

Will the Supreme Court Limit the FTC's Use of Section 13(b) Court Actions?

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The FTC's authority to seek permanent injunctive relief and monetary relief under Section 13(b) of the FTC Act is being called into question. While more commonly used in consumer protection cases, Section 13(b) has been used by the FTC to seek injunctive relief and equitable relief in competition cases as well. Just this week, the FTC filed an antitrust complaint pursuant to Section 13(b) against Vyera Pharmaceuticals, LLC and "Pharma Bro" Martin Shkreli, seeking permanent injunctive relief and equitable relief, including monetary relief, for an alleged elaborate anticompetitive scheme to preserve a monopoly for the life-saving drug, Daraprim. Whether the FTC will be able to continue this practice is being disputed, and the issue has been presented to the U.S. Supreme Court for review.

The FTC itself is asking the Court to take up the issue and overturn a Seventh Circuit decision in a consumer protection case that conflicts with other circuits' holdings that Section 13(b) includes the authority to require wrongdoers to return money that they illegally obtained. The August 2019 decision held that Section 13(b) authorizes only restraining orders and injunctions and not, as the FTC has long viewed it, restitution.

According to the FTC's petition for review, seven courts of appeals have held that district courts exercising that authority may enter an injunction that requires

defendants to return to the victims of their wrongdoing funds obtained through their illegal activity, and now one has held the opposite. The agency noted that until this recent Seventh Circuit decision, the courts of appeals (including the Seventh Circuit) had uniformly held for more than 35 years that a district court's authority to grant a permanent injunction under Section 13(b) included the authority to require wrongdoers to return money that they illegally obtained.

In its petition, the FTC contended that the appellate court's analysis of Section 13(b) was incorrect. "The court's cramped view that injunctions are strictly limited to prohibitions on future misconduct contradicts historical understanding of that remedy." In addition, the issue is recurring in that the FTC brings dozens of cases each year seeking injunctions that return funds to consumers under Section 13(b), it was asserted (*FTC v. Credit Bureau Center, LLC*, Dkt. No. 19-825).

Two earlier petitions that also question the FTC's ability to collect monetary relief under Section 13(b) were referenced in the FTC's filing. These petitions, which seek review of Ninth Circuit decisions, were prompted by the split among the circuits created by the August 2019 Seventh Circuit decision (*AMG Capital Management, LLC v. FTC*, Dkt. 19-508; *Publishers Business Services, Inc. v. FTC*, Dkt. 19-507).

More recently, the credit monitoring service in the Seventh Circuit case has filed a conditional cross petition for writ of certiorari. The company asks whether Section 13(b)'s second proviso providing that the FTC "may seek" a permanent injunction is an independent grant of authority to "file suit" seeking implied consumer redress remedies circumventing the elaborate enforcement scheme set by Congress in Section 19 of the Act. The Seventh Circuit had upheld an injunction but vacated a \$5 million restitution award. The petitioners contend that, while the Seventh Circuit correctly held that the FTC may not seek to use Section 13(b) as authority to imply restitutionary authority, the court did not go far enough (*Credit Bureau Center, LLC v. FTC*, Dkt. 19-914).

According to the petition, Section 13(b) does not explicitly or implicitly authorize the FTC's authority to file full-fledged lawsuits imposing receiverships and pursuing document and deposition discovery, restitution, and disgorgement. The section expressly authorizes the commission to "file suit" to enjoin allegedly false, misleading or deceptive trade practices with a temporary restraining order or preliminary injunction "pending the issuance of an administrative complaint"

within 20 days of the grant of the requested relief. The petitioners note that Section 19 of the FTC Act provides an elaborate enforcement scheme that authorizes the FTC to file direct enforcement actions in the district court for relief; however, that provision is limited to rule violations.

“The agency set out on a campaign to persuade the courts that Section 13(b) was a full, unqualified grant of equitable relief despite the fact Section 13 lacked the same language in Section 19 authorizing ‘relief may include, but shall not be limited to’ or the authority to grant ‘such relief as the court finds necessary to redress injury to consumers,’” the petitioners contended. They argued that the district court should have dissolved the preliminary injunction in the case once the FTC failed to file an administrative complaint within twenty days of the date of issuance of injunctive relief.

While the current questions pending before the High Court were raised in consumer protection cases, the FTC’s competition mission could also be impacted if the Court were to take the case and uphold the Seventh Circuit’s decision.