Federal Trade Commission to Increasingly Seek Monetary Relief in Antitrust Matters

Last week, in order to provide itself with increased flexibility to seek monetary relief, the Federal Trade Commission (by a 4-1 vote) withdrew its previous policy statement on the use of disgorgement (and restitution) in antitrust cases. It is too early to predict how this action will affect the Commission’s willingness to seek monetary relief, but the decision suggests that parties need to consider carefully the potential for such relief in FTC antitrust investigations going forward.

The FTC issued its Policy Statement on Monetary Remedies in Competition Cases (Policy Statement) in 2003 after seeking public comment on the issue. That statement indicated that the Commission would consider three factors in determining whether to seek disgorgement or restitution in a competition case:

- First, whether the underlying violation is “clear”;
- Second, whether there is a reasonable basis to calculate the amount of a remedial payment; and
- Third, whether remedies in other litigation would be more likely to accomplish the purposes of the antitrust laws.

The Commission noted that “[a] strong showing in one area may tip the decision whether to seek monetary remedies. For example, a particularly egregious violation may justify pursuit of these remedies even if there appears to be some likelihood of private actions. Moreover, the pendency of numerous private actions may tilt the balance the other way, even if the violation is clear.”

In its Statement of July 31, 2012 withdrawing the Policy Statement, the Commission stated that the Policy Statement had created an “overly restrictive view of the Commission’s options for equitable remedies.” The Commission indicated that “while disgorgement and restitution are not appropriate in all cases,” it did not believe those remedies should apply only in “exceptional cases,” as set forth in the Policy Statement. The FTC has indicated, however, that it will not seek monetary remedies in cases brought solely under Section 5 of the FTC Act.

The Commission indicated that the requirement in the Policy Statement of a “clear” violation may limit the Commission’s ability to obtain monetary relief in matters of first impression. Likewise, the need to consider remedies available in other actions might place

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2 This factor did not apply to restitution.
too high a burden on the Commission. And the Commission stated that the need for a reasonable basis to calculate the amount of a remedial payment "does no more than restate existing legal standards." Without providing specifics, the Commission noted that "the Policy Statement has chilled the pursuit of monetary remedies in the years since the statement’s issuance."

In dissent, Commissioner Ohlhausen indicated she had seen no evidence that the Commission had been chilled in the nine years since the Policy Statement was issued. She also expressed concern that withdrawal, rather than revision, of the Policy Statement ran counter to the Commission’s goal of transparency and was done without seeking public comment.

In the past, the Commission’s use of disgorgement has been sparing. There have been only a handful of disgorgement cases in more than a decade.

The FTC’s use of disgorgement in competition cases was upheld in 1999 when the U.S. District Court for the District of Columbia held that the FTC could seek recovery of money damages under the FTC Act’s prohibition on unfair methods of competition.\(^3\) The FTC sought disgorgement from Mylan, a manufacturer of two generic anti-anxiety drugs.\(^4\) Mylan had entered into a 10-year exclusive dealing contract with most of the producers of the active ingredients for the drugs in exchange for a percentage of gross profits and, according to the FTC, subsequently raised the prices of the generics by amounts ranging between 1900% and 3200%.\(^5\) Following the District Court’s ruling, the FTC entered into a record settlement of US$100 million in disgorged profits paid into a fund to compensate injured consumers and state agencies.\(^6\)

Around the same time as its victory in Mylan, the FTC successfully sought both divestiture and disgorgement in connection with a consummated merger. The FTC alleged that Hearst Corporation’s 1998 acquisition of J.B. Laughery, Inc. was unlawful in part because Hearst had unlawfully omitted important information from its pre-merger Hart-Scott-Rodino filings, materially impeding the Commission’s ability to evaluate the competitive effects of the deal.\(^7\) The Commission also determined that the merger itself substantially lessened competition in the drug information database market.\(^8\) The parties reached a settlement agreement whereby the assets at issue were divested and Hearst agreed to pay US$19 million in disgorgement of unlawful profits (in addition to a US$4 million penalty for failure to comply with Hart-Scott-Rodino).\(^9\)

In 2003, the FTC sought disgorgement following an agreement between would-be generic competitors for children’s Motrin®, one of which agreed to forego entry in exchange for a "large upfront payment … plus a share of … profits."\(^10\) Generic manufacturers Perrigo and Alpharma had both filed applications with the FDA to produce the generic

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\(^8\) Id.


The FTC successfully obtained a consent decree under which defendants agreed to disgorge US$6.25 million in profits. It is noteworthy that the Commission had previously declined to seek disgorgement in a similar matter, Abbott Laboratories and Geneva Pharmaceuticals, Inc. in 2000 (prior to the Policy Statement). The Commission noted that this was the first resolution of a challenge to a patent settlement that involved payments by a generic manufacturer to a brand name manufacturer. But the Commission warned that companies “should now be on notice, however, that [such] arrangements … can raise serious antitrust issues,” and that “in the future, the Commission will consider its entire range of remedies in connection with enforcement actions against such arrangements, including possibly seeking disgorgement of illegally obtained profits.”

The FTC’s most recent attempt to obtain disgorgement in an antitrust matter was unsuccessful. In 2008, the FTC sued in federal court to challenge Ovation Pharmaceuticals, Inc.’s (now Lundbeck, Inc.) January 2006 acquisition of the drug NeoProfen®. According to the Commission, the transaction “eliminated [Ovation’s] only competitor for the treatment of a serious and potentially deadly congenital heart defect affecting more than 30,000 babies born prematurely each year in the United States.” The Commission alleged that the acquisition led to severely inflated prices for the formerly competing drugs and sought equitable relief, including divestiture and disgorgement of profits, from Ovation’s sales of NeoProfen® and Indocin® (Ovation’s allegedly competing drug). The U.S. District Court for the District of Minnesota determined that NeoProfen® and Indocin® were not in the same relevant product market, a conclusion affirmed by the 8th Circuit, and declined to order any relief.

It is far from clear to what extent the Commission’s withdrawal of the Policy Statement signals a move to widespread use of monetary relief, as opposed to incremental change. Is this withdrawal geared toward “reverse” patent settlement cases, an area that the Commission has scrutinized closely, or a broader array of cases? Will the Commission seek disgorgement only of profits that resulted directly from the alleged violation at issue? Or—as it asked when it initially sought public comment on a Policy Guide—will the Commission seek remedies “where the violator reduces its investment in future technology because of a reduction in the competition it faces?” And when and how will the Commission distribute monetary remedies it receives where there are also private actions?

These are all issues we expect the Commission to grapple with in future cases. Stay tuned.

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following attorneys:

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12 Id.
15 Id.