FTC Can't Challenge Prior Acts in Federal Court Says Third Circuit

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In a decision that will limit the Federal Trade Commission's (FTC) ability in both consumer protection and antitrust matters to bring certain claims in federal court, the Third Circuit Court of Appeals held in *FTC v. Shire Viropharma, Inc.* that the FTC may only bring a case under Section 13(b) of the FTC Act when the FTC can articulate specific facts that a defendant "is violating" or "is about to violate" the law.

Since the 1980s, the FTC has filed most of its cases challenging deceptive or unfair practices under Section 5 of the FTC act in federal court, instead of administratively. The FTC's authority to file these types of cases in federal court is found in Section 13(b) of the act, added to the act in 1973, which permits the FTC to seek an injunction in federal court "[w]henever the Commission has reason to believe . . . that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC]." While in cases of pending acquisitions or ongoing fraud it may be clear that the FTC has reason to believe someone "is violating" or "is about to violate" the law, the FTC has also brought cases under Section 13(b) for claims arising from abandoned conduct. The *Shire* decision addressed the FTC's authority to bring an action in federal court under Section 13(b) in these circumstances.

In *Shire*, the FTC alleged that Shire abused the U.S. Food and Drug Administration's citizen petition process to maintain its monopoly on a drug it manufactured. The complaint alleged that Shire filed forty-six citizen petitions between 2006 and 2012. In 2017, the Commission filed its complaint, which alleged, *inter alia*, that "[a]bsent an injunction, there is a cognizable danger that Shire will engage in similar conduct" and "[Shire] has the incentive and opportunity to continue to engage in similar conduct in the future. At all relevant times, [Shire] marketed and developed drug products for commercial sale in the United States, and it could do so in the future."

Shire filed a motion to dismiss, arguing that Section 13(b) only allowed the Commission to pursue injunctive relief where the violation is occurring or is about to occur. After considering the text of the statute and the legislative history, the court agreed. Because the FTC failed to "plausibly suggest [Shire] is 'about to violate' any law enforced by the FTC, particularly when the alleged misconduct ceased almost five years before filing of the complaint," the court dismissed the case.

On appeal, the FTC argued that a "likelihood of recurrence" standard, borrowed from the common law standard for injunctive relief, should govern when the FTC may bring an action in federal court under Section 13(b). The FTC also advanced a "parade of horribles" argument that crafty defendants could flaunt the FTC's authority by swiftly shutting down their operations at the outset of an FTC investigation to immunize themselves from a federal court action.

The Third Circuit rejected these arguments. It concluded that the statutory text under Section 13(b) requiring that the FTC have reason to believe a wrongdoer "is violating" or "is about to violate" the law unambiguously prohibits only existing or impending conduct. The Court also rejected the FTC's arguments that its decision would hamper its law enforcement efforts, noting that Section 5 of the FTC Act would continue to allow the FTC to bring administrative actions based on past conduct. The Court further noted that if the FTC determined during the pendency of an administrative action that a respondent was violating or about to violate the law, it could then seek injunctive relief in federal court under Section 13(b). Having determined the appropriate legal standard, the Court of Appeals upheld the district court's holding that the FTC failed to allege in its complaint that the defendant "is violating" or "is about to violate" the law.

The FTC is likely to appeal the decision in *Shire*, but there is no guarantee that the Supreme Court will grant certiorari given the plain language of the statute and the lack of any contrary circuit authority. In the meantime, the same issue in the context of a consumer protection action is likely headed to the Eleventh Circuit Court of Appeals in *FTC v. Hornbeam Special Situations, LLC*, No. 1:17-cv-3094 (N.D. Ga.). where the FTC sued a variety of defendants, including the estates of deceased individuals, for allegedly billing consumers without their authorization.

While the FTC continues to have the option to bring cases against past violations administratively under Section 5, including to seek a cease and desist order, it may decide to exercise more restraint in bringing cases involving abandoned conduct. This is especially true for claims subject to statutes of limitations. Where the FTC does decide to pursue conduct that has ceased, it may seek tolling agreements during the investigational phase.

The FTC may consider bringing more administrative actions under its Part 3 authority. As former Commissioner Maureen Ohlhausen has observed, "[t]he FTC's Part 3 authority is a powerful tool for developing or clarifying the law." Yet, over time, the FTC has brought far fewer Part 3 cases – 94 cases during the period 1977 to 1986 compared to 12 during the period 2007 to 2016. *Shire*, and quite possibly *Hornbeam*, should cause the Commission to assess the reasons behind this trend and to take steps to ensure the Part 3 process fulfills the role intended by Congress when it was created. That could very well mean that cases that would have been brought in federal court may find their way to hearing being brought before administrative law judges.