

Antitrust Alert

Court Approves First Profit Disgorgement Remedy In Federal Antitrust Case

February 22, 2011

On February 2, 2011, U.S. District Judge William H. Pauley III approved a settlement entered into last year between the U.S. Department of Justice (DOJ) and KeySpan Corporation, whereby KeySpan agreed to disgorge \$12 million in profits in response to DOJ claims that KeySpan violated the antitrust laws by entering into an agreement restraining competition in the New York City electricity market. The court's approval of the settlement is significant in that it is the first time that a court has sanctioned DOJ's requirement of disgorgement of profits as a remedy for a federal antitrust violation. The district court decision now strengthens the case for future DOJ use of disgorgement as a viable antitrust remedy. Its use could also potentially have broader implications outside of the electric utility industry and spread into other industries, such as those where derivative instruments could be used as tools to manipulate markets. Disgorgement could also be applied as a remedy where other avenues of relief may not be available or when cited by a court as a justifiable exercise of equitable powers.

Background

In January 2006, KeySpan, the largest seller of electricity generating capacity in the New York City market at that time, entered into an agreement (the "KeySpan Swap") with a financial services company that effectively gave KeySpan a financial interest in the electricity generating capacity sales of its competitor, Astoria Generating Company Acquisitions, LLC. The DOJ's complaint alleged that the KeySpan Swap violated § 1 of the Sherman Act. In particular, the complaint alleged that, because the KeySpan Swap provided KeySpan with revenues from its competitor's sales, it had the effect of eliminating KeySpan's incentive to sell its electricity generating capacity at lower, more competitive prices. Thus, according to the DOJ, the agreement resulted in retail electricity prices in New York City that were likely higher than they would have been absent the anticompetitive agreement. For a more detailed discussion of the complaint, the significance of the disgorgement remedy and its general use in light of other available remedies, please see our February 26, 2010 Akin Gump client alert, "[Justice Department Obtains Disgorgement of \\$12 Million in Profits in Civil Antitrust Settlement with New York Electricity Generator.](#)"

The Court's Ruling

The court approved the settlement pursuant to the Tunney Act 15 U.S.C. § 16(e)(1), a law that requires judicial review of a DOJ settlement to determine whether it is "in the public interest." Because this was the first time the government had pursued disgorgement as a remedy for a Sherman Act violation, and no judicial precedent existed ordering disgorgement in such a case, the court looked to the application of the securities laws in the starting point of its analysis and found not only support to use its "inherent equitable powers" to apply it to the antitrust context, but also that the remedy comported with established principles of antitrust law.



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The court found disgorgement appropriate for a number of reasons. First, the anticompetitive conduct had ceased. Further, the swap had expired, no restitution to New York City consumers was available and no assets could be divested. Absent a disgorgement remedy, the government would have been without recourse to remedy KeySpan's anticompetitive conduct, and the court's rejection of a disgorgement remedy would have "incentivized other generators to manipulate electricity markets using derivative instruments that expire in the short term, with the understanding that they will be permitted to retain their earnings because restitution to consumers is unavailable."

In upholding the adequacy of the \$12 million disgorgement remedy and noting the precedential effect of its applicability, Judge Pauley further sent a strong message. He stated—

Future manipulators of electricity markets or those who seek to leverage derivative products in the restraint of trade now face the prospect of disgorgement in addition to other remedies. This case is an important marker for enforcement agencies and utility regulators alike. Approving disgorgement as part of the Government's arsenal tilts in favor of competitive bidding and deters the use of derivatives as tools to manipulate a market.

Significance

Clearly, this ruling is a significant victory for antitrust enforcement agencies, and it is likely that DOJ Antitrust Division enforcers now consider this a viable addition to their enforcement toolkit, having only used it sparingly before. However, it is still premature to conclude whether disgorgement will be used with increasing frequency or whether it will be expanded beyond the electric utility industry. Additionally, in an effort to increase consistency in enforcement between DOJ and the Federal Trade Commission (FTC), it may choose to limit application to exceptional cases, such as the FTC has chosen to do in the past.

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