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ANTITRUST TRADE AND PRACTICE

Expert Analysis

FTC's Power To Seek Money Damages Called Into Question

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On Aug. 21, 2019, the U.S. Court of Appeals for the Seventh Circuit overturned a district court order that required a credit-monitoring service, Credit Bureau Center, and its principal, Michael Brown, to pay a $5.2 million award to the FTC under §13(b) of the Federal Trade Commission Act (the FTC Act). 15 U.S.C. §53(b); *FTC v. Credit Bureau Ctr.*, 937 F.3d 764 (7th Cir. 2019). The FTC's petition for certiorari is currently pending at the Supreme Court alongside two other petitions relating to Ninth Circuit decisions concerning 13(b). Petition for Writ of Certiorari, *Publishers Business Service v. FTC*, No. 19-507 (U.S. Oct. 18, 2019); Petition for Writ of Certiorari, *AMG Capital Mgmt. v. FTC*, No. 19-508 (U.S. Oct. 18, 2019).

In all three petitions, the Supreme Court has been asked to decide whether a district court's authority to grant a permanent injunction under §13(b) of the FTC Act includes the authority to require wrongdoers to return money that they illegally obtained, in the form of a restitutionary or disgorgement award. While the court has yet to grant certiorari in any of these cases, the failure to overturn, or a decision to affirm, the Seventh Circuit will have wide-sweeping ramifications for the FTC's enforcement strategy in competition matters.

Under §13(b) of the FTC Act, the Commission has the authority to seek temporary injunctive relief in federal courts when it has reason to believe there is an ongoing or imminent violation of the law within its purview and that injunctive relief would be in the interest of the public. §53(b). Section 13(b) also authorizes the issuance of a permanent injunction after "proper proof." Id.

For nearly four decades, many circuit courts have broadly interpreted the permanent injunction language of §13(b) as implicitly authorizing the grant of restitutionary rewards for antitrust violations. See, e.g., *FTC v. Ross*, 743 F.3d 886 (4th Cir. 2014). While the $5.2 million award at issue in *Credit Bureau* was imposed to penalize the defendants for unfair or deceptive acts or practices under the FTC's consumer protection program, the FTC has heavily relied on 13(b) in competition matters to seek disgorgement as an antitrust remedy, particularly in generic pay-for-delay drug cases.

Challenges to the FTC's 13(b) Authority

The *Credit Bureau* decision marks a departure from the broader interpretation of 13(b) that began in 1980s with the Ninth Circuit's holding in *FTC v. N.H. Singer*, 668 F.2d 1107 (9th Cir. 1982). Since that decision, many circuit courts followed suit and found a grant of implied authority for the FTC to issue "equitable" rewards such as restitution and disgorgement. In *Credit Bureau*, the Seventh

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Circuit acknowledged this trend but rejected the categorical reasoning behind many of the decisions and noted that this interpretation of 13(b) has "largely escaped critical examination." *Credit Bureau*, 937 F.3d at 779. In holding that the 13(b) forecloses monetary relief, the Seventh Circuit relied on a Supreme Court decision on statutory interpretation, *Meghrig v. KFC*, 516 U.S. 479 (1996). The *Meghrig* court held that the provisions of an environmental conservation statute which authorized district courts to "restrain" actions or "order such person to take such other action as may be necessary, or both," did not allow plaintiffs to recover waste-cleanup costs as a form of restitution. Id. at 484. The Seventh Circuit pointed to *Meghrig* and a subsequent line of Supreme Court cases that similarly declined to read broader judicially implied remedies into statutory schemes. *Credit Bureau*, 937 F.3d at 780-82.

The Seventh Circuit also examined the statutory scheme and temporary injunction language of 13(b) and held both were irreconcilable with a reading that the statute allowed implied restitutionary remedies. Id. at 771-75. The court reasoned that, if 13(b) accommodated monetary relief, the statute's temporary injunction provision mandates that such relief could only be granted where the unlawful conduct is "imminent" or "ongoing," which matches the forward-looking nature of injunctions, but not the backwards-looking nature of restitution. Id. at 772-73.

Under the second requirement of 13(b), the court distinguished between the public interest in "enjoining an ongoing or imminent violation" and the public interest in remedying past harm. Id. at 773. While the court acknowledged that both these requirements apply to temporary injunctive relief, and that it had previously held not all of the 13(b) language applies to permanent injunctions, it reasoned that the language of the provision as a whole informs the meaning of injunction in this context. Id.

Looking beyond the language of 13(b), the court pointed to the existence of other enforcement provisions in the FTC Act which specifically provide for restitutionary relief, particularly §5(*l*) and §19. 15 U.S.C. §§45(*l*); 57b(b). *Credit Bureau*, 937 F.3d at 773-74. Under §5(*l*), district courts are empowered to grant mandatory injunctions "and such other and further equitable relief as they deemed appropriate" against parties that violate final cease-and-desist orders of the Commission. However, §5(*l*) does not allow courts to order the return of any gains from the original alleged misconduct. Section 19 expressly provides for restitutionary relief, but only in consumer protection cases, and sets out a cumbersome and lengthy process that begins with an administrative adjudication.

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Pointing to the detailed structure of these other provisions and the protections they put in place, the Seventh Circuit declined to find that 13(b) "provides an unqualified right to the very remedies that the FTCA's other enforcement provisions give with heavy qualification," such as notice requirements and a statute of limitations. *Credit Bureau*, 937 F.3d at 774.

Credit Bureau is currently pending at the Supreme Court alongside two other petitions from the Ninth Circuit. Petition for Writ of Certiorari, *Publishers Business Service*, No. 19-507 (U.S. Oct. 18, 2019); Petition for Writ of Certiorari, *AMG Capital Mgmt*, No. 19-508 (U.S. Oct. 18, 2019). Both of the Ninth Circuit decisions underlying the petitions similarly addressed restitutionary awards for consumer protection violations under 13(b), and the Ninth Circuit held that 13(b) allowed for this implied remedy. *AMG Capital Mgmt. v. FTC*, 910 F.3d 417 (9th Cir. 2018), petition for cert. filed, No. 19-508 (U.S. Oct. 18, 2019); *FTC v. Dantuma*, 748 F. App'x 735 (9th Cir. 2018), petition for cert. filed sub nom. *Publishers Bus. Servs. v. FTC*, No. 19-507 (U.S. Oct. 18, 2019).

Despite the seeming unity of the circuits on this matter pre-*Credit Bureau*, there were telltale rumblings of judicial discontent. Judge Diarmuid O'Scannlain of the Ninth Circuit, in his concurring opinion in *AMG Capital*, heavily criticized the agencies' practice of seeking

monetary damages in the form of disgorgement or restitution, arguing that "such interpretation is no longer tenable" and dubbing it "an impermissible exercise in judicial creativity." *AMG Capital Mgmt.*, 910 F.3d at 429, 437. The Third Circuit, in *FTC v. Shire ViroPharma*, also voiced qualms about the broader reading of 13(b), but declined to decide whether it allowed monetary relief. 917 F.3d 147, 160 n.19 (3d Cir. 2019).

In February 2020, FTC Chairman Joseph Simons expressed interest in clarifying the language of 13(b), telling listeners at the January 2020 Consumer Electronics Show that, if he could change one law, it would be to have 13(b) expressly allow for monetary relief. Matthew Perlman, *FTC's Antitrust Powers Under Indirect Attack*, Law360 (Jan. 21, 2020).

The challenge to the FTC's 13(b) authority forms part a broader attack on agencies' ability to use statutory provisions allowing for "equitable relief" as a vehicle for obtaining restitutionary and disgorgement awards. The SEC, represented by Solicitor General Noel Francisco, is currently defending an appeal at the Supreme Court filed by petitioners, Charles Liu and Xin Wang, a couple who allegedly scammed Chinese immigrant investors. *Sec. & Exch. Comm'n v. Liu*, 754 F. App'x 505 (9th Cir. 2018), cert. granted, No. 18-1501 (U.S. Nov. 1, 2019).

The petitioners have argued that, under the relevant statutes, the SEC's authority to seek equitable remedies does not encompass disgorgement awards, which should be properly construed as a penalty intended to deter future wrongdoing. Petition for Writ of Certiorari, *Liu v. Sec. & Exch. Comm'n* No. 18-1501 (U.S. Nov. 1, 2019). The petitioners have centered their arguments on the Supreme Court decision in *Kokesh v. SEC*, where the court held that disgorgement is a civil penalty but stopped short of stating that courts could not order disgorgement as a form of equitable relief in enforcement suits. 137 S. Ct. 1635 (2017).

The Ninth Circuit, in *Dantuma* and *AMG Capital*, rejected application of *Kokesh* to 13(b) on the grounds that the holding was expressly limited to whether the SEC's power to seek equitable disgorgement was subject to the five-year statute of limitations. *AMG Capital Mgmt.*, 910 F.3d at 427; *Dantuma*, 748 F. App'x at 737-38. Francisco recognized the implications that a decision in *Liu* might have for the FTC in his request for an extension of time to petition for a writ of certiorari in *Credit Bureau*, asking for additional time "to assess the legal and practical impact of the court of appeals' ruling, including the relationship between the question presented here and the question presented in Liu v. SEC." Appl. for Extension of Time at 5, *FTC v. Credit Bureau Ctr.*, No. 19-825 (U.S. Dec. 19, 2019).

> Whether clarification will come from Congress or the Supreme Court remains to be seen. For now, the most probable outcome is that the FTC will face a moray of uncertainty surrounding its 13(b) powers.

The FTC, in its petition for certiorari in *Credit Bureau*, attempted to distinguish *Liu*, arguing that *Credit Bureau* poses distinct questions. Petition for Writ of Certiorari, *Credit Bureau*, No. 19-825 (U.S. Dec. 19, 2019). It is clear to see why—if faced with an unfavorable decision in *Liu*, the FTC will be forced to distinguish the provisions of the FTC Act and the securities laws or, even less appealing, to completely reconsider its approach to enforcement remedies. [The court heard arguments in *Liu* on March 3, 2020.]

The pressure on the court to grant certiorari in *Credit Bureau* has been mounting. On January 30, 2020, over twenty states filed an amicus curiae brief urging the court to overturn the Seventh Circuit on the basis that "[t]he FTC's ability to seek restitution under §13(b) benefits the amici States and their residents" by providing redress to victims of fraud and "promoting fair and competitive markets." Brief for State of Illinois et al. as Amici Curiae Supporting Petitioner, Federal Trade Commission, *Credit Bureau*, No. 19-825 (U.S. Dec. 19, 2019). On the other side, amicus curiae briefs filed by legal non-profits in the two Ninth Circuit cases have decried the historical reading of 13(b) as, among other things, violating separation of powers principles and the plain meaning of the text. Brief for the Cause of Action Institute as Amicus Curiae Supporting Petitioners, *Publishers Business Services*, No. 19-507 (U.S. Oct. 18, 2019); *AMG Capital Management*, No. 19-508 (U.S. Oct. 18, 2019); Brief for the Washington Legal Foundation

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Potential Implications

A decision by the Supreme Court to deny the pending petitions, or to uphold the Seventh Circuit's decision, will have significant consequences for the FTC's antitrust enforcement strategy going forward. In the agency's own words, suits under 13(b) are "one of its most important and effective enforcement tools" and 13(b) has served as the primary statutory authority on which the FTC relies in bringing cases against alleged antitrust offenders. Petition for Writ of Certiorari, *Credit Bureau*, No. 19-825 (U.S. Dec. 19, 2019).

Yet, pre-2012, the FTC only sought disgorgement under 13(b) in a limited number of antitrust cases. Maureen K. Ohlhausen, Dollars, *Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission*, FTC (April 20, 2016). In July 2012, in a split vote, the FTC revoked a nine-year-old guidance under which it had limited its use of monetary remedies to "exceptional" antitrust cases and noted that "[i]t has been our experience that the policy statement has chilled the pursuit of monetary remedies in the years since the statement's issuance … ." *Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases*, FTC (July 31, 2012).

More recently, the FTC has utilized disgorgement under 13(b) as a tool against antitrust defendants in litigations and settlement negotiations. In 2015, for example, Teva agreed to pay $1.2 billion in disgorgement to settle an antitrust suit that accused the company of paying drug makers to delay the launch of generic alternatives of its Cephalon product, Provigil. *FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected By Anticompetitive Tactics*, FTC (May 28, 2015).

Cardinal Health also agreed to pay $26.8 million in 2015 to settle a case in which the FTC was pursuing disgorgement for alleged illegal monopolization of the market for the sale of low-energy radiopharmaceuticals to health care providers. *Cardinal Health Agrees to Pay $26.8 Million to Settle Charges It Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospitals and Clinics*, FTC (April 20, 2015). Similarly, Judge Bartle of the Eastern District of Pennsylvania ordered AbbVie to pay $448 million in disgorgement for its allegedly anticompetitive patent lawsuits the FTC argued were designed to stave off competition from AndroGel generics. *FTC v. AbbVie Inc., et al.*, 329 F. Supp. 3d 98 (E.D. Pa. 2018).

As evidenced by these examples, prior judicial decisions regarding 13(b) have granted the FTC significant leverage in settlement negotiations. The loss of disgorgement under 13(b) will remove at least some of that leverage and render litigants more likely to press on with litigation rather than settle particularly where the conduct at issue is not ongoing. Current cases litigated by the FTC are also likely to feel the effects of the Seventh Circuit's decision and any resulting Supreme Court review. The defendants in the AbbVie litigation already have raised on appeal, among other questions, whether 13(b) authorizes disgorgement. Reply Brief of Appellees/Cross-Appellants AbbVie Inc., et al., at 35-40, *FTC v. AbbVie Inc., et al.*, No. 18-2758 (3rd Cir. Aug. 13, 2018). As a result, the antitrust enforcement balance might move towards state enforcers or the DOJ, which can use provisions of the Sherman Act to obtain monetary awards against defendants.

Hoping to resolve the matter, the FTC has turned to Congress and proposed legislation that would grant the agency clear authority to seek injunctions without the requirement of ongoing or imminent violations of the law, impose a 10-year statute of limitations on any monetary relief, and grant unambiguous authority to seek monetary remedies. See John Villafranco & Khoury DiPrima, *Where The Fight Over FTC's Enforcement Authority Stands*, Law 360 (Jan. 15, 2020). Whether clarification will come from Congress or the Supreme Court remains to be seen. For now, the most probable outcome is that the FTC will face a moray of uncertainty surrounding its 13(b) powers.