

discretion, monetary equitable remedies (particularly disgorgement or restitution) in competition cases brought pursuant to section 13(b) of the FTC Act.¹ In December 2001, the Commission issued a notice requesting comment on the issue,² and received six comments in response.³ The agency has also reviewed relevant case law and literature, including a number of sources cited by commentators, as well as discussions in public fora and its own experience. The Commission may use all these resources to inform its decisions whether to seek monetary remedies in particular competition matters on a case by case basis. In addition, the Commission sets forth below some general observations on the use of disgorgement or restitution in competition cases.⁴

Disgorgement is an equitable monetary remedy “designed to deprive a wrongdoer of his unjust enrichment and to deter others” from future violations.⁵ Depriving the violator of any of the benefits of illegal conduct has long been accepted as an appropriate, indeed necessary, element of antitrust remedies. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 577 (1966); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128 (1948). Restitution is also an equitable remedy, serving different but often complimentary purposes. Restitution is intended to restore the victims of a violation to the position they would have been in without the violation, often by refunding overpayments made as a result of the violation. The Commission has sought and obtained disgorgement or restitution in a number of competition cases over the last few

decades,⁶ most recently in the *Mylan*⁷ and *Hearst*⁸ matters. In exercising its prosecutorial discretion in the competition area, however, the Commission has moved cautiously and used its monetary remedial authority there sparingly. The Commission continues to believe that disgorgement and restitution can play a useful role in some competition cases, complementing more familiar remedies such as divestiture, conduct remedies, private damages, and civil or criminal penalties. The competition enforcement regime in the United States is multifaceted, and it is important and beneficial that there be a number of flexible tools, as well as a number of potential enforcers, available to address competitive problems in a particular case. Nonetheless, we do not view monetary disgorgement or restitution as routine remedies for antitrust cases. In general, we will continue to rely primarily on more familiar, prospective remedies, and seek disgorgement and restitution in exceptional cases.

As a general matter, the Commission will consider the following three factors in determining whether to seek disgorgement or restitution in a

competition case. *First*, the Commission will ordinarily seek monetary relief only where the underlying violation is clear. *Second*, there must be a reasonable basis for calculating the amount of a remedial payment. *Third*, the Commission will consider the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings. 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.

Clear Violation

The Commission will ordinarily seek monetary disgorgement only when the violation is clear. A violation is “clear” for this purpose when, based on existing precedent, a reasonable party should expect that the conduct is issue would likely be found to be illegal. (“Clearness” is therefore measured *ex ante*, as of the time the act occurs, and not *ex post* with the benefit of hindsight.) In such cases, the use of disgorgement will serve an appropriate deterrence goal. One key purpose of the disgorgement remedy is to remove the incentive to commit violations by demonstrating to the potential violator that unlawful conduct will not be profitable. This purpose can best be served when the violator can determine in advance that its conduct would probably be considered illegal. Disgorgement might arguably serve useful purposes whether or not the violation was clear—for instance, by providing an example for future violators and restoring the relevant market to its pre-violation status (thereby removing any unfair advantages obtained by the violator). Overall, however, the Commission believes 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.⁹

⁹ The analysis may be slightly more complicated in cases in which the Commission is seeking restitution rather than disgorgement. Restitution focuses on the victim, not the violator, and is justified by the need to restore the victim to the status quo ante, not on *ex ante* deterrence of unlawful conduct by a defendant. Thus, for example, when significant consumer harm will not (for one reason or another) be redressed through a private action (see discussion of our third factor, below), the Commission might therefore consider

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¹ 15 U.S.C. 53(b).

² 66 FR 67254 (Dec. 28, 2001); also available on the Commission’s web site at <http://www.ftc.gov/os/2001/12/disgorgefrn.htm>.

³ The following filed comments: The Antitrust Section of the American Bar Association, the American Antitrust Institute, the American Enterprise Institute for Public Policy Research, James M. Spears, Stephen A. Stack, and Kenneth G. Starling. These comments are available at <http://www.ftc.gov/os/comments/disgorgement/index.htm>.

⁴ This statement sets forth some observations and intentions of the Commission regarding its exercise of discretion in determining whether to seek monetary equitable remedies in competition cases. It does not create any right or obligation, impose any element of proof, or adjust the burden of proof or production of evidence on any particular issue, as those standards have been established by the courts. This statement of policy does not apply to consumer protection cases.

⁵ *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989).

⁶ See *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. American Home Products Corp.*, Civ. No. 92–1367 (D.D.C. June 11, 1992) (same); *FTC v. Joseph Dixon Crucible Co.*, Civ. No. C80–700 (N.D. Ohio 1983) (alleged price-fixing, under Section 5(1) for violation of earlier order; stipulated judgment included \$525,000 in consumer redress, plus \$75,000 civil penalty); *Commonwealth Land Title Ins. Co.*, 126 F.T.C. 680, 688 (1998) (alleged price-fixing; consent order included refund of excess charges); *Binney & Smith Inc.*, 96 F.T.C. 625 (1980) (alleged price-fixing; consent order included \$1 million in consumer redress); *Milton Bradley Co.*, 96 F.T.C. 638 (1980) (same; consent order included \$200,000 in consumer redress); *American Art Clay Co.*, 96 F.T.C. 809 (1980) (same; consent order included \$25,000 in consumer redress); 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) (holding that FTC Act section 13(b) permitted the FTC to seek permanent injunction ordering restitution in antitrust case); FTC press release, June 5, 1989, re: A&P/Waldbaums (noting position of Commissioner Strenio that Commission should have exercised its “authority to obtain full disgorgement of these ill-gotten gains”).

⁷ *FTC v. Mylan Labs, Inc.*, No. 1:98CV03114 (TFH) (D.D.C. Feb. 9, 2001) (alleged monopolization; stipulated judgment included \$100 million restitution); see Mem. Opinion, 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).

⁸ *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).