NORTON ROSE FULBRIGHT

Understanding the FTC's monetary equitable remedies under Section 13(b) for antitrust violations

By Gerald A. Stein, *American Bar Association* — Fall 2019

Until recently the Federal Trade Commission's ability to seek monetary equitable remedies (particularly disgorgement and restitution) for alleged antitrust violations— whether ongoing, impending, or stale—went virtually unchallenged. After it first gained statutory authority under Section 13(b)[1] of the FTC Act to bring suit in federal district court to preliminarily enjoin conduct that "is violating, or is about to violate" the antitrust laws, the FTC successfully convinced many federal courts that Section 13(b) also impliedly allowed the FTC to seek standalone permanent injunctions and monetary equitable remedies regardless of whether a defendant's alleged anticompetitive conduct was ongoing or completed long ago.[2]

The FTC brought few antitrust cases in the years following the enactment of Section 13(b) in 1973, and the agency formalized its conservative approach in its unanimously approved 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases. In 2012, however, the FTC abruptly, and without providing an opportunity for public comment, withdrew its 2003 Policy Statement, asserting that it created "an overly restrictive view of the Commission's options for equitable remedies" and that the FTC no longer believed that disgorgement and restitution "should apply only in 'exceptional cases.'"[3] Subsequently, the number of antitrust cases in which the FTC sought monetary equitable remedies for completed—not ongoing or imminent—anti-competitive conduct increased sharply.

This trend may have ended. In two recent and unrelated cases, defendants challenged—and defeated—the presumption that the FTC can bring an action for a permanent injunction and monetary equitable remedies under Section 13(b) with unfettered discretion. First, in *FTC v. Shire Viropharma, Inc.*,[4] the Third Circuit affirmed the dismissal of the FTC's complaint seeking permanent injunctive relief and standalone monetary equitable remedies for alleged antitrust violations pursuant to Section 13(b) where the alleged anticompetitive conduct was neither ongoing nor imminent. Next, in *FTC v. Credit Bureau Center LLC*,[5] the Seventh Circuit vacated an award for restitution in a consumer protection case based on its determination that Section 13(b) authorizes only restraining orders and injunctions. And, in a third case that is still pending, *FTC v. Surescripts*,[6] the defendants moved to dismiss the FTC's action based on Section 13(b), arguing that Section 13(b) is available only for "proper cases"—garden variety antitrust violations—and that the case at hand raised novel legal theories.

This article focuses only on the *Shire* case and the "is violating, or is about to violate" requirement of Section 13(b) as applied in antitrust actions. *Shire* provides a bright line test that prevents the FTC from seeking monetary equitable remedies for anticompetitive conduct that is neither ongoing nor about to occur. *Shire*'s reasoning fully comports with Congress's rationale in enacting Section 13(b), encourages the FTC to use its administrative proceedings to address completed antitrust violations, and establishes predictable limits as to when the FTC may seek monetary equitable remedies.[7] It remains to be seen whether other courts will follow *Shire*.

Gerald A. Stein is a Senior Counsel in the New York Office of Norton Rose Fulbright US LLP and a member of the firm's Antitrust and Competition Group. A former attorney at the Bureau of Competition (Northeast Region) of the Federal Trade Commission, Gerald counsels and represents clients before the U.S. antitrust enforcement agencies and in all aspects of pri- vate antitrust litigation. Significant contributions to this article were made by Mark Angland and Emily L. Woolbank.

Antitrust, Vol. 34, No. 1, Fall 2019.

The FTC's remedial power: Cease and desist orders

The FTC generally investigates and prosecutes anticompetitive conduct as a violation of Section 5 of the FTC Act, which prohibits "unfair methods of competition in or affecting commerce." This prohibition encompasses violations of other federal antitrust laws, including Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act.[8] Until the passage of Section 13(b), the FTC could bring Section 5 enforcement actions only in administrative proceedings, after which the FTC could order a respondent found to have engaged in unfair methods of competition to "cease and desist" from such conduct.[9] The FTC Act does not authorize the FTC to issue an order that imposes injunctive relief (e.g., interim relief to maintain the status quo pending the outcome of a full hearing on the merits) or that awards monetary equitable remedies in antitrust cases. Instead, the FTC must proceed under Section 13(b) to obtain injunctive relief for alleged antitrust violations. The express terms of Section 13(b), however, do not authorize the FTC to seek stand-alone monetary equitable remedies for antitrust violations.

The FTC's authority to obtain equitable relief under Section 13(b)

Introduction of Section 13(b). In 1973, Congress added Section 13(b) to the FTC Act to address the FTC's concern that it lacked authority to seek preliminary injunctions to prevent anticompetitive mergers in the energy industry.[10] Section 13(b) was intended to be a "gap filler" to allow the FTC to seek a preliminary injunction "to prevent the continuation of particular aggravated violations of the laws" "pending the completion of the lengthy administrative proceedings and appeals which lead to a final cease and desist order . . . ."[11] Section 13(b) also authorizes the FTC to seek a permanent injunction.[12]

Application of Section 13(b) by the FTC: Early Focus on Consumer Protection Matters. Although Section 13(b) was enacted for use in competition cases, the FTC gradually and steadily expanded its use of Section 13(b) to seek monetary equitable remedies in consumer protection cases. This expansion relied on language in Section 13(b) that allows the FTC to obtain permanent injunctions.[13] In *FTC. v. H.N. Singer, Inc.*,[14] the FTC successfully argued that "because [Section 13(b)] gives the court authority to grant a permanent injunction, it also by implication gives the court authority to afford all necessary ancillary relief, including rescission of contracts and restitution."[15] Several other courts have since followed *Singer,* effectively enabling the FTC to seek equitable relief, including monetary equitable remedies, "even though such power is not expressly granted to the [FTC] under any part of the FTC Act."[16]

Shift towards antitrust cases

The FTC has used Section 13(b) to bring 11 antitrust actions involving allegedly anticompetitive practices and mergers, as well as HSR violations to obtain monetary equitable remedies. It won or settled seven of these cases.[17]

Three time periods are relevant to understanding the FTC's use of Section 13(b) to seek monetary equitable remedies in antitrust cases: (1) from 1973 to the 2003 Policy Statement; (2) from the 2003 Policy Statement to the 2012 Withdrawal; and (3) post-2012 Withdrawal.

Period from 1973 to 2003 Policy Statement. The FTC brought only two actions for monetary equitable remedies involving alleged antitrust violations during the 30-year period from 1973 to 2003. In 1998, the FTC sought monetary equitable remedies in *FTC v. Mylan Laboratories*,[18] alleging that Mylan embarked on an ongoing strategy beginning in 1997 to monopolize markets for two anti-anxiety drugs by entering into long-term exclusive licenses with the industry's suppliers that effectively blocked many of Mylan's competitors from the market.[19] The matter settled for $100 million and injunctive relief.[20] Dissenting in part and concurring in part, Commissioner Thomas B. Leary sharply criticized the FTC's decision to seek monetary equitable remedies in federal court, arguing that it would "create an undesirable precedent for antitrust enforcement at both the state and the federal levels," and calling for the Commission to clarify the circumstances in which it would seek such remedies in antitrust cases.[21] In a majority statement, Chairman Robert Pitofsky and Commissioners Sheila Anthony and Mozelle Thompson agreed that Section 13(b) should be used only in cases of "egregious conduct," and that "the Commission should cautiously exercise its prosecutorial discretion to seek disgorgement in antitrust cases."[22]

In 2001, in FTC v. The Hearst Trust,[23] the Commission sought monetary equitable remedies against Hearst Trust, alleging that the company failed to produce responsive documents with its HSR filing in 1998, and was therefore in "continuous violation" of the HSR Act.[24] The FTC settled for $19 million in disgorgement.[25]

The 2003 Policy Statement to 2012 Withdrawal. Consistent with the views expressed by the majority and by Commissioner Leary in the Mylan case, the 2003 Policy Statement advised that the FTC would seek disgorgement or restitution only in "exceptional" competition cases and would rely on three factors to guide its decisions: (1) whether the "underlying violation is clear"; (2) whether there is a "reasonable basis for calculating the amount of the remedial payment"; and (3) "the value of seeking monetary relief" as compared to "any other remedies available," including private actions and criminal proceedings.[26] The 2003 Policy Statement, however, did not specifically address the "ongoing or is about to occur" standard.[27]

It is not possible to know the precise impact the 2003 Policy Statement had on the FTC's decisions regarding which cases to bring in federal district court under Section 13(b) because such information is not publicly available. Nevertheless, it can be noted that from 2003 to the withdrawal of the Policy Statement in 2012, the FTC brought only two cases under Section 13(b), one with discontinued alleged anticompetitive conduct and the other with continuing alleged anticompetitive conduct.

In its first antitrust complaint filed after the 2003 Policy Statement, *FTC v. Perrigo Co.*,[28] the FTC alleged that the only two manufacturers of store-brand children's liquid ibuprofen restrained trade by formally agreeing not to compete with one another. Both companies rescinded their noncompete agreements before the FTC filed its complaint,[29] and the matter was settled for $6.25 million in disgorgement.[30]

In 2008, the FTC challenged Ovation Pharmaceuticals for monopolizing the market for drugs to treat congenital heart defects in premature babies in *FTC v. Lundbeck*. The FTC brought its case under Section 7 of the Clayton Act and Section 13(b)[31] but lost after the district court ruled that the two drugs at issue effectively belonged to different product markets.[32]

The 2012 Withdrawal of the 2003 Policy Statement. In 2012, the FTC withdrew the 2003 Policy Statement, asserting that, "[a]lthough intended to clarify past Commission views on" monetary equitable remedies, "the practical effect of the Policy Statement was to create an overly restrictive view of the Commission's options for equitable remedies."[33] The FTC highlighted its effective use of monetary equitable remedies in its consumer protection work and noted that "while disgorgement and restitution are not appropriate in all [antitrust] cases, we do not believe they should apply only in 'exceptional cases,' . . . ."[34] In the FTC's view, the Policy Statement "chilled the pursuit of monetary remedies," and "prosecutorial discretion" would be sufficient to limit the use of disgorgement to appropriate cases.[35]

The FTC rejected the 2003 Policy Statement's first factor, stating that "rarity or clarity of the violation is not an element considered by the courts in disgorgement requests," so there was no reason to create a "heightened standard for disgorgement" in antitrust cases. The FTC also rejected the third factor, reasoning that the question of "whether there are alternative plaintiffs that may seek or are seeking monetary relief is relevant in this context, but it is not dispositive."[36]

Then-Commissioner Maureen Ohlhausen vigorously dissented from the FTC's withdrawal of the 2003 Policy Statement. She emphasized that the Statement's "strong pedigree" included a 5-0 bipartisan vote by the FTC and unanimous endorsement by the 2007 Antitrust Modernization Commission.[37] Commissioner Ohlhausen predicted that withdrawal of the 2003 Policy Statement could lead the FTC to seek disgorgement in circumstances that would not meet the Statement's three-part standard.[38] She disagreed that the 2003 Policy Statement had inappropriately constrained the FTC and expressed concern that the FTC was "moving from clear guidance on disgorgement to virtually no guidance on this important policy issue."[39] The U.S. Chamber of Commerce also expressed "its deep disappointment" in the FTC's decision to withdraw the 2003 Policy Statement, voicing its concern about the "open-ended implication that the FTC plans to pursue disgorgement more frequently."[40]

Section 13(b) Cases Brought After the 2012 Withdrawal of the 2003 Policy Statement. In the seven years following the withdrawal of the 2003 Policy Statement, the FTC brought at least six cases seeking monetary equitable remedies for anticompetitive conduct, all of which involved pharmaceuticals or health care. It is beyond the scope of this article to determine whether or not these cases would have met the 2003 Policy Statement's requirements had it remained in effect. However, it can be noted that the FTC brought more cases seeking monetary equitable remedies during this time period than in the preceding 39 years.

For example, in *FTC v. Cephalon, Inc.*,[41] Cephalon settled allegations of entering into reverse payment agreements to delay the entry of generic equivalents of Provigil for $1.2 billion in disgorgement.[42] In *FTC v. AbbVie, Inc.*,[43] the FTC won a judgment for $448 million in disgorgement after establishing that AbbVie and Besins Healthcare filed sham litigation claims against Perrigo and Teva to delay generic entry of AndroGel.[44] In *FTC v. Endo Pharma*,[45] the FTC sought disgorgement from Endo based on reverse payment agreements pertaining to the delay of generic drug entry.

In *FTC v. Mallinckrodt Ard Inc.*,[46] the FTC settled for $100 million in disgorgement to resolve its concerns that Mallinckrodt illegally maintained a monopoly in the U.S. market for adrencorticotropic hormone (ACTH) drugs used to treat a seizure disorder affecting infants.[47] In *FTC v. Cardinal Health, Inc.*,[48] the FTC disgorged $26.8 million from Cardinal Health to settle claims that Cardinal had illegally monopolized the market for the sale and distribution of radiopharmaceuticals to hospitals and clinics in 25 geographic markets seven years earlier.[49] The majority highlighted that disgorgement was "the only realistic avenue" for victims to obtain monetary redress given statute of limitations issues and referring to the deterrent effect of preventing companies from "profit[ing] from their wrongdoing."[50] In her dissent, Commissioner Ohlhausen noted the sharp increase in disgorgement cases since the withdrawal of the 2003 Policy Statement and expressed her concerns about pursuing disgorgement given the "the lack of guidance that the Commission has provided the business community about when it will seek this remedy."[51]

The *Shire* case

Shire is the most recent appellate case that interprets the FTC's monetary equitable remedies under Section 13(b) for a completed antitrust violation.[52] In *Shire*,[53] the Third Circuit held that the express language and statutory history of Section 13(b) limit the FTC's use of Section 13(b) only to anticompetitive conduct that "is violating, or is about to violate" the law.

Shire ViroPharma manufactured Vancocin, a drug used to treat life-threatening gastrointestinal infections. When generic drug companies sought to make generic equivalents of Vancocin, Shire allegedly made a total of 43 filings to the FDA and instituted three federal court proceedings from 2006 to 2012—all allegedly to delay the approval of generic Vancocin capsules. By April 2012, the FDA rejected the last of Shire's filings, finding

that they "lacked merit" and "were unsupported." The FDA ultimately approved the generic equivalents to Vancocin but, by that time, Shire had allegedly made hundreds of millions of dollars in profits by delaying generic entry.[54]

Almost five years after the FDA concluded that Shire's filings were meritless, the FTC filed a complaint against Shire under Section 13(b), seeking a permanent injunction and restitution on the grounds that Shire engaged in sham petitioning to delay generic entry so that it could continue to reap monopoly profits. The district court dismissed the complaint, holding that the FTC failed to plead facts sufficient to show that the alleged anticompetitive conduct "is" or "is about to violate" the law, as required under Section 13(b).

In affirming the dismissal of the complaint, the Third Circuit first determined that Section 13(b)'s requirements are not jurisdictional and that the "is" or "is about to violate" requirement relates to the merits of a Section 13(b) claim.[55] While the court found that Section 13(b) authorized the FTC to file suit in federal district court in certain circumstances,[56] it concluded that the express language of the statute "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."[57] The court further reasoned that Section 13(b) "was not designed to address hypothetical conduct or the mere suspicion that such conduct may yet occur . . . . Nor was it meant to duplicate Section 5, which already prohibits past conduct."[58]

The FTC argued that, absent an injunction, there was a danger that Shire would engage in similar future sham petitioning with respect to other drugs because Shire knew its behavior was profitable and it would have opportunities to repeat the same scheme. Thus, the FTC argued, Section 13(b) was satisfied by showing that Shire's historic conduct had "a likelihood of reoccurrence," a theory that had been accepted by other courts when deciding whether to grant an injunction under Section 13(b). The Third Circuit squarely rejected this argument, finding that the "likelihood of reoccurrence" standard applied only after Section 13(b)'s pleading requirements had been met.[59]

Consistent with its reading of the congressional purpose in enacting Section 13(b), the Third Circuit reasoned that, by seeking an injunction for conduct that was neither occurring nor imminent, the FTC essentially was pursuing immediate relief in federal court under Section 13(b) rather than pursuant to a Section 5 administrative remedy.[60]

Where to next for monetary equitable remedies for alleged antitrust violations?

Shire leaves open many questions about the FTC's ability to seek monetary equitable remedies in antitrust cases pursuant to Section 13(b). One question concerns cases in which the effects of the allegedly anticompetitive act are ongoing but the conduct itself is not.

The FTC encountered that exact situation in *Perrigo and AbbVie*. In *Perrigo*, the FTC's complaint did not allege that any violations were imminent or ongoing. Rather, the FTC's complaint explained that Perrigo and Alpharma had rescinded their non-compete agreement three months prior in the face of the FTC's investigation.[61] Under *Shire*, it is not clear whether the FTC would have been able to bring an action for monetary equitable remedies under Section 13(b) given that Perrigo and Alpharma were not "violating" or "about to violate" the law.

So, too, in AbbVie, in which the FTC alleged that AbbVie illegally maintained a monopoly, including by filing sham litigation against Teva in 2011. While the FTC did not allege that AbbVie was filing sham litigation in 2014, when the FTC filed its case, it did allege that Teva settled sham litigation claims with an agreement to refrain from entering the market until sometime in the future, after the FTC filed its lawsuit. Although the alleged conduct was completed, would a court nevertheless allow the FTC to use Section 13(b) to seek monetary equitable remedies where the effects of the act are ongoing?

It stands to reason, however, that in cases brought after the effects of the allegedly anticompetitive conduct have ended (such as the *FTC v. Endo Pharma* line of cases[62]), *Shire* would presumably prevent the FTC from seeking monetary equitable remedies.[63]

The question of whether ongoing effects from a completed action also arises in the merger context. In *FTC v. Ovation Pharm., Inc.*,[64] the FTC alleged that Ovation violated the FTC Act through unlawful acquisitions two years before the FTC filed its case. Because the acquisition had occurred two years prior, a strict reading of *Shire* suggests that the FTC should not have been able to bring that case. However, Section 13(b) may allow actions in which the FTC can identify some ongoing activity, as in *FTC v. Hearst Trust,* in which the FTC alleged that the defendants were in "continuous violation" of the HSR Act.[65]

Shire also may apply equally to consumer protection cases brought by the FTC. Indeed, prior to the Third Circuit's decision in Shire (but after the district court's ruling), in *FTC v. Hornbeam Special Situations LLC,*[66] the Northern District of Georgia considered the FTC's practice of seeking monetary equitable remedies under Section 13(b) in situations where conduct was not ongoing. In this case (which involved an alleged scheme that began in 2010 but had ceased at the time of the FTC's action), the court held that Section 13(b)'s plain language—particularly the phrase "about to"— "evokes imminence, as if the offending action could be resumed with little delay."[67] The court went on to state that "Section [13(b)] is not, on its face, a broad and sweeping avenue of relief" but rather "an injunctive remedy, a stop-gap to discontinue ongoing or threatening conduct violative of the laws the FTC enforces."[68] While the *Hornbeam* decision is currently on appeal to the Eleventh Circuit, the district court's reasoning is entirely consistent with *Shire*.

Despite *Hornbeam and Shire*, it is important to note that the FTC may be less constrained in the consumer protection context than in the antitrust context. Section 19 of the FTC Act enables the FTC to seek consumer redress from a respondent in a district court action, but only after the

FTC determines through an administrative proceeding that the practice at issue was unfair or deceptive.[69] To obtain such relief in district court, the FTC must demonstrate that "a reasonable man would have known under the circumstances" that the underlying conduct "was dishonest or fraudulent."[70] Actions under Section 19 are subject to a three-year statute of limitations,[71] which imposes significant practical limits on the FTC's ability to use this authority for conduct that is not ongoing—particularly because the FTC must conduct a full administrative proceeding before going to federal court.

Does *Shire* support the application of a statute of limitations?

Although *Shire* does not directly address the application of a statute of limitations to actions brought pursuant to Section 13(b), it does apply a bright-line temporal limitation. If *Shire* is distinguished in cases where the alleged anticompetitive conduct has ceased and is not imminent, but the harm continues, the question then becomes how far back in time the FTC can reach. So far, the FTC has withstood attacks on applying a statute of limitations to Section 13(b).

This is in contrast to the Securities and Exchange Commission. The SEC does not have statutory authorization for monetary remedies but has routinely sought disgorgement against companies and individuals alleged to have breached securities legislation. Like the FTC, the SEC had persuaded courts to grant disgorgement as an "exercise of their inherent equity power to grant relief ancillary to an injunction" without any temporal restrictions.[72]

In 2017, however, the Supreme Court in *Kokesh v. SEC* held that SEC disgorgement is a "penalty" and therefore subject to a general five-year statute of limitations period under 28 U.S.C. § 2462.[73] As a result, the Court reversed lower court decisions that granted the SEC $34.9 million in disgorgement from a defendant whose misconduct occurred outside the five-year statute of limitations period.

Emphasizing that its central holding was that "SEC disgorgement constitutes a penalty" subject to Section 2462's five-year statute of limitations period, the *Kokesh* Court stated that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context."[74] In addition, at oral argument Justice Gorsuch noted that the Supreme Court had never, in 50 years of lower court precedent, held that a court could order disgorgement based on its inherent equitable authority ancillary to an injunction.[75]

Courts have distinguished *Kokesh* in refusing to apply Section 2462's limitations period to FTC actions brought under Section 13(b). Most recently, in *FTC v. AMG Capital Management*, the defendant argued that *Kokesh* severs the line of reasoning that links "injunctions to equitable relief" and "mandates the application of a statute of limitations to FTC 13(b) enforcement actions."[76] The Ninth Circuit panel, however, declined to apply *Kokesh*, noting that *Kokesh* was not clearly irreconcilable Ninth Circuit precedent regarding Section 13(b).[77]

Still, *Kokesh* could leave the door open for courts to question the appropriateness of the use of monetary equitable remedies when a statute, such as Section 13(b), merely authorizes injunctions.[78] Read together, *Kokesh* and *Shire* indicate some degree of judicial impetus to limit the expansive use of ancillary monetary equitable remedies by regulators, including the FTC.

Conclusion

Shire's limitation on the FTC's authority to seek monetary equitable remedies for alleged anticompetitive conduct to situations where the defendant "is" or "is about to" violate the antitrust laws is fully consistent with the rationale and express language of Section 13(b). It remains to be seen if other circuit courts will follow *Shire* and how *Shire* will be applied in cases where completed conduct but ongoing harm is alleged. Furthermore, practitioners will be following whether courts impose further limitations on the use of Section 13(b) in the wake of *Surescripts*.

In a political climate where both major political parties have expressed their support for increased and innovative antitrust enforcement, *Shire* may be viewed as weakening one of the FTC's most important remedial powers and deterrents to anticompetitive conduct. If it is indeed Congress's intent to allow the FTC to seek monetary equitable remedies for past antitrust conduct—and if *Shire* is followed by other courts—the remedy is to amend Section 13(b).

1 15 U.S.C. § 53(b).

2 The FTC argued that Section 13(b) has two provisos—the first allowing the FTC to seek preliminary injunctions and the second allowing the FTC to seek standalone permanent injunctions and monetary equitable remedies. *See, e.g., FTC v. Commonwealth Mktg. Grp., Inc.*, 72 F. Supp. 2d 530, 535–36 (W.D. Pa. 1999) ("The first proviso authorizes the FTC to seek, and district courts to grant, preliminary relief in aid of administrative proceedings. . . . The second proviso authorizes the FTC to seek, and district courts to grant, permanent injunctions without the FTC's initiating the administrative proceedings prerequisite to a grant of relief under the first proviso.").

3 Statement of the Commission Regarding Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), https://www.ftc.gov/public-statements/2012/07/state ment-commission-regarding-withdrawal-commissions-policy-statement. ThenCommissioner and future Acting Chairman Maureen Ohlhausen vigorously dissented from the FTC's decision. She later explained that the lack of policy guidance created an era of unpredictability and "a dramatic uptick in the agency's pursuit of monetary equitable relief." FTC Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission (Apr. 20, 2016), https://www.ftc.gov/system/files/documents/public_statements/945 623/160420dollarsdoctrinespeech.pdf.

4 917 F.3d 147 (3d Cir. 2019).

5 937 F.3d 764 (7th Cir. 2019).

6 See Surescripts' Motion to Dismiss Complaint, No. 1:19-cv-01080 (JDB) (D.D.C. 2019). At the time of writing, the court had not ruled on this motion.

7 It is not clear whether *Shire* will impact consumer protection cases brought by the FTC. *See FTC v. Credit Bureau Center*, 937 F.3d 764, 774 (7th Cir. 2019) (going beyond *Shire* by reasoning that "[i]f section 13(b) permitted restitution as a general matter, Congress would have had no reason to enact § 57b, which authorizes restitution [in consumer protection cases] under narrower circumstances").

8 *See* Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https:// www.ftc.gov/system/files/documents/public_ statements/735201/ 150813section5enforcement.pdf. However, the FTC has interpreted the reach of Section 5 as going beyond the limitations of those statutes, especially for cases alleging an invitation to collude. *Id.; see, e.g.,* Drug Testing Compliance Group, FTC Docket No. C-4565 (2016) (alleging antitrust violation pursuant to Section 5 for alleged invitation to collude).

9 15 U.S.C. §§ 45(a)–(b).

10 *See* David M. FitzGerald, Remarks Before the FTC 90th Anniversary Symposium, The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act 5 (Sept. 2004); *see also* Section 408 of the TransAlaska Pipeline Act (stating that "[i]t is the purpose of this Act to grant the [FTC] the requisite authority to insure prompt enforcement of the laws the [FTC] administers by granting statutory authority to . . . seek preliminary injunctive relief to avoid unfair competitive practices").

11 Letter from Lewis A. Engman to Hon. Henry M. Jackson, Chairman, Committee on Interior and Insular Affairs, 119 CONG. REC. 36,810 (Nov. 13, 1973).

12 15 U.S.C. § 53(b)(2).

13 *See* David K. Park & Richard Wolfram, The *FTC's Use of Disgorgement in Antitrust Actions Threatens to Undermine the Efficient Enforcement of Federal Antitrust Law*, ANTITRUST SOURCE 2 (Sept. 2002), http://www.american bar.org/content/dam/aba/publishing/antitrust_source/ disgorgement.pdf.

14 668 F.2d 1107 (9th Cir. 1982).

15 *Id.* at 1112–13 (finding that Section 13(b) carried with it the power to "grant any ancillary relief necessary to accomplish complete justice . . . .").

16 Park & Wolfram, *supra* note 13, at 3. These commentators further argue that the limited scope of Section 13(b) has been expanded incorrectly and without basis because Section 19, passed two years after Section 13(b), specifically provides for monetary equitable remedies but only in cases involving conduct that "a reasonable man would have known under the circumstances was dishonest or fraudulent," per 15 U.S.C. § 57b(a)(2). "The logical conclusion is that Congress never intended Section 13(b) as an authorization to the FTC to seek and obtain disgorgement or restitution, either for consumer fraud cases or antitrust cases." *Id.* at 3–4.

17 *See* discussion infra notes 18–51.

18 Complaint, *FTC v. Mylan Labs, Inc.*, No. 1:98-cv-03114 (D.D.C. Dec. 21, 1998).

19 *Id.* ¶ 19.

20 Press Release, FTC Reaches Record Financial Settlement to Settle Charges of Price-Fixing in Generic Drug Market (Nov. 29, 2000), https://www.ftc.gov/ news-events/press-releases/2000/11/ ftc-reaches-record-financial-settle ment-settle-charges-price.

21 Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part, *FTC v. Mylan Pharm., Inc.*, No. 9810146 (Nov. 29, 2000).

22 Statement of Chairman Pitofsky, Commissioner Anthony, and Commissioner Thompson, *FTC v. Mylan Pharm., Inc.*, No. 9810146 (Nov. 29, 2000).

23 Complaint, *FTC v. The Hearst Trust*, No. 1:01-cv-00734 (D.D.C. Apr. 4, 2001).

24 *Id.* at 30.

25 Press Release, Hearst Corp. to Disgorge $19 Million and Divest Business to Facts and Comparisons to Settle FTC Complaint (Dec. 14, 2001), https:// www.ftc.gov/news-events/press-releases/2001/12/hearst-corp-disgorge19-million-and-divest-business-facts-and

26 Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003).

27 The Policy did explain that the Commission would "consider [equitable] monetary remedies when it anticipates that other remedies are likely to fail to accomplish fully the purposes of the antitrust laws or when such a monetary remedy may provide important additional benefits." *Id.* at 45,822. For example, the Policy stated that the Commission may seek disgorgement to prevent a violator from benefiting from the violation where the "statutes of limitation for . . . private damage actions are likely to leave a violator with some or all of the fruits of its violation." *Id.* This example is consistent with the FTC's longstanding (and now incorrect) belief that it could seek monetary equitable remedies in cases where the alleged conduct is neither ongoing nor is about to occur.

28 Complaint, *FTC v. Perrigo Co.*, No. 1:04-cv-01397 (D.D.C. Aug. 12, 2004).

29 *Id.* ¶ 42.

30 Press Release, Generic Drug Marketers Settle FTC Charges (Aug. 12, 2014), https://www.ftc.gov/ news-events/press-releases/2004/08/generic-drugmarketers-settle-ftc-charges.

31 *Id.* at 1.

32 *FTC v. Lundbeck, Inc.*, 650 F.3d 1236, 1242–43 (8th Cir. 2011) (affirming the district court's judgment).

33 Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47,070 (Aug. 7, 2012).

34 *Id.*

35 *Id.*

36 *Id.* at 8.

37 Dissenting Statement of Commissioner Maureen K. Ohlhausen, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47,071 (Aug. 7, 2012).

38 *Id.* at 47,072.

39 *Id.*

40 Letter from R. Bruce Josten to FTC Chairman Jon Leibowitz (Aug. 22, 2012), https://www. uschamber.com/letter/letter-regarding-ftc-disgorgement.

41 Complaint, *FTC v. Cephalon, Inc.*, No. 2:08-cv-2141 (E.D. Pa. Feb. 13, 2008).

42 Press Release, 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 (May 28, 2015), https://www.ftc.gov/ news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delaycase-ensures-12-billion-ill.

43 Complaint, *FTC v. AbbVie, Inc.*, No. 2:14-cv-05151 (E.D. Pa. Sept. 8, 2014).

44 *FTC v. AbbVie Inc.*, 329 F. Supp. 3d 98, 143 (E.D. Pa. 2018). The FTC has since appealed the case, seeking greater equitable relief. *See* Opening Brief of the FTC at 3, *FTC v. AbbVie Inc.*, No. 18-2621 (Mar. 28, 2019).

45 Complaint, *FTC v. Endo Pharm.*, No. 2:16-cv-1440 (E.D. Pa. Mar. 30, 2016); Fed. Trade Comm'n, Endo Pharmaceuticals Inc. Agrees to Abandon Anticompetitive Pay-for-Delay Agreements to Settle FTC Charges; FTC Refiles Suits Against Generic Defendants (Jan. 23, 2017).

46 Complaint, *FTC v. Mallinckrodt Ard Inc.*, No. 1:17-cv-00120 (D.D.C. Jan. 25, 2017).

47 Press Release, Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained Its Monopoly of Specialty Drug Used to Treat Infants (Jan. 18, 2017). In addition to $100 million in disgorgement, the settlement between the FTC and Mallinckrodt required Mallinckrodt to grant a license to develop Synacthen Depot to a licensee approved by the Commission. *Id.*

48 No. 15-cv-3031 (S.D.N.Y. Apr. 20, 2015).

49 Complaint, *FTC v. Cardinal Health, Inc.*, No. 15-cv-3031 (S.D.N.Y Apr. 20, 2015).

50 Statement of the Commission on Cardinal Health, Inc. at 5, FTC File No. 101-0006 (Apr. 17, 2015).

51 Dissenting Statement of Commissioner Ohlhausen, Cardinal Health, Inc. at 1, FTC File No. 101-0006 (Apr. 17, 2015), https://www.ftc.gov/system/ files/documents/public_ statements/637761/150420cardinalhealth ohlhausen.pdf.

52 Complaint, *FTC v. Shire Viropharma Inc.*, No. 1:17-cv-00131-RGA (D. Del. Feb. 7, 2017).

53 917 F.3d 147 (3d Cir. 2019).

54 *Id.* at 149.

55 *Id.* at 154. The Third Circuit applied the standard announced in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006).

56 *Shire*, 917 F.3d at 155.

57 *Id.* at 156. On appeal, the FTC abandoned its longstanding argument that Section 13(b) contained two separate provisos, see supra note 2, which the district court had already rejected. *See FTC v. Shire ViroPharma, Inc.*, No. 17-131-RGA, 2018 U.S. Dist. LEXIS 45727, at *8–9 (D. Del. Mar. 20, 2018), *aff'd*, 917 F.3d 147, 157 n.14 (3d Cir. 2019).

58 *Shire*, 917 F.3d at 156.

59 *Id.* at 158.

60 *Id.* at 155–56.

61 Complaint, *FTC v. Perrigo Co.*, No. 1:04-cv-01397 (D.D.C. Aug. 12, 2004).

62 The FTC alleged in 2016 and 2017 that Endo paid different companies to delay their entry into particular drug markets until 2013. *See generally* Complaint, *FTC v. Allergan*, plc, No. 3:17-cv-00312-JCS (N.D. Cal. Jan. 23, 2017); FTC v. Endo Pharm., No. 2:16-cv-1440 (E.D. Pa. Mar. 30, 2016).

63 *See Shire*, 917 F.3d at 160 n.19 ("We also reject the FTC's standalone claim for equitable monetary relief. Assuming that such relief is available under Section 13(b), the FTC must still meet the 'is' or 'is about to' requirement.").

64 Complaint, *FTC v. Ovation Pharm.*, No. 08-6379 (D. Minn. Dec. 16, 2008).

65 Complaint ¶ 30, *FTC v. The Hearst Trust*, No. 1:01-cv-00734 (D.D.C. Apr. 4, 2001).

66 308 F. Supp. 3d 1280 (N.D. Ga. 2018).

67 *FTC v. Hornbeam Special Situations LLC*, No. 1:17-cv-3094, 2018 WL 6254580, at *4–5 (N.D. Ga. Oct. 15, 2018).

68 *Id.*

69 *See* 15 U.S.C. § 57b (a), (b).

70 The court can grant such relief as it "finds necessary to redress injury to consumers," including "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification . . . ." 15 U.S.C. § 57b(b).

71 15 U.S.C. § 57b(d).

72 *Kokesh v. SEC*, 137 S. Ct. 1635, 1640 (2017) (citing *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 91 (S.D.N.Y. 1970)).

73 The Court identified "three hallmarks of a penalty" that supported its conclusion that the SEC's use of disgorgement constituted a "penalty": (1) disgorgement is imposed to redress the violation of a matter of public law; and (2) for punitive purposes; and (3) disgorgement is not solely imposed to compensate victims because disgorged profits are paid to the district court. *Id.* at 1644–45.

74 *Id.* at 1642 n. 3.

75 M. Sean Royall, Richard H. Cunningham & Ashley Rogers, *Are Disgorgement's Days Numbered? Kokesh v. SEC May Foreshadow Curtailment of the FTC's Authority to Obtain Monetary Relief*, ANTITRUST, Spring 2018, at 94, 96. https://www.americanbar.org/content/dam/aba/publishing/antitrust_ magazine/anti-spring18-3-23.pdf.

76 Opening Brief of the Federal Trade Commission at 90–92, *FTC v. AMG Capital Management, LLC*, 910 F.3d 417 (9th Cir. 2018).

77 *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 427 (9th Cir. 2018).

78 *See Royall et al., supra* note 75, at 96; *see also FTC v. Credit Bureau Center LLC*, 937 F.3d 764 (7th Cir. 2019).