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Antitrust Alert

Federal Trade Commission Withdraws Policy Statement Applying Monetary Equitable Remedies Only in "Exceptional Cases"

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On July 31, 2012, the Federal Trade Commission (FTC) withdrew its Policy Statement on Monetary Equitable Remedies in Competition Cases ("Policy Statement") issued in 2003.[1] In its withdrawal statement ("Withdrawal"), the FTC asserted that in practice, the Policy Statement created "an overly restrictive view" of the FTC's equitable remedy options.[2] Going forward, the FTC will look to existing law for guidance on the use of monetary equitable remedies.

Withdrawal of the Policy Statement signals that the FTC aims to employ monetary equitable remedies on a more frequent basis. The increased threat of disgorgement or restitution may also incentivize parties to settle for more extensive conduct relief in order to avoid monetary equitable remedies.[3]

Reasoning

According to the FTC majority, the Policy Statement, while intended to clarify the FTC's views on monetary equitable remedies, has had the effect of "chill[ing] the pursuit of monetary remedies in the years since the statement's issuance."[4] The FTC, however, did not specifically identify any instances in which the Policy Statement impeded its ability to seek disgorgement or restitution. The Policy Statement limited the FTC's ability to seek monetary equitable remedies to "exceptional cases,"[5] which the FTC majority no longer believes is appropriate. The Policy Statement directed the FTC to consider three factors before seeking disgorgement or restitution in a competition case, two of which the FTC majority now believes may impose constraints "beyond the requirements of the law."[6]

The Policy Statement directed the FTC to consider three factors in deciding whether to seek monetary equitable remedies in a competition case: 1) whether the "underlying violation is clear;"[7] 2) whether there is "a reasonable basis for calculating the amount of remedial payment"; and 3) whether there are "other remedies available in the matter, including private actions and criminal proceedings."[8] In the Withdrawal, the FTC majority opines that the first factor is

[1] Fed. Trade Comm'n, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003).
[2] Fed. Trade Comm'n, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases, at 1 (July 31, 2012).
[3] In contrast to the Tunney Act, 15 U.S.C. § 16, which requires the DOJ to disclose alternative remedies considered by the United States in proposing a consent judgment, the FTC is not required to make similar disclosures. See FTC Act, 15 U.S.C. §§ 41-58; FTC Rules, 16 C.F.R. §§ 0-999.
[4] Withdrawal at 2
[5] Policy Statement, 68 Fed. Reg. at 45821.
[6] Withdrawal at 1-2.
[7] The Policy Statement explained that a "clear violation" is one where, "based on existing precedent, a reasonable party should expect that the conduct at issue would likely be found to be illegal." Policy Statement, 68 Fed. Reg. at 45821.
[8] Policy Statement, 68 Fed. Reg. at 45821.

not an element considered by courts in evaluating requests for disgorgement and it has been "erroneously interpreted" to mean that disgorgement should not be sought in matters of first impression.[9] The Commission majority stated that "[w]hether conduct is common or novel, clearly a violation or never before considered, has little to do with whether the conduct is anticompetitive; some novel conduct can violate the antitrust laws and can be even more egregious than 'clear' violations."[10] The majority further rejected the notion that it should not be able to seek equitable remedies in the absence of advance notice, asserting that disgorgement is not a punitive tool, like fines or imprisonment.[11] As to the third factor, the FTC majority states that it may place "an undue burden on the Commission" by appearing to require that the FTC demonstrate the insufficiency of other actions for monetary equitable remedies.[12] The Commission majority did not criticize the second factor. However, the majority indicated that, overall, the Policy Statement placed unnecessary constraints on the pursuit of monetary equitable remedies.[13]

In rejecting the first Policy Statement factor, the FTC relies on United States v. KeySpan Corp., a case in which the Department of Justice, which had not adopted a similar policy statement regarding use of disgorgement remedies in antitrust cases, sought disgorgement of profits gained from an allegedly anticompetitive financial derivative agreement ("KeySpan Swap") giving KeySpan an indirect financial interest in the sale of electricity generated by its largest competitor.[14] The court in KeySpan approved of the use of the disgorgement remedy, and its opinion contained no discussion of novelty of the allegedly anticompetitive conduct or notice.[15] Interestingly, the KeySpan court did appear to take into account the availability of other remedies, finding that "absent disgorgement, the Government is without recourse to remedy Keyspan's anticompetitive conduct."[16] In a related matter, DOJ recently obtained disgorgement as part of its consent judgment against Morgan Stanley, the financial services firm that facilitated the KeySpan Swap.[17] In its Competitive Impact Statement, DOJ highlighted that securing disgorgement from "the other responsible party to the anticompetitive agreement" would deter other firms "from entering into similar financial agreements that result in similar anticompetitive conduct in the future."[18]

History

The FTC has obtained monetary equitable relief such as disgorgement or restitution in 11 antitrust cases since 1980, all through settlement or consent decree.[19] After the FTC issued its Policy Statement in 2003, however, it has sought

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[9] Withdrawal at 2.
[10] Id.
[11] Id.
[12] Id.
[13] Withdrawal at 1-2.
[14] 763 F. Supp. 2d 633 (S.D.N.Y. 2011).
[15] Id. at 640.
[16] Id.
[17] See *United States v. Morgan Stanley*, No. 11-6875 (S.D.N.Y. Sept. 30, 2011).
[18] Competitive Impact Statement, *United States v. Morgan Stanley*, No. 11-6875.
[19] See *FTC v. Perrigo Co.*, Civ. No. 1:04CV1397 (RMC) (D.D.C. Aug. 12, 2004) (consent decree required defendants to disgorge profits gained from an agreement under which Perrigo allegedly paid Alpharma to refrain from entry into a generic drug market); *FTC v. Hearst Trust*, Civ. No. 1:01CV00734 (D.D.C. Dec. 14, 2001) (Hearst entered a settlement agreement with the FTC and agreed to disgorge profits obtained when its acquisition of J.B. Laughery, Inc. created a monopoly in a drug information database market); *FTC v. Mylan Labs., Inc.*, Civ. No. 1:98CV03114 (TFH) (D.D.C. Nov. 29, 2000) (settlement of charges of monopolization and attempted monopolization required Mylan to disgorge allegedly illegally obtained profits); *Commonwealth Land Title Ins. Co*., 126 F.T.C. 680 (1998) (consent decree required refund of amount Commonwealth overcharged consumers during the beginning of a joint venture that was later abandoned); *FTC v. College of Physicians-Surgeons of Puerto Rico*, Civ. No. 97-2466-HL (D.P.R. Oct. 2, 1997) (consent decree required restitution based on an allegedly unlawful group boycott of non-emergency patient care); *FTC v. Mead Johnson & Co*., Civ. No. 92-1366 (D.D.C. June 11, 1992) (consent decree required in-kind restitution based on allegations of price coordination on bids for infant formula made to the government); *FTC v. American Home Products Corp*., Civ. No. 92-1365 (D.D.C. June 11, 1992) (same); *FTC v. Joseph Dixon Crucible Co*., Civ. No. C80-700 (N.D. Ohio 1983) (consent decree required art supplier that had allegedly engaged in unlawful price-fixing with other art suppliers to provide restitution to customers); *Binney & Smith Inc*., 96 F.T.C. 625 (1980) (same); *Milton Bradley Co*., 96 F.T.C. 638 (1980) (same); *American Art*

monetary equitable relief in just two cases, obtaining relief in only one.[20] Although not explicitly authorized to obtain equitable monetary relief under the FTC Act, the Sherman Act or the Clayton Act,[21] in seeking such relief the FTC has relied on a line of cases in which courts have refrained from limiting the availability of equitable remedies without clear statutory direction to do so.[22]

Implications

The FTC's withdrawal of its Policy Statement demonstrates an intent to make broader use of monetary equitable remedies, putting the FTC's ability to seek disgorgement and restitution more on par with the DOJ. This sentiment is echoed by Commissioner Maureen K. Ohlhausen in her strong dissent from the Withdrawal in which she says that rescinding the Policy Statement signals that the FTC "will be seeking disgorgement in circumstances in which the three-part test heretofore utilized under the Statement is not met."[23] In addition to a potential uptick in monetary equitable remedies, withdrawal of the Policy Statement makes the FTC's deliberations on such matters less transparent. Withdrawal of concrete guidance on the FTC's use of disgorgement and restitution will thus make it more difficult for companies to predict circumstances in which the FTC may seek such remedies. Another practical implication of the Withdrawal is that a greater threat of monetary equitable remedies may encourage parties to settle for more extensive conduct relief in hopes of avoiding disgorgement or restitution.

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Clay Co., 96 F.T.C. 809 (1980) (same); *see also* Antitrust Modernization Comm'n, Supplemental Civil Remedies-Government Discussion Memorandum (July 20, 2006).

[20] See *Perrigo*, Civ. No. 1:04CV1397; *FTC v. Lundbeck, Inc.*, No. 08-6379, 2010 WL 3810015 (D. Minn. Aug. 31, 2010) (the court found that the FTC failed to establish its monopolization claim and thus did not reach the issue of remedies).

[21] See 15 U.S.C. §§ 4, 25, 53(b).

[22] See, *e.g., Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); see also Supplemental Civil Remedies-Government Discussion Memorandum, at 2.

[23] Maureen K. Ohlhausen, Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases, at 1 (July 31, 2012).

