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Washington Legal Foundation
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2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

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Third Circuit Limits the FTC's Authority to Challenge Ceased Conduct

by M. Sean Royall, Richard H. Cunningham, and Emily Riff

On February 25, 2019, the Third Circuit issued a decision affirming the District of Delaware's dismissal of the FTC's "sham petitioning" case against Shire ViroPharma (Shire), the manufacturer of the branded drug Vancocin. The Court of Appeals held that to proceed pursuant to § 13(b) of the FTC Act, the FTC must plead facts plausibly showing that Shire is "about to violate" the antitrust laws, but failed to do so because the challenged conduct ceased years before the lawsuit and the FTC's allegations were otherwise insufficient to meet the "about to violate" standard.

The decision may substantially limit the FTC's ability to invoke § 13(b) in cases where the challenged conduct is not ongoing. This is significant because the agency has, for years, successfully used § 13(b) to challenge past conduct in both the antitrust and consumer-protection contexts in federal court to obtain injunctive and equitable monetary relief.

The FTC's Complaint

According to the FTC's complaint, Shire "inundated" the FDA with meritless citizen's petitions and other filings requesting delay of approval of generic equivalents to Vancocin in violation of § 13(b) of the FTC Act. Specifically, the FTC claimed that Shire's submission of serial, meritless filings had harmed consumers and competition because it enabled Shire to maintain and extend its monopoly by delaying the FDA's approval of generic alternatives to Vancocin.

Notwithstanding that the FTC's suit was filed approximately five years after the last allegedly improper filing, the FTC alleged that, "absent an injunction, there is a cognizable danger that Shire will engage in similar conduct causing future harm to competition and consumers." Op. at 13. This was because, according to the FTC, Shire knew that a petitioning campaign could enrich it at the expense of consumers, had an incentive to engage in similar conduct in the future, and would have the opportunity to engage in similar conduct in the future because it marketed and developed drug products for commercial sale in the United States.

The District Court's Motion to Dismiss Ruling

Shire, which had divested itself of Vancocin before the FTC filed suit, moved to dismiss the FTC's suit on the grounds that the FTC's allegations of long-past petitioning activity failed to satisfy § 13(b)'s requirement that Shire "is violating" or "is about to violate the law." The FTC argued that the language "is violating, or is about to violate" is satisfied by a showing that a violation is likely to recur.

M. Sean Royall and **Richard H. Cunningham** are Partners with Gibson, Dunn & Crutcher LLP, and **Emily Riff**, is an Associate with the firm.

The court agreed with Shire that the FTC had failed to show that Shire was violating or was about to violate a law enforced by the FTC. The court stated that "[w]hile the [FTC's] complaint contains specific factual allegations" in regard to Shire's "conduct from March 2006 to April 2012, it contains nothing by way of facts that plausibly suggest ViroPharma [Shire's successor in the sale of Vancocin] 'is about to violate' any law."

The Third Circuit Affirms Dismissal

On appeal, the FTC argued that it is not required to allege that Shire "is violating, or is about to violate" the law, that it is instead only required to satisfy the standard for issuing injunctive relief—that there is a likelihood of recurrence. The Third Circuit rejected this argument, stating that it was contrary to the plain text of the statute and the history of the FTC Act.

Turning first to the text of the FTC Act, the court noted that § 13(b) requires that the FTC have reason to believe a wrongdoer "is violating" or "is about to violate" the law. Op. at 20. According to the Third Circuit, this language is "unambiguous; it prohibits existing or impending conduct." *Id*. at 23. In other words, "Section 13(b) does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant 'is' committing or 'is about to' commit another violation." *Id*. at 23-24.

The Third Circuit explained that the "plain language of Section 13(b) is reinforced by its history." *Id*. at 24. The court noted that an administrative proceeding is the FTC's "traditional enforcement tool." *Id*. at 19. "Since its inception," explained the court, "the FTC Act has provided for administrative proceedings to remedy unfair methods of competition." *Id*. at 19-20. The administrative proceedings may be in the form of an administrative complaint or a cease-and desist order, and may provide "limited monetary remedies." *Id*. at 20.

The court then explained that § 13, which was not part of the original FTC Act, was added as an adjunct power to the FTC's administrative power. In 1973 Congress amended the FTC Act to allow the FTC to obtain a temporary restraining order or preliminary injunction when the FTC "has reason to believe" that violations of the FTC Act are occurring or are about to occur. 15 U.S.C. § 53(b). Section 13(b) was added to the FTC Act with the purpose of "obtaining injunctions against illegal conduct pending completion of FTC administrative hearings." *Id*. at 24. Section 13(b) was not "designed to address hypothetical conduct or the mere suspicion that such conduct may yet occur. . . . [n]or was it meant to duplicate § 5, which already prohibits past conduct." *Id*.

The court then explained why it rejected the FTC's arguments to reverse the lower court. First, the FTC argued that relief under § 13(b) is appropriate when the FTC shows a reasonable likelihood that past violations will recur. According to the Third Circuit, the question of whether there is a likelihood of a recurrence is a distinct inquiry from the "meaning of Section 13(b)'s threshold requirement that a party 'is' violating or 'is about to' violate the law." *Id*. at 25. The court explained that Congress' "plain language in Section 13(b) . . . requires the FTC to plead, at the time it files suit, that a violation 'is' occurring or 'is about to' occur." *Id*. at 27. The Third Circuit made clear that the two standards are not inconsistent—"about to violate" is a pleading requirement applied right out of the gate, while "likelihood of recurrence" is used to determine the FTC's entitlement to an injunction. *Id*. at 28-29. The court declined the FTC's request to collapse the requirements.

Second, the court rejected the FTC's assertion of the "old adage that a remedial statute like the FTC Act should be construed broadly." *Id*. at 30. The Third Circuit explained that even if the FTC Act is a broad remedial statute, courts are not empowered to ignore clear statutory language even if that language fails to promote a remedial interpretation. *Id*.

Third, the court declined to credit the "parade of horribles" that the FTC predicted would result from this ruling. According to the FTC "[l]imiting the FTC's Section 13(b) authority to cases of ongoing or imminent violation would make it easy for wrongdoers to evade Congress' purposes in creating this regime." *Id*. at 30-31. The Third Circuit explained that the FTC would still be able to address wrongdoing because § 5 authorizes administrative proceedings based on past violations and if the FTC believed a wrongdoer "is" or "is about to violate" the law while an administrative proceeding is pending, the FTC could come to court and obtain an injunction under § 13(b).

The court noted that the FTC's "preference" for litigating under § 13(b), rather than in an administrative proceeding, "does not justify its expansion of the statutory language." *Id*. at 31. The court made crystal clear that "[i]f the FTC wants to recover for a past violation—where an entity 'has been' violating the law—it must use Section 5(b)." *Id*. The FTC cannot, the court explained, "use the most advantageous aspects of each statutory provision" by punishing Shire for a past violation "using the less onerous enforcement mechanism." *Id*.

Interestingly, the court stated in a footnote that the fact that the FTC was seeking equitable monetary relief—relief that would be logically relevant to an past harm—did not alter its analysis. *Id*. at 35 n.19. Specifically, the court stated that it "reject[s] the FTC's standalone claim for equitable monetary relief" because even "assuming" that equitable monetary relief is available under Section 13(b), the FTC "must still meet the 'is' or 'is about to' requirement." *Id*.

The court then applied its holding to the FTC's complaint against Shire. The court noted that the FTC "waited until five years after Shire had stopped its allegedly illegal conduct before seeking an injunction under Section 13(b)." *Id*. at 33. Because "Shire indisputably is not currently violating the law, nor is it alleged to be poised to do so anytime in the foreseeable future," the FTC "fails to state a claim upon which relief can be granted." *Id*. at 36.

Implications of the Court's Ruling and Open Questions

- A Potential Uptick in Administrative Proceedings – The FTC may respond to the *Shire* decision by pursuing antitrust and consumer-protection claims based on ceased conduct in administrative proceedings rather than through federal litigation under 13(b).
- Further Judicial Development of the "About to Violate" Standard – *Shire* addresses a fact pattern in which the challenged conduct had ceased, the defendant had divested itself of the product at issue, and the marketplace for the product had changed such that the seller no longer had incentives to re-start the challenged conduct (generic Vancocin had become available). As the Third Circuit stated, "[w]hatever the outer reach of 'about to violate' may be the facts in this case do not approach it." Op. at 35. How the FTC and the courts will address fact patterns that present closer calls remains to be seen.
- Is *Shire* an Outlier? – As is noted in the FTC's briefing, other circuit courts have implicitly permitted the FTC to challenge ceased conduct under § 13(b). The Third Circuit distinguished these cases by noting that those decisions did not involve analysis of § 13(b)'s "about to violate" standard. It will be interesting to see whether other Circuits adopt the legal reasoning and standard set forth by the Third Circuit in *Shire*.

