Antitrust, Vol. 35, No. 1, Fall 2020.

High Stakes at the High Court: The FTC's Disgorgement Authority Comes Before the Supreme Court

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THE FEDERAL TRADE COMMISSION HAS long relied on Section 13(b) of the FTC Act to obtain disgorgement or restitution in fraud and other consumer protection cases filed in federal court. More recently—and particularly since 2012—the agency has sought disgorgement as a remedy in antitrust cases with increasing frequency, including settling one case for $1.2 billion and obtaining a district court decision requiring the disgorgement of nearly $500 million in another.

The FTC had successfully convinced no fewer than seven U.S. Courts of Appeal that Section 13(b) authorizes courts to order divestiture of ill-gotten gains, notwithstanding the fact that the statute includes no mention of disgorgement, restitution, or any other equitable monetary relief. That decades-long effort, however, was dealt a significant blow last year before the Seventh Circuit, which ended the agency's unbeaten streak in the appellate courts, created a circuit split, and ultimately led the Supreme Court to grant certiorari to address the FTC's authority to seek disgorgement under 13(b).[1]

There is a substantial likelihood that the Court will find that the FTC lacks such authority. If so, there likely will be a push for Congress to amend 13(b) to allow the agency to seek such relief in both consumer protection and antitrust cases. As for the latter, Congress will need to consider whether the FTC needs the authority to seek disgorgement in order to effectively enforce the antitrust laws, and, if so, under what circumstances the agency should be able to seek such far-reaching relief. The stakes for the agency, the businesses subject to its jurisdiction, and the enforcement of the antitrust laws are considerable.

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FTC Pursuit of Disgorgement in Antitrust Cases

Origins of Section 13(b). Section 13(b) allows the FTC to obtain injunctive relief—including temporary restraining orders, preliminary injunctions, and permanent injunctions—in federal court. Prior to the enactment of 13(b) in 1973, the FTC was limited to seeking cease-and-desist orders through its internal administrative litigation process and, in merger matters, injunctive relief through the All Writs Act.[2] Congress passed 13(b) to allow the FTC to seek more timely injunctive relief, particularly in consumer fraud cases, where the administrative route was taking too long for the agency to obtain meaningful relief for consumers in the form of an order preventing or ending the challenged conduct.

Section 13(b) provides in relevant part that "[w]henever the Commission has reason to believe that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC], and that the enjoining thereof pending the issuance of a complaint by the Commission . . . would be in the interest of the public" the agency can seek and "[u]pon a proper showing" a district court may grant a temporary restraining order or preliminary injunction.[3] The FTC typically invokes this provision to obtain preliminary injunctive relief where it is simultaneously pursuing administrative litigation. For example, when challenging an unconsummated merger, the FTC will seek a preliminary injunction in federal court to prevent the closing of the transaction while the agency pursues the case administratively. Section 13(b) also provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."[4] It is this permanent injunction provision that the FTC cites as providing the statutory justification for its efforts to obtain disgorgement.

The authority provided by Section 13(b) served as the foundation for the FTC's fraud program, which began in the early 1980s and included a determined effort to convince federal courts to issue asset freezes against, and order restitution from, defendants engaged in unfair or deceptive acts or practices. The agency was successful in this legal strategy in significant part because it "used Section 13(b) for a narrow class of cases involving fraud, near fraud, or worthless products."[5] As a result, there was minimal opposition to the FTC's and ultimately the courts' expansive interpretation of 13(b) to permit that kind of monetary relief.

Selective Pursuit of Disgorgement in Antitrust. The FTC obtained its first significant disgorgement remedy

in an antitrust case in 2000, with Mylan Laboratories, Inc. agreeing to pay $100 million to settle allegations that it monopolized the markets for two anti-anxiety drugs through exclusive supply agreements with the sole suppliers of the drugs' active ingredients.[6] Shortly thereafter, the agency reached a settlement with The Hearst Corporation, which agreed to disgorge $19 million after allegedly acquiring its only competitor in the market for drug information databases and withholding key Item 4(c) documents from its Hart-Scott-Rodino filing for the acquisition.[7]

Then in 2003 a unanimous Commission issued a policy statement laying out criteria it would consider in seeking disgorgement in antitrust cases (2003 Policy Statement). Because the agency at the time did "not view monetary disgorgement or restitution as routine remedies for antitrust cases," it committed to limiting such remedies to "clear violations" of the antitrust laws.[8] The 2003 Policy Statement included two additional factors the agency would consider in exercising its prosecutorial discretion in seeking disgorgement in antitrust cases: (1) "there must be a reasonable basis for calculating the amount of a remedial payment"; and (2) "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."[9]

During the nine years following the issuance of that statement, the FTC sought disgorgement in only two competition cases. In one, the agency settled allegations of a horizontal market allocation between Perrigo Company and Alpharma Inc., with the companies paying a combined $6.25 million in disgorgement.[10] In the other case, the FTC sought but failed to obtain disgorgement in a case challenging Lundbeck, Inc.'s acquisition of a competing supplier of a drug used to treat congenital heart defects in premature infants, which was dismissed for failure to establish the relevant product market.[11]

Seeking Disgorgement Becomes Routine for the FTC. Since 2012, however, the FTC has routinely sought disgorgement in antitrust cases. That year, a divided Commission withdrew the 2003 Policy Statement, concluding that "while disgorgement and restitution are not appropriate in all cases, we do not believe they should apply only in 'exceptional cases,' as previously set out in the Policy Statement."[12] The Commission explained that the statement "has chilled the pursuit of monetary remedies in the years since [its] issuance"[13]—which arguably is precisely what the agency had in mind in cabining its prosecutorial discretion back in 2003.

During the eight years since withdrawing the 2003 Policy Statement, the FTC has sought disgorgement in nine cases. In four of those cases, the defendants agreed to disgorge amounts ranging from $10 million to $1.2 billion.[14] In one case, the FTC obtained a district court order requiring the defendants to pay a combined $448 million.[15] One case settled without any monetary relief,[16] another case was dismissed,[17] and two cases have yet to go to trial.[18] In antitrust conduct cases, including monopolization and pharmaceutical pay-for-delay cases in particular, the FTC now routinely seeks disgorgement of the defendants' profits in federal court rather than pursuing such cases administratively. In fact, in the eight-year period following withdrawal of the 2003 Policy Statement, the FTC has pursued disgorgement as a remedy in more than 25 percent of its cases alleging Section 1 and/or Section 2 violations and in a remarkable 70 percent of its Section 2 cases.[19]

FTC Likely to Face Skeptical Supreme Court

In *FTC v. Credit Bureau Center, LLC*, the Seventh Circuit became the first appellate court to hold that Section 13(b) does not provide for monetary relief.[20] Prior to that decision, eight circuit courts—including the Seventh Circuit itself—had read 13(b) to allow courts to issue such relief.[21] In *Credit Bureau Center*, the Seventh Circuit reversed the "starkly atextual interpretation" of 13(b) it had previously endorsed and vacated the district court's restitution award of nearly $5.3 million against an individual and his company for violating the FTC Act and other consumer protection laws.[22] In ruling against the FTC, the Seventh Circuit relied significantly on the Supreme Court's narrower view of implied remedies since its prior decision in favor of the FTC.

In *FTC v. AMG Capital Management, LLC*, the Ninth Circuit upheld an order compelling a defendant to disgorge $1.27 billion in unjust gains from issuing deceptive consumer loans, explaining that it was bound by its prior ruling that Section 13(b) allows for equitable monetary relief.[23] Yet, the same judge who wrote the opinion of the court also issued a concurring opinion in which he argued—much like the Seventh Circuit did in *Credit Bureau Center*—that the text and structure of the FTC Act foreclose such monetary relief under 13(b).[24] (More recently, a panel of the Third Circuit ruled that 13(b) does not authorize district courts to order disgorgement, largely following the reasoning of *Credit Bureau Center* and the *AMG Capital Management* concurrence.[25])

Looking ahead to the Supreme Court's review of the disgorgement question in *AMG Capital Management*, the FTC is likely to face substantial challenges in convincing the Court to read Section 13(b) to allow for monetary relief. As discussed below, the plain language of Section 13(b), its legislative history, and the structure of the FTC Act as a whole all appear to run counter to the broad interpretation of 13(b) that had prevailed in the courts. Further, recent Supreme Court precedent on implied remedies—including cases construing the disgorgement authority of the U.S. Securities and Exchange Commission (SEC)—indicates that the Court is likely to be skeptical of the FTC's reading of 13(b).

Plain Reading of the Statutory Text. Courts interpreting statutes typically begin with the actual text of the statute at issue. In analyzing Section 13(b), the Seventh Circuit easily concluded that a plain reading of its text shows that it does not authorize courts to grant restitution or other

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forms of monetary relief. There is no reference to such relief anywhere in 13(b)—only to temporary restraining orders and preliminary and permanent injunctions. And, although "injunction" is a broad term, the court concluded that statutory authorizations for injunctions do not include "other discrete forms of equitable relief like restitution."[26] Similarly, the *AMG Capital Management* concurrence succinctly concluded: "I would begin (and end) with the statute's text."[27]

In its petition seeking certiorari in *Credit Bureau Center*, the FTC argued that the Seventh Circuit's narrow reading of "injunction" was error. Citing *Black's Law Dictionary*, the agency noted that the term "injunction" encompasses a "reparative injunction," which "requir[es] the defendant to restore the plaintiff to the position that [it] occupied before the defendant committed a wrong."[28] The FTC also pointed to *California v. American Stores Co.*, where the Supreme Court upheld the divestiture of unlawfully acquired assets as a form of injunctive relief under the Clayton Act (not the FTC Act), a remedy the FTC embraced as "almost identical" to an order requiring restitution.[29]

The Supreme Court is likely to focus its analysis in large part on the plain text of Section 13(b). As Justice Kagan stated a few years ago, "We're all textualists now."[30] Whether that fully and accurately captures the mindset of all nine justices on statutory construction, it is clear that a majority of the Court will give considerable weight to the language contained in, and omitted from, 13(b).[31]

Structure of the FTC Act. The structure of the FTC Act more generally is also likely to play a role in the Supreme Court's analysis of 13(b). Two other provisions within the act explicitly grant the FTC the right to seek monetary relief, including one, Section 5(l), enacted in the very same bill that created 13(b),[32] and one that Congress enacted just two years later, Section 19.[33] Section 5(l) allows district courts to grant "mandatory injunctions *and such other and further equitable relief as they deem appropriate*" against a party that violates a final FTC administrative cease-and-desist order.[34] Similarly, when a party violates an FTC-issued rule, Section 19 authorizes "such relief as the court finds necessary to redress injury to consumers or other persons," which "may include . . . *the refund of money or . . . the payment of damages* . . . ."[35] As the Seventh Circuit noted, the absence of similar language in 13(b) is "conspicuous."[36] That is, Congress knew how to authorize the FTC to seek monetary relief, but it did not specifically do so in 13(b).

Importantly for companies subject to FTC jurisdiction, Section 13(b) lacks certain procedural protections found in other enforcement provisions of the FTC Act. For example, the FTC must provide notice to defendants—through either cease-and-desist orders or rules that "define with specificity" the prohibited conduct—before it can invoke Section 19 to seek disgorgement for consumer protection violations.[37] Section 19 also includes a three-year statute of limitations.[38] Section 13(b), in contrast, provides neither notice nor a statute of limitations. Reading 13(b) to allow for disgorgement would appear to render Section 19—including both the relief it offers to the FTC and its procedural protections for defendants—superfluous.

The FTC leans heavily on the savings clause contained in Section 19, which states that remedies provided under that provision are in addition to, rather than in lieu of, any other remedy provided by existing law.[39] Yet a savings clause

cannot save what does not exist in the first place. As a result, it is unclear how persuasive this argument will be to the Supreme Court.

The FTC also argues that neither Section 19 nor Section 5(l) is an adequate alternative to requiring disgorgement under 13(b).[40] The former is limited to rule violations and defendants who have already gone through the administrative process and been subjected to a cease-and-desist order, while the latter is limited to enforcing existing cease-and-desist orders. Regardless of the validity of the FTC's argument regarding the adequacy of current statutory relief, it seems unlikely that any remedial shortcomings in these other provisions of the FTC Act would serve as a basis for the Supreme Court to read disgorgement or other monetary relief into 13(b).

Legislative History of Section 13(b). The current Supreme Court tends to discount the relevance of legislative history in its statutory construction. In any case, it is unclear whether the legislative history of 13(b) provides any basis for disgorgement under that provision. As explained in the Senate report addressing the bill that would become 13(b), "The purpose of [Section 13(b)] is to permit the Commission to bring an immediate halt to unfair or deceptive acts or practices when . . . [a]t the present time such practices might continue for several years until agency action is completed."[41] As described by two former FTC officials who oversaw the development of the agency's 13(b) fraud program, "Had Congress understood that provision to be effecting a major change in the FTC's remedial authority, it surely would have occasioned more debate and commentary. Indeed, the consumer redress provision that eventually became Section 19 was the subject of considerable controversy in Congress."[42]

The FTC, however, has argued that when Congress amended the FTC Act in 1993 and in 2006, it was fully aware of the appellate courts' interpretation of 13(b) to authorize disgorgement, and thus implicitly endorsed such interpretation.[43] The Seventh Circuit rejected this argument in *Credit Bureau Center*, noting that the first set of amendments modified only 13(b)'s venue and service-of-process provisions without altering its remedial scope, and the latter amendments simply extended the application of existing remedies in prosecuting violations in foreign commerce.[44] In any case, to the extent that legislative history is a factor in the Supreme Court's analysis of 13(b), reading such intent from post-enactment inaction would seem to be even more precarious than relying on intent evidence that is contemporaneous with the passage of the statute.

Further Curtailing of the Implied Remedies Doctrine? Notwithstanding arguments that a plain reading of Section 13(b) and the structure of the FTC Act preclude monetary relief, the FTC has successfully argued that such a remedy is necessarily implied from the statutory purpose of 13(b). For appellate courts favoring the FTC's reading of 13(b), this rationale has proved to be a convincing one. Relying on *Porter v. Warner Holding Co.*[45] and *Mitchell v. Robert DeMario Jewelry, Inc.*,[46] those courts (including the Seventh Circuit) have embraced an expansive implied remedies doctrine, under which "a district court exercising authority to enjoin violations of a regulatory statute may order violators to return their unlawful gains absent a clear congressional directive to the contrary."[47]

Implied remedies jurisprudence, however, has evolved considerably since *Porter* and *Mitchell*. More recently, the Supreme Court has been more deferential to Congress's choice to specify the available forms of relief. One can trace this trend to the Court's refusal in *Meghrig v. KFC Western, Inc.*, to imply a restitutionary remedy based on a reading of the Resource Conservation and Recovery Act, which granted district courts authority to issue only mandatory injunctions requiring defendants to clean up toxic waste, or restraining injunctions prohibiting defendants from further violations.[48] The Seventh Circuit characterized the current state of the implied remedies doctrine as follows: "Whatever strength *Porter* and *Mitchell* retain, *Meghrig* clarifies that they cannot be used as . . . a license to categorically recognize all ancillary forms of equitable relief without a close analysis of statutory text and structure."[49]

The FTC has distinguished *Meghrig* on several grounds. First, the agency has argued that, unlike statutes authorizing permanent injunctions "without qualification"—like Section 13(b) and those at issue in *Porter* and *Mitchell*—the statute at issue in *Meghrig* limits a court's remedial authority to cases of "imminent and substantial danger."[50] Second, as argued by the FTC, *Meghrig* involved an action brought by a private plaintiff seeking relief that more closely resembled damages than restitution, rather than a government enforcement action.[51] Finally, the FTC has argued that the "extensive remedial scheme" at issue in *Meghrig* might have been disrupted by allowing monetary relief—circumstances not present in either *Porter* or *Mitchell*.[52] The FTC also has argued that *Porter* and *Mitchell* were the law of the land when Congress enacted 13(b), and they remain good law today.[53] As the agency has characterized it, since deciding *Meghrig*, the Supreme Court has relied on *Porter* "without qualification multiple times."[54]

In *Credit Service Bureau*, the Seventh Circuit observed that "no circuit has ever considered the effect of *Meghrig* in a section 13(b) case."[55] This term, the Supreme Court will consider the implied remedies doctrine post-*Meghrig* and how that doctrine informs which remedies, if any, are implied by the text of Section 13(b).

A Supreme Court ruling finding a lack of FTC disgorgement authority under 13(b) would be consistent with its recent decisions narrowing the SEC's disgorgement authority. The SEC statute at issue in two of the Court's recent decisions—*Kokesh v. SEC* and *Liu v. SEC*—is materially broader than 13(b), allowing for "any equitable relief that may be appropriate or necessary for the benefit of investors."[56] In *Kokesh*, the Court held that a claim for

disgorgement imposed as a sanction for violating a federal securities law is a penalty and therefore subject to the five-year federal catch-all statute of limitations.[57] In so holding, the Court found that disgorgement obtained in securities cases was not necessarily limited to restoring the status quo, but in some cases exceeded the amount of ill-gotten gains. In arguing against the majority's broader reading of Section 13(b), the concurrence in *AMG Capital Management* argued that under *Kokesh* "restitution under § 13(b) would appear to be a penalty—not a form of equitable relief."[58]

More recently, in *Liu*, the Court further hemmed in the SEC's ability to obtain disgorgement by limiting such relief to excess profits (rather than total revenues), requiring those monies to be returned to investors, and precluding the awarding of joint and several disgorgement orders against multiple defendants.[59] In doing so, the Court reviewed its precedent on equitable relief and found that disgorgement goes by many names, but notably missing from those names were "injunction" and "permanent injunction," which are all that 13(b) explicitly provides for.[60]

Implications for Business, Antitrust Enforcement, and the Development of the Law

Would Congress Fill Any Disgorgement Void? If the Supreme Court were to rule that Section 13(b) does not allow courts to order disgorgement, the FTC and pro-enforcement interest groups can be expected to lobby Congress to amend the statute to explicitly allow the agency to obtain such relief.[61] In that case, Congress might amend 13(b) to allow for monetary relief solely in consumer protection cases, including, in particular, instances of consumer fraud, where arguably the case for restitution is strongest. Although the FTC already can pursue restitution in consumer protection cases under Section 19, as noted above, it has argued that that provision does not allow it to obtain timely and thus meaningful relief in fraud cases.

With Congress currently facing significant political pressure to modify the antitrust laws in a manner to allow for more aggressive enforcement by the FTC and Department of Justice, any amendment of 13(b) to allow for monetary relief also could extend to antitrust cases.[62] If so, what standards, if any, might Congress impose on the FTC before it can pursue disgorgement from antitrust defendants? Congress could leave it to the FTC's prosecutorial discretion to decide when to seek disgorgement. That would not be a particularly desirable outcome for the business community, which since 2012 has been left with little guidance on the circumstances in which the FTC will seek disgorgement. Alternatively, Congress could impose a relatively strict standard—comparable to the one found in the FTC's 2003 Policy Statement—and limit any disgorgement remedy to clear or egregious antitrust violations. How Congress addresses any perceived gap in the FTC's enforcement authority will have significant implications for businesses under its jurisdiction.

Is Disgorgement Optimal or Even Necessary? The implications for the FTC's consumer protection program from the loss of disgorgement authority likely would be substantial, given the challenges it would face in obtaining restitution in consumer fraud cases. It is less clear, however, that the loss of a disgorgement remedy would hinder the agency's ability to effectively enforce the antitrust laws. The FTC enforced those laws for over 85 years—from its founding in 1914 to the *Mylan* case in 2000—without relying on a disgorgement remedy. Seeking disgorgement for antitrust violations also raises the related issues of optimal deterrence and duplicative recovery of damages from public and private enforcement. Private plaintiffs routinely pursue treble damages against parties accused of Section 1 or Section 2 violations by the FTC. Although the 2003 Policy Statement took into account concerns about multiple recoveries for the same unlawful conduct, the FTC no longer appears to be bound by such considerations. Before granting any disgorgement authority in antitrust cases, Congress might consider how necessary this remedy is for effective enforcement of the antitrust laws, particularly in light of the history of robust private enforcement.

In that scenario, the FTC also might consider whether its scarce resources would be better utilized in developing the antitrust laws through its unique administrative function, rather than seeking disgorgement in federal court. The FTC's pursuit of disgorgement in antitrust cases is in substantial conflict with the rationale underlying the creation of the FTC as an expert agency with wide jurisdiction yet limited remedial powers. As former Commissioner Maureen Ohlhausen has argued, the agency might have better served its mission by developing the post-*Actavis*[63] case law on pay-for-delay agreements through administrative litigation, rather than pursuing, and fighting over its authority to pursue, disgorgement in federal court.[64]

Disgorgement is a powerful tool for an antitrust agency to wield. Former Commissioner Thomas Leary raised a legitimate concern in his admonition 20 years ago that disgorgement could change the fundamental nature of the FTC:

> An action of this kind is almost too expedient and, dare I say, too seductive. It transforms the Commission into a prosecutor with an immensely powerful antitrust weapon. I suggest that this kind of remedy in this kind of case is hardly what Congress had in mind when it passed the [FTC] Act in 1914 or, for that matter, when it gave the Commission the power to seek injunctive relief in 1973. Our traditional role in competition matters has been to look forward rather than backward, to articulate the law where the law is uncertain, and to seek relief that is prospective and remedial rather than retrospective and punitive. As we stray progressively further away from that vision . . . we may unwittingly neglect our special mission.[65]

FTC-DOJ Divergence on Disgorgement. Finally, an issue that has not garnered much attention in the debate over the FTC's disgorgement authority is the divergence between the two U.S. antitrust agencies in their pursuit

of this remedy. While the FTC frequently seeks monetary relief, the DOJ Antitrust Division has done so only sparingly. The DOJ appears to have obtained disgorgement in only three civil (i.e., non-criminal) antitrust matters—all of which were settlements obtained during the Obama administration.[66] With the DOJ forgoing this remedy since 2015,[67] antitrust defendants have been effectively subject to substantially different remedial results, depending on which agency is reviewing a particular course of conduct. It is hard to justify such a divergence in antitrust enforcement policy.

Notwithstanding the current divergence on this issue, a Supreme Court decision reading monetary relief out of Section 13(b) could have implications for any attempt by the DOJ to revive its pursuit of disgorgement in antitrust cases. The case law on the DOJ's authority to obtain disgorgement for antitrust violations is limited to a single district court decision in which the court held that its inherent equitable powers include authority to require disgorgement for a violation of the Sherman Act.[68] In so ruling, the court relied primarily on circuit precedent allowing for disgorgement for securities law violations, text in Section 4 of the Sherman Act granting district courts with "jurisdiction to prevent and restrain" violations of that act, as well as the implied remedies doctrine originating with *Porter* and *Mitchell*.[69] Therefore, to the extent the Supreme Court curtails the FTC's ability to obtain disgorgement under Section 13(b), the DOJ's ability to pursue such a remedy under the Sherman Act may face a similar fate.

Conclusion

Nearly 40 years after the first appellate court read disgorgement into Section 13(b), the Supreme Court will finally address this issue. If the Court rules against the FTC, Congress likely will be called on to fill the remedial gap. How Congress responds will have important implications for the business community, the FTC's antitrust enforcement agenda, and the development of the antitrust laws. ■

[1] In July 2020, the Supreme Court granted certiorari in two consumer protection cases addressing the FTC's authority to seek disgorgement under 13(b). *See* FTC v. Credit Bureau Ctr., LLC, No. 19-825, 2020 WL 3865251 (July 9, 2020) (holding that 13(b) does not authorize courts to order disgorgement); AMG Cap. Mgmt., LLC v. FTC, No. 19-508, 2020 WL 3865250 (July 9, 2020) (holding that 13(b) authorizes disgorgement). The Court subsequently vacated the grant of certiorari in *Credit Bureau Center*, apparently to avoid Justice Amy Barrett having to recuse herself from that matter based on her participation therein while it was before the Seventh Circuit. The fact that the Court will now decide only the *AMG Capital Management* matter, however, is not expected to materially change either the scope of the issues before the Court or how the Court analyzes those issues.

[2] *See* FTC v. Dean Foods Co., 384 U.S. 597, 611–12 (1966) (holding that FTC has standing to seek preliminary injunction to prevent consummation of merger under All Writs Act).

[3] 15 U.S.C. § 53(b).

[4] *Id.* § 53(b)(2).

[5] J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 22 (2013).

[6] *See* FTC v. Mylan Labs., Inc., No. 1:98CV03114 (D.D.C. Feb. 9, 2001) (final order and stipulated permanent injunction). Prior to the *Mylan* settlement, the FTC had obtained relatively small amounts of restitution or consumer redress in a limited number of antitrust cases. *See* Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820, 45,821 n.6 (Aug. 4, 2003) (collecting cases) [hereinafter 2003 Policy Statement].

[7] *See* FTC v. Hearst Trust, No. 1:01CV00734 (D.D.C. Dec. 14, 2001) (final order and stipulated permanent injunction).

[8] 2003 Policy Statement, *supra* note 6, at 45,821.

[9] *Id.*

[10] *See* FTC v. Perrigo Co., No. 1:04CV01397 (D.D.C. Aug. 24, 2004) (final order and stipulated permanent injunction).

[11] *See* FTC v. Lundbeck, Inc., No. 08-6379, 2010 WL 3810015 (D. Minn. Aug. 31, 2010) (dismissing complaint), *aff'd*, 650 F.3d 1236 (8th Cir. 2011).

[12] Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47,070, 47,071 (Aug. 7, 2012) [hereinafter 2012 Policy Withdrawal]. Then-Commissioner Maureen Ohlhausen voted against withdrawing the 2003 Policy Statement. *See* Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission's Decision to Withdraw Its Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. at 47,071–72 (expressing concern that "we are moving from clear guidance on disgorgement to virtually no guidance on this important policy issue").

[13] 2012 Policy Withdrawal, *supra* note 12, at 47,071.

[14] *See* FTC v. Indivior Inc., No. 1:20CV00036 (W.D. Va. July 24, 2020) (joint motion for entry of stipulated order for permanent injunction and equitable monetary relief and dismissal) ($10 million in disgorgement); FTC v. Reckitt Benckiser Grp. plc, No. 1:19CV00028 (W.D. Va. July 11, 2019) (joint motion for entry of stipulated order for permanent injunction and equitable monetary relief and dismissal) ($50 million in disgorgement); FTC v. Mallinckrodt ARD Inc., No. 1:17CV00120 (D.D.C. Jan. 30, 2017) (stipulated order for permanent injunction and equitable monetary relief) ($100 million in disgorgement); FTC v. Cephalon, Inc., No. 2:08CV02141 (E.D. Pa. June 17, 2015) (stipulated order for permanent injunction and equitable monetary relief) ($1.2 billion in disgorgement); FTC v. Cardinal Health, Inc., No. 1:15CV03031 (S.D.N.Y. Apr. 23, 2015) (final order and stipulated permanent injunction) ($26.8 million in disgorgement). The consents with Indivior and Reckitt Benckiser centered on the same conduct by the former, which was previously owned by the latter.

[15] *See* FTC v. AbbVie Inc., 329 F. Supp. 3d 98 (E.D. Pa. 2018), *aff'd in part and rev'd in part*, No. 18-2621 (3d Cir. Sept. 30, 2020).

[16] *See* FTC v. Allergan plc, No. 3:17CV00312 (N.D. Cal. Jan. 23, 2017) (joint motion for entry of stipulated order for permanent injunction as to Endo Pharmaceuticals Inc. and Endo International plc).

[17] *See* FTC v. Shire ViroPharma, Inc., No. 1:17CV00131, 2018 WL 1401329 (D. Del. Mar. 20, 2018) (dismissing FTC complaint), *aff'd*, 917 F.3d 147 (3d Cir. 2019).

[18] *See* Complaint for Injunctive and Other Equitable Relief, FTC v. Vyera Pharms., Inc., No. 20CV00706 (S.D.N.Y. Jan. 27, 2020); Complaint for Injunctive and Other Equitable Relief, FTC v. Surescripts, LLC, No. 1:19CV01080 (D.D.C. Apr. 24, 2019).

[19] Cases alleging solely standalone FTC Act Section 5 violations are excluded from these counts, which cover the period July 31, 2012 (the day on which the FTC withdrew its 2003 Policy Statement) through July 30, 2020. The FTC's enforcement actions are available at https://www.ftc.gov/enforcement/cases-proceedings.

[20] 937 F.3d 764 (7th Cir. 2019).

[21] *See* FTC v. Ross, 743 F.3d 886, 890–92 (4th Cir. 2014); FTC v. Bronson Partners, LLC, 654 F.3d 359, 365 (2d Cir. 2011); FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 15 (1st Cir. 2010); FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); FTC v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312, 1314–15 (8th Cir. 1991); FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 571-72 (7th Cir. 1989); FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1432–34 (11th Cir. 1984); FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1112 (9th Cir. 1982).

[22] *Credit Bureau Center*, 937 F.3d at 767.

[23] 910 F.3d 417, 427 (9th Cir. 2018).

[24] *See id.* at 429–37 (O'Scannlain, J., concurring).

[25] *See* FTC v. AbbVie Inc., No. 18-2621, slip op. at 83–93 (3d Cir. Sept. 30, 2020).

[26] *Credit Bureau Center*, 937 F.3d at 772. *See also AMG Capital Management*, 910 F.3d at 430 (O'Scannlain, J., concurring) ("[I]f 'injunction' included court orders to pay monetary judgments, then 'a statutory limitation to injunctive relief would be meaningless, since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction.'") (quoting Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 211 n.1 (2002)).

[27] *AMG Capital Management*, 910 F.3d at 430 (O'Scannlain, J., concurring).

[28] *See* Petition for Writ of Certiorari at 14, FTC v. Credit Bureau Ctr., LLC, No. 19-825 (Dec. 19, 2019) (quoting Black's Law Dictionary 904–05 (10th ed. 2014)) [hereinafter FTC Cert. Petition].

[29] *Id.* at 15–16 (citing California v. Am. Stores Co., 495 U.S. 271, 281–82 (1990)).

[30] Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

[31] In light of Justice Amy Coney Barrett's professed embrace of Constitutional originalism, her recent addition to the Supreme Court would appear to bolster the expectation that the Court will be skeptical of a broad reading of Section 13(b).

[32] *See* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408, 87 Stat. 576, 591 (1973).

[33] *See* Magnuson-Moss Warranty Act, Pub. L. No. 93-637, § 206, 88 Stat. 2183, 2202 (1975).

[34] 15 U.S.C. § 45(l) (emphasis added).

[35] *Id.* § 57b(b) (emphasis added).

[36] *Credit Bureau Center*, 937 F.3d at 773. *See also* Nken v. Holder, 556 U.S. 418, 430 (2009) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

[37] *Credit Bureau Center*, 937 F.3d at 774 (citing 15 U.S.C. §§ 45(b), 57a(a)(1)).

[38] *See* 15 U.S.C. § 57b(d).

[39] *See, e.g.*, *Credit Bureau Center*, 937 F.3d at 775; FTC Cert. Petition, *supra* note 28, at 21.

[40] *See, e.g.*, FTC Cert. Petition, *supra* note 28, at 12–13.

[41] S. Rep. No. 93-151, at 30 (1973). *See also* 119 Cong. Rec. S21445 (June 26, 1973) (statement of Sen. Jackson introducing bill) (the FTC sought "the statutory authority to seek directly in the federal district courts preliminary injunctions against the continuance of anticompetitive conduct ('unfair methods of competition') as well as deceptive practices").

[42] Beales & Muris, *supra* note 5, at 21.

[43] FTC Cert. Petition, *supra* note 28, at 16–18.

[44] *Credit Bureau Center*, 937 F.3d at 775.

[45] 328 U.S. 395 (1946).

[46] 361 U.S. 288 (1960).

[47] *See* FTC Cert. Petition, *supra* note 28, at 4.

[48] 516 U.S. 479, 484 (1996).

[49] *Credit Bureau Center*, 937 F.3d at 782. *See also id.* at 783 ("Every one of *Meghrig*'s reasons for refusing to find restitutionary authority in the [Resource Conservation and Recovery Act] applies with equal force to section 13(b)."). The Seventh Circuit also identified a conceptual tension in reading backward-looking monetary relief into Section 13(b). As the court observed, the statute is forward-looking in that it requires ongoing or imminent harm before a court can issue an injunction. Further, 13(b) is keyed to injunctions, with injunction-specific requirements such as a weighing of the equities and likelihood of success on the merits. Such demands do not apply to monetary relief, which is governed by different considerations. *See id.* at 772–73.

[50] FTC Cert. Petition, *supra* note 28, at 18.

[51] *Id.* at 19.

[52] *Id.*

[53] *Id.* at 10–11, 19–20.

[54] *Id.* at 19–20 (citing Kansas v. Nebraska, 135 S. Ct. 1042, 1052–53, 1057 (2015); United States v. Oakland Cannabis Buyers' Co-Op, 532 U.S. 483, 496–97 (2001); Miller v. French, 530 U.S. 327, 340 (2000)).

[55] *Credit Bureau Center*, 937 F.3d at 785.

[56] 15 U.S.C. § 78u(d)(5).

[57] *See* Kokesh v. SEC, 137 S. Ct. 1635, 1639 (2017).

[58] *AMG Capital Management*, 910 F.3d at 433 (O'Scannlain, J., concurring).

[59] *See* Liu v. SEC, 140 S. Ct. 1936, 1946–49 (2020).

[60] *See id.* at 1942–44.

[61] On August 5, 2020, in response to the Supreme Court's decision to grant certiorari in *Credit Bureau Center* and *AMG Capital Management*, the FTC requested Congress to amend Section 13(b) to specifically enable the FTC to obtain disgorgement of ill-gotten gains as a remedy. *See* Press Release, Federal Trade Comm'n, FTC Testifies at an Oversight Hearing Before the Senate Commerce Committee (Aug. 5, 2020), https://www.ftc.gov/news-events/press-releases/2020/08/ftc-testifies-oversight-hearing-senate-commerce-committee.

[62] In September 2020, several Republican members of the Senate Commerce Committee introduced a comprehensive privacy bill that, among other things, authorizes the FTC to obtain disgorgement under Section 13(b). *See* Setting an American Framework to Ensure Data Access, Transparency, and Accountability Act, S. 4626, 116th Cong. § 403 (2020).

[63] FTC v. Actavis, Inc., 570 U.S. 136 (2013).

[64] *See* Maureen K. Ohlhausen, Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission, Remarks Before Dechert Antitrust Spring Seminar 9–13 (Apr. 20, 2016), https://www.ftc.gov/system/files/documents/public_statements/945623/160420dollarsdoctrine-speech.pdf.

[65] Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part, Mylan Labs., Inc., FTC File No. X990015 (Nov. 29, 2000), https://www.ftc.gov/sites/default/files/documents/cases/2000/11/mylanlearystatment.htm.

[66] *See* United States v. Twin Am., LLC, No. 1:12CV08989 (S.D.N.Y. Nov. 17, 2015) (final judgment including $7.5 million in disgorgement); United States v. Flakeboard Am. Ltd., No. 3:14CV04949 (N.D. Cal. Feb. 2, 2015) (final judgment including $4.95 million in total disgorgement from multiple defendants); United States v. Morgan Stanley, No. 1:11CV06875 (S.D.N.Y. Aug. 7, 2012) (final judgment including $4.8 million in disgorgement); United States v. KeySpan Corp., No. 1:10CV01415 (S.D.N.Y. Feb. 2, 2011) (final judgment including $12 million in disgorgement). The Morgan Stanley and KeySpan consents involved the same allegedly unlawful set of facts.

[67] The DOJ recently issued a revised *Merger Remedies Manual*, in which the agency notes that "[i]n appropriate circumstances, the Division may consider seeking disgorgement in consummated merger challenges instead of or in addition to unwinding the transaction." U.S. Dep't of Justice, Merger Remedies Manual 4 n.11 (2020), https://www.justice.gov/atr/page/file/1312416/download. As of the publication of this article, however, the DOJ has not pursued disgorgement in any civil antitrust matters since 2015.

[68] *See* United States v. KeySpan Corp., 763 F. Supp. 2d 633, 641 (S.D.N.Y. 2011).

[69] *See id.* at 638–40. The DOJ had cited *Porter* and *Mitchell* in the Tunney Act competitive impact statement it filed with the court in the *KeySpan* matter. *See* Competitive Impact Statement at 8, United States v. KeySpan Corp., No. 1:10CV01415 (S.D.N.Y. Feb. 23, 2010) ("The Supreme Court has held that '[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.' Nothing in the Sherman Act negates this inherent authority.") (citing *Porter*, 328 U.S. at 398; *Mitchell*, 361 U.S. at 291).