

Dispute Over Restitution Power Threatens FTC Antitrust Tool

By **Christopher Cole**

Law360 (July 14, 2020, 9:05 PM EDT) -- The Federal Trade Commission's disgorgement power, probably best known to the public for whopping judgments and settlements meant to shield consumers from scams, has evolved into a key antitrust enforcement tool, but it's a weapon the FTC could soon be forced to sheathe.

The U.S. Supreme Court recently took up a pair of circuit court rulings addressing whether the FTC's authority to seek court injunctions also allows it to demand that companies cough up ill-gotten gains. One from the Seventh Circuit rejected the FTC's authority to demand disgorgement, and another from the Ninth upheld it.

By choosing to take the cases, the justices have waded into a debate that has simmered not only in the judiciary, but inside the commission for years: whether the Federal Trade Commission Act gives the agency authority to order restitution to consumers who have been hurt by fraud and other misconduct in the marketplace.

The impact on antitrust enforcement could be long-lasting, FTC observers say, because even though the agency uses disgorgement more frequently in consumer protection, it also claims the same authority to go after profits made by collusive conduct. Major examples include the FTC's win of a huge disgorgement from drug giant AbbVie and a \$1.2 billion settlement with Cephalon over generic-drug delays.

The key issue presented by the two cases from the Seventh and Ninth circuits, which the high court consolidated and **agreed to review**, is the FTC's longtime argument that the Federal Trade Commission Act's 13(b) section allows it to seek monetary equitable relief.

Because the statute limits actions the FTC may take against bad actors to "temporary restraining orders" and "injunctions," some in industry argue that disgorgement doesn't fall under its authority. One of the cases also challenged the FTC's ability to pursue cases directly in district court without an administrative process first, but the high court declined to review that question.

The justices' review of FTC authority follows the recent decision in *Liu v. U.S. Securities and Exchange Commission*, which appeared to clarify what qualifies as equitable relief by affirming that the SEC could force profit disgorgement within certain limits. But the court has yet to rule on how the FTC is affected, particularly whether injunctions qualify as a form of equitable relief.

If the Supreme Court ends up reining in the FTC on disgorgement, the agency would lose a major deterrent to collusive conduct, experts told Law360.

"The Supreme Court's consideration of the 13(b) cases is a huge deal for the FTC's antitrust work, particularly in conduct cases," Alexis Gilman, partner in Crowell & Moring's Antitrust Group in Washington, D.C., said in an email.

The FTC might have to ask Congress to restore its restitution powers if the justices curtail the commission's authority, he said.

Pharma's Bitter Pills Show FTC's Might

The courts over the decades have largely upheld the FTC's use of disgorgement, a point that is not lost on anyone watching some of its larger pharmaceutical antitrust cases.

The FTC scored one of its marquee wins in the competition arena with a \$448 million disgorgement against AbbVie Inc. and a subsidiary. In the Third Circuit, AbbVie is trying to overturn a lower court's 2018 order for AbbVie and an affiliate to disgorge profits from sales of the blockbuster AndroGel, raked in allegedly with the help of sham lawsuits to keep generic competitors at bay.

That case dates back years and landed at the Third Circuit in 2018, when the commission told an appeals panel that a lower court had too quickly dismissed a claim that AbbVie paid off Teva to delay releasing a generic.

Lawyers for each side wrote to the appeals court right after Liu, with both **claiming the decision** backs up their contrasting views on whether the FTC wields the statutory power to collect ill-gotten profits. Taking the textualist view, the company pointed out that the court did not name injunctions as a form of equitable relief.

But the commission noted that in Liu, the justices cited the Supreme Court's 1946 holding in Porter v. Warner Holding Co. "that a statutory grant of injunctive authority invokes the district court's equity jurisdiction."

The FTC notched another victory in the pharmaceutical industry with its \$1.2 billion agreement several years ago with Cephalon that forced it to shell out profits from a pay-for-delay scheme.

Experts say the cases demonstrate that losing restitution power in the impending Supreme Court case would amount to a blow to the FTC's competition enforcement.

"Disgorgement is an important tool in the FTC's arsenal," Michael Carrier, a professor at Rutgers Law School, told Law360 in an email. "Sometimes wrongdoing is so profitable that a potential antitrust damages award is viewed as just the cost of doing business. Disgorgement can alter that assessment."

The FTC has broadly used its disgorgement power in competition, noted Gilman, who was assistant director of the FTC's Mergers IV Division.

"Although the cases that the court will consider are consumer protection cases, the FTC also uses 13(b) to seek monetary relief in antitrust conduct cases," he said, noting that the agency had even used

13(b) to obtain monetary relief over a consummated acquisition.

That result was reached in January 2017 when Mallinckrodt ARD Inc. — formerly Questcor Pharmaceuticals Inc. — and its parent company agreed to pay \$100 million to settle FTC charges that they violated the antitrust laws when Questcor acquired the rights to a drug that threatened its monopoly in the U.S. market for adrenocorticotrophic hormone.

"So if the Supreme Court rules that 13(b) does not permit the FTC to obtain monetary relief in federal court, only injunctions, that will take away one of the FTC's big enforcement 'sticks,'" Gilman said.

He added that the cases that the Supreme Court will hear follow on recent cases in lower courts that constrain the FTC's ability to obtain injunctive relief for past conduct. So the high court outcome "could be the first of a tough 1-2 punch to the FTC's enforcement efforts if they go against the agency," he said. "If so, the FTC would want to see legislation to fix any hole in its enforcement arsenal."

The Liu decision has figured in another dust-up over the FTC using its claimed restitution power, *FTC v. Surescripts LLC*. That case, in D.C. federal court, deals with whether the e-prescription company secured monopolies over certain segments of its industry. Surescripts has disputed the notion that it represents a "proper case" for an FTC injunction.

Both sides filed briefs Monday at the district court's request that they address Liu, each contending that Liu backed up its position. Surescripts said that even though the FTC cases granted Supreme Court review will bring clarity, Liu's analysis "already casts further doubt over whether Section 13(b) authorizes disgorgement."

"The FTC cannot point to any statutory language that authorizes it to seek disgorgement because it does not exist, and it most certainly cannot point to anything favorable on this point in Liu," the company said.

But the FTC argued that Liu upheld the SEC's disgorgement power as a form of equitable relief, though it said the ruling "did not raise or address any substantive antitrust issues that would affect Surescripts's potential liability," so it did not have an immediate impact on the case at hand.

FTC Shifts Goalposts On Disgorgement

The commission has not always voiced a full-throated defense of its claimed monetary relief powers in antitrust. In 2003, it took steps to put some limits on when use of the authority was appropriate in competition cases, even issuing a policy statement to that effect.

But the FTC rescinded that statement almost a decade later, with one commissioner at the time, Maureen Ohlhausen, strongly objecting to the withdrawal.

After voting to ditch the policy, the commission stated that "the practical effect of the [statement] was to create an overly restrictive view of the commission's options for equitable remedies." Instead the commission said it would rely on existing law, "which provides sufficient guidance on the use of monetary equitable remedies." The commission said after the 2012 vote that it would "exercise responsibly its prosecutorial discretion in determining which cases are appropriate for disgorgement."

But in a scathing dissent, Ohlhausen said the commission had gone too far in relaxing the guidelines. She

noted that the commission was effectively abandoning a three-part test set out in the written policy, which stated that the commission will ordinarily seek monetary relief only where the underlying violation is clear; that there must be a reasonable basis for calculating the amount of a remedial payment; and that the commission will consider the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings.

Ohlhausen said that by rescinding the policy, the commission had signaled it would seek competition disgorgement even in cases "where the alleged antitrust violation is not clear or where other remedies would be sufficient to address the violation. I have significant concerns about sending such a signal and seeking disgorgement in such situations."

According to Stephen Calkins, a professor at Wayne State University Law School who was FTC general counsel during the Clinton administration, the FTC has been relying on the statute since the early 1980s to argue, successfully, that the language "confers on courts sweeping equitable powers."

"Dozens of times a year the FTC goes to federal court to seek equitable remedies such as disgorgement and consumer redress," he said in an email. Until the decision by the Seventh Circuit that the FTC has taken to the Supreme Court, "every court of appeals to address the issue had agreed that the FTC has this authority," he said.

Most such cases challenge what the FTC alleges are unfair or deceptive acts or practices, but starting in 2000, the FTC, noting that 13(b) applies to both of its missions, started bringing occasional competition disgorgement cases, Calkins said.

After the policy statement was repealed in 2012, the agency has brought such cases about once a year, he said, observing that 13(b) equitable relief "is a modest but important part of what the FTC does on the competition side."

An FTC spokesman, while not commenting directly on the Supreme Court case as it relates to antitrust, emphasized what the commission had argued in its petition for high court review. In those papers, the FTC urged tackling the Seventh Circuit's ruling because it broke from what other appeals courts have held.

"Until the split is resolved, the FTC Act will mean one thing in the Seventh Circuit and something different in seven other circuits," the FTC said, predicting a long period of litigation if it's not addressed. "The upshot is commission resources spent on procedural fencing rather than enforcement action."

The FTC spokesman also pointed out figures compiled by the agency showing the impact of monetary relief on consumers' behalf in sheer dollars. From July 1, 2018, until Dec. 31, 2019, the agency got a total of \$1.2 billion refunded to consumers, according to the data.

Even though the stakes are high in the pair of Supreme Court cases, which will also review a decision favorable to the FTC in the Ninth Circuit, the U.S. solicitor general has mostly stayed out of the fray. The commission is representing itself in trying to kill the Seventh Circuit ruling.

The solicitor general did file a response in the Ninth Circuit case, but primarily to urge the court to hold off on deciding the 13(b) issue until Liu was decided.

Daniel Walker, a shareholder at Berger Montague, told Law360 in an email that disgorgement is critical

to antitrust enforcement in the "conduct," or non-merger cases because it is "really the only deterrent to violating the antitrust laws, especially in monopolization cases where there is really no threat of criminal prosecution."

"Beyond deterrence, it is also a matter of equity to require the return of ill-gotten gains," said Walker, who worked in the FTC's Health Care Division and litigated the AbbVie and Cephalon cases.

Walker said he also thinks the government should win the Supreme Court battle because the analysis in the Seventh Circuit opinion hinges on an overreading of the Supreme Court case law, "and it would be absurd to think that Congress meant to grant the FTC the ability to stop illegal behavior but no mechanism to require the return of ill-gotten gains."

"But it is not a slam dunk for the FTC, as evidenced by the fact that the [solicitor general] didn't file the cert petition," he said.

--Editing by Peter Rozovsky.