Another Court of Appeals Rules Against the FTC on Disgorgement Issue

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Court reverses award of $448 million in ill-gotten gains

The Court of Appeals for the Third Circuit rejected a district court's award of $448 million against a pharmaceutical company in a lawsuit brought by the Federal Trade Commission (FTC). In an antitrust case styled FTC v. AbbVie, Inc. (decided on September 30, 2020), the Third Circuit ruled that district courts lack the power to order disgorgement under the FTC Act. While the Third Circuit ruled in favor of the FTC on other issues in this case, the reversal of the disgorgement award the FTC is the focus of this blog entry.

Although the FTC and the Securities and Exchange Commission (SEC) are governed by separate statutes, both agencies commonly ask federal courts to award disgorgement, a legal remedy that requires the repayment of all ill-gotten gains to the government (not the victims) by the wrongdoers, without regard to whether those gains were actual profits or are still in the possession of the wrongdoers. For many years, both the SEC and FTC have obtained disgorgement by making the argument that, despite no explicit statutory language permitting such recovery, disgorgement is a form of equitable relief that is generally available to them. In the case of the FTC Act, disgorgement is not even mentioned, but it is often awarded by courts pursuant to Section 13(b), which was added to the FTC Act in 1973 to address concerns that the FTC’s administrative regime moved too slowly. In recent years, however, courts have been chipping away at the concept of allowing disgorgement as a remedy when the statutes in question are silent.

The AbbVie ruling is another move forward in that trend. The Third Circuit’s rationale is based on the precedent established earlier in the year by the U.S. Supreme Court in Liu v. SEC. Liu, however, was decided under the Securities Exchange Act of 1934, whereas the AbbVie ruling specifically applies to the similarly worded FTC Act.

The Third Circuit has now concurred with a previous Seventh Circuit ruling, FTC v. Credit Bureau Center, which also refused to allow the FTC to obtain disgorgement. But circuit courts are not unanimous in this area of the law. The Supreme Court recently consolidated the Credit Bureau case with another disgorgement case, AMG Capital Management v. FTC, a Ninth Circuit ruling that permitted the FTC to obtain disgorgement. A Fall 2020 term hearing and subsequent ruling from what will likely be a more conservative Supreme Court will resolve the conflict between the circuit courts, a process that will not be concluded until 2021.

TAKEAWAY: Defendants continue to have success fighting the government on the issue of disgorgement. Until the Supreme Court makes a clear ruling on the legal limits that apply to the government’s recovery efforts, it is important to have attorneys that can both devise and set forth a well-reasoned argument in support of civil defendants in government actions.

Tags: FTC