

Consumer Finance Monitor (Season 4, Episode 25): How the FTC is Responding to SCOTUS's April 2021 AMG Capital Management Decision: A Conversation With Special Guest Bikram Bandy, FTC Chief Litigation Counsel, Bureau of Consumer Protection

Speakers: Alan Kaplinsky, Bikram Bandy

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor podcast, where we explore important developments in the area of consumer financial services law. I'm Alan Kaplinsky from Ballard Spahr and I'm your host today. Before I introduce our very special guest today, let me remind you that in addition to listening to our podcast which we encourage you to do, to consult our blog or subscribe for our blog which also goes by the name of Consumer Finance Monitor.

Alan Kaplinsky:

We've been doing our blog for almost 10 years. We launched it when the CFPB got stood up on July 21, 2011. We changed the name of it in 2017 with the change of administrations and our belief that the CFPB was not going to become as important or as much of a news maker as it had been during the Obama administration, so it's now called Consumer Finance Monitor. The topic that we're going to talk about today, we actually blogged about on April 22nd of this year.

Alan Kaplinsky:

Let me briefly describe the topic and introduce our guest and then we will take it from there. On April 22nd, the US Supreme Court came down with an opinion in a case called AMG Capital Management LLC versus Federal Trade Commission. It was an enforcement action brought by the Federal Trade Commission under section 5 of the Federal Trade Commission Act which broadly proscribes people from engaging in unfair or deceptive acts or practices.

Alan Kaplinsky:

It was also brought under section 13(b) of the Federal Trade Commission Act and the FTC sought in a permanent injunction and it also sought monetary relief for consumers or customers of AMG which was a payday lender, and the case got filed in the district court, went to the Ninth Circuit Court of Appeals, and the FTC prevailed above levels.

Alan Kaplinsky:

The big issue raised by the defendant in that case was whether or not the FTC had the right to obtain the monetary relief in the form of restitution or disgorgement. There was no question that the FTC had the right too if there have been a violation of law to obtain a permanent injunction. Case ends up in the Supreme Court, Supreme Court grants cert, and they reverse and they say that the FTC has no authority to obtain the monetary relief.

Alan Kaplinsky:

That triggered a firestorm literally among those of us who very closely follow the Federal Trade Commission and the CFPB. It was I think a surprising result at least for a lot of us. Let me introduce our very special speaker today who knows more about this subject I would say than any other person in the country, and that is Bikram Bandy.

Alan Kaplinsky:

He's the Chief Litigation Counsel for the FTC's Bureau of Consumer Protection, and in that role, he advises the Bureau Director on litigation matters and provides legal, strategic, and tactical advice to case teams that are investigating and litigating consumer protection cases. He also is the FTC's appoint person on addressing challenges the agency faces as a result of this Supreme Court opinion. He obtained his undergraduate degree from Duke and his law degree from George Washington University Law School. Bikram, a very warm welcome to you today.

Bikram Bandy:

Thank you for having me. Delighted to be here today.

Alan Kaplinsky:

Great. We'll start with some very easy questions and I know you need to make a disclaimer at the beginning of your remarks, but I gave a very brief overview of the background and I'm hopeful you might describe the facts and the procedural posture and the holding of the Supreme Court opinion and AMG, and then from there, we'll talk about what are the ramifications and implications.

Bikram Bandy:

Sure. Yes, you're right. I'm a lawyer, so a lawyer has a hard time doing anything without some sort of disclaimer. My disclaimer is this, that anything I say today in the podcast reflects my own personal opinion. It's not of the position of the Commission or any individual commissioner or the official position of the Bureau of Consumer Protection. Just talking as a guy here so I hope everyone keeps that in mind.

Bikram Bandy:

What was this AMG case? I think he did a pretty good job of covering the highlights, but let me get a little bit more in the details of it. The fact of the case were AMG was an online payday lending scheme operated by a relatively famous race car driver named Scott Tucker. It had a bunch of websites setup and consumers could go to those websites and apply for a loan. It's a payday loan so that means that the loan will be payable, the funds would be taken out based on when consumers paychecks were deposited in their bank accounts.

Bikram Bandy:

When consumers went to the website and applied for a loan, the loan would say you'd put in how much money you were looking for and it would say, "Okay, here's your loan here's the finance charge." Take for example, if the consumer put in, "I'm looking for \$300." They would say, "Okay, you're approved and you have to pay \$90 finance charge on that," so you'll end up having to pay back \$390.

Bikram Bandy:

What consumers didn't know, because it was buried in very confusing fine print, was that it was not just one finance charge. Instead, the company would tack on additional finance charges for each pay period for which the loan was not repaid up in 10 day period.

Bikram Bandy:

For that \$300 loan I talked about with the \$90 finance charge that was advertised, if they didn't pay it back within the pay period, they would end up actually paying a total finance charge of \$675, or to put it another way, \$585 more in finance charges than it was advertised when they signed up for the loan.

Alan Kaplinsky:

Let me ask you a question, Bikram. I'm curious, not that I think it's germane to the holding here, but it's important in terms of how the FTC views that payday loan product. When the customer originally got I assume a two week loan to tie him or her over to the next pay day, was the consumer guaranteed the right to roll over or was that something that he or she had to apply for and had to be approved for?

Bikram Bandy:

Now you're testing my knowledge of the minutiae of the facts of the case. I'm not sure, but basically I think it was setup as an auto renewal, so they didn't have to take any action and I think did have an ability to opt out of that auto renewal but it was very difficult to do and they would only know that they had that right because it was buried in the fine print that most consumers didn't see.

Alan Kaplinsky:

If it was simply a payday loan that had a maturity date of two weeks and in order to roll it over, you had to go back to the lender and apply for and the lender could then decide to either approve or not approve it, I assume that the FTC wouldn't have the problem with disclosing that finance charge for two weeks rather than for all the extended periods.

Bikram Bandy:

It's hard for me to say particularly because this is not my area of expertise in terms of TILA and that. I'm learned generally with what the statute requires but applying to that alternative set of facts, I don't know. We get that question all that time, what would have been adequate disclosure.

Bikram Bandy:

We typically say we're not going to give legal advice like that, but suffice it to say that what was going on here was that the terms and auto renewal and the amount of finance charge that consumers actually could end up paying was not disclosed, or it was disclosed but in very confusing fine print that a reasonable consumer would not see or understand, and so that was the problem.

Bikram Bandy:

Their advertising alone with saying \$300, \$90 finance charge, but the reality is that most consumers, except for the ones that actually paid the loan back within the two week period, were paying far, far more than that, and they weren't told that when they signed up for the loan and so that was really the problem in the case.

Alan Kaplinsky:

Got it. FTC brought a lawsuit based on section 5 of the act, am I right?

Bikram Bandy:

That's correct. We filed a lawsuit against Mr. Tucker and his companies in 2012 and we alleged that among other things and I think what's most relevant here was that the way that they were advertising this loan was deceptive, and actually five of the FTC Act says that that declares unlawful, unfair or deceptive acts or practices. Here, we're saying that what they were doing was essentially a misrepresentation of the repayment terms of the loan and that was a deceptive act under section 5 of the FTC Act and therefore, that was the law violation.

Bikram Bandy:

We did have some TILA and EFTA claims in there as well but the crux of the case was this deception, the deceptive advertising of the loan and that is what the case is primarily based on.

Alan Kaplinsky:

Okay. What happened procedurally in the district court?

Bikram Bandy:

In the district court, we brought our case. We moved for summary judgment and we won. We won on liability and when it came to accepting monetary relief, we asked the court to basically award refund, a restitutionary award which we would then use to refund consumers that paid more, and the amount that we were seeking is essentially the delta. You can go back to that \$300 loan that I was talking about.

Bikram Bandy:

The advertised finance rate was \$90 but consumers actually end up paying \$675 if they didn't take action after pay periods, so that's \$585. For that particular consumer, we would calculate the monetary relief to be \$585. That's the delta. That was the basis of our monetary relief award. Go ahead.

Alan Kaplinsky:

You mentioned that you did bring or at least asserted in the complaint was Truth In Lending Act and you mentioned one other federal statute. What was it?

Bikram Bandy:

The Electronic Funds Transfer Act.

Alan Kaplinsky:

EFTA.

Bikram Bandy:

That's right.

Alan Kaplinsky:

They were not part of your summary judgment, motion I take it?

Bikram Bandy:

I think they were, but in some sense, the TILA and EFTA claims were... We didn't seek different monetary relief for those violations because at the end of the day, because the TILA also have to do with disclosure of loan terms and I think EFTA have to do with the way that they were actually taking, they were debiting the accounts to get these fees, but all of it's part of the same thing that they're basically taking money from consumers that they didn't disclose that they would be doing.

Bikram Bandy:

We didn't seek additional monetary relief. The monetary relief, the harm that consumers suffered is the same based on whichever one of the claims, and so that delta, that \$585 in that one example I get, if you look at that over the five million loans that were at issue, you sum that up and that's how we got to a \$1.3 billion restitution award, massive court award at best.

Bikram Bandy:

To just put a fine pin on that, think of that as the difference between what consumers actually paid and what consumers thought they would pay based on the advertising of the loan.

Alan Kaplinsky:

By the way, just for our listeners that want to get some more information about this particular payday lending company and Scott Tucker, there is a documentary about him. I can't remember if it was on Netflix. It got released several years ago and was quite-

Bikram Bandy:

It is on Netflix.

Alan Kaplinsky:

It was quite interesting.

Bikram Bandy:

It's called American Greed or Dirty Money or something like that.

Alan Kaplinsky:

It was part of the reason Netflix was doing, and anyway-

Bikram Bandy:

Mr. Tucker's currently in prison because the Department of Justice brought a criminal action against him for fraud for the same conduct and they got a conviction on him and so he's currently in jail.

Alan Kaplinsky:

I thought he might be. Okay. Anything more you want to add about the case before we get to some of the implications of it?

Bikram Bandy:

I thought it might be helpful to talk a little bit about the nuts and bolts of what happened on appeal.

Alan Kaplinsky:

Yeah, sure.

Bikram Bandy:

After we won, Mr. Tucker challenged the commission's ability to get monetary relief, and so I think that may help setup our conversation just to get a little bit into the weeds about what the Supreme Court opinion was and what the reasoning was, but we got relief under section 13(b) of the FTC act.

Bikram Bandy:

Section 13(b) says that when someone violates any law that's enforced by the FTC, the FTC can go to federal court and ask the court to issue a "Permanent injunction," and so we have argued that that permanent injunction language authorizes the court to provide all kinds of equitable remedies which would include things like restitution and disgorgement.

Bikram Bandy:

For nearly four decades, going back from 2009 to the early '80s, we had had incredible success with that argument in federal courts.

Bikram Bandy:

Eight out of the eight Court of Appeals that had considered the question prior to 2019 had agreed that section 13(b) allows us to get monetary relief, and the reasoning was actually based on two old Supreme Court cases called Porter and Mitchell which said that when congress authorized in a statute one form of equitable relief such as a permanent injunction, that that triggers the full equity jurisdiction of the court and the court has the power to grant any equitable remedy necessary to accomplish complete justice, and that would include restitution and disgorgement.

Bikram Bandy:

Eight out of eight courts of appeal had considered that argument, they looked at Porter and Mitchell, looked at the FTC Act and section 13(b) and said, "Yes, that allows you to get equitable monetary relief."

Bikram Bandy:

Over the last 40 years, the commission have used that authority to get tens of billions of dollars of refund back to consumers, but Mr. Tucker challenged that in his appeal and the case eventually have made it up to the Supreme Court and Supreme Court changed the law on how we interpret permanent injunction in 13(b) and said that, "No, it doesn't actually authorize monetary relief."

Bikram Bandy:

In reaching that conclusion, what the court said as they looked at the FTC Act as a whole and it said, "Well, there are parts of this FTC Act that actually allow us to get money too," and in particular, there's section 19. Section 19 in the FTC Act allows the commission to get monetary relief in cases that a mob rule violations or as a follow-on to an administrative proceeding.

Bikram Bandy:

If we bring in administrative proceeding and then go to federal district court under section 19 and get monetary relief. We can't get money in our administrative proceeding. What the Supreme Court said is yes, we have the principle of order in Mitchell, but here, because Congress has a provision that authorizes the commission to get monetary relief, the whole structure of the FTC Act is indicative of some sort of congressional intent that 13(b) not be used for monetary relief, only section 19 can be used for monetary relief.

Bikram Bandy:

Based on that, it said that as used in 13(b), that permanent injunction language, doesn't authorize monetary remedies because you have a more specific or direct provision of the FTC Act in section 19 that does. That's the gist of the reasoning that the court used to reach the ruling that it did.

Alan Kaplinsky:

Was it a unanimous opinion or was there that's done?

Bikram Bandy:

It was a unanimous opinion. We went down 9-0.

Alan Kaplinsky:

Okay. Am I right that there is another situation where the Supreme Court indicated you can get monetary relief other than under section 19 by first going through an administrative hearing, and that is when you bring a lawsuit for a violation of another federal consumer protection law like the Truth In Lending Act or like EFTA, am I right?

Bikram Bandy:

A little bit. Rule violations, and when I say rule violations, there are also several federal statutes out there that we enforce and the statute have language that say that if you violate the statute, it shall be treated as if you're violating an FTC rule, so for those cases, and I just put those probably under rule violation cases-

Alan Kaplinsky:

When you say rule violation, are you talking about FTC rules or are you talking about rules of not only the FTC but any other federal agencies such as a rule adopted by the CFPB under the Truth In Lending Act?

Bikram Bandy:

It's not any other rules but the TILA rules... Well, TILA's a little bit of a complicated situation, but there are some rules that may have been promulgated by a different agency but they may be under statutes that give the FTC and that agency concurrent authority to enforce.

Bikram Bandy:

When I say rule violations, what I mean is any rule or statute that the FTC is authorized to enforce, and for rules, it could be rules that the FTC has promulgated, it might be some rules that the FTC still has the authority to enforce even if we didn't promulgate them ourselves, and for statutes, it would have to be a statute that says that a violation of the statute itself shall be treated as a rule violation under the FTC Act.

Bikram Bandy:

TILA actually is not enforceable as a rule violation under the FTC Act because it doesn't have the language that some of the other statutes do that say that a violation of TILA is a violation of a rule under the FTC Act. It just says that a violation of TILA shall be treated as an unfair or deceptive act or practice, but that isn't enough for us to enforce it under section 19 to get monetary relief.

Bikram Bandy:

The only way a TILA that we can get monetary relief is if we alleged the section 5 violation for engaging in unfair and deceptive act or practice, but we can't get monetary relief for that under section 19. We can only get monetary relief... Before AMG, we can get monetary relief under 13(b), but now, the only way we can get monetary relief in a case like that is we would have to get bring an administrative case.

Bikram Bandy:

After the completion of that administrative case, then we would have to go to federal court and file an action under section 19 for monetary relief, so you have to do that extra step. We can't go straight to federal court to get monetary relief. Does that make sense?

Alan Kaplinsky:

Yeah, it does. That's very helpful.

Bikram Bandy:

It's complicated.

Alan Kaplinsky:

Yeah, it's complicated. I think I understand now how it works. Let me ask you this. The other avenue available to you is administrative hearings, and I know that's sort of rarely done and I'm curious why that wouldn't be something in fact that you could do in the AMG case. Start all over with an administrative hearing and file your 13(b) action in court.

Bikram Bandy:

Administrative proceedings, on the consumer protection side, you're right, we have not historically done a lot of administrative litigation and there's some reasons for that. We'll note though that my colleagues on the antitrust side of the house here, they do actually do a lot of administrative proceeding. But that's typically audible 00:24:19] in some of these antitrust actions. They're not looking for monetary relief. A monetary relief doesn't make sense in those cases.

Bikram Bandy:

But really, in any case that the agency is doing where it's important to get money back to our consumers, we have shied away from administrative proceedings and here's why. Administrative proceeding, going down that pathway is extremely cumbersome, it's time consuming, it's resource intensive, and let me give you an example of why. Let's take the AMG case. If we were to go back and start over, and that's really not a practical solution now, but-

Alan Kaplinsky:

I figured it wouldn't be, but I'm curious about it.

Bikram Bandy:

If we did that, we would bring an administrative case, so then that... The process for getting monetary relief under section 19 after an administrative proceeding, it's essentially section 19 bifurcates the case. It basically says we try the liability portion of it administratively, and what does that mean? It means we file an administrative complaint, we have a hearing before an ALJ, then if we succeed, there is almost always an appeal to the commission. The commission then decides.

Bikram Bandy:

I think a lot of defendants in those cases say, "Well, it's not surprising that the commission that approved the complaint to bring an administrative proceeding has sided with complaint counsel and affirmed a ruling against me," so we hear the term "Kangaroo court."

Bikram Bandy:

After the commission affirms, although not always, but after the commission affirms, then the defendant really wants to have a Circuit Court of Appeals. They have a right to appeal that to Circuit Court of Appeals of their choosing, and so then they do that and then if we succeed there, there might be a substitution, if not, the case is over, so then the liability portion of done. All appeals have been exhausted, Supreme Court has denied cert, and then only then can we go and file a new case in federal district court where we seek monetary relief.

Bikram Bandy:

We can't, unlike other agencies. Other agencies do have the authority to get monetary relief in administrative proceedings. We do not. Because of that, we have to bring that second case then litigate that, so we litigate, we succeed, there's an appeal, and we've done this a couple of times and in one case, from the time we file the complaint to the time when we were able to actually start sending out refund checks to harmed consumers, it took 12 years.

Bikram Bandy:

That's not an efficient process, and it's not like we're lazy. It's not that. That's 12 years the consumers had to wait, and even more than that because they suffered their losses before we filed the complaint. That's a long time for people to have to wait to get their money back. It's not ideal and so if we can go straight to district court and litigate the whole case as we used to be able to do before AMG, that's a much more efficient process.

Bikram Bandy:

Look, I'm not here to tell people that federal court litigations is something that can be resolved in a couple of months, but still, it's far shorter than 12 years. That's why we have historically opted for that.

Alan Kaplinsky:

I'm curious, I'm just again thinking out loud here. You've got already a district court opinion that has issued a just summary judgment in your favor in terms of there being a violation of law and liability and the court's issued a permanent injunction, if you were to initiate an administrative proceeding right now, would that ALG... ALJ, I'm sorry, be bound by the district court opinion? You've got a sense of final judgment right now dealing with liability and permanent injunction.

Bikram Bandy:

I think there's some complicated questions there about how res judicata and claim conclusion would apply. The other thing is would the defendants, would Mr. Tucker have an argument that there's some res judicata there that prevent us from going down that path because we do have a final judgment and... I don't know, I haven't looked into that.

Bikram Bandy:

Look, we filed the AMG case in 2012. Here we are in 2019 or 2021, nine years later, and so there's also some practical considerations. The other thing is DOJ brought their criminal action, they got a criminal forfeiture order in their case. I don't want to talk from the AMG case team and I really can't get into that, but I think I would be surprised if we devoted those kinds of resources to this case at this point, even the history that's there.

Alan Kaplinsky:

I guess you can't blood out of a stone. Even if it were to work, what I just imagined, your defendant is in jail, I assume his companies are not operating right now.

Bikram Bandy:

That's right.

Alan Kaplinsky:

They're shut down, so yeah, I get it. All right, let's turn to other implications. I'm wondering, I assume you've got many, many other cases that are pending in federal courts around the country that had been brought on under the same theory where you're seeking monetary relief. What's happened to all those other cases? Where do they stand up?

Bikram Bandy:

I don't know. This is what has kept me extremely busy between April 22nd and today. I worry and have to deal a lot with all of our pending cases, and it's been hectic. I've got case teams reaching out to me all the time based on trying to navigate this post-AMG landscape.

Bikram Bandy:

Now I will tell you that prior to AMG coming out, really I think once the Supreme Court granted cert on this case, we had planned and prepared for a loss in AMG. Honestly, I personally thought that it was more likely than not that we would lose the case, so in some sense, the results in AMG was not surprising to me.

Bikram Bandy:

I do commend my colleagues here that briefed it and argued it. I think we put ourselves in as good a position as we could, but given where statutory interpretation is and where the Supreme Court is on statutory interpretation, I thought it was a tough audience for us, and sadly, I was right.

Bikram Bandy:

Anyways, we had a plan and we've been executing that plan but it's still hectic to put it into play, but yes, we do have a lot of cases out there that are pending but the good news from at least my perspective, in our perspective is that we're not completely out of business in all those cases. In a lot of those cases, we have rule violation that we can enforce under section 19.

Bikram Bandy:

In those cases, we are sort of business as usual because we're saying, "Hey, we may not have the authority under 13(b) to get monetary relief but we do have rule violations that was on 19 so we can get monetary relief under section 19." Some defendants are pushing back and contesting against that but I think if you look at the statutory language, it's pretty clear. We do have that authority and we're doing that.

Alan Kaplinsky:

What would be an example of a rule...imagine TILA doesn't work because that special language is lacking. What would be an example? I don't need to know the name of the case, but a type of case where you'd be able to make that point?

Bikram Bandy:

Sure. I think a lot of the cases, I think there's two statutes or rules that are pretty common in our cases because of the breadth of the conduct that they cover, and one of is the Telemarketing Sales Rule. There are a lot of consumer transactions that occur that have some element of telemarketing associated with them, and so you do see a lot of TSR rule violations, particularly in some of our more egregious fraud cases.

Bikram Bandy:

There are still a ton of telemarketing scams out there. From debt relief and tech support, you name it, we have a lot. We still have a lot of illegal stuff going on in the telemarketing rule, so yeah. Let's say we have a debt relief scam. Someone calls you up and says, "Hey, I can reduce that student loan payment of yours. All you need to do is pay me \$5,000 but you're going to make it back because you're going to save \$10,000 once I renegotiate your student loan debt." That type of scam is typically operated and done via telemarketing and so we'll bring that case.

Bikram Bandy:

It is a violation of section 5 to lie to people about debt relief. It's also a violation of the Telemarketing Sales Rule to do that. It's a violation of Telemarketing Sales Rule to collect an advance payment or a debt relief service. That's the kind of case that we would seek monetary relief under 19 for that TSR violation.

Bikram Bandy:

The other statute by the way is ROSCA. ROSCA is the Restore Online Shopper's Confidence Act. That covers internet transactions and has various descriptions on what can and can't be done on an online transaction, so that's a common one that you see as well and we do have cases out there where there's been some deceptive act of practice but it was done and there's some ROSCA violations as well and so we brought them together and we're not keeping on... We're persisting with our monetary relief demand based on the ability to get monetary relief for the ROSCA violation under section 19.

Alan Kaplinsky:

How have those cases been working for you? Is it too early to tell what the courts are going to buy that argument?

Bikram Bandy:

I think for the most part, it's a little too early. I think we're still in the briefing stages in most of those cases where defendants have pushed back. There's one other complication with section 19 that I think is worth mentioning. Under section 13(b), monetary relief part of AMG, there was no applicable statute of limitation, so we could go back and get monetary relief really as far as back as we could prove consumer losses, but section 19 has a three year statute limitation.

Bikram Bandy:

In some of those cases, even if we have a section 19, we've had to tailor our monetary relief so that we're only refunds for the consumers who are injured and suffered losses in the three years predating the filing of the case. There's been some of that that's been going on.

Bikram Bandy:

Right now, we have some asset freezes in place prior to AMG in cases where we do have section 19 and so defendants are fighting the asset freezes saying that we no longer have a basis to maintain them but we're saying we do because we have section 19, monetary relief authority, but I think most of those cases are still in the... They're briefed up or in various stages of briefing up, but to the best of my knowledge, we haven't gotten a decision on those cases yet.

Bikram Bandy:

I feel pretty good about where those cases are going to go because I think the language of the statute's pretty clear that we can get monetary relief in those cases.

Alan Kaplinsky:

Sure. Let me ask you another question that has intrigued me. What about companies that right before the AMG case came down, they settled with you in a similar kind of case, in a similar posture to AMG where you didn't have a section 19 claim as well? A settlement gets entered into but what happens there? Could the other party undo the settlement? Have they tried to do it?

Bikram Bandy:

To answer the second question first, have they tried? No. No one has tried to do that. We've heard some interest or, I don't want to say threat, but saying, "Hey, we did that settlement. We're thinking about it," but no one's actually taking action on it, and I think there's a good reason why. Because that's unlikely to be successful based on my view.

Bikram Bandy:

Courts, the need for finality of judgment is pretty well established and I think courts are reticent to undo final judgment under rule 59 or rule 60 unless there's a good reason, and typically, a subsequent change in law is not a good enough reason to get out of a judgment that's already been entered by a court, and whether it agreed to as an instant judgment or even in a litigated context.

Bikram Bandy:

But even more so for the consent judgment, there are well established legal principles that say, "Hey, look. When you settle a case, you are compromising your claim. You're making a calculation and you're taking on some risks." Particularly for the ones that settled while AMG's issue was pending, I think courts are going to be very, very unlikely to undo a deal that was made just because an unknown factor which was whether which side would prevail in AMG is now known.

Bikram Bandy:

I look at it this way. If we'd won AMG, could we go back to a defendant and say, "Well, we gave you a discount because we had AMG risk. Now we want more money because we ended up winning." Obviously, no, we wouldn't do that. I know a

court wouldn't do that and so likewise, I would say, "Well, we baked into the monetary relief number, this idea that we could lose AMG and you baked in that we might win and so you have to..."

Bikram Bandy:

Courts that have dealt with this situation basically say, "Hey, look, a deal's a deal," and they're not going to do that. They have plenty to do rather than go back and try to relitigate these things, so I'm pretty confident that courts, they're not going to be very receptive to these efforts if they ever come.

Alan Kaplinsky:

I was thinking about it very simplistically, and if it wasn't a settlement agreement but say you had just a plain vanilla contract between two parties and there is a mutual mistake of fact or law, sometimes you can try to undo the settlement. There's some basis that the parties entered in an agreement based on a bilateral mistake, but I guess that doesn't work when your other contracting party is the government or if it is...

Bikram Bandy:

I don't know if I would view it as a mutual mistake. Look, if any settlement was agreed to in the last two years, really, this issue came to head in early part of 2019. That's when we started seeing some rumblings in the appellate court that there was a problem here, and that's when I really started worrying about this problem, and it's been amongst the FTC practitioners. It's been pretty well known that this is an issue over the last year.

Bikram Bandy:

If someone agrees to a settlement and AMG comes out the way it did, it's not a mutual mistake. I think both parties were aware that there was this contingency out there, so the fact that it goes one way or the other, I don't view that as a mutual mistake that would void the meaning in the minds of the party in a settlement agreement.

Alan Kaplinsky:

Point well made, Bikram. Let me also clarify one other related thing and that is the circumstances in which the FTC can get civil money penalties. You weren't able to seek them in your section 13(b) case against AMG, am I right? There's no authority to get them.

Bikram Bandy:

Right. One thing, your listeners are learning that the way remedies work in the FTC is complicated. Yes, that's correct for AMG. We can't get civil penalties for just the section via violation. We can't get them for TILA or EFTA. There are other handful of statutes that... They're actually the same statutes that we can't enforce the rule violation under section 19, but for every statute that we can enforce as a rule violation and get monetary relief under section 19, we can also pursue a civil penalty under section 5(m) of the FTCA.

Bikram Bandy:

Now we typically don't do that and the reason is that when we get a civil penalty, we can't return that money to consumers. That money goes to the treasury, and so as a consumer protection agency, we want to prioritize getting money from defendants and returning them back to our consumers, not sending it to the government desk. For that reason, we don't bring a lot of civil penalty cases.

Bikram Bandy:

The one area where we do is where we have a violation where it's really hard, where there is no consumer monetary loss or where it's hard to quantify it. The best example of that would be like a privacy case. We have the Children Online Protection

Act, COPPA. Privacy case, it's hard to say consumers lost this much money because a company's complied with privacy practices, so we typically seek civil penalties in those cases.

Alan Kaplinsky:

Got it. I see. When you seek them, can you go directly to court or do you have to first go through an administrative proceeding?

Bikram Bandy:

We don't have to go through an administrative proceeding but here, another complexity to the gift that is the FTC Act is in order to give a civil penalty, we actually have to refer that case to the Department of Justice, and then if the Department of Justice wants to litigate that case, they can. If they decline it, then it comes back to us and we litigate the case, so we do have an extra step but we don't have to go administratively to get a civil penalty.

Alan Kaplinsky:

I got it. Okay. Let's talk about where we go or where the FTC goes from here. My understanding is the FTC is seeking some kind of amendment to the Federal Trade Commission Act which would I guess change the language of 13(b) to expressly give you the authority to get monetary relief. Am I right?

Bikram Bandy:

Yeah. I think in the fall, before AMG came out, all five of our 10 commissioners, we're down to four now, but all five of the commissioners signed a letter to Congress urging Congress to enact the legislation to make clear that the agency has the ability to get equitable monetary relief under section 13(b). The commission did ask for that on fall.

Bikram Bandy:

In the wake of AMG, our commissioners have all said that it's important for Congress to make amendments to the FTC Act to restore or at least to make clear that we're entitled to get monetary relief under section 13(b), so yeah. The commission has urged that. What I do know is that on the house side, a bill has been introduced and that bill actually yesterday was loaded out of the house Energy and Commerce Committee and referred to the full house for consideration. There has been some legislative movement on basically amendments to section 13(b) that would restore the section-

Alan Kaplinsky:

If you know the house bill number for our listeners, do you have that?

Bikram Bandy:

I don't know it. I know it begins with a two. It's 2,000-something but I don't remember the actual number of it but I can certainly find out.

Alan Kaplinsky:

It will go now on the floor of the house. I take it you don't know when the full house will act on the bill.

Bikram Bandy:

No, I don't know. I would hesitate that people work in the house, the representatives don't know that yet either. All I know is yesterday, there was a markup on the bill and it was referred to the full house.

Alan Kaplinsky:

It would seem to be a no-brainer, right? For our Congress and the Senate to deal with this thing, no?

Bikram Bandy:

In my view, yes. I've looked at the house bill and from what my read up is it's pretty straightforward. It basically would restore the status quo ante before AMG. It would restore the commission's ability to get restitution and disgorgement directly in federal court under section 13(b). The only difference is that the house bill actually put the 10 year statute limitation, so we wouldn't be able to get monetary relief going back 10 years prior to filing the suit, but other than that, it restores the status quo.

Bikram Bandy:

Now I am aware that there have been other groups that are out there, like the Chamber of Commerce is one, who have been pretty vocal in saying that they're in support of some restoration of authority under section 13(b) but they want additional conditions. There's been some talk of reducing that 10 year period to three years. There's been ideas about not making it applicable to competition cases, to impose additional evidentiary burdens that we would have to meet in order to get monetary relief in certain cases.

Bikram Bandy:

I think that there is an agreement even amongst the people we regulate that it's important for the agency to have the ability to get monetary relief directly in federal court. I think everyone recognizes that administrative process laid out is not great. It's not great for defendants either because they get mired in a dedicated litigation either, so I think everyone recognizes that.

Bikram Bandy:

The details of how 13(b) should work post AMG, post statutory amendment, that's where there's some disagreement between consumer protection advocates and business advocates. We'll have to wait and see how Congress resolves that.

Alan Kaplinsky:

It does, while it says you can go back 10 years, if that became law, you would be able to apply that to all your pending cases or does it only apply to newly filed cases after that's done?

Bikram Bandy:

That's a great question. I have to mention that that is another area of debate. The house bill, I actually did pull up the number it's HR2668. That bill has a provision that would make it applicable to all pending cases, so any case that's pending at the time, not in final judgment, we would be able to get monetary relief under 13(b) in those cases. Now it would be fully retroactive meaning we can't go to cases that have already been resolved and say now we want to go...

Bikram Bandy:

For example, AMG is I think it's a final judgment. I think the mandate came back. We couldn't go back and say, "Oh, now we want to undo AMG" because that's a final case, but for some of the cases that are still keeping around in active litigation, it would help with those cases.

Alan Kaplinsky:

Now, putting aside the bill, I assume, and all the cases that you've got to deal with now going forward that are already pending, what about new cases? What's happened since April? Have any new cases been brought and what avenues is the agency using?

Bikram Bandy:

Sure. I've been telling people this all the time, like "Look, AMG is going to set that for us," but we're still going to keep doing everything we can to protect consumers and to get money back, and we're not out of business on that front. We do have

section 19 so we're continuing to bring those cases where we do have a rule violation under which we can get monetary relief under section 19, so we're doing that.

Bikram Bandy:

In the cases where we're not, I think we're thinking about maybe we have to do that case administratively and go through the long haul to try to get monetary relief back in those cases. The other thing we're doing is we are partnering with state AGs.

Bikram Bandy:

The good thing about AMG is it only apply to the FTC Act, it did not impair the ability of a state attorney general's office to get monetary relief and distribute refunds to consumers based on that monetary relief war, and not every state has the authority to do nationwide regress, as we like to call it, but many do and we've had a lot of productive and helpful conversations with our state partners on that and there have been some instances more recently where we have brought this data. Now, we've historically also bought cases partnering with state AGs but I think you see an uptick in that going forward-

Alan Kaplinsky:

It would have to be an AG where their law gives them a right to get nationwide relief?

Bikram Bandy:

I think obviously, that's what we would be looking for, right? Because bringing cases that can only provide refunds to the citizens of X state, that's not an ideal... At the FTC, we're not looking in small cases. We're a federal agency, so we're looking at getting the biggest bang for our buck and that means cases where we have a lot of consumer arms, so we're going to look to partner with someone that can help us get refund back to everybody.

Alan Kaplinsky:

What about the CFPB? Have you been partnering more with them and do you see that as another way to go?

Bikram Bandy:

We have historically had a very good strong working relationship with CFPB. We meet with them and communicate with them regularly and we have partnered with them historically on a lot of different matters, particularly in the mortgage area. I think since AMG's come out, I don't think we filed a case yet with the CFPB but it's certainly something that we're exploring.

Bikram Bandy:

Really, to take a step back and think about this, for cases that we can't bring as rule violation cases and our only pathway to monetary relief is administrative, because that administrative process is so inefficient and so time consuming, we're going to look to anyone we can partner with that may be able to make that a much more efficient process, whether it be a state AG or the CFPB, and I think just depends on...

Bikram Bandy:

Of course that also depends on the state AG or CFPB's capacity to work with us, their willingness to work with us, but we are having those conversations and I think that that's something you could see certainly more of in the future which is that we are partnering strategically so that we can do our cases but still provide consumers with the monetary relief and the refunds of the money that they lost in these cases.

Alan Kaplinsky:

It should be noted in that regard that when Dodd-Frank became law in 2010, Congress gave the CFPB very, very broad authority in terms of penalties that it could obtain. I mean there's a whole laundry list of things that they can do. They can get

civil money penalties, they can use the civil money penalties as redress that can go back to consumers, and so they would seem like a natural partner for you to work with. That would make a lot of sense to me.

Alan Kaplinsky:

One other thing I thought of, just to get your reaction to that, what about partnering with plaintiffs' class action lawyers where they seek the monetary relief and you seek the injunction?

Bikram Bandy:

I think it's probably a little more complicated for us to partner with them, but I can tell you that in certain areas, we have had a good working relationship with plaintiff class action bar, but class actions work differently than government enforcement actions, and there are two big differences.

Bikram Bandy:

One is class certification is always a tricky issue that you have to worry about in the private sector cases that we don't have to worry about as a government agency, and the other thing is with that \$1.3 billion reward that we got in AMG, it's not like we got a 33% cut of that. That \$1.3 billion minus the cost of sending out the checks was going to go back to consumers. You think about that, we can be a little bit more effective.

Bikram Bandy:

I used to do the agency's do not call and telemarketing enforcement work and there's a lot of activity amongst the private plaintiffs at least prior to the Facebook cases I've turned about private TCPA class actions, and we had a really good working relationship with TCPA class action counsel because my view was that when we're doing telemarketing cases, we're really looking for the scams, but when the TCPAs folks are looking for it, they're really looking...

Bikram Bandy:

They don't want to go after these time scammers because they're not going to be able to pay giant class action judgment. They're looking for the large legitimate publicly traded companies because they're in TCPA cases, so it's like that's a good lane for them, and a good lane for us is going after the scammers who are defrauding people.

Bikram Bandy:

There tend to be some efficiencies if we work together or at least strategize with private counsel, but I think partnering in a case is going to be complicated and it may not be a particularly efficient use of either sides of resources.

Alan Kaplinsky:

Right. Then of course, it just occurred to me that in some cases, you may be dealing with a company that's got an arbitration provision that can't be enforced against a government agency but it can be involved against a private litigant. That will be another potential hurdle.

Alan Kaplinsky:

Okay. We're drawing to the end of our show today, Bikram. I'm wondering, before we wrap things up, if you have anything else that you'd like to add? Something that we haven't focused on that you think is important?

Bikram Bandy:

No. I think really, the message that I've been telling people, really, two things. One is that, look, the AMG decision is certainly a setback. I think it certainly requires us to think about things differently, but we're still fighting for consumers. We still have a

lot of consumer protection work that we can do. We are doing that. We're still going to continue to do the work that Congress is asking to do in terms of protecting consumers.

Bikram Bandy:

I don't want people to think that we're cowering in the corner over here. I think we're just as energized as we were. We've had setbacks before, everyone had setbacks before but I think how you react to them is what's important and I'm really proud of the work that our staff is doing to really get through this and I'm optimistic even without a statutory fix that we're going to be able to do a lot of good for consumers.

Bikram Bandy:

Now I really hope that the people in Capitol Hill can get together and reach an agreement and give us a fix because I think that would be great for consumers, great for their constituents, and I'm optimistic that Congress will get to the right place eventually, and so I'm hopeful for that.

Alan Kaplinsky:

Yup. Thank you very much, Bikram, for joining me today. There's no question. I think I said at the beginning, you're I think the most knowledgeable person I know about the subject today and you've definitely gone a long way to confirm that.

Alan Kaplinsky:

The other thing I want to mention, you've written an article called "Not A One Trick Pony: FTC Monetary Remedies Beyond Section 13(b)," and I think it was presented in connection with another program that you did. Maybe it was in American Bar Association program or something. Am I right?

Bikram Bandy:

That's right. It's before AMG came out.

Alan Kaplinsky:

We're going to do a blog about, at some point after our podcast has been released, about the podcast and with your consent, we'd like to attach that to our blog because it is a very thorough, very erudite explication of what is a very complex issue about remedies available to the Federal Trade Commission, both prior to AMG coming down and certainly now in the aftermath of the opinion. Thank you again and we wish you well.

Bikram Bandy:

Thanks, man. It was great to be here.