Requires Home Advisor to Pay Up To $7.2 Million and Stop Deceptively Marketing its Leads for Home Improvement Projects* (Jan. 23, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-order-requires-homeadvisor-pay-72-million-stop-deceptively-marketing-its-leads-home-improvement.

[35] Press Release, Fed. Trade Comm'n, *FTC Approves Publication of Federal Register Notice on Revision to Parts 0-4 of the Commission's Rules of Practice* (June 2, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-approves-publication-federal-register-notic-revisions-parts-0-4-commissions-rules-practice.

[36] Axon Enter., Inc. v. FTC, 986 F.3d 1173, 1187 (9th Cir. 2021), *rev'd and remanded*, 143 S. Ct. 890 (2023).

[37] Philip Elman, *Administrative Reform of the Federal Trade Commission*, 59 Geo. L.J. 777, 785 (1971).

[38] *Axon*, 143 S. Ct. at 897.

[39] *Id.*

[40] *Id.* at 900 (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212 (1994)).

[41] *Id.* at 905.

[42] In a concurring opinion, Justice Thomas went further than the Court in addressing the substantive constitutional questions, expressing his "grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end." *Id.* at 906 (Thomas, J., concurring).

[43] *See SEC v. Jarkesy*, No. 22-859 (S. Ct. 2023); *see also Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *cert. granted sub nom.* SEC v. Jarkesy, No. 22-859, 2023 WL 4278448 (U.S. June 30, 2023).

[44] Christine S. Wilson, Commissioner, Fed. Trade Comm'n, *The Neo-Brandeisian Revolution: Unforced Errors and the Diminution of the FTC, Remarks for the ABA Antitrust Law Section's 2021 Fall Forum* (Nov. 9, 2021), .https://www.ftc.gov/system/files/documents/public_statements/1598399/ftc_2021_fall_forum_wilson_final_the_neo_brandeisian_revolution_unforced_errors_and_the_diminution.pdf.

[45] *Id.* at 6.

[46] David McLaughlin, *U.S. FTC's Lina Khan Vows Return to Agency's Trustbusting Roots*, Bloomberg (July 28, 2021), https://www.bloomberg.com/news/articles/2021-07-29/u-s-ftc-s-lina-khan-vows-return-to-agency-s-trustbusting-roots#xj4y7vzkg.

[47] Fed. Trade Comm'n, *Statement of Chair Lina M. Kahn, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines* (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

[48] Fed. Trade Comm'n, *In re Illumina, Inc. and Grail, Inc.*, No. 9401 (Mar. 30, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/201-0144-illumina-inc-grail-inc-matter; Fed. Trade Comm'n, *In re Nvidia Corp., Softbank Group Corp. and Arm, Ltd.*, No. 9401 (Dec. 2, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110015-nvidiaarm-matter.

[49] Press Release, Fed. Trade Comm'n, *FTC and DOJ Seek Comment on Draft Merger Guidelines* (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines.

[50] *Id.*

[51] *Id.*

[52] *See generally* Fed. Trade Comm'n, *Statement of the Commission, On the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf (hereinafter, "Statement of the Commission").

[53] Press Release, Fed. Trade Comm'n, *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act* (July 1, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act.

[54] *See generally* Statement of the Commission, *supra* note 52.

[55] Fed. Trade Comm'n, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[56] Statement of the Commission, *supra* note 52, at 2.

[57] Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* 56 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[58] *Id.* at 12, 13, 15.