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In Victory for WLF, Appeals Court Limits FTC's Authority to Sue for Injunctive Relief

(*FTC v. Shire ViroPharma Inc.*)

“To sue for an injunction against those it believes are engaged in unfair competition, the Federal Trade Commission must demonstrate that the defendant either is or is about to violate the law. The court correctly determined that FTC abuses its power when it seeks injunctions based solely on claims that its target violated the law in the past and might do so again at some unspecified future date.”

—Richard Samp, WLF Chief Counsel

WASHINGTON, DC—The U.S. Court of Appeals for the Third Circuit sharply curtailed the Federal Trade Commission’s (FTC) enforcement powers, ruling that Congress has strictly limited the FTC’s statutory authority to file lawsuits for injunctive relief against those it accuses of having engaged in unfair competition. The decision in *FTC v. Shire ViroPharma Inc.* was a victory for the Washington Legal Foundation (WLF), which filed a brief arguing that Congress limited the FTC’s authority to file suit to those instances in which a defendant “is violating, or is about to violate” the Federal Trade Commission Act. Quoting directly from WLF’s brief, the court agreed that the about-to-violate standard requires the FTC to provide evidence of the defendant’s near-term plans.

The FTC’s lawsuit contended that a drug company filed a “sham” petition with the Food and Drug Administration for the purpose of delaying FDA approval of generic versions of its brand-name drug. But the FTC did not file its lawsuit until 2017, five years after the drug company had ceased its petitioning activity and five years after generic competition began. The FTC asserted that it satisfied the “about to violate” standard because there was a “reasonable likelihood” that the defendant—based on its past behavior and the fact that it continues to manufacture other brand-name drugs—would renew its “sham” petitioning activity. The district court disagreed and dismissed the lawsuit, ruling that the FTC Act’s “about to violate” standard requires a showing that the defendant is likely to act in the near term. The Third Circuit today affirmed that ruling.

The court held that the FTC’s proper procedure, when it concludes that a business may have violated the FTC Act, is to initiate administrative proceedings. If, at the end of those proceedings, the FTC finds against the company, it may issue a cease-and-desist order to prevent future violations. The court agreed with WLF that FTC is authorized to turn immediately to federal courts for injunctive relief only when the business is currently violating or is about to violate the law; Congress granted that authority to ensure that businesses would not be able to continue with their wrongdoing during the months or years it takes to complete administrative hearings.

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