Legal Backgrounder

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"MISSION CREEP" AT FTC?:
USE OF DISGORGEMENT REMEDY SIGNALS DESIRE TO PROSECUTE

by

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No longer content with the seemingly less glamorous role of a regulator, the Federal Trade Commission ("the FTC") is now seeking to recast itself as a prosecutor by soliciting public comments on a "framework" for disgorgement in FTC proceedings. Apart from the FTC's bald *presumption* that it is empowered to seek such a dramatic remedy — a proposition that is decidedly uncertain[1] — this development is disquieting because it removes any doubt that the FTC intends to forever blur the lines drawn by Congress between the regulation of anti-competitive conduct (a task assigned to the FTC) and its prosecution (which, until now, was the prerogative of the Justice Department). The stakes are anything but abstract. Emboldened by having secured more than $100 million from the disgorgements in *FTC v. Mylan Pharmaceuticals, Inc.* and *FTC v. Hearst Trust,* the FTC will no doubt wield this daunting "remedy" to maximum effect.

[1]Although the FTC expressly is not seeking comments on the legal basis for disgorgement, even its most ardent proponents have to concede that the FTC lacks "clear" statutory authority for the draconian remedy. The FTC has relied upon a section of the FTC Act that "does not authorize the FTC to seek monetary remedies." *F.T.C. v. Mylan Labs. Inc.,* 62 F. Supp. 2d 25, 36 (D.D.C. 1999). Indeed, the *Mylan* Court cleared the way for disgorgement simply because "the defendant cite[d] no relevant case law that prohibits the FTC from seeking disgorgement." *Id*. at 37. Because Commissioner Leary and others have made many persuasive arguments that neither statutes nor case law authorize disgorgement, this LEGAL BACKGROUNDER instead focuses on why the FTC should not seek disgorgement in competition cases even if the Commission were properly empowered to do so.

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The FTC Strays Far Beyond Its Role as a Regulator When It Seeks Disgorgement

Although the FTC and the DOJ share jurisdiction over certain types of conduct, Congress was careful to give the FTC regulatory authority and the Department of Justice prosecutorial authority over anti-competitive misconduct. 15 U.S.C. §41; 15 U.S.C. § 21. As a regulator, the FTC is to use its civil jurisdiction and equitable remedies to prevent allegedly anti-competitive conduct from recurring. 15 U.S.C. §§ 45-45 (a)(1). As a prosecutor, by contrast, the DOJ is to seek to punish alleged wrongdoers by obtaining a criminal indictment or pursuing a civil complaint. 15 U.S.C. § 15a.

The FTC, through the Bureau of Competition, pursues competition cases that are in the "interest of the public" under the F.T.C. Act, the Clayton Act, and the Robinson-Patman Act. *See* 15 U.S.C. § 45(b). The public interest is served by ensuring, generally through an administrative "cease and desist" order, that the offending conduct will not recur. *Id.* This process is consistent with the FTC's mandate to obtain equitable relief for the public. As Commissioner Leary recently observed, the FTC's "traditional role in competition matters has been to look forward rather than backward, to articulate the law where the law is uncertain, and to seek relief that is prospective and remedial rather than retrospective and punitive." *FTC v. Mylan Pharmaceuticals, Inc.,* FTC File No. X990015 (Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part, *available at,* http:// www.ftc.gov/os/2000/11/mylanlearystatment.htm).

The FTC departed sharply from this "traditional role" when it sought disgorgement in several health-related competition matters. *See FTC v. Abbott Labs.,* No. C-3945 (May 22, 2000); *FTC v. College of Physician Surgeons of Puerto Rico*, No. _____ (1997); *Mylan Labs.,* 62 F. Supp. 2d 25 (D.D.C. 1999). Lacking a framework for imposing this punishment, the FTC has now appealed for answers to questions that could easily be mistaken for an exam in "Disgorgement 101": When is disgorgement appropriate? How should disgorgement be calculated? What factors should inform the use of disgorgement? How should disgorgement interface with state and private remedies? Remedial Use of Disgorgement, 66 Fed. Reg. 67254 (Dec. 28, 2001).

Whatever the answers, the FTC will betray each aspect of its "traditional role" should the Commissioners continue to seek disgorgement in competition matters. *First*, disgorgement looks backwards, not ahead. For example, the $100 million disgorged in *Mylan* was ostensibly the amount that the defendants had overcharged consumers through inflated drug prices. *Mylan Labs.*, FTC File No. X990015 (Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson, *available at,* http://www.ftc.gov/os/2000/11/ mylanpitofskystatment.htm). Whether the FTC adheres to the *Mylan* formula, or adopts one of the formulae proposed in the agency's notice ("all profits earned from the acquisition, all profits attributable to antitrust harm, or some other approach," 66 Fed. Reg. at 67254), the award will be tied to past conduct.

Second, even the FTC acknowledges that disgorgement should be sought only for clear violations of competition laws. Thus, one of the criteria for seeking disgorgement is that the conduct be *per se* illegal or fall into an established rule of reason violation. S*ee* Comments of FTC Competition Bureau Senior Deputy Director Molly Boast, February 17, 2001. But easy victories under black letter law leave the gray areas of competition law unexplored. As a regulator, the principal challenge confronting the FTC is to refine and define competition law.

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Third, disgorgement punishes, pure and simple. In fact, the Commissioner majority in *Mylan* cited the defendants' "particularly egregious misconduct" in voting to accept settlement of the disgorgement claims. *Mylan Labs.*, FTC File No. X990015 (*available at,* http://www.ftc.gov/os/2000/11/mylanpitofskystatment.htm). In other words, rather than regulating conduct going forward, the FTC will adjust the "punishment" to fit the "crime."

The FTC Circumvents Important Process When it Seeks Disgorgement

Seeking disgorgement also enables the FTC to circumvent the process of adjudication established by Congress for those civil competition claims that fall within the FTC's jurisdiction. Wielding the disgorgement sword will likely enable the FTC to extract hefty settlements without ever being put to its burden of proof. The FTC is able to extract a favorable settlement by wielding the disgorgement sword, and avoid a full hearing on the merits while securing a hefty settlement. In *Mylan*, for instance, defendants agreed to a $100 million settlement as soon as the district court ruled that the FTC could seek disgorgement. *Mylan Labs.,* FTC File No. X990015 (*available at,* http://www.ftc.gov /os/2000/11/mylanpitofskystatment.htm). The upshot threatens to be fewer well-reasoned decisions arrived at with the benefit of a fully developed record.

The FTC Is Likely to Expand its Use of Disgorgement

The dangers mount now that the FTC has succumbed to the "seductive" quality of disgorgement. *Mylan Labs.,* FTC File No. X990015 (Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part, *available at, h*ttp://www.ftc.gov/os/2000/11/Mylanlearystatment.htm). Dissatisfied with seeking disgorgement solely for violations of substantive competition law, the FTC now seeks disgorgement for violations of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1994), which governs pre-merger notification procedure. *FTC v. Hearst Trust,* Civ. No. 1:01CV00734 (2001) (Complaint for Permanent Injunction and Other Equitable Relief).

Concerns about the expanding reach of disgorgement will only increase with Timothy J. Muris is FTC Chairman. *First*, Chairman Muris is a longtime supporter of disgorgement, dating from his tenure as Director of the Bureau of Consumer Protection. *Second*, by supporting the *Hearst* disgorgement, Chairman Muris indicates that he will continue former Chairman Robert Pitofsky's pro-disgorgement position. *Third, Hearst* shows that a majority of Commissioners, with Chairman Muris as the champion, will seek disgorgement in previously uncharted waters.

Disgorgement Skews the Antitrust Remedial Framework

Congress, in its considered judgment, distributed jurisdiction over anticompetitive conduct among several parties: the FTC regulates conduct, private parties pursue class actions, states enforce state antitrust law violations, and the Department of Justice prosecutes criminal violations and pursues civil complaints.

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The FTC now blurs this separation of authority. By punishing competition law violations with disgorgement, the FTC encroaches on the DOJ's role. This encroachment is particularly troubling as the FTC, unlike the DOJ, is not staffed by trained and seasoned prosecutors who are supervised to ensure that their exercise of prosecutorial discretion does not become abusive. In addition, the defendants from which the FTC seeks disgorgement are *not* protected by procedural and substantive criminal law protections and the higher burden of proof that accompanies them.

Moreover, the FTC usurps the ability of private parties and states to bring their own recovery actions. Both private parties and states could have held the *Hearst* defendants responsible for monopoly profits. Also, numerous private and state actions sought the same damages preemptively obtained by the FTC in *Mylan*. Instead, the FTC unnecessarily overstepped its mission, disregarded the administrative process, and now threatens defendants with duplicative and potentially inconsistent liability.

Conclusion

There can be no doubt that the FTC has become too enamored with what many had hope would be only a "cameo" role as a prosecutor. Having sought disgorgement on its own terms in several matters, the FTC now seeks comments on a framework for future — and undoubtedly increasing — disgorgement actions. The FTC ignores the extent to which the Commission's action disrupts Congress's system for regulating and enforcing the Nation's competition laws. Indeed, the FTC itself has already demonstrated that the power to punish is both seductive and difficult to contain. When the FTC assumes and succumbs to that power as it has in each and every disgorgement action, it threatens the rights of the punished, tramples Congress's judgment, and usurps the role of the Department of Justice.