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FTC Settlement With Cardinal Health, Inc. Highlights FTC's Increased Use of Disgorgement Remedy in Competition Cases—And Lack of Concrete Standards

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A settlement announced Tuesday between the Federal Trade Commission ("FTC" or "the Commission") and Cardinal Health, Inc. ("Cardinal") is an example of the FTC seeking disgorgement more frequently in antitrust matters, as well as disagreement within the Commission regarding when disgorgement is appropriate and whether the Commission should provide formal guidance. The FTC statement supporting the settlement, authored by Chairperson Ramirez, Commissioner Brill, and Commissioner McSweeny, identifies disgorgement as a vital tool for the FTC in enforcing the antitrust laws. The dissenting statements of Commissioners Wright and Ohlhausen argue that the FTC should provide formal guidance on the limited circumstances in which the Commission will seek disgorgement in antitrust matters.

The Cardinal Settlement

The Commission accepted a settlement with Cardinal Health to resolve allegations that the company monopolized markets for the sale and distribution of low-energy radio-pharmaceuticals in 25 metropolitan areas. The FTC's complaint alleges Cardinal maintained its monopoly power in these markets through a course of dealing that included inducing and coercing manufacturers of essential inputs to enter into exclusive dealing

contracts with Cardinal. The settlement includes certain injunctive relief designed to prevent future violations, as well as disgorgement of $26.8 million, payable to a fund to be distributed to customers injured by Cardinal's conduct.

Withdrawal of the FTC's 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases

The FTC has sought disgorgement with increased frequency since 2012 when it withdrew the 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases ("2003 Policy"). The 2003 Policy limited disgorgement in antitrust matters to "exceptional" cases where (i) there is a clear antitrust violation, (ii) there is a reasonable basis for calculating the disgorgement amount, and (iii) there is value to seeking monetary relief, given related civil and criminal actions.

On July 31, 2013 when it withdrew the 2003 Policy, the FTC issued a statement saying that it would be guided by "existing case law." The FTC further indicated that under "existing case law," factors (ii) and (iii) of the 2003 Policy would remain relevant in deciding whether to pursue disgorgement, but not (i), a "clear" violation.

The FTC has not replaced the 2003 Policy with any formal guidance. FTC decisions to seek disgorgement in particular cases are currently the only source of insight into when disgorgement may be in play, and how the FTC's 2012 interpretation of "existing case law" will factor into the equation.

Chairperson Ramirez Statement: The Importance of Disgorgement in Competition Cases

The Commission's Democratic majority highlights disgorgement as an important tool for the FTC in antitrust cases, but provides little concrete guidance for future litigants. The statement explains that allowing antitrust violators to "retain the full dividends of their monopolistic practices" would "thwart the goals of the antitrust laws."

The statement also states that the role of the FTC in enforcing the antitrust laws includes "where appropriate, tak[ing] action to remedy the actual, realized effects of antitrust violations." The statement notes the FTC withdrew the 2003 Policy to clarify the Commission's broad ability to use disgorgement as a tool to play exactly this role.

The FTC Statement goes on to explain the appropriateness of disgorgement in this particular case. The writing Commissioners' views that: ***First,*** that the conduct at issue was "highly" anticompetitive. And, ***Second,*** the need to "deprive [Cardinal] of any of the benefits of the illegal conduct," which the Commissioners believed private follow-on litigation alone could not accomplish.

More specifically, the FTC Statement defends the appropriateness of the disgorgement remedy against Cardinal with the following points:

(1) The monopoly at issue did not result from legitimate, independent

market forces (as suggested by the dissenting statement of Commissioner Ohlhausen).

(2) There is "significant evidence of anticompetitive effects" in both the underlying pricing data and company documents.

(3) "Cardinal's conduct [thus] resulted in demonstrable consumer harm and enabled Cardinal to amass substantial ill-gotten gains." Because Cardinal had "retained the full dividends of [its] monopolistic conduct," the facts alleged in the Cardinal complaint are "precisely the type of situation in which we appropriately 'start from the premise that an injunction against future violations is not adequate to protect the public interest.'"

(4) Statute of limitations hurdles would render private civil claims challenging, making disgorgement "the only realistic avenue for any victims of Cardinal's anticompetitive conduct to obtain monetary redress."

(5) Finally, "injunctive relief alone would have [an] insufficient deterrent effect."

Dissenting Statements of Commissioners Wright and Ohlhausen: The Need to Clarify the Limited Role of FTC Disgorgement in Competition Cases

The Commission is far from unified on this issue. In a strongly worded dissenting statement, Commissioner Wright concludes that the FTC should provide "meaningful guidance regarding when and whether it will seek" disgorgement in competition cases. In a separate dissenting statement, Commissioner Ohlhausen expresses similar concerns about a lack of guidance. Both Wright and Ohlhausen suggest that the Commission "reinstate the [2003] Policy Statement - either in its original form or in some modified form that the current Commissioners can agree on - or provide some additional guidance on when it plans to seek the extraordinary remedy of disgorgement in antitrust cases."

Wright's dissenting statement raises concerns about the possible adverse effects of a failure to provide more concrete guidance. He notes that risk averse companies may shy away from conduct that could benefit consumers for fear of a disgorgement order.

Commissioner Ohlhausen states that the FTC's efforts to secure disgorgement in competition cases without transparent guidance "represents a significant departure from the agency's traditional reliance on its cease-and-desist authority in antitrust cases" and that "[o]veruse of this remedy fundamentally changes the nature of the agency and the role it was designed to play."

Commissioner Wright dissenting statement also provides some general thoughts on when disgorgement is appropriate. Wright suggests limiting the remedy to:

(1) “[N]aked price fixing agreements among competitors.”

(2) Monopolistic conduct that violates the Sherman Act and has “no plausible efficiency justification,” such as “a monopolist’s fraudulent or deceptive conduct, or tortious activity such as burning down a competitor’s plant.” Wright suggests that where *any* plausible efficiency justification for conduct exists—regardless of whether that justification is outweighed by anti-competitive effects—“the inquiry into whether a matter is appropriate for disgorgement should end.” With respect to single-firm monopolization cases, Wright expresses a general view that “the bar for the Commission pursuing monetary relief … is extremely high” and that such vertical restraint cases present a risk of *over*-deterrence, rather than under-deterrence. Wright explains this partially in terms of the “economics of penalties,” which provide for a level of deterrence that is a function of the likelihood of detecting wrongful conduct and the magnitude of the penalty. In the case of single firm conduct (including that at issue in Cardinal), the conduct is generally known to the victims, thus the probability of detection is high (as compared, for example, to clandestine cartels to fix prices).

(3) Where conduct harming consumers would not be adequately deterred with private lawsuits and public enforcement seeking injunctive relief.

Commissioner Wright and Ohlhausen both conclude, though for different reasons, that disgorgement is an inappropriate remedy for Cardinal’s conduct.

Commissioner Wright does not express a view on whether Cardinal’s conduct constitutes an antitrust violation, but “disagree[s] with the Commission’s assertion that ‘there is no efficiency benefit or legitimate business justification’” for the exclusive dealing and other conduct in which Cardinal engaged. Because of plausible efficiency justifications for Cardinal’s conduct, Wright concludes that the FTC may not seek disgorgement from Cardinal. Wright further disagrees with the Commission’s view that injunctive relief and private actions will have an insufficient deterrent effect, reiterating that disgorgement would more likely result in over-deterrence and cause a chilling effect.

Commissioner Ohlhausen declined to support the Cardinal settlement primarily because she did not view Cardinal’s conduct as clearly violating the antitrust laws. She also notes in her dissenting statement that much of the conduct alleged in the FTC’s complaint occurred prior to the withdrawal of the 2003 Policy. Commissioner Ohlhausen applies that Policy to the conduct at issue, and concludes disgorgement is inappropriate because (1) Cardinal did not clearly violate the antitrust laws, and (2) disgorgement cannot be calculated with certainty. With respect to (1), Commissioner Ohlhausen questions whether Cardinal’s monopoly was caused by improper conduct, and views the evidence of anticompetitive conduct as insufficient. With respect to (2), Commissioner Ohlhausen notes that “the available market-specific empirical evidence points to the real possibility of no ill-

gotten gains for Cardinal."

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The Commissioners' statements on the Cardinal settlement set the stage for continuing debate and uncertainty regarding when the FTC may appropriately seek disgorgement in antitrust matters. However, aggressive FTC enforcement of the antitrust laws with all available means, including monetary relief, likely will continue in concert with debate over disgorgement in antitrust matters.

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