FTC adds disgorgement of profits and restitution to its arsenal

Antitrust Alert

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The Federal Trade Commission has fired another warning salvo at companies facing antitrust scrutiny by withdrawing its nearly decade old Policy Statement on Monetary Equitable Remedies in Competition Cases.

Many had previously interpreted the Policy Statement, issued in 2003, as limiting the FTC's use of monetary equitable remedies, including disgorgement of profits, to only "exceptional cases" involving "clear" antitrust violations and where "remedies in other civil or criminal litigation are likely to accomplish the purposes of the antitrust laws." **By withdrawing the Policy Statement, the FTC has now removed these limitations and put into play the possibility of disgorgement of ill-gotten profits as well as restitution for injured parties absent class certification**. This is a real possibility even in cases where the alleged anticompetitive conduct at issue is one of first impression and other civil or criminal litigation would sufficiently remedy any injury.

Previously, under the now rescinded Policy Statement, the FTC had infrequently sought monetary equitable remedies in competition cases instead limiting itself to injunctive relief. The FTC reserved seeking such relief only for "exceptional" cases. The rescinding of the Policy Statement suggests that the FTC will now seek significant monetary equitable remedies more regularly across the board.

According to the FTC, the primary reason for withdrawing the Policy Statement was because the Policy Statement had the practical effect of creating "an overly restrictive view" of the FTC's options for seeking monetary remedies. The Policy Statement provided a three-part test for the FTC in determining whether or not to seek monetary remedies: "(1) whether the underlying violation is 'clear;' (2) whether there is a reasonable basis to calculate the remedial payment; and (3) whether remedies in other civil or criminal litigation are likely to accomplish fully the purposes of the antitrust laws." By withdrawing the Policy Statement, the FTC has essentially removed the first and third parts of the test. As noted by the FTC, the withdrawal of the Policy Statement will not impact the second part of the test, which "does no more than restate legal standards" already required by courts.

The first part of the test required that the violation be "clear," *i.e.,* the anticompetitive conduct had to be "common" or previously addressed in order for the FTC to consider seeking monetary equitable remedies. Now, even anticompetitive conduct that is novel, one of first impression or based on unsettled law will be fair game for the FTC to seek disgorgement of profits and/or restitution. As the FTC notes, "[w]hether conduct is common or novel, clearly a violation or never before considered, has little to do with whether the conduct is anticompetitive; some novel conduct can violate the antitrust laws and can be even more egregious than 'clear' violations."

The FTC's withdrawal of the Policy Statement also removes the third part of the test, which required the FTC to examine if "other remedies are likely to fail to accomplish fully the purposes of the antitrust laws." The FTC reasons that this part

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of the former test could be interpreted as requiring the FTC to establish “the insufficiency of other actions to secure monetary equitable remedies.” While the issue of whether or not other civil or criminal actions will secure the disgorgement of profits or restitution remains “relevant,” it now no longer can be argued that it is dispositive. **This, of course, could result in duplicative monetary awards, with companies possibly getting hit twice in the pocketbook for the same conduct**. It also raises a jurisdictional issue: are disgorgement of profits and restitution available to the FTC under the Sherman Antitrust Act and/or Section 5 of the FTC Act?

In justifying its about face, the FTC claims that the withdrawn Policy Statement “has chilled the pursuit of monetary remedies in the years since the statement’s issuance,” which took place in 2003. The FTC asserts that the existing case law and the agency’s reasonable exercise of its prosecutorial discretion will suffice going forward. However, with no guidelines, the FTC staff now has unfettered discretion in deciding which remedies are reasonable.

The Commission vote was not unanimous, with Commissioner Maureen K. Ohlhausen vehemently disagreeing and stating that she had “significant concerns about sending such a signal.” In criticizing the other commissioners’ decision to withdraw the nine-year-old Policy Statement, Commissioner Ohlhausen notes that the Policy Statement was issued in 2003 by a bipartisan vote and “subsequently received a unanimous endorsement by the Antitrust Modernization Commission” in 2007.

Commissioner Ohlhausen’s dissenting statement highlights the significance of the FTC’s withdrawal of the Policy Statement. **By rescinding the Policy Statement, the FTC has signaled its willingness to pursue monetary equitable remedies in any competition case, particularly those involving allegations of an impact on price**. Even companies engaging in behavior that a court has yet to deem anticompetitive must now evaluate the risk of the FTC seeking monetary equitable relief.

In such cases, companies will also have to weigh the potential risk of disgorging profits or paying restitution, perhaps even when other related civil or criminal cases would suffice which could result in double recovery.

This significant development will almost certainly up the ante for companies negotiating with the FTC, including companies discussing options such as consent decrees and stipulated judgments, because what was once out of the ordinary may become commonplace. These unchartered waters will need to be carefully navigated with proper legal guidance, because the stakes have now increased significantly.

For more information about this action by the FTC, please contact Carl Hittinger, John D. Huh and Lesli Esposito.

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