FTC WORKSHOP: PROTECTING CONSUMER INTERESTS IN CLASS ACTIONS

Panel 5—Class Actions as an Alternative to Regulation: The Unique Challenges of Multiple Enforcers and Follow-On Lawsuits

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Today, as the representative outside defense counsel on the panel, I would like to address an issue of concern to the business community. The current multi-jurisdictional system of antitrust enforcement proceedings—which includes state and federal private class actions, lawsuits brought by state Attorney Generals, and federal regulatory proceedings—necessarily creates a risk of duplicative recovery. From a defense perspective, this risk of duplicative recovery is increased by the Federal Trade Commission's recent decisions to pursue disgorgement as a remedy in its regulatory investigations. This increased risk is particularly problematic because, in my view, disgorgement does not solve any substantive problem that currently exists in the system. Because the remedy of disgorgement in non-consumer protection cases is a solution in search of a problem, in my opinion, the F.T.C. should not pursue it.

A. Duplicative Recovery

The risk of exposure to duplicative liability in antitrust cases is commonplace in today's environment. The confluence of government antitrust enforcement proceedings and ubiquitous follow-on state and federal class action lawsuits means that defendants face paying four-fold or more in damages for an alleged violation.

Concern about duplicative recoveries should not be limited to the defense bar. Rather, it should be an apprehension of federal antitrust enforcers and ultimately

consumers as well. The United States Supreme Court has condemned multiple liability for antitrust defendants as being counter to the interests of federal antitrust policy. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731 & n.11 (1977) (noting that the risk that a defendant pays duplicative damages is "not acceptable" even if one assumes that an injured party goes uncompensated).[1]

In *Illinois Brick*, the plaintiffs sought to recover an overcharge on concrete acquired from users and direct purchasers of the concrete, who allegedly had overpaid for the concrete due to a manufacturers' alleged price-fixing conspiracy and had passed on that overcharge to the plaintiffs. 431 U.S. at 726-27. The United States Supreme Court concluded that such a plaintiff, as an indirect purchaser, should not be deemed to have suffered an injury cognizable under the federal antitrust laws, ***given the potential for multiple liability*** and complexity that would be introduced into antitrust damages suits if such offensive pass-on theories were permitted. *Id.* at 728-29, 736-47 (emphasis added). Similarly, the Supreme Court in *Associated General Contractors* held that whether the plaintiff's claim risks duplicative recoveries and would require a complex apportionment of damages is one of five factors in determining whether the relationship between the plaintiff's harm and the defendant's conduct is sufficiently close to confer antitrust standing. 459 U.S. at 535-45

Numerous state legislatures have passed so-called *Illinois Brick* repealer statutes that allow indirect purchasers to recover under their state antitrust statutes. In addition,

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[1] S*ee also Associated General Contractors of California, Inc. v. Carpenters,* 459 U.S. 519, 544 (1983); *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 474-475 (1982)).

several state courts have interpreted their antitrust and consumer protection statutes to authorize indirect purchaser lawsuits.[2] While the United States Supreme Court has clearly held that this is within a given state's legislative and judicial prerogative under our federal system,[3] it does in fact create greater risk of duplicative liability for defendants.

Duplicative damages are problematic to an effective, optimal market because they can deter otherwise procompetitive conduct. Simply put, it is not an optimal market outcome to have companies facing exposure from upwards of four-fold damages. Indeed, such multiple liability clearly was not either foreseen or authorized by Congress when it drafted the Clayton Act. Neither federal enforcers nor consumers should desire this result.

Finally, although I have focussed here on the risks inherent in overlapping civil antitrust proceedings, the risk of duplicative recoveries is also present in the context of criminal antitrust enforcement proceedings. On the criminal side, the Criminal Fine Improvements Act and United States Sentencing Guidelines allows the agencies to impose fines equal to twice the alleged overcharge or plus or minus 20% of the affected

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[2] For a comprehensive list of states allowing indirect purchaser actions *see* Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, n.3 (2004) (identifying 26 jurisdictions that have Illinois Brick repealer statutes, and 4 states that permit indirect purchaser actions by court decision). *See generally* Joel M. Cohen & Trisha Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, 15 ANTITRUST 29 (Summer 2001); Kevin J. O'Connor, *Is the Illinois Brick Wall Crumbling?*, 15 ANTITRUST 34 (Summer 2001); William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 ANTITRUST L.J. 1 (1999).

[3] *California v. ARC America Corp.*, 490 U.S. 93, 103-04 (1989).

commerce. These criminal fines raise similar concerns of duplicative liability for defendants because tag-along civil antitrust lawsuits are brought after the criminal cases.

B. Disgorgement

Against this backup, in recent years the F.T.C. has decided to seek disgorgement as a remedy in certain antitrust cases. In my view, this decision has increased the risk of duplicative recoveries in antitrust cases because the equitable monetary relief that the agency has begun to seek from defendants often overlaps with the damages sought by private plaintiffs bringing class actions and state AG concerning the same conduct.

In 2000, Richard G. Parker, then Director of the Bureau of Competition, set out the criterion to be applied by the F.T.C. in seeking disgorgement relief: "[t]he criteria for [disgorgement] cases include a serious violation of the antitrust laws, a substantial amount of injury, and the ability to be able to identify and return a substantial portion of the disgorgement to the injured consumers."[4] Mr. Parker also commented that absent the disgorgement remedy, "some instances of serious anticompetitive conduct would pass a cost/benefit test, and make perfect business sense."[5]

If the agency has reason to believe that a private class action already has been or will be filed and is likely to be successful, the threat of such suits should act as an effective deterrent on the alleged conduct. Indeed, about a year ago, the F.T.C. issued an

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[4] Report from the Bureau of Competition, Prepared Remarks of Richard G. Parker before the ABA 2000 Spring Meeting, located at http://www.ftc.gov/speeches/other/rparkerspingaba00.htm.

[5] *Id.*

unanimous policy statement which again recognizes that the likelihood of a successful private suit should work against the Commission expending resources to seek disgorgement.[6] The Commission's statement recognizes that duplicative recoveries should be avoided by the staff when framing relief: "The Commission is sensitive to the interest in avoiding duplicative recoveries by injured persons or 'excessive' multiple payments by defendants for the same injury. Thus, although a particular illegal practice may give rise both to monetary equitable remedies and to damages under the antitrust laws, when an injured person obtains damages sufficient to erase an injury, we do not believe that equity warrants restitution to that person." *Id.*

While the F.T.C. has recognized in principle that disgorgement is not appropriate where private actions will produce compensation for victims it has, nevertheless, sought disgorgement in such cases.

In 1998 the F.T.C. brought suit against Mylan and three drug ingredient suppliers (*FTC v. Mylan Labs, Inc.*, No. 1:98CV03114 (TFH), (D.D.C. Feb. 9, 2001)) alleging that the drug manufacturer entered into long term exclusive supply licenses with the other defendants in order to monopolize the markets for two anti-anxiety drugs and drive up prices substantially.[7] When the parties settled, the consent decree required that defendants pay $100 million into escrow to disgorge the profits earned as a result of their

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6 *See* Federal Trade Commission, *Policy Statement of Monetary Equitable Remedies in Competition Cases*, July 25, 2003 at http://www.ftc.gov/os/2003/07/disgorgementfrn.htm.

7 Statement of Chairman Robert Pitofsky in *FTC v. Mylan Lbs., Inc.*, (FTC File No. X990015), located at http://www.ftc.gov/opa/2000/11/mylanfin.htm ("Pitofsky Statement").

allegedly anticompetitive conduct. *Id.* The purpose of this escrow fund was to compensate consumers who had submitted claims for overcharges on these drugs whether they purchased them directly from Mylan or not. *Id.* In addition to the F.T.C.'s case against Mylan et al., private state and federal plaintiffs and a number of state AGs also sued Mylan for the same conduct alleged in the F.T.C.'s complaint. These suits were all settled as well.

Subsequently in April 2001, the F.T.C. filed a case against Hearst (*FTC v. The Hearst Trust*, No. 1:01CV00734 (TJP), (D.D.C. Nov. 9, 2001)) to dissolve the 1998 merger of two principle vendors of integratable drug information databases and seek $19 million disgorgement of unlawful monopoly profits earned after the merger. *In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96, 96 (D.D.C. 2002). Specifically, the Commission contended that Hearst had violated the HSR Act by failing to disclose material information in the pre-merger filing to the F.T.C. The F.T.C. states that a week after the Commission filed suit, Hearst contacted the agency in order to settle the case. *Id.* at 97. About a week after initial settlement talks with the F.T.C., the first of what would be many private class actions for treble damages—including direct purchaser and indirect purchaser classes—were brought against Hearst "based on substantially the same misconduct alleged in the F.T.C.'s suit against the defendants." *Id.* In addition, actions were brought by a number of state Attorney Generals on behalf of consumers in their states. Settlement discussions immediately commenced in these actions as well. *Id.* The court approved the settlement between the Commission and Hearst and the settlement with the consolidated private class action plaintiffs. *Id.* at 98.

It is worth also noting that again just last month, in *FTC v. Perrigo Co. and Alpharma Inc.*, (D.D.C. August 12, 2004), the F.T.C. entered an order with defendants requiring that they disgorge over $6 million in illegal profits to settle the government investigation alleging that the only two F.D.A. approved generic drug manufacturers of children's liquid ibuprofen entered into an agreement not to compete for seven years. At the same time defendants agreed to pay various state Attorneys General $1.5 million to resolve their claims challenging the same conduct.

Although the verdict is still out concerning the August 2004 Perrigo/Alpharma disgorgement order, the disgorgement relief sought in *Mylan* and *Hearst* was ill-advised for several reasons. First, the relief was not necessary to deter the alleged conduct because there were private direct and indirect purchaser actions also pending at the time the agency entered the consent decrees there. As a result, it is not clear that disgorgement served any useful purpose that would not have been achieved in the private plaintiff lawsuits. In other words, there is no reason to believe consumers would not have been compensated whether the F.T.C. sought disgorgement or not. As Commissioners Swindle and Leary aptly put it in their dissent in *Hearst*, "[w]e particularly dissent from the Commission's decision to seek disgorgement in this situation. . . . [because] if a violation is proven, existing private remedies are adequate to ensure that respondents do not benefit from any possible wrongdoing and their customers can be made whole."[8]

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[8] Dissenting Statement of Commissioners Orson Swindle and Thomas B. Leary in *FTC v. The Hearst Trust*, (File No. 991-0323), located at hhtp://www.ftc.gov/os/2001/04/hearstdisswinleary.htm.

Second, the disgorgement relief sought in those cases runs counter to the United States Supreme Court's refusal in *Illinois Brick* to allow indirect purchasers to recover federal damages under the Sherman Act. The disgorgement escrow funds from *Hearst* and *Mylan* were used to satisfy private class claimants. Thus, a portion of the F.T.C.'s settlement escrow funds went to refund indirect purchasers of lorazepam and clorazepate and integratable drug information databases respectively.[9] At bottom, this amounts to a federal agency establishing a disgorgement fund to satisfy indirect purchasers that have no independent standing to pursue antitrust damages in federal court. It is one thing for a given state's legislature to decide to repeal *Illinois Brick*, but it is quite another to have ***federal regulators*** provide a remedy to indirect purchasers that ignores the United States Supreme Court's express policy concerns (including avoidance of duplicative recoveries) underlying *Illinois Brick*.

Third, it is not clear that the F.T.C. has reached the optimal result for consumers by seeking disgorgement in these cases. For example, as Commissioner Swindle succinctly stated in his dissent in *Hearst* "because the Commission's $19 million in disgorgement will be subtracted from the at least $26 million obtained against defendants by class action plaintiffs, the Commission's months-long pursuit of disgorgement has yielded a monetary recovery that adds no real value to the private remedy."[10] In addition, because there was civil penalty aspect of the *Hearst* case as well as a disgorgement

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[9] *See* Pitofsky Statement; *In re First Databank Antitrust Litig.*, 209 F. Supp. 2d at 97-98.

[10] Statement of Commissioner Orson Swindle concurring in *FTC v. Hearst Trust*, (File No. 991-0323), located at hhtp://www.ftc.gov/os/2001/12/swindlestate.htm.

remedy, Commissioner Leary concluded that if disgorgement were not pursued "[the] case could probably have been settled by the Commission with payment of civil penalties substantially larger than those that [were] paid."[11] I am not sure that is true, but at least two Commissioners thought the F.T.C. traded disgorgement dollars for civil penalty dollars; i.e., that the total relief package was not enhanced in anyway by seeking disgorgement funds.

Finally, where a follow-on civil class action has not yet been filed at the time of settlement with the F.T.C., setting up a viable mechanism to avoid duplicative payment is time consuming and problematic, if not impossible. It is not clear how one would administer a disgorement fund for the benefit of current claimants while avoiding the possibility that some of those claimants may seek recovery as class members in a future private class action.

K.A.G.

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[11] Statement of Commissioner Thomas B. Leary concurring in part and dissenting in part in *FTC v. Hearst Trust*, (File No. 991-0323), located at hhtp://www.ftc.gov/os/2001/12/learystate.htm.