Court Dismisses FTC Antitrust Lawsuit Alleging That Shire ViroPharma Inc. Abused Government Processes to Delay Generic Competitors

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In recent years, the Federal Trade Commission (FTC) has brought a series of cases involving drug manufacturers allegedly seeking to delay competition from generic drug companies. *See, e.g., F.T.C. v. Actavis, Inc.*, 570 U.S. 136 (2013) (Actavis allegedly entered into reverse payment settlements to delay the entry of generic drug competition). The case described below involving Shire ViroPharma Inc. is another recent example of the FTC's actions in this field.

Notwithstanding the FTC's aggressiveness in this area, a Delaware federal court recently dismissed the FTC's suit against Shire ViroPharma Inc. in *Federal Trade Commission v. Shire ViroPharma Inc.*, No. 17-cv-131 (D. Del. Mar. 20, 2018). On February 7, 2017, the FTC filed a complaint in the U.S. District Court for the District of Delaware alleging that ViroPharma engaged in an unfair method of competition in violation of Section 5(a) of the FTC Act. The FTC alleged that ViroPharma abused government processes to slow the approval by the U.S. Food and Drug Administration (FDA) of a generic drug to compete with its branded prescription drug, Vancocin HCl Capsules. The complaint alleged that between 2006 and 2012, ViroPharma engaged in an anticompetitive campaign of repetitive and meritless filings with the FDA along with related litigation to delay and obstruct the entry of generic competitors and therefore maintain its monopoly on Vancocin. The FTC's suit sought a permanent injunction against ViroPharma under Section 13(b) of the FTC Act.

In its motion to dismiss, ViroPharma argued that the FTC must demonstrate that ViroPharma "is violating, or is about to violate" a law enforced by the FTC in order to obtain a permanent injunction pursuant to Section 13(b) and that the FTC failed to do so. ViroPharma also argued that its activities were protected petitioning activity under the *Noerr-Pennington* doctrine which gives broad immunity from liability to those who petition the government, including administrative agencies and courts, for redress of their grievances.

On March 20, 2018, Judge Richard Andrews granted ViroPharma's motion to dismiss. The court agreed that the FTC failed to make a required showing that ViroPharma was violating (or was about to violate) a law enforced by the FTC. After reviewing Section 13(b)'s statutory language and legislative history, the court held that the second provision does not create an independent grant of authority. The court explained that the language "is violating, or is about to violate" is not properly understood to mean that the violation is merely "likely to recur." The court rejected the FTC's argument that its 46-page complaint alleged facts that plausibly suggested that ViroPharma "is about to violate" a law enforced by the FTC, especially in light of the fact that the alleged misconduct ended almost five years before the complaint was even filed. The court also held that the FTC's allegations were sufficient to overcome the *Noerr-Pennington* doctrine because the issue of whether ViroPharma's activity was in fact a sham constitutes a factual inquiry that could not be resolved at the motion to dismiss stage.

The decision expressly granted the FTC leave to amend its complaint within a reasonable time. The decision on whether to amend and refile may ultimately be resolved by President Trump's FTC nominees currently awaiting Senate confirmation. In late February of 2018, the Senate Committee on Commerce, Science and Transportation voted to advance President Trump's four nominees for seats on the FTC, but the nominees are still awaiting full Senate confirmation and it is unclear when

this will occur.[1] Because the two current commissioners plan to leave the agency when their successors are confirmed,[2] the incoming commissioners will likely be the final arbiters of any decision involving whether to amend and refile or how to proceed.

If your company is a brand or generic manufacturer, you should continue to monitor this closely to determine how the law develops in this area. These cases are becoming frequent in nature, and this will likely continue.

If you have any questions regarding antitrust issues, please contact Jeffrey S. Jacobovitz, Chair of Arnall Golden Gregory's Antitrust Group. Mr. Jacobovitz is a former attorney in the Bureau of Competition at the FTC. Bradford J. Kelley is an Associate in Arnall Golden Gregory LLP's Washington, D.C. office.

1 *See Daniel R. Stoller*, "Trump FTC Picks Get Valentine's Day Confirmation Hearing," Bloomberg BNA (Feb. 8, 2018), https://www.bna.com/trump-ftc-picks-n57982088546.
2 *See id.*

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