FTC Unveils New Strategy in "Pharma Bro" Case

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Court allows FTC to withdraw disgorgement claims with eye towards possible reinstatement.

The Federal Trade Commission has formulated a new strategy to avoid dismissal of its claims for restitution and disgorgement. On April 22, 2021, the U.S. Supreme Court held in *AMG Capital Management, LLC v. FTC* that Section 13(b) of the FTC Act does not authorize the FTC to obtain monetary relief such as restitution or disgorgement directly from district courts. This was a big blow to the FTC’s enforcement efforts because it was seeking equitable monetary relief in many current cases. One such case is the “Pharma Bro” case against Martin Shkreli and Vyera Pharmaceuticals in the Southern District of New York, where the Defendants are accused of anti-competitive behavior that kept the price of Daraprim, a life-saving drug, astronomically high.

The Pharma Bro Defendants indicated they would seek partial summary judgment based on the recent Supreme Court ruling, but the FTC devised a loss-cutting tactic to keep alive the possibility of recovering restitution and/or disgorgement if Congress passed a new law allowing such remedies. The strategy is to ask the Court’s permission to withdraw the claims for now, but with a stipulation that they can be reinstated if Congress amends the law in the future. An amendment is already in the works, as a proposed bill has already been drafted which specifically allows the reinstatement of restitution and disgorgement claims for any lawsuit that is pending on the potential date of the bill’s enactment.

Another plaintiff in the case, the State of New York, argued that the Supreme Court left New York law unaffected, and the remedies were still available under state law.

The Defendants opposed both the FTC and the State of New York, but Judge Denise L. Cote ruled in favor of the Plaintiffs. She ordered that “in the event Congress passes legislation authorizing the FTC to seek equitable monetary relief, the FTC may request to reinstate its prayer for equitable monetary relief.” As for the State of New York, Judge Cote permitted the Defendants to move for partial summary judgment, but adopted New York’s proposed briefing schedule, which will stretch out until September, thus buying the FTC some time to advocate for new federal legislation.

**TAKEAWAY:** With a possible amendment to the FTC Act in the works, the FTC has implemented a strategy that would allow it to preserve claims for restitution and disgorgement, even though such remedies are not currently available to it. The first reported ruling on this tactic has succeeded, giving the FTC the chance to seek reinstatement of the claims in the event that new legislation is passed by Congress.

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