

Government Remedies: Finding the Right Cure

Monetary Remedies in Civil Cases

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The terms

- Restitution
 - Equitable remedy intended to restore victims to position they would have been in without the violation, often by refunding overpayments resulting from the violation
 - Focus on the victim
- Disgorgement
 - Equitable monetary remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from future violations
 - Focus on wrongdoer
- Civil penalty
 - Prescribed penalty or fine for civil violation of law

Equitable remedies – FTC authority

- FTC Act, § 13(b), 15 U.S.C. § 53(b)
 - Whenever the Commission has reason to believe -
 1. that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC], and
 2. that the enjoining thereof pending the issuance of a[n administrative] complaint by the Commission and until such complaint is dismissed . . . , or until the order of the Commission made thereon has become final, would be in the interest of the public, the Commission . . . may bring suit . . . to [preliminarily] enjoin any such act or practice.
 - Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. (emphasis added)

Precedent on FTC authority

- Restitution and disgorgement have been sought by FTC as equitable remedies within court's injunctive powers
- Numerous cases upholding §13(b)'s use for restitution or disgorgement in consumer protection cases
- Upheld for antitrust use in *FTC v. Mylan Labs, Inc.*, 62 F. Supp. 2d 25,36–37 (D.D.C.), revised and reaffirmed in pertinent part, 99 F. Supp. 2d 1, 4–5 (D.D.C. 1999)
- See also *FTC v. Abbott Laboratories*, 1992–2 Trade Cas. (CCH) ¶ 69,996 (D.D.C. 1992) (Gesell, J.), dismissed on other grounds, 853 F. Supp. 526 (D.D.C. 1994) (§ 13(b) permitted FTC to seek permanent injunction ordering restitution in antitrust case)
- Note: One court has held FTC does not have authority to order restitution remedy through its own administrative proceedings. *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974)

Track record

- FTC has sought restitution or disgorgement remedies only occasionally in antitrust matters
 - *FTC v. Mylan Labs, Inc.*, No. 1:98CV03114 (TFH) (D.D.C. Feb 9, 2001) (alleged monopolization; stipulated judgment included \$100 million restitution);
 - *FTC v. The Hearst Trust*, No. 1:01CV00734 (TPJ) (D.D.C. Nov. 9, 2001) (alleged anticompetitive acquisition and violation of pre-merger filing requirements; stipulated judgment included \$19 million disgorgement
 - *FTC v. College of Physicians-Surgeons of Puerto Rico*, Civ. No. 97–2466 HL (D.P.R. Oct. 2, 1997) (alleged price-fixing and boycott, under FTC Act sections 5(a) and 13(b); stipulated judgment included \$300,000 restitution to Puerto Rico
 - *FTC v. Mead Johnson & Co.*, No. 92–1266 (D.D.C. June 11, 1992) (alleged bid-rigging, under FTC Act sections 5(a) and 13(b); stipulated judgment included restitution in kind to USDA)
 - *FTC v. Perrigo Co.*, File No. 0210197, (D.D.C. Aug. 12, 2004) (consent remedy included provision of 3.6 million pounds of infant formula to Puerto Rico)
 - *FTC v. Ovation Pharmaceuticals, Inc.*, (D. Minn. Dec. 16, 2008) (complaint)
 - Other cases where grounds included violation of existing FTC order

ABA Antitrust Section position

- FTC authority “unsettled”
- “Disgorgement is a traditional equitable remedy that serves the goal of preventing unjust enrichment by requiring a defendant to turn over “ill-gotten gains”. Therefore, as a general principle, the Commission should regard disgorgement as an exceptional remedy that should be used sparingly” (emphasis added)
 - disgorgement remedy subject to “abuse”; will increase FTC bargaining power in settlement discussions
 - “enormous” complexity and delay; will “impair” swift adjudication
 - FTC should not consider harm to indirect purchasers unable to pursue claims; may be unwarranted for policy reasons underlying Illinois Brick
 - “specter” of multiple liability
 - “strong likelihood that [private, state and federal criminal litigation] will more than suffice to deprive a defendant of any ill-gotten gains”
 - might deter private treble action claims due to impact on plaintiff bar fee recovery

Letter of ABA Antitrust Section in response to FTC request for comment on use of disgorgement remedy in competition matters, March 11, 2002

<http://www.ftc.gov/os/comments/disgorgement/aba.pdf>

Expressed concerns

- Whether FTC really has authority
- Whether FTC action risks duplication of private litigation recoveries
- Whether, if duplication is avoided, there is any benefit
- Whether FTC should seek payments for indirect purchasers
- Whether identifying amounts to be recovered and allocation to injured parties will be too complicated
- Whether amounts sought should only be those attributable to “antitrust” harm
- Whether FTC risks devoting too many resources to chasing money
- Whether FTC will get in way of DOJ criminal enforcement
- Whether disgorgement (in contrast to restitution) proceeds should go to Treasury and not to consumers

Arguments supporting pursuit of monetary remedies

- Antitrust recoveries likely do not approximate treble damages, and possibly not even single damages
- Antitrust violations are not “over-deterred”
- Indirect purchasers are unprotected by federal antitrust law, but are harmed in fact and direct purchasers sometimes do not pursue claims (e.g., pharmaceuticals)
- Illinois Brick policy arguments against private claims by indirect purchasers do not run counter to government pursuit of relief for indirect purchasers. Supreme Court has permitted indirect purchaser actions under state antitrust law.
- Critics’ claims of duplication or undue multiple recovery not supported, particularly where indirect purchasers are harmed, and direct purchasers don’t act
- FTC fund recovery can be coordinated with private litigation awards, or escrowed, but if disgorgement or restitution would exceed awarded or negotiated private litigation damages, that’s not wrong
- Gov’t action does not discourage private litigation, but may foster it

FTC position

- FTC will generally consider the following factors in determining whether to seek disgorgement or restitution in a competition case
 - Whether the underlying violation is clear
 - Whether there is a reasonable basis for calculating the amount of a remedial payment
 - Whether there is value in FTC seeking monetary relief in light of any other remedies available, including private actions and criminal proceedings

FTC Policy Statement on Monetary Equitable Remedies in Competition Cases, July 25, 2003 (68 Fed. Reg. 48,250 Aug. 4, 2003)

<http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>

Antitrust Modernization Commission

- There is no need to clarify, expand, or limit the agencies' authority to seek monetary equitable relief.
 - The Commission endorses the Federal Trade Commission's policy governing its use of monetary equitable remedies in competition cases.

Mylan case

- Mylan monopolized by entering into long-term exclusive supply licenses with the only suppliers of an essential ingredient necessary to produce particular generic drugs. Once its competitors were denied access to the essential ingredient, Mylan raised prices for its drugs by over 2700%.
- In deciding to pursue recovery benefiting indirect purchaser consumers, FTC considered:
 - Unclear whether there would be any follow-on private class actions or state actions after a traditional FTC administrative proceeding
 - Drug wholesalers who would be entitled to recover as direct purchasers (1) had benefited substantially from the price increases, (2) had no real incentive to go forward with an antitrust case and (3) were heavily dependent on drug manufacturers and would not want to rock the boat
- In fact, in the direct purchaser class action, most of the drug wholesalers opted out and did not pursue their own claims

See remarks of Melvin Orlans, “Injunctions, Divestiture and Disgorgement,” Federal Trade Commission 90th Anniversary Symposium (Sept. 22-23, 2004)
www.ftc.gov/ftc/history/transcripts/040923transcript007.pdf - 2004-09-23

What's the latest

- *FTC v. Ovation Pharmaceuticals, Inc.* (D. Minn. Dec. 2008 complaint)
 - Complaint alleges acquisition is forcing hospitals to pay monopoly prices for drugs used to treat 30,000 premature babies born each year with patent ductus arteriosus (“PDA”), a potentially life-threatening congenital heart defect
 - Indocin and NeoProfen are the only two pharmaceutical treatments for PDA sold in the U.S. Ovation purchased rights to Indocin in August 2005 and then acquired the U.S. rights to NeoProfen in January 2006 while it was still awaiting final FDA approval.
 - After acquiring NeoProfen, Ovation immediately raised the price to hospitals for Indocin nearly 1,300 percent, from \$36 to approximately \$500 per vial. When Ovation launched NeoProfen in July 2006, it set a price of approximately \$483 per vial, essentially matching Indocin’s price.
 - FTC seeks injunctive relief, including disgorgement of “ill-gotten gains”

<http://www.ftc.gov/os/caselist/0810156/081216ovationcmpt.pdf>

Future targets

- Drugs, drugs, drugs
- Health care provider collusion?
 - Thirty years of “Now cut that out” civil enforcement
 - Little private plaintiff activity
- Other

DOJ statutory authority

- Sherman Act, § 4, 15 U.S.C. §4; Clayton Act § 15, 15 U.S.C. § 25
 - The [federal] district courts . . . are invested with jurisdiction to prevent and restrain violations of [the Sherman and Clayton Acts] and it shall be the duty of the several United States attorneys . . . to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition . . . praying that such violation shall be enjoined or otherwise prohibited. (emphasis added)

Potential for DOJ seeking monetary remedies?

- DOJ believes it has the authority to seek equitable monetary remedies in civil antitrust proceedings
- See *Ford Motor Co. v. United States*, 405 U.S. 562, 573 & n.8 (1972)
 - Antitrust laws empower Attorney General to institute proceedings in equity to prevent and restrain antitrust violations
 - Relief must be directed to what is "necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute," or "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (citations omitted) (emphasis in original)
 - cited in Reply Brief for United States on Petition for a Writ of Certiorari, *United States v. Philip Morris USA, Inc.*, No. 05-92, at 4 & n.3 (filed Sept. 2005) (arguing that RICO provides government with disgorgement remedy and refuting contention that antitrust laws preclude disgorgement)

Restitution or disgorgement in criminal cases

- DOJ can seek restitution in criminal antitrust enforcement, but typically does not
- Antitrust Division Manual notes
 - availability of treble damages to private plaintiffs
 - complexity of antitrust cases
 - difficulty of making accurate damage estimates
 - per se nature of criminal offenses so that no evidence of harm and its quantification is required
- “Division attorneys should consider seeking orders for restitution in cases in which victims are unable or unlikely to seek treble damages or where the fashioning of such an order would not unduly complicate or prolong the sentencing process, and should also consider including restitution as part of plea agreements, particularly in circumstances where it appears that a defendant has insufficient resources to pay both a Guidelines criminal fine and damages to the victims of the violation”

Antitrust Division Manual, Fourth Edition IV-89-90.

What's next?

- Comments of Commissioner Leibovitz may be harbinger of future FTC course
- “The Commission should use disgorgement in antitrust cases more often”
 - Concurring statement in *Ovations Pharmaceuticals* complaint
- “The first factor – a clear violation of law – should be the primary consideration when disgorgement is being contemplated. [It] should also outweigh concerns about duplicate recovery from private actions because, after all, we generally can’t predict how – or when – follow up litigation might be resolved, assuming there is litigation filed in the first place. In fact, the threat of disgorgement may be an even more powerful deterrent than treble damages under some circumstances. . . .”
 - Commissioner John Leibovitz, “Building on the Muris and Pitofsky Years: Evolving Remedies from ‘Time-Outs’ to Civil Penalties (Not the Third Rail of Antitrust),” 80 *Tulane L. Rev.* 595 (from speech to American Antitrust Institute, June 21, 2005)

Civil penalties

- FTC and DOJ may not impose or seek civil penalty or fine in typical antitrust case
- Major gap between harsh penalties of criminal enforcement and typical “go forth and sin no more”-type remedy in civil cases where no treble damage action is brought
- Cf. statutory addition of civil monetary penalty to supplement criminal enforcement scheme to combat kickbacks in government health care programs

AMC consideration

- DOJ lukewarmly proposed civil penalties as topic for consideration by Antitrust Modernization Commission.
- Antitrust Modernization Commission:
 - “There is no need to give the antitrust agencies expanded authority to seek civil fines. Neither the DOJ nor the FTC has requested expanded civil fine authority. In fact, the head of the Antitrust Division expressed “reservations” about increased government civil fine authority, stating that such a change might “blur] the distinction between a civil violation and a criminal violation”—a distinction that is important to the DOJ.”
 - Chapter III, Civil and Criminal Remedies, Antitrust Modernization Commission Report and Recommendations (April 2007) (emphasis added)
http://govinfo.library.unt.edu/amc/report_recommendation/chapter3.pdf

What do scholars say?

- Stephen Calkins, “Civil Monetary Remedies Available to Federal Antitrust Enforcers,” 40 *U. San. F. L. Rev.* 57 (2005-2006) (supporting availability of civil penalties for antitrust cases)
- Harry First, “The Case for Antitrust Civil Remedies,” New York University Public Law and Legal Theory Working Papers Year 2008 Paper 101 <http://lsr.nellco.org/nyu/plltwp/papers/101> (supporting civil penalty remedy for §2 only)

Movement toward civil penalties?

- “There are other holes in our authority that we think are worth filling and we are working on those. . . . Authority to obtain civil penalties would be a useful addition to our portfolio of policy tools, FTC Chairman William E. Kovacic, “Trans Atlantic Consumer Dialogue,” April 7, 2008 (speech) (talking about antitrust?) www.ftc.gov/speeches/kovacic/080407tacd.pdf - 2008-04-07
- “We should at least consider the feasibility of enhanced [civil] penalty authority on the competition side” (Commissioner Leibovitz, “Building on the Pitofsky and Muris Years,” supra.
- FTC Reauthorization Act of 2008, S. 2831 would extend FTC authority to seek civil penalties to violations of FTC Act, expanding existing authority to seek penalties for violation of FTC rules “respecting unfair or deceptive acts or practices”
 - FTC congressional testimony supports legislation providing direct authority to seek civil penalties in consumer protection cases, but sidesteps on competition cases:
 - “Although civil penalty authority in competition cases might provide a similar deterrent effect, [our testimony on the proposed bill] is limited to civil penalty authority in consumer protection cases. Prepared Statement of the Federal Trade Commission Before the Committee on Commerce, Science, and Transportation United States Senate Washington, D.C. April 8, 2008 www.ftc.gov/os/testimony/P034101reauth.pdf

Further reading

- Einer Elhauge, “Disgorgement as an Antitrust Remedy,” Harvard Law School John M. Olkn Center for Law, Economics and Business Discussion Paper Series, 2008 Paper 613 (76 Antitrust L.J. (forthcoming issue 2009)
<http://lsr.nellco.org/cgi/viewcontent.cgi?article=1402&context=harvard/olin>
- Stephen Calkins, “Civil Monetary Remedies Available to Federal Antitrust Enforcers,” 40 *U. San. F. L. Rev.* 57 (2005-2006)
- Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson, Federal Trade Commission v. Mylan Laboratories, Inc., et al. FTC File No. X990015 www.ftc.gov/os/2000/11/mylanpitofskystatment.htm
- Statement of Commissioner Thomas B. Leary, Concurring in part and dissenting in part, FTC v. The Hearst Trust, File No. 991-0323
www.ftc.gov/os/2001/12/learystate.htm
- “Civil Remedies Available to the Federal Trade Commission,” Comments of John Graubert, Principal Deputy General Counsel, Federal Trade Commission, to the Antitrust Modernization Commission, Dec. 1, 2005
www.ftc.gov/os/2005/12/051202civil.pdf - 2005-12-02
- Robert Pitofsky, “Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies,” 91 *Geo. L. J.* 169
- The Use of Disgorgement as a Remedy in Competition Cases, Public Comments
<http://www.ftc.gov/os/comments/disgorgement/index.shtm>
- Chapter III, Civil and Criminal Remedies, Antitrust Modernization Commission Report and Recommendations (April 2007)
http://govinfo.library.unt.edu/amc/report_recommendation/chapter3.pdf

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