

Section 13 (b)log: Business As Usual? FTC Practice in the Wake of Shire ViroPharma and Credit Bureau Center

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Section 13 (b)log



The reach of Section 13(b) of the FTC Act – and the extent of the FTC’s enforcement authority -- has been a hotly-debated topic following the Third Circuit’s decision in *Shire ViroPharma* and the Seventh Circuit’s decision in *Credit Bureau Center*.

In this first installment of what we are calling the “Section 13 (b)log,” we summarize a recent discussion between Bikram Bandy (FTC Chief Litigation Counsel), John Villafranco (Kelley Drye), Berin Szoka (Tech Freedom), and Noah Kaufman (Morgan Lewis) on this issue during an ABA Antitrust Law Section panel, revisit the *Shire* and *Credit Bureau Center* cases, and opine as to the next steps that the Supreme Court may take when it weighs in on Section 13(b). [Find our original posts on these cases [here](#) and [here](#)]

In recent months, there has been a good deal of speculation -- if not hand-wringing -- as government lawyers and private practitioners grapple about the reach of Section 13(b) of the FTC Act following the Third Circuit’s decision in *Shire ViroPharma* and the Seventh Circuit’s decision in *Credit Bureau Center*.

On Friday, Bikram Bandy (FTC Chief Litigation Counsel), [John Villafranco](#) (Kelly Drye), Berin Szoka (Tech Freedom), and Noah Kaufman (Morgan Lewis) discussed this issue during an ABA Antitrust Law Section panel.

During his remarks, Mr. Bandy stated that the two cases have had only a limited effect on FTC enforcement decisions, and he expects no major changes to the Commission’s long-time approach moving forward. In ongoing litigation where the FTC is seeking monetary relief from defendants, according to Mr. Bandy, the FTC has prevailed (so far) on all motions raised by opposing counsel that have attempted to assert the legal theories advanced in *Shire ViroPharma* or *Credit Bureau Center* as a means of blocking a restitution award.

As followers of the agency and readers of this blog know, the FTC has regularly sought restitution or other monetary relief as a remedy for fraud, deceptive conduct, or other wrongful acts under Section

13(b). According to Mr. Bandy, that strategy will not change: the FTC will continue to be aggressive, at least in the numerous circuits that have not adopted the holdings in *Shire ViroPharma* or *Credit Bureau Center* – which is to say, all circuits other than the Third and Seventh.

While Mr. Bandy was confident in the FTC's prospects for obtaining restitution, other panelists made clear that there could be choppy waters ahead. Mr. Villafranco made the point that the FTC should expect to face more defendants who are willing to litigate, as opposed to agree to a settlement order, based on the possibility that they may not have to pay a single dollar, as opposed to settle for tens or hundreds of millions. The Supreme Court also could weigh in on the correct interpretation of Section 13(b), as two important petitions for certiorari were filed by defendants in Section 13(b) cases on Friday – increasing the likelihood that this issue is headed to the Roberts Court for resolution.

Shire and Credit Bureau Center, Revisited

By way of review, the Third Circuit held earlier this year in *FTC v. Shire ViroPharma Inc.* that the FTC cannot bring a case under Section 13(b) unless the FTC can articulate specific facts that a defendant is violating or is about to violate the law. In other words, the Third Circuit decided Section 13(b) authorizes the FTC to bring a lawsuit in federal court only in cases of ongoing or imminent – as opposed to past – misconduct.

During the panel discussion, Mr. Bandy commented that most of the Commission's enforcement activities involve ongoing conduct. Therefore, the Third Circuit's holding would not foreclose the Commission's enforcement efforts. Despite this, Mr. Bandy remarked that the Third Circuit's decision left some important questions unanswered, especially relating to the timing around when the wrongful conduct ended. The conduct by the defendant in *Shire ViroPharma* had ceased five years earlier, with no evidence of recurring conduct in the interim. Mr. Bandy said it remains unclear how a court would view a closer call – such as where the conduct ceased only two months prior or where the conduct had stopped only after the FTC issued a Civil Investigative Demand.

Mr. Bandy noted that one effect of the *Shire ViroPharma* decision is that the FTC is requesting parties sign tolling agreements when they engage in investigations under Part 2 of the FTC's Rules of Practice. Mr. Villafranco expressed reservations about signing an agreement that could impair any number of equitable defenses, particularly when it is combined with the waiver of any other defense based on the timeliness of asserted claims. He also expressed concern about the broadening of the scope of liability beyond what the courts might conclude is the correct reach under Section 13(b).

Mr. Kaufman (counsel in the *Shire ViroPharma* case) commented that the FTC likely would have sought certiorari review if the *Shire* case was “close” – and the Commission's decision not to seek such review is telling. He commented that the holdings in both *Shire ViroPharma* and *Credit Bureau Center* emphasize that the plain text of Section 13(b) should govern, and that both cases were correctly decided.

In *FTC v. Credit Bureau Center LLC*, decided six months after *Shire ViroPharma*, the [Seventh Circuit](#) held that the FTC could not obtain monetary relief in the form of restitution under Section 13(b). The court sided with the defendant's argument that, because Section 13(b)'s text cites injunctions as the FTC's exclusive remedy, the FTC could not seek restitution. The Seventh Circuit's decision overturned three decades of its own precedent and broke with eight other federal appellate courts.

Bandy said although this holding is a setback, the FTC would proceed “full speed ahead” in all other circuits besides the Seventh Circuit in attempting to obtain restitution when appropriate. However, if

Credit Bureau Center's holding is approved in other circuits (or if the Supreme Court decided that Section 13(b) did not authorize monetary relief), the FTC would be forced to rely on its own administrative adjudication process – a process that is slow-moving -- rather than seeking restitution in federal courts, Bandy said.

Petitions for Certiorari: How Will the Supreme Court Weigh In?

The panelists speculated that the Supreme Court would be asked to clarify the Section 13(b) circuit split and weigh in relating to the FTC's authority to seek restitution. Later in the day, this prediction proved correct, as two petitions for certiorari were filed on Friday pertaining to Ninth Circuit cases where the FTC's ability to obtain monetary relief under Section 13(b) was upheld.

In *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (2018), the Ninth Circuit affirmed the FTC's ability to obtain monetary relief under 13(b) because it was bound by precedent. Notably, there was subsequent motions practice in the district court case directly about the holding in *Credit Bureau Center*, and the FTC prevailed in its argument that 13(b) permitted monetary relief. In *FTC v. Publishers Business Services*, No. 17-15600 (9th Cir. 2018), the Ninth Circuit again upheld the FTC's ability to obtain monetary relief, finding that 13(b) grants district courts the power to impose equitable remedies, including restitution and disgorgement of unjust gains in these cases.

Because cert petitions were filed in *AMG Capital Mgmt* and *Publishers Business Services*, the FTC now has to grapple with its next steps in *Credit Bureau Center*. If the FTC also opts to file a petition for cert in that case to challenge the Seventh Circuit's holding, the Supreme Court would have several pending cert petitions before it raising the same (or similar) issues. The Supreme Court could choose to hear the first-filed case, or adopt a procedure whereby it would combine the pending petitions. The court also could decide to take neither case, although that may be unlikely given the *Credit Bureau Center* ruling created a direct circuit split.

While practitioners await the Supreme Court's guidance on the future of Section 13(b), the panelists provided their perspective on how the current legal framework will impact ongoing litigation. Mr. Villafranco observed that, until the issue is definitively resolved, it will be raised by defendants in virtually every case the FTC brings under the statute. Sure enough, on Thursday of last week a motion to dismiss was filed by the defendant Match.com in *Federal Trade Commission v. Match Group, Inc.* (N.D. Tex.). Match contended that the FTC was wrongly seeking injunctive monetary relief against it based on its purported unfair practices because its conduct had been permanently discontinued. Match's brief also asserted that monetary relief, including restitution, should not be available as a remedy. The Fifth Circuit has not adopted *Shire ViroPharma* or *Credit Bureau Center*, so it will be interesting to see how the court weighs these arguments.

A Legislative Fix?

The FTC also intends to seek a legislative remedy to settle the confusion over Section 13(b), as Congress could rewrite the statute to clarify the FTC's power. The panelists agreed that legislative action would be the best outcome but it is far from certain that Congress will act.

Mr. Szoka said Congress should take concrete action to fully revise and reconsider the FTC's mandate – a process that Congress only undertook in 1994, 1996 and 2006 and only for limited purposes. Because the FTC maintains uniquely broad power, Szoka commented that the FTC Act needs a better enforcement structure that consistently spells out standards for settlements, the investigative process, and other issues relating to enforcement.

However, many are aware that even when there is bi-partisan support for a bill in Congress, having Congress act – and pass actual legislation -- is an unlikely outcome.

Although the future of FTC enforcement power is unclear, what is clear is that *Shire ViroPharma* and *Credit Bureau Center* will impact the FTC's enforcement choices until they are resolved. The holdings in these seminal cases place all parties who deal with the FTC on shifting ground until the FTC's enforcement power is clarified by either the Supreme Court or Congress.

Stay tuned for more installments of the "Section 13 (b)log."