

The Commission will assess whether a violation is "clear" by means of an objective, not a subjective, standard, *i.e.*, a reasonableness test. "Naked" restraints of trade, such as price-fixing or horizontal market division, are presumptively clear cases. The list of "clear" cases, however, goes beyond traditional *per se* violations. The *Hearst* and *Mylan* cases are themselves examples of easily condemned conduct that would not necessarily be described as a *per se* violation: In *Hearst*, merger to monopoly aided by withholding key documents from the FTC;¹⁰ and in *Mylan*, conspiracy to obtain monopoly power through exclusive supply agreements (unsupported by any legitimate business purpose).¹¹

Conversely, in the Commission's statement accompanying the issuance of its consent agreement in *Abbott Laboratories and Geneva Pharmaceuticals, Inc.*, File No. 981-0395 (March 16, 2000), the Commission noted that the case represented the first resolution of an antitrust challenge by the government to a private agreement whereby a brand name drug company paid the first generic company that sought FDA approval not to enter the market, and to retain its 180-day period of market exclusivity under the Hatch-Waxman Act. Because the behavior occurred in a complex regulatory context, and because this was the first government antitrust enforcement action in this area, the Commission believed the public interest was

satisfied with orders that regulated future conduct by the parties, without further monetary relief. The Commission warned pharmaceutical firms that they "should now be on notice, however, that [such] arrangements * * * can raise serious antitrust issues," and that accordingly, "in the future, the Commission will consider its entire range of remedies in connection with enforcement actions against such arrangements, including possibly seeking disgorgement of illegally obtained profits."¹²

Reasonable Basis for Calculation of Remedy

The Commission will not seek a monetary equitable remedy when there is no reasonable basis for calculating the amount of the disgorgement or restitution to be ordered. Thus, the agency does not expect to seek disgorgement unless it can suggest to a court a reasonable means of calculating the gains or benefits from a violation, nor to seek restitution unless it can offer a reasonable gauge of the amount of injury from a violation. Nonetheless, a reasonable basis for calculation does not require undue precision. *See, e.g., FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997); *see also SEC v. Bilzerian*, 29 F.3d 689 (D.C. Cir. 1994); *SEC v. First City Financial Corporation, Ltd.*, 890 F.2d 1215 (D.C. Cir. 1989).

Value Added by the Commission's Monetary Remedy

The Commission will consider monetary remedies when it anticipates that other remedies are likely to fail to accomplish fully the purposes of the antitrust laws or when such a monetary remedy may provide important additional benefits. When other remedies are brought to bear and are likely to result in complete relief, a Commission action for monetary equitable relief might well be an unnecessary and unwise expenditure of limited agency resources.¹³

Thus, for example, a case may be particularly appropriate for disgorgement when private actions likely will not remove the total unjust enrichment from a violation. If statutes of limitation for, or market disincentives to, private damage actions are likely to leave a violator with some or all of the fruits of its violation, we may seek disgorgement to prevent the violator from benefitting from the violation. Similarly, when practical or legal difficulties are likely to preclude compensation for those injured by a violation who in equity should be made whole, we may seek restitution for them.¹⁴ Such situations can arise, for example, when significant aggregate consumer injury results from relatively small individual injuries not justifying the cost of a private lawsuit, or when direct purchasers do not sue (for a variety of possible reasons) and indirect purchasers are precluded from suit under section 4 of the Clayton Act.

Disgorgement can also be particularly valuable when the advantages a violator reaps from the violation greatly outweigh the specific penalties prescribed in applicable laws, and thereby overwhelm the significant disincentive to violating the law that such penalties otherwise provide.¹⁵ The paramount purpose of disgorgement is to make sure that wrongdoers do not profit from their wrongdoing. *E.g., SEC v. First City Financial Corp.*, *supra*; *SEC v. Tome*, 833 F.2d 1086 (2d Cir. 1987),

Injury in the Microsoft Case?, 69 Geo. Wash. L. Rev. 829 (2001); Robert Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio St. L.J. 115 (1993); Steven Salop & Lawrence White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1033-39 (1986); Walter Erickson, *The Profitability of Violating the Antitrust Laws: Dissolution and Treble Damages in Private Antitrust*, 5:4 Antitrust L. & Econ. Rev. 101 (1972); Alfred Parker, *Treble Damage Action—A Financial Deterrent to Antitrust Violations?*, 16 Antitrust Bull. 483 (1971); compare Joseph Gallo *et al.*, *Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study*, 17 Rev. Indus. Org. 75, 125-27 (2000). The Commission will therefore need to continue to evaluate this issue on a case-by-case basis.

¹⁴ For example, *Hearst* presented the somewhat unusual case of a consummated merger that had passed through the HSR review process. Absent FTC action, private plaintiffs would have faced the possibly discouraging prospect of not only having to prove a violation of section 7 of the Clayton Act or section 2 of the Sherman Act, but also, as a practical matter, needing to show a violation of the Hart-Scott-Rodino premerger notification rules to explain why the FTC took no action with respect to the merger.

¹⁵ Such a discrepancy could also be addressed by the Department of Justice in a criminal action seeking, among other remedies, the significant penalties under the alternative fines provisions of the Sentencing Reform Act. 18 U.S.C. 3571(d). When DOJ has initiated a criminal prosecution, however, under existing institutional arrangements the Commission ordinarily will defer to DOJ and not bring a separate action for monetary relief.

seeking restitution even if the conduct at issue does not otherwise meet our definition of a "clear" violation.

¹⁰ Although there are some disagreement among the Commissioners in *Hearst* on whether seeking disgorgement resulted in the optimal payment from the defendants, there was general agreement that the conduct at issue was egregious. It is axiomatic that a merger of the only significant competitors in a market (absent unusual circumstances such as proof of the "failing firm" criteria of Section 5 of the Horizontal Merger Guidelines) violates the letter of the Clayton and Sherman Acts. *See United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945); Areeda, Hovenkamp & Solow, IV ANTITRUST LAW section 14.12 (2002 ed.). The case is further bolstered when, as in *Hearst*, such conduct is paired with evidence of specific intent to monopolize. *See United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir.), (en banc), cert. denied, 534 U.S. 952 (2001); Statement of Chairman Pitofsky and Commissioners Anthony and Thompson (Apr. 2001) (available at <http://www.ftc.gov/os/2001/04/hearstpitantthom.htm>).

¹¹ According to the Commission's complaint in *Mylan*, the parties' exclusive arrangements covered 90% of the supply of the ingredient necessary to produce one of the drugs at issue, and 100% with respect to a second drug. The Commissioners all characterized the conduct alleged as "egregious," with one Commissioner observing that the facts alleged described "a clear cut antitrust violation." Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part (available at <http://www.ftc.gov/os/2000/11/mylanlearystatement.htm>).

¹² *See* <http://www.ftc.gov/opa/2000/03/hoechst.htm>.

¹³ Several commentators suggested that the mere availability of treble damage actions or other avenues of relief will ordinarily render disgorgement unnecessary, implying that ultimately such other actions will have extracted the full amount of unjust enrichment from violators and will provide adequate deterrence against future violations. On the current state of the record we cannot share this confidence. We have not been directed to empirical evidence indicating that existing remedies routinely achieve these goals, let alone evidence that antitrust defendants have been subjected to excessive, "duplicative" damage awards. In fact it appears that the issue has been the subject of considerable debate. *See, e.g.,* Richard Posner, ANTITRUST LAW 47 (2d ed. 2001); John Lopatka & William Page, *Who Suffered Antitrust*