THE FTC WITHDRAWS ITS 2003 POLICY STATEMENT ON MONETARY EQUITABLE REMEDIES IN COMPETITION CASES

On July 31, 2012, the Federal Trade Commission (the "FTC") withdrew its Policy Statement on Monetary Equitable Remedies in Competition Cases (the "2003 Statement"). The 2003 Statement[1] outlined the three factors the FTC would consider in evaluating whether a monetary remedy — such as disgorgement or restitution — would be appropriate in an antitrust case, but cautioned that it would apply disgorgement or restitution remedies only in "exceptional cases." In withdrawing the 2003 Statement, the FTC now pledges to make decisions based on "[e]xisting case law" and noted that the parameters of the 2003 Statement were overly restrictive.

For violations of the FTC Act,[2] the FTC generally imposes "cease and desist" orders that do not include monetary components (either fines or penalties). In some rare cases,[3] the FTC has sought a monetary remedy in the form of restitution or disgorgement. The current withdrawal of the 2003 Statement is meant to communicate that the FTC may seek monetary remedies more frequently and thus increases the stakes of FTC enforcement.

The 2003 Statement

Based on "general observations on the use of disgorgement or restitution in competition cases," the FTC issued the 2003 Statement, which specified three factors the FTC would consider when deciding whether to employ either of these remedies in competition cases: 1) whether the "underlying violation is clear;" 2) whether there was "a reasonable basis for calculating the amount of a remedial payment;" and 3) whether there were "other remedies available in the matter."

The first factor, the clarity requirement, was rooted in the FTC's goal of promoting deterrence. The 2003 Statement noted that "the value of deterrence is reduced when the violator has no reasonable way of knowing in advance that its conduct is placing it in jeopardy of having to pay back all the potential gains." For that reason, the FTC stated that it would "ordinarily seek monetary disgorgement only when the violation is clear." The FTC went on to define a "clear" violation as one in which, "based on existing precedent, a reasonable party should expect that the conduct at issue would likely be found to be illegal."

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[1] Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003).

[2] 15 U.S.C. §§ 41-58 (2012).

[3] *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36 (D.D.C. 1999), is a notable example of a case where the FTC sought disgorgement.

The second factor, the requirement that there be a "reasonable basis" by which to determine the amount of the remedy, did not require "undue precision." Rather, this requirement was based on case law, which supports the proposition that the calculation need not be exact. *See FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997); *SEC v. Bilzerian*, 29 F.3d 689, 697 (D.D.C. 1994); *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1232 (D.D.C. 1989).

The FTC considered a third factor, whether other remedies were available, because the existence of other remedies meant that "a Commission action for monetary equitable relief might well be an unnecessary and unwise expenditure of limited agency resources." The FTC recognized the value of a disgorgement or restitution remedy in some situations, but was "sensitive to the interest in avoiding duplicative recoveries." In the end, it would rely on the courts "craft[ing] orders to avoid unjust results." While the 2003 Statement was in effect, the courts did in fact consider whether other remedies were available before deciding which, if any, monetary remedy was appropriate in a given situation. *See, e.g., United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 640 (S.D.N.Y. 2011) (taking into account that neither restitution nor divestiture was available when deciding to grant disgorgement).

The 2012 Withdrawal

In July 2012, the FTC withdrew the 2003 Statement (the "2012 Withdrawal").[4] The FTC stated that it withdrew the 2003 Statement as policy guidance because it provided an "overly restrictive view of the Commission's options for equitable remedies" and it had "chilled the pursuit of monetary remedies in the years since [its] issuance." Specifically, the FTC disagreed that disgorgement and restitution should be instituted only in "exceptional cases." Rather, it noted that "disgorgement and restitution can be effective remedies in competition matters, both to deprive wrongdoers of unjust enrichment and to restore their victims to the positions they would have occupied but for the illegal behavior." These measures would allow the FTC to "remedy the actual, realized effects of antitrust violations."

The 2012 Withdrawal addressed each of the three factors identified in the 2003 Statement. The FTC characterized the second factor as nothing more than a restatement of existing legal standards. The first and third factors, however, were found to "impose constraints on the [FTC] beyond the requirements of the law." The FTC found the first factor — the clarity requirement — to be problematic because it has been misinterpreted by some to mean that disgorgement should not be available in cases of first impression. The FTC clarified that "some novel conduct can violate antitrust laws and can be even more egregious than 'clear' violations" and stated that it did "not see a basis for creating a heightened standard for disgorgement in cases brought under the federal antitrust statutes." Regarding the third factor — the consideration of other available remedies — the FTC stressed that the availability of other remedies was relevant, but not dispositive.

[4] Statement of the Commission, Effecting the Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), 77 Fed. Reg. 47,070 (Aug. 7, 2012).

Instead of relying on the three factors listed in the 2003 Statement, the FTC will now rely on "[e]xisting case law" — discussed above, and grounded in the notion that the purpose of disgorgement is to force the defendant to give up the amount by which he was unjustly enriched, *see Keyspan Corp.*, 763 F. Supp. 2d at 638 — for guidance on monetary equitable remedies. The FTC "will evaluate the unique circumstances of each case through that framework" while exercising its prosecutorial discretion "responsibly."

The Dissent to the 2012 Withdrawal

Commissioner Maureen K. Ohlhausen filed a dissenting opinion to the 2012 Withdrawal. Her dissent noted that she saw no evidence that the 2003 Statement had "inappropriately constrained the Commission" since its release and expressed concern that without the 2003 Statement, the FTC's new policy to simply rely on existing case law "could justify a decision to refrain from issuing any guidance whatsoever about how this agency will interpret and exercise its statutory authority on any issue." Ohlhausen argued that the 2012 Withdrawal compromised the Commission's "goal of transparency" and left the FTC with no guidance on the issue of equitable monetary remedies.

Implications

The 2012 Withdrawal may signal an increased willingness by the FTC to seek monetary remedies in competition cases. Former FTC Chairman Pitofsky once advocated for using disgorgement "only in exceptional circumstances."[5] And, in fact, since issuing the statement in 2003, the FTC has pursued monetary equitable remedies in only two cases: *FTC v. Perrigo Co.*[6] and *FTC v. Lundbeck*.[7] No longer governed by language that suggests that disgorgement and restitution be employed only in "exceptional cases," and simultaneously shaking off an "overly restrictive view" of when it is appropriate to seek these remedies, the FTC may now seek monetary remedies in competition cases with greater frequency.

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[5] Statement of Chairman Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson, Hearst Trust, File No. 991-0323 (Apr. 4, 2001), *available at* http://www.ftc.gov/os/2001/04/hearstpitantthom.html.

[6] No. 1:04CV1397 (D.D.C. Aug. 12, 2004).

[7] No. 08-6379, 2010 WL 3810015 (D. Minn. Aug. 31, 2010).

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