Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission

Maureen K. Ohlhausen[1]
Commissioner, Federal Trade Commission

Dechert LLP, NY

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I. Introduction

Good morning, and thank you for inviting me to speak with you. Today, I discuss a matter that should concern those who care about the FTC's competition mission. The problem is the pursuit of disgorgement.

monetary equitable relief, which we can only obtain in federal court under Section 13(b), has troubling ramifications

As I observed in my concurring statement in *Cephalon* last year, "the incentive to pursue

Over the next few minutes, I will discuss the FTC's embrace of disgorgement, the value of the agency's administrative process, and how the FTC has recently forsaken Part III in antitrust matters.

II. The FTC Pursues Disgorgement

A. *1980-2002: The FTC Wields Disgorgement as a Precision Tool*

Our story begins with the FTC's historical pursuit of disgorgement. The agency previously wielded that imposing remedy with restraint. Between 1980 and 2002, for example, the FTC sought disgorgement in just two cases: *Hearst Trade*[8] and *Mylan Laboratories*.[9] The Commission settled those cases in 2001 and 2000, respectively, with the accused firms' agreeing to disgorge their wrongfully obtained profits.[10]

Importantly, both of those matters involved clear wrongdoing.

All told, the pre2003 period saw the FTC pursue monetary equitable remedies with

potential gains.[21] Hence, the disincentive value of disgorgement is greatest "when the violator can determine in advance that its conduct would probably be considered illegal."[22] In this respect, it is important to emphasize that disgorgement is not a punitive tool.

The principles espoused by the 2003 Commission found favor within the larger antitrust community. The Antitrust Modernization Commission, for instance, approved of the FTC statement in 2007.[23]

C. *The FTC Seeks Disgorgement in Two Cases Between 2003 and 2012*

The Commission remained true to its principles for almost a decade after the 2003 statement. It sought disgorgement in just two cases during that time. In *Perrigo*, the first case—two drug companies conspired to limit competition in the sale of ibuprofen for children.[24] In settling the case in 2006, then-Chairman of the FTC, Tim Muris, announced that "[t]his case involves a clear antitrust violation."[25]

In the second matter, *Lundbeck*, the FTC challenged a drug company's acquisition of the only substitute drug for treating a heart condition suffered by premature infants.[26] Shortly after the acquisition, the firm raised price 1300%.[27] In suing Lundbeck in 2008, the FTC sought disgorgement, though it ultimately lost the case on market definition grounds.[28] During this period, the FTC clearly adhered to its principles in deciding whether to pursue monetary equitable relief.

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[21] 2003 Policy Statement, *supra* note 2.
[22] *Id.*
[23] ANTITRUST MODERNIZATION COMM'N, REPORT & RECOMMENDATIONS 285, 288 (2007).
[24] Compl., FTC v. Perrigo Co., No. 1:04CV01397 (D.D.C. Aug. 12, 2004).
[25] FTC, *Generic Drug Marketers Settle FTC Charges* (Aug. 12, 2004), https://www.ftc.gov/news-events/press-releases/2004/08/generic-drug-marketers-settle-ftc-charges
[26] Compl., FTC v. Ovation Pharma. (*later* Lundbeck, Inc.), Civil No. 8-06379 (D. Minn. Dec. 16, 2008).
[27] FTC. v. Lundbeck, Inc., Civil No. 0:08-cv-06379, Findings of Fact, Conclusions of Law, and Order Issued by th7(de7t)6.9.3(

D. *The Commission Reverses Course in 2012*

The Commission abruptly changed direction in 2012.[29] Over my dissent, the FTC

One might expect such an about-face to reflect rigorous debate, with the benefit of the practicing community's insights. But the FTC did not solicit any public input. No wonder stakeholders reacted with alarm. For example, the U.S. Chamber of Commerce wrote to the FTC's then-Chairman to exp6(p)s 4(l)1 its "deep disappointment" with the agency's withdrawal of the 2003 policy statement.[34]

E. *T6(p)he FT6(p)C Pursues Disgorgement Mo-4(l)1 F-4(l)1quently*

In suddenly withdrawing its 2003 policy statement, the [illegible] of course, that disgorgement was inappropriate in al[illegible]

thoat1at In 2015 in *Cephalon*, I supported a consent providing for [illegible] K. Ohlhausen, at 2 (Apr. 17, 2015) [illegible]

https://www.ftc.gov/public-statements/2014/senting-statement-commissioner-maureen-k-ohlhausen-carinal-health-inc [*Cardinal* Dissent].

[37] FTC. Cphalon, Inc., Statement of the Fed. Trade Comm'n (May 28, 2015), https://www.ftc.gov/public-statements/2015/statement-federal-trade-commission-ftc-v-cephalon-inc.

[38] *Id* at 4.

Other instances of disgorgement were not as well-founded. In *Cardinal Health* in 2015, the FTC sued the company for monopolizing 25 radiopharmaceutical markets and entered into a consent, in which Cardinal Health agreed to pay almost $27 million in disgorgement.[40] I dissented.[41] Even accepting the FTC's withdrawal of the 2003 statement, I believe that the FTC in *Cardinal Health* should have honored the factor test because the alleged misconduct occurred while the 2003 statement was in effect.

The principles embedded in the 2003 statement counseled heavily against disgorgement in *Cardinal Health*. First, there was no clear violation.[42] Indeed, in my view, the evidence did not support an antitrust violation at all.[43] The FTC's complaint largely focused on Cardinal Health's acquisition of two companies in 2004. Despite timely and compliant HSR filings, the

FTC decided to challenge the transactions [illegible]

To my mind, *Cardinal Health* exemplifies the lax disgorgement standard that reigns after the FTC withdrew its policy statement. In closing out my dissent, I

Instead, the agency preferred to go to court. I did not believe that it was in the public interest to sue in federal court, challenging the full array of conduct identified in the Section 13(b) complaint. Hence, I dissented.

Unfortunately, the *AbbVie* litigation in federal court has not proved fruitful, at least thus far. Last year, the district court dismissed the FTC's pay-for-delay claim, while allowing discovery on the sham-litigation count to proceed.[53] The result is that the restraint of trade claim under *Actavis* will lie in abeyance until the court resolves the other issues in the case. No doubt, staff will appeal the district court's pay-for-delay decision to the Third Circuit and may very well succeed. But even if the appellate court reverses the judgment of dismissal, it would have to remand for discovery and the litigation will continue onward, potentially for years.

In the meantime, district courts have struggled mightily with pay-for-delay cases. In the first post-*Actavis* case to go to trial, *In re Nexium*, the district judge began his opinion with the concession that "I did not try this case very well."[54] He admitted to proceeding all the way to trial under a "major misconception" about the claims in the case.[55] Judge Young's difficulties reflect the challenges faced by his counterparts across the country. As Chief Justice Roberts observed in dissent in *Actavis*, "good luck" to the district courts that must fashion an appropriate rule of reason inquiry in these matters.[56] My firm belief is that there are correct answers to these difficult questions and that the FTC is optimally placed to address them.

The FTC could have taken the lead in *AbbVie* through Part III, guiding the lower courts on how to think through these issues and providing an appellate court with an expert agency's ruling based on a clean record. Instead, the agency has gotten stuck in the weeds. The

[53] FTC v. AbbVie Inc., 107 F. Supp. 3d 428, 435-36 (E.D. Pa. 2015).
[54] *In re*

Commission has thus been relegated to damage control. Over the past two years, the FTC has filed a series of amicus briefs across the country to rectify misconceptions that the agency might have nipped in the bud by proceeding administratively.

For instance, in June 2015 in *American Sales v. Warner Chilcott*, the FTC filed an amicus brief before the First Circuit.[57] Our brief explained that the district court had wrongly dismissed a pay-for-delay claim where the reverse payment was a promise not to market an authorized generic, rather than a cash transfer.[58]

Two months ago, in *In re Nexium*, the FTC told the First Circuit that the lower court had erroneously conflated the existence of an antitrust violation with antitrust injury.[59] And, last month, the Commission filed a brief before the Third Circuit in *In re Wellbutrin*.[60] Again, the district court had been mistaken. It had held that there is no antitrust problem when a branded drug firm pays its generic rival not to enter at risk, if the deal allowed the underlying patent litigation to continue.[61] Again, the agency had to intervene to explain how the rule of reason operates under *Actavis*.[62]

[57] Brief of FTC as Amicus Curiae in Support of Plaintiffs-Appellants, Am. Sales Co. v. Warner Chilcott Co., Nos. 14-2071 & 15-1250 (1st Cir. 2015), https://www.ftc.gov/policy/advocacy/amicus-briefs/2015/06/american-sales-co-et-al-plaintiffs-appellants-v-warner.

[58] *Id.* at 2, *passim*.

[59] Brief of Amicus Curiae FTC in Support of No Party, *In re* *Tf -0.004 Tc 0.007 Tw 0.506 0 Td [-2.8(a)-2.7(c)-14.9(y)5(/a)-14.8(m)5.9*

B. Endo*: A Missed Opportunity to Develop the Law*

The FTC's most recent venture into the world of pay-for-delay agreements came just three weeks ago, in *Endo*.[63] The case, which challenged two separate deals involving the same branded company, raises a fascinating array of issues.

There were compelling reasons to bring *Endo* into administrative litigation under Part III. Above all, *Endo* implicates how the rule of reason should operate in the pay-for-delay context. As courts and scholars have asked in this area, is a "large, unjustified payment" a threshold inquiry whose satisfaction triggers rule of reason analysis or does it lie at the heart of the rule of reason itself? What else must a plaintiff show beyond such a payment to prevail? Should the courts scrutinize the competitive effects of a pay-for-delay agreement at the time the parties signed it or at the time of suit? What kinds of compensation qualify as a payment? Both settlement agreements in *Endo* included a promise not to market an authorized generic for a time.[64] One agreement involved the provision of free branded product. How do those provisions factor into the analysis?

I believe that the FTC is optimally placed to resolve those questions as reviewed by the appellate courts, of course. The Part III process would have allowed the Commission to weigh in expeditiously, perhaps stemming the plethora of amicus briefs that we must file as courts work through post-*Actavis* pay-for-delay matters. Instead, the Commission filed in federal court and sought disgorgement.

As I explained in my dissenting statement in *Endo*, "I do not believe . . . that it serves the public interest to seek disgorgement in this case. The better course would be to pursue this matter administratively. The Part III process grants to the Commission a unique tool to advance the law."

[63] Compl., FTC v. Endo Pharm., 2:16-cv-1440 (E.D. Pa. filed Mar. 30, 2016).
[64] *Id.* ¶¶ 2-3.

Employing it here would allow the Commission to render a thoughtful decision applying the *Actavis* standard, providing much-needed guidance to courts and firms around the country."[65]

This is a missed opportunity to continue the FTC's strong track record in advancing competition policy through Part III, which I recounted at the outset of my remarks.

IV. The SMARTER Act

In *AbbVie* and *Endo*, the FTC saw advantages to federal court that outweighed the benefits of administrative litigation. Disgorgement may explain that calculus. Of course, monetary equitable remedies are appropriate tools to deter clear violations of the antitrust laws. But frequent pursuit of money undercuts the FTC's competition mission. As should now be obvious, I think that the FTC has overestimated the value of disgorgement and undervalued its administrative function in complex antitrust cases.

The irony is that the FTC's pivot toward federal court in important antitrust matters comes at a time when the agency is fighting to preserve its administrative litigation authority. Last month, the House of Representatives passed the SMARTER Act.

apparently support. Meanwhile, they fight to defend Part III for cases where it matters least. In recent conduct cases like *Endo* and *AbbVie*—where Part III offered compelling advantages—the FTC opted for federal court. To the extent the Commission may have looked past Part III for monetary relief reasons, I would think that to be a most unfortunate mistake.

V. Conclusion

In summation, I worry that the FTC's pursuit of disgorgement—though well intentioned—distracts from the agency's unique mandate to develop antitrust law. To appreciate the FTC's change in direction, recall Commissioner Thomas Leary's remarks in *Mylan*, which closely preceded the 2003 statement.[74] Commissioner Leary worried about the district court's suggestion in *Mylan* that the FTC could seek ancillary monetary relief in antitrust cases for any violation of a law enforced by the Commission.[75]

Commissioner Leary observed that, while "present members of the Commission may only intend to seek this extreme relief in the most extraordinary cases," the court's ruling "may be employed by successors less scrupulous."[76] He worried that the "seemingly expedient solution may have a ripple effect far beyond the matter at hand."[77]

Cases like *Endo*, *AbbVie*, and *Cardinal Health* show that Commissioner Leary was prescient. I call on the FTC to reinstate the principles adopted by the 2003 statement on monetary equitable relief. If today's Commission cannot embrace those norms, at the very least it should explain the principles that guide its discretion in pursuing such powerful remedies. Today's *status quo* is unacceptable, not least when it leads the FTC to forgo its special role to develop complex antitrust doctrines through Part III, as it has done so successfully in the past.

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[74] Mylan Labs., Inc., FTC File No. X990015, Statement of Commissioner Thomas B. Leary, Dissenting in Part & Concurring in Part, at 5 (Nov. 29, 2000), https://www.ftc.gov/sites/default/files/documents/cases/2000/11/mylanlearystatment.htm

[75] *Id.*

[76] *Id.*

[77] *Id.*