

# The Third Circuit Sharply Curtails the FTC's Preferred Enforcement Power

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On February 25, 2019, the United States Court of Appeals for the Third Circuit upset decades of Federal Trade Commission (FTC) practice by significantly limiting when the FTC can bring competition and consumer protection enforcement actions in federal court.

**Debevoise  
& Plimpton**

In *FTC v. Shire ViroPharma, Inc.*, the Third Circuit ruled that absent an allegation that a violation of the FTC Act (FTCA) “is” occurring or “is about to” occur, the FTC is limited to its administrative enforcement mechanism. This means that the FTC largely has lost its ability to seek injunctive and monetary relief for past violations that are not ongoing in Delaware, New Jersey, Pennsylvania, and the Virgin Islands. The decision could impact other Circuits as well. A consumer protection case presenting the same issue, *FTC v. Hornbeam Special Situations, LLC*, No. 1:17-cv-3094 (N.D. Ga.), is headed to the 11th Circuit.

## PROCEDURE FOR ENFORCEMENT OF THE FTCA

The FTCA declares unlawful “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” The FTC can enforce the FTCA through two relevant processes: (a) administrative enforcement under FTCA Section 5(b); or (b) judicial enforcement under FTCA Section 13(b). (The third process, the FTC’s rulemaking authority under FTCA Section 18, is not implicated by the Third Circuit’s decision and is not addressed in this Update.)

Under Section 5(b), the FTC issues a complaint that, if the respondent contests, is adjudicated before an administrative law judge in a trial under the FTC’s Rules of Practice. In this administrative proceeding, the FTC’s remedy primarily is limited to a cease-and-desist order. With a final cease-and-desist order, the FTC can seek in federal court either: (1) penalties for violations of that order; or (2) in consumer protection cases only, penalties or other equitable relief if a “reasonable man” would have known that the underlying activity was dishonest or fraudulent.

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Section 5(b) permits the FTC to challenge a respondent that “has been or is” violating the FTCA. The FTCA originally did not provide for injunctive relief pending the completion of the administrative process. So in 1973, Congress added Section 13(b) to permit the FTC to sue directly in federal court to obtain preliminary or permanent injunctive relief and/or various kinds of monetary equitable relief. Because it was intended to allow the FTC to preserve the status quo, Section 13(b) is limited to situations where a party “is violating, or is about to violate” the FTCA. The FTC’s position, long adopted by courts, has been that the Section 13(b) “is about to violate” requirement is satisfied by showing a prior violation and a “reasonable likelihood of recurrence.”

The FTC typically has made a strategic decision to proceed under Section 13(b) because it enables the FTC to obtain prohibitory and monetary equitable relief in one step and any injunctive relief granted can take effect immediately. As a result, the FTC initiates the vast majority of its enforcement actions in federal court without regard to whether a violation is ongoing or imminent.

## **BACKGROUND FACTS AND DISTRICT COURT DISMISSAL**

Shire submitted 43 filings with the Food and Drug Administration (FDA), including alleged “sham” Citizen’s Petitions, and filed three lawsuits against the agency in a purported effort to delay generic competition to its branded prescription drug, Vancocin. In April 2012, the FDA rejected Shire’s petitions and approved the applicable generic drug. In 2015, Shire divested itself of Vancocin.

In February 2017, nearly five years after cessation of the petitions and generic entry, the FTC filed suit in the District Court for the District of Delaware under Section 13(b) seeking a permanent injunction and restitution. The FTC alleged that Shire violated the FTCA’s prohibition against unfair methods of competition because the petitioning permitted Shire to maintain and extend its monopoly by delaying FDA approval of the generic Vancocin, thereby harming consumers and competition.

Shire moved to dismiss, arguing that the FTC’s allegations of its past petitioning activity failed to satisfy Section 13(b)’s requirement that Shire “is violating” or “is about to violate” the law. Consistent with past practice, the FTC alleged that Shire had a general motive and speculative opportunity to engage in similar conduct in the future. In a break with longstanding precedent, the district court agreed with Shire and dismissed the case.

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### AFFIRMANCE IN THE THIRD CIRCUIT

In the Third Circuit, the FTC boldly argued that: (1) the proper standard for the “about to violate” prong was a “likelihood of recurrence” standard with no temporal element; and (2) the FTC’s determination that a violation was “likely to recur” is not reviewable. The FTC also predicted a series of consequences that would ensue should the Third Circuit affirm, including a wrongdoer’s ability to render itself immune to suit in federal court by ceasing the investigated activity and the FTC’s inability to recover monetary relief, such as the over \$8 billion paid to date by Volkswagen for purportedly having rigged its vehicles to cheat the emissions test.

The Third Circuit upheld the dismissal, “reject[ing] the FTC’s invitation to stretch Section 13(b) beyond its clear text.” Concluding that the “language is unambiguous,” the Court ruled that “[s]imply put, 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.” The Court “[e]ft for another day the exact confines” of “about to violate,” merely concluding that the FTC in this case had “failed to state a claim under any reasonable definition.” In a footnote, the Third Circuit made clear that its ruling covered both injunctive and equitable monetary relief under Section 13(b).

The Court reminded the FTC that it retained the ability under Section 5(b) to pursue past violations and to seek an injunction under Section 13(b) if a wrongdoer was “about to violate” the law. On the facts of this case, the Court questioned whether the FTC’s decision to wait five years after Shire’s cessation of petitioning would “ha[ve] the potential to discourage lawful petitioning by interested citizens—activity that is protected by the First Amendment.” The Third Circuit “suggest[ed] that the FTC be mindful of such First Amendment concerns.”

### THE FTC’S NEXT STEPS

The FTC could seek a rehearing or a rehearing *en banc* from the Third Circuit, and may ultimately seek Supreme Court review. But given Shire’s bad facts and a strong possibility that the current Supreme Court would agree with the Third Circuit’s “plain language” analysis, the FTC may not want to risk extending this ruling beyond the Third Circuit. The FTC may instead prefer to seek legislative intervention. Many FTC reform bills have been introduced in Congress in recent years, and this decision could lead to the introduction of additional bills in the 116th Congress.

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**HOW THIS DECISION MIGHT AFFECT YOU**

Section 13(b) has been a cornerstone of the FTC's consumer protection and competition enforcement efforts. This decision will have immediate, far-reaching ramifications on that strategy's use in the Third Circuit for both antitrust and consumer protection (including false advertising and privacy/cybersecurity) matters.

In competition cases involving past violations of the FTCA that are not ongoing, the FTC will be unable to recover monetary redress (disgorgement or restitution). And in consumer protection cases involving past violations of the FTCA that are not ongoing, the FTC will only be able to obtain consumer redress (disgorgement or restitution) via a lengthy two-step process whereby the FTC must first obtain a final cease-and-desist order in an administrative proceeding. This decision also may impact the petitioning of the FDA by innovator pharmaceutical companies concerned about the safety and/or efficacy of generic drugs.

The FTC generally does not bring suit without first conducting a thorough investigation. If this decision holds, and particularly if it expands beyond the Third Circuit, a party that is the subject of an FTC investigation should give strategic consideration whether to cease or reform the allegedly offending conduct and make commitments to not do so in the future. Similarly, private equity funds and strategic acquirers in corporate transactions will have even more incentive to curtail immediately after closing questionable conduct identified during due diligence. Limiting the FTC to its administrative processes and remedies may limit a party's downside risk when it is alleged to have engaged in conduct that violates the FTCA.

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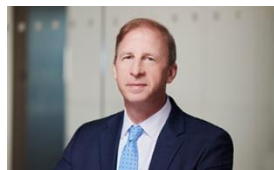
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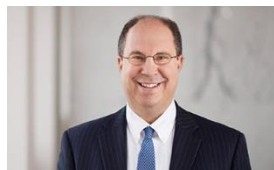
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