JONES DAY

COMMENTARY

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Third Circuit Limits FTC's Ability to Seek Monetary Damages for Past Conduct

IN SHORT

The Situation: The United States Court of Appeals for the Third Circuit ruled that the FTC could not recover past profits under FTC Act Section 13(b) if the alleged violation occurred in the past and the defendant was not "violating" or "about to violate" the law.

The Impact: The FTC's pursuit of monetary remedies in antitrust cases, in amounts as high as $1.2 billion in one case, has been controversial. If followed in other circuits, this decision would severely limit the FTC's ability to collect monetary remedies for ceased conduct that violated the antitrust laws.

Looking Ahead: While the FTC could seek a more favorable result in another jurisdiction, the FTC may want to avoid risk of similar precedent, limit use of Section 13(b) to cases involving ongoing harm, and push for faster compliance with investigative subpoenas.

Statutory Background
Federal Trade Commission Act ("FTC Act") Section 5 authorizes the FTC, following a hearing, to order a person or corporation to cease and desist from using any unfair method of competition. FTC Rules provide for a hearing before an FTC administrative judge, subject to appeal to the full commission, and a subsequent appeal to a U.S. court of appeals. Congress amended the FTC Act, as Section 13(b), to permit the FTC to seek injunctive relief in federal court if the FTC has reason to believe that any person or corporation "is violating, or is about to violate" the FTC Act, and enjoining such conduct pending resolution of the administrative proceeding would be in the public interest. A proviso adds that "in proper cases," the court may issue a permanent injunction.

The FTC generally challenges past violations in its administrative court and seeks only a cease and desist order. The FTC cannot obtain monetary remedy under Section 5 unless a defendant violates a cease and desist order.

The FTC has interpreted "injunction" in Section 13(b) to refer to all of a court's equity powers, and in some cases, the FTC has invoked Section 13(b) to file an action in federal court seeking restitution or disgorgement of unlawfully obtained profits. Although rarely litigated, courts have upheld the FTC's ability to obtain such relief. The FTC's use of Section 13(b) to seek monetary relief, however, is contentious.

The FTC's Case Against Shire
Shire Viropharma ("Shire") manufactured Vancocin, a drug used to treat a life-threatening gastrointestinal infection. According to the FTC, Shire filed forty-three meritless citizen petition filings with the U.S. Food and Drug Administration and instituted three federal court proceedings to forestall entry of a generic version of Vancocin from March 2006 to April 2012. Nearly five years later, in February 2017, the FTC filed suit in the U.S. District Court for the District of Delaware under Section 13(b). The FTC alleged that Shire's actions delayed generic entry prior to April 2012, which resulted in consumers overpaying "hundreds of millions of dollars" for medication. The FTC sought a permanent injunction and restitution and/or disgorgement of Shire's allegedly unlawful profits. The district court granted Shire's motion to dismiss because the FTC did not meet Section 13(b) requirements, and the Third Circuit panel affirmed in *FTC v. Shire ViroPharma*.

The FTC conceded that Shire's allegedly illegal conduct stopped in 2012 and Shire even had divested Vancocin before the FTC filed its lawsuit. In an effort to avoid dismissal, the FTC asserted that Shire was "about to violate" the law because its past conduct involving Vancocin made it more likely that the company would repeat the conduct in the future with respect to an unrelated drug. The Third Circuit disagreed, holding that the FTC cannot succeed under Section 13(b) with merely "a violation in the distant past and a vague and generalized likelihood of recurrent conduct." Continuing to operate the business with similar products is not sufficient for the FTC to meet its pleading burden under Section 13(b).

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Implications
The Third Circuit's ruling is a blow to FTC enforcement, particularly in the pharmaceutical industry, where it has recently pursued significant enforcement actions seeking disgorgement. The FTC has argued that monetary remedies have a deterrent effect enhanced by the speed of a Section 13(b) case. The Third Circuit rejected the FTC's argument, noting that the FTC's "understandable preference for litigating under Section 13(b), rather than in an administrative proceeding, does not justify its expansion of the statutory language," despite whatever "parade of horribles" the FTC believes could occur.

In future cases, the FTC could seek preliminary injunctions in other circuits. However, such a strategy also risks adverse precedent in other jurisdictions or the potential for a circuit split that may ultimately result in an unfavorable Supreme Court ruling. Alternatively, the FTC has previously argued that a Section 13(b) permanent injunction is a standalone cause of action under which it need not establish that a defendant "is violating, or is about to violate the law." The FTC made this argument, unsuccessfully, in district court in the Shire matter, but did not appeal this issue in the Third Circuit.

THREE KEY TAKEAWAYS

1. This ruling limits the FTC's ability to bring cases and obtain monetary remedies under Section 13(b) where the allegedly unlawful conduct has ended and is not likely to recur.

2. This case may stifle the FTC's enforcement in so-called "product hopping" or "sham petitioning" cases in the pharmaceutical industry because the conduct may have ceased by the time the FTC files a complaint.

3. In relevant cases, the FTC is likely to insist on faster compliance with investigative subpoenas so that it can file in court before the allegedly unlawful conduct ends.


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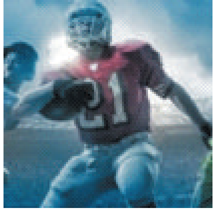

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