

Civil Monetary Remedies Available to the Federal Government

By Stephen Calkins \*

The Antitrust Modernization Commission has teed up for study two issues related to civil monetary remedies available to the federal government:

1. Should DOJ and/or the FTC have statutory authority to impose civil fines for substantive antitrust violations? If so, in what circumstances and what types of cases should such fines be available? If DOJ and/or the FTC are given such authority, how, if at all, should it affect the availability of damages awarded to private plaintiffs?
2. Should Congress clarify, expand, or limit the FTC's authority to seek monetary relief under 15 U.S.C. § 53(b)?<sup>1</sup>

Although logic would seem to favor addressing the issues in order—and, indeed, some arguments for civil fines also support the FTC's use of 13(b)<sup>2</sup>—the second issue is so much easier and straightforward that this paper will address it first. The answer is a resounding “no.” (The answer to the first question is a tentative “probably.”) Supporting

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<sup>1</sup> Antitrust Modernization Commission, Request for Public Comment: Remedies, at 2, available at [http://www.amc.gov/comments/request\\_comment\\_fr\\_28902/remedies\\_comments.pdf](http://www.amc.gov/comments/request_comment_fr_28902/remedies_comments.pdf).

<sup>2</sup> 15 U.S.C. § 53(b) codifies Section 13(b) of the FTC Act. This paper will use the latter, more familiar, reference.

both positions is the reality that at least without appropriate use of 13(b), our current system of antitrust remedies, even with its complicated and evolving mix of criminal penalties, federal government injunctions, state enforcement, and private injunction and treble damages actions,<sup>3</sup> provides insufficient deterrence of selected categories of cases and creates unfortunate incentives.

### I. The Insufficiency of Current Antitrust Remedies

Federal government antitrust remedies continue to be largely “bi-modal.”<sup>4</sup> Hard core cartel behavior is punished with seemingly ever-increasing severity by serious criminal penalties<sup>5</sup> supplemented by state and private damages actions. Unlawful mergers are enjoined in their entirety, usually in advance of consummation. But almost all other civil antitrust violations result in nothing more, as a federal government consequence, than a time-limited injunction. An occasional injunction has serious consequences, such as dissolution; most do not. This is unfortunate.

This is not the session in which to debate whether antitrust remedial consequences,

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<sup>3</sup> See Stephen Calkins, *Corporate Compliance and the Antitrust Agencies’ Bi-Modal Penalties*, 60 LAW & CONTEMP. PROBLEMS 127 (1997); Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147 (2005); Spencer Weber Waller, *Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207 (2003).

<sup>4</sup> This concept is developed in Calkins, *supra* note 3, which complements the discussion in this section.

<sup>5</sup> See Scott D. Hammond, Acting Deputy Assistant Attorney General for Criminal Enforcement, DOJ Antitrust Division, *An Overview of Recent Development’s in the Antitrust Division’s Criminal Enforcement Program*, Remarks before the ABA Midwinter Leadership Meeting (Jan. 10, 2005), available at <http://www.usdoj.gov/atr/public/speeches/207226.htm>.

in general, over-deter or under-deter. The Antitrust Division's international cartel program suggests that at least until fairly recently there was under-deterrence, and Professor Robert Lande has energetically set out an argument that there continues to be under-deterrence even after recent increases in penalties;<sup>6</sup> others disagree and worry about over-deterrence.<sup>7</sup> If antitrust violations are under-deterred across-the-board, that would be an additional reason for preserving 13(b) and/or establishing civil penalties, but the argument for preserving 13(b) and/or establishing civil penalties does not depend on any such conclusion, so I leave the debate about general deterrence to others.

In truth, we have a strange system for punishing persons who commit civil antitrust violations. Whereas in Europe the civil fine is the tool of choice,<sup>8</sup> here a federal government civil enforcement action typically ends with an injunction (usually by consent) that prevents future violations and it is assumed that private and state damages actions will extract sufficient money from the wrong-doer to compensate victims and adequately deter other violations. The government plays the role of the volleyball setter, leaving for others the more glamorous (and lucrative) spiking. Although one might regard this as the model

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<sup>6</sup> Robert H. Lande, *Five Myths about Antitrust Damages*, forthcoming in the University of San Francisco Law Review (draft available from author).

<sup>7</sup> See Michael L. Denger & D. Jarret Arp, *Criminal and Civil Cartel Victim Compensation: Does our Multifaceted Enforcement System Promote Sound Competition Policy?*, 15 ANTITRUST ABA 41 (Summer 2001).

<sup>8</sup> See Damien Geradin & David Henry, *The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments* (Feb. 17-18, 2005), available at <http://www.kernbureau.uva.nl/acle/object.cfm/object.cfm/acf12e3.pdf?objectID=03A55C8D%2DCF84%2D459F%2DB4FFB394A70448C3&download=true>.

system were one starting afresh, it often works reasonably well.<sup>9</sup> Unfortunately, (a) the system does not always work, and (b) it creates worrisome incentives.

A. The System Does Not Always Work

Optimal deterrence is not total deterrence, since the antitrust system could deter every antitrust violation only by deterring substantial amounts of lawful behavior. But recall that both deterrence and victim compensation depends substantially on effective follow-on litigation that recovers sufficient money damages. There are important categories of cases where this does not happen, for a variety of reasons. It has long been known that, in the words of Professor Areeda, there are “antitrust violations without damages recoveries.”<sup>10</sup> The requirements that private plaintiffs surmount the rigorous hurdles of proving standing and antitrust injury<sup>11</sup> (as well as the other elements of their cases), when added to the commercial realities of business, make quite real the possibility that an antitrust violation will go without private punishment. As Assistant Attorney General Hewitt Pate observed, “[t]he prospect of injunctive relief alone may not be sufficient to deter or redress violations of the antitrust laws . . . .”<sup>12</sup>

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<sup>9</sup> See, e.g., David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 ANTITRUST L.J. 1113, 1124-25 (2005) (examples of system working); Calkins, *supra* note 3.

<sup>10</sup> Phillip E. Areeda, *Antitrust Violations without Damages Recoveries*, 89 HARV. L. REV. 1127 (1976).

<sup>11</sup> See Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U PITT L REV 437, (2001).

<sup>12</sup> Letter from R. Hewitt Pate to Deborah A. Garza, Chair, Antitrust Modernization Commission (Jan. 5, 2005), at 2, available at <http://www.amc.gov/comments/pate.pdf>

Years ago, the Justice Department uncovered what it viewed as a naked price-fixing agreement among dentists and proceeded criminally, only to suffer a stinging defeat in *United States v. Alston*.<sup>13</sup> Shortly thereafter, the Division entered into civil settlements of what began as serious grand jury investigations<sup>14</sup> and in the more than a dozen years since then the Division has filed only one criminal case involving health care providers.<sup>15</sup> Whether that is a good thing I leave for others to decide.<sup>16</sup> Government-sought remedies have usually been limited to a “go forth and sin no more’ cease and desist order.”<sup>17</sup> But

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(hereinafter Pate).

<sup>13</sup> 1991-1 TRADE CAS. (CCH) ¶ 69,366 (D. Ariz. Dec. 17, 1990), *aff’d*, 974 F.2d 1206 (9th Cir. 1992).

<sup>14</sup> Jack R. Gierig, *Presentation to DOJ/FTC on Remedial Issues in Antitrust Enforcement in Health Care* (Oct. 1, 2003), available at <http://www.ftc.gov/ogc/healthcarehearings/docs/031001jackbiering.pdf> (discussing *United States v. Burgstiner*, 56 Fed. Reg. 6681 (Feb. 19, 1991); see 22 *Obstetrician/Gynecologists in Georgia Settle Division’s Fee Exchange Accusations*, 60 ANTITRUST & TRADE REG. REP. (BNA) 240 (Feb. 14, 1991) (case had been referred from FTC)); Toby G. Singer & Helen-Louise Hunter, *Criminal Investigation and Enforcement of the Antitrust Laws in the Health Care Field*, 2 ANNALS OF HEALTH LAW 67 (1993) (also discussing *United States v. Massachusetts Allergy Soc’y, inc.*, 1992-1 TRADE CAS. (CCH) ¶ 69,846 (D. Mass. 1992) (consent decree).

<sup>15</sup> *United States v. Lake Country Optometry Soc’y*, No. W-95-CR-114 (W.D. Tex. filed Dec. 15, 1995); see Thomas L. Greaney, *Chicago’s Procrustean Bed: Applying Antitrust Law in Health Care*, 71 ANTITRUST L.J. 857, 892 n.148 (2004) (noting the many *threats* to file criminal suits).

<sup>16</sup> For the argument against substantially increased penalties against health care professionals, see Gierig, *supra* note 5.

<sup>17</sup> David Marx, *Messenger Models: What Can the Agencies Do to Prevent Provider Networks From Violating the Antitrust Laws?*, HEALTH LAWYERS NEWS, Apr. 2004, at 25; see also Greaney, *supra* note 15, at 893 (“Typically, the government’s consent orders have been wrist slaps, doing little more than enjoining future

here class actions and other follow-on suits appear to be largely missing in action.

Physicians regularly file treble damages actions as plaintiffs who are excluded from some medical facility, and they may find themselves as medical-facility-control-group defendants on the other side of those cases, but private antitrust lawsuits virtually never follow on government challenges to physician price fixing.<sup>18</sup> It appears that the most logical plaintiffs (payers) are loath to sue providers with whom they desire a long-term, mutually beneficial business relationship.<sup>19</sup>

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misconduct—even in cases involving obvious cartel activities.”) (footnote omitted).

<sup>18</sup> Marx, *supra* note 17. Even some people who suggest that treble damages provide sufficient deterrent that criminal enforcement is rarely necessary fail to provide much evidence of treble damages being imposed. See Biertig, *supra*, at 8:

It is worth noting that, in addition to government actions, private treble damage actions are available. As you know, defendants who lose such actions get to pay, not only treble damages, but also the plaintiffs’ attorneys fees – even if only injunctive relief is granted. There have been many such cases, e.g., *Int’l. Healthcare Mgmt. v. Hawaii Coalition for Health*, 322 F.3d 600, 605 (9th Cir. 2003), decided just this year. There are plaintiffs’ antitrust attorneys and class action attorneys ready to move in if an arguable antitrust violation has occurred. Moreover, managed care plans and other who feel that providers are acting anticompetitively are not shy about threatening antitrust litigation. The threat of private treble damage actions is deterrent enough for those who would ignore antitrust requirements.

Unfortunately for the strength of this position, the cited case affirmed the granting of a defense motion for summary judgment on all claims, so although it proves that a private treble damages case has been filed against, among others, a physicians group, it does not prove that an action has been filed successfully.

<sup>19</sup> Marx, *supra* note 17 (“Finally, it is most unusual for payors—who are the victims of the anticompetitive conduct of provider networks—to pursue private actions against their networks, and that is unlikely to change for the obvious reason that litigation would chill any desire providers might have to contract with a payor on favorable terms in the future.”).

The inevitable result of this lack of deterrence: continued government antitrust actions. Whether or not legal ambiguities or aggressive promoters of various schemes contribute to the problem, and even recognizing that respondents may agree to consent orders simply to dispose of matters (without having done anything illegal), there is something wrong when government agencies challenge very similar behavior by responsible professionals year after year without achieving effective deterrence. As Professor Greaney has observed, “[a]n epidemic of unvarnished cartelization schemes has surfaced and continued despite the numerous civil and administrative cases filed by the federal agencies over the last twenty years.”<sup>20</sup> FTC Chairman Majoras has noted that the agency has “physician groups comprising some 20,000 physicians under order – by some estimates, that is 10 percent of all doctors in the country.” She wonders “why the message is not being heard and whether we can improve our effectiveness . . . .”<sup>21</sup> The simple answer is that profitable activities will continue unless they are adequately deterred, and government antitrust agencies are not adequately deterring problematic physician behavior.

Although physician agreements may be the leading example of insufficient deterrence, the problem is inherent in a system in which government consequences, rather than increasing in severity with the severity of the wrong-doing, leap from the modest to the

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<sup>20</sup> Greaney, *supra* note 15, at 892 (noting that the FTC challenged 14 instances of physician price fixing in 2002–03 alone).

<sup>21</sup> Deborah Platt Majoras, *Reflections on my First Year*, Remarks at the 2005 ABA Annual Meeting (Aug. 6, 2005), at 12 (citing five new orders entered in the past year), available at <http://www.ftc.gov/speeches/majoras/050806abamtg.pdf>.

severe. Where private and state suits fail to fill the gap, as inevitably will happen from time to time, victims will go uncompensated and wrongful conduct inadequately deterred.<sup>22</sup>

#### B. Worrisome Incentives

Without in any way suggesting any lack of good faith, one can point out some troubling incentives created by the current system of bi-modal federal sanctions.<sup>23</sup> If the Antitrust Division or the FTC proceeds with a civil challenge to attempted or actual price fixing or market division—and some such cases are challenged civilly<sup>24</sup>—the federal government remedy is likely to be limited to an injunction that can be described, often with some justification, as an order not to do it again. On the other hand, if the same conduct is successfully challenged criminally, it can be punished with prison time and massive individual and corporate fines, as well as the image-shattering prospect of a felony conviction. The striking disconnect between those two outcomes must create some temptation, on the margin, for the Division to proceed criminally. Why give someone a “slap on the wrist” when such substantial penalties are there for the asking? This is not to suggest any bad faith; this is not to imply that indictments are lightly sought. It is merely to note that when the choice is so stark, a government official would not be human were he or

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<sup>22</sup> For additional examples, see Calkins, *supra* note 3, at 149-53.

<sup>23</sup> Examples of this problem are provided in Calkins, *supra* note 3, at 136-39.

<sup>24</sup> See, e.g., *Superior Court Trial Lawyers Ass'n v. FTC*, 493 U.S. 411 (1990). In *FTC v. Warner Chilcott Holdings Co. III, Ltd.* (D.D.C. complaint filed Nov. 7, 2005), the FTC filed a civil challenge to what Chairman Majoras described as “a naked agreement not to compete and to share the resulting profits between a branded drug seller and its only prospective generic competitor.” FTC Press Release, *FTC Sues to Stop Anticompetitive Agreement in U.S. Drug Industry* (Nov. 7, 2005).

she not tempted on occasion to choose the serious remedy. For instance, might frustration at the impotence of the alternative have helped motivate the Justice Department's 1988 launching of three ill-fated health professional grand juries? Surely that is possible.

The federal agencies' general lack of a financial penalty creates another unfortunate incentive. It is human nature to want to punish a wrong-doer. When the wrong-doer has posed a substantial challenge (say, by resisting the government), the temptation is all the stronger. How satisfying can it be to work long hours litigating against, well, lawyers, when the "prize" for winning is the right to impose a wrist-slap, telling the wrong-doer to behave next time. No parent would find that satisfying were the child the wrong-doer; query whether government officials find it satisfying when a corporation has done wrong. To be sure, injunctions legally may not be punitive<sup>25</sup>—but it just has to be tempting to make them punitive. Orders are regularly justified as imposing various obligations in order to prevent future violations, yet, speaking frankly, who is *less* likely to violate some clear antitrust rule than a firm just found liable for doing so, at least if that finding of liability had some serious consequence? Government lawyers simply must be tempted to impose orders with terms intended, were one candid, as much or more to punish as to prevent future wrong-doing.

Terms more onerous than needed punish not only the defendant/respondent, but

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<sup>25</sup> See, e.g., FTC/DOJ Hearings on Health Care and Competition Law and Policy, Wednesday, October 1, 1003, at 5 (Remarks of DOJ's Gail Kursh) ("The only legitimate goal of a civil antitrust remedy . . . is to restore competition to the marketplace. Thus, the remedy must not be punitive. That's the job for criminal enforcement."), *available at* <http://www.ftc.gov/ogc/healthcarehearings/031001ftctrans.pdf> (hereinafter Health Care Hearings).

also the general public, which suffers when resources are wasted on unimportant compliance and especially when procompetitive activities are foregone because of an unduly stringent order. This is especially an issue in Section 2 cases. During the *Microsoft* saga, the listserves saw a number of commentators wishing that the antitrust system could simply impose a massive fine and then set Microsoft on its way, free to compete vigorously but fully aware that any misstep could bring further litigation and penalties. That option was simply unavailable in our system. (It was an option in Europe, but enforcers there chose to impose both a fine and conduct provisions.) Where conduct is lawful in some contexts but not in others, it is very hard to write a good order, so it is unfortunate that the system creates incentives for unduly burdensome orders.

II. Congress should not change the FTC's 13(b) authority.

Addressing both whether to increase DOJ's authority to seek disgorgement or civil fines, and to whether FTC disgorgement authority should be clarified, the AMC's Civil Procedure and Remedies Working Group wrote that "[t]here is general agreement that the agencies have made considerable efforts recently to address these issues and that they are not a high priority for additional reform efforts."<sup>26</sup> At least with respect to FTC disgorgement, the Working Group was correct (although it later abandoned its own recommendation).<sup>27</sup> This is an issue that should be left alone.

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<sup>26</sup> Memorandum from Civil Procedure and Remedies Working Group to All Commissioners (Dec. 21, 2004), at 14, available at <http://www.amc.gov/pdf/meetings/CivilProcedure.pdf>

<sup>27</sup> After the Working Group submitted its report, it received a letter from AAG Hew Pate that recommended studying whether to endorse federal government civil fine

In recommending that the AMC leave the Commission's 13(b) disgorgement and restitution authority<sup>28</sup> alone (and, more specifically, not recommend that Congress change the Commission's 13(b) authority), I accept as settled law that 13(b) authorizes disgorgement.<sup>29</sup> That acceptance is not important to the argument, however. If critics are right and Section 13(b) does not authorize disgorgement,<sup>30</sup> no Congressional action is needed, because the courts will take care of the matter. Plenty of 13(b) cases continue to be litigated, so there is ample opportunity for courts to correct any misreading.

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authority. Pate, *supra* note 12, at 2. Several members of the Working Group reacted by deciding that it was preferable to review private remedies in the context of government remedies. Transcript, Antitrust Modernization Commission Meeting, Jan. 13, 2005, at 99, available at <http://www.amc.gov/pdf/meetings/transcript050113.pdf>. The initial list of Issues Selected for Study included the issue recommended for rejection, "Should government civil remedies be expanded, restricted, or clarified?," available at [http://www.amc.gov/pdf/meetings/study\\_issues.pdf](http://www.amc.gov/pdf/meetings/study_issues.pdf).

<sup>28</sup> For simplicity, this paper will henceforth use "disgorgement" to include restitution, unless the context calls for different treatment. The legal and policy analysis is usually the same.

<sup>29</sup> See, e.g., *FTC v. Munoz*, 17 Fed. Appx. 624 (9th Cir. 2001) (unpublished opinion); *FTC v. Febre*, 128 F.3d 530 (7th Cir. 1997); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466 (11th Cir. 1996); *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994); *FTC v. Security Rare Coin and Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 411 (5th Cir. 1982); *FTC v. Ameridebt, Inc.*, 373 F. Supp. 2d 558 (D.D.C. 2005); see also *FTC v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999).

<sup>30</sup> See Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139 (1992); Ivy Johnson, *Restitution on Behalf of Indirect Purchasers: Opening the Backdoor to Illinois Brick*, 57 WASH. & LEE L. REV. 1005 (2000); Michael S. Kelly, *In Seeking Dollars from Drug Concerns, FTC Oversteps Bounds of Law*, LEGAL TIMES, Mar. 8, 1999, at S34. FTC critics argue that even if it once seemed permissible to read Section 13(b) broadly, more recent Supreme Court teaching has shown the error of this approach, see *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 488 (1996).

(Conversely, even if one believes, as I do, that the correct reading of Section 13(b) permits disgorgement, nothing would prevent Congress from amending the statute.)

Rather, the argument for leaving Section 13(b) alone is based on four points: (1) it plays a critical role in consumer protection cases, and preserving that role while abolishing its use in antitrust cases would be problematic; (2) it potentially plays an important role in selected antitrust cases; (3) the FTC's disgorgement policy for competition cases is extremely limited; and (4) the arguments typically made to support change are unpersuasive. As noted above, the argument does not depend on a belief that even when the antitrust system's full array of penalties—corporate criminal fines, individual fines and incarceration, private treble damages, parens patriae actions, and state actions—are brought to bear, inadequate deterrence is achieved. If that is true, it provides an additional argument for preserving 13(b), but there is a compelling case regardless.<sup>31</sup>

(1) Section 13(b)'s Critical Role in Consumer Protection Cases.

The original vision of the FTC called for a group of wise experts to deliberate about business practices and advise well-intended business leaders about what practices were “unfair.” The Commission would determine that this or that method of competition was “unfair,” and direct a respondent to cease engaging in it. Although the Commission could

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<sup>31</sup> This paper's argument for preserving 13(b) also does not depend on any suggestion that disgorgement might be important in cases reachable only to the extent that Section 5 extends beyond the antitrust laws, see Comments of the American Antitrust Institute Working Group on Remedies (June 17, 2005), at 14 (“In addition, the FTC Act is broader than the Sherman Act and the Clayton Act, and disgorgement actions can, at least in theory, assure some level of deterrence in a wider range of cases.”), *available at* [http://www.amc.gov/public\\_studies\\_fr28902/remedies\\_pdf/AAI\\_Remedies.pdf](http://www.amc.gov/public_studies_fr28902/remedies_pdf/AAI_Remedies.pdf) (hereinafter “AAI Remedies Comment”).

issue an order against a particular firm found to have been “unfair,” there was a sense that once business leaders knew that a practice was considered “unfair,” they would refrain from engaging in it.

This genteel vision, if ever valid, proved singularly inapplicable to fraud artists, against whom the FTC started a major push during the 1980s.<sup>32</sup> Gradually the Commission developed the Section 13(b)-based tools needed to accomplish the anti-fraud mission.<sup>33</sup> Today, the heart of the FTC’s consumer protection mission is using Section 13(b) to combat fraud by obtaining equitable relief.<sup>34</sup> Although Section 13(b)’s origins lie in the world of antitrust,<sup>35</sup> its dominant use has been against fraud.

Presumably the AMC is not seriously considering interfering with this heart of the FTC’s consumer protection mission; after all, the AMC’s mandate is limited to antitrust. Yet the same Section 13(b) that applies to all of the FTC’s core jurisdiction, consumer

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<sup>32</sup> See Miles W. Kirkpatrick et al., *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43 (1989).

<sup>33</sup> See Calkins, *supra* note 3, at 133-36; David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act*, presented at the Federal Trade Commission 90th Anniversary Symposium (Sept. 23, 2004), available at <http://www.ftc.gov/ftc/history/docs/fitzgeraldremedies.pdf>.

<sup>34</sup> Remarks of Deborah Platt Majoras, Chairman, Federal Trade Commission, to the Consumer Federation of America Consumer Assembly (Mar. 11, 2005), at 3 (“Aggressive law enforcement is the mainstay of the FTC’s consumer protection mission. [In the past year,] the FTC has filed 83 actions in federal district court, and obtained 75 judgments ordering the return of more than \$474 million in consumer redress to consumers.”), available at <http://www.ftc.gov/speeches/majoras/050311faw.pdf>.

<sup>35</sup> See *supra* note 3.

protection and competition alike; the question posed by the AMC asks whether Congress should change Section 13(b)—not Section 13(b) as applied to antitrust cases. Nor would anyone likely want to ban Section 13(b) in antitrust cases, since this is the authority for enjoining unlawful mergers, which is near-universally seen as a core Commission function. Presumably the question is whether Section 13(b) should be revised so as not to apply, or to apply in only limited ways, to “unfair methods of competition” cases seeking monetary equitable relief. Yet competition and consumer protection law are “two wings of the same house.”<sup>36</sup> They share a common origin; they have a common objective in the protection of consumers; indeed, to the extent they are associated with separate parts of Section 5—“unfair methods of competition” and “unfair and deceptive acts or practices”—they share the common word “unfair.” Every so often, an investigation in one part of the Commission’s house raises issues in the other. Mischief could potentially follow from any effort to specify that some particular remedy is available for use against an “unfair or deceptive act” but not against an “unfair method of competition.” (It is one thing for the Commission to treat its two missions differently as a matter of prosecutorial discretion. It would be another thing to give a defendant a statutory right to object to a remedy if the Commission filed what the respondent claimed was “really” a competition matter.)<sup>37</sup>

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<sup>36</sup> Thomas B. Leary, *Competition Law and Consumer Protection Law: Two Wings of the Same House*, 72 ANTITRUST L.J. 1147 (2005).

<sup>37</sup> Any effort at statutory drafting would confront the reality that Section 13(b) applies to all of the law enforced by the FTC, but also that the FTC is only one of the federal agencies using this kind of equitable authority. The SEC is the best known of these agencies, but not the only one. See, e.g., Eric M. Blumberg, *Universal Management, Abbott, Wyeth, Schering-Plough, and . . . : Restitution and Disgorgement Find Another*

## (2) Disgorgement's Potentially Important Role in Competition Cases

The potentially important role for disgorgement flows simply from the reality that a significant number of cases do not have effective follow-on litigation. Without effective follow-on litigation, there may well be insufficient compensation of the injured and deterrence of other wrong-doers. Follow-on litigation may fail to play its salutary role because procedural problems or standing issues prevent recovery, because persons with good causes of action are loath to sue for one reason or another, because recoveries are too small to be worth pursuing, or likely for other reasons. The FTC's participation may facilitate a global, national settlement.<sup>38</sup> Alternatively, private settlements for sub-optimal amounts may result in insufficient deterrence and inadequate compensation. Although no one is suggesting that the FTC needs to be filing large numbers of these actions, the apparent failure of deterrence with respect to physicians serves as a reminder that without disgorgement there are classes of cases in which deterrence is insufficient.<sup>39</sup>

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*Home at the Food and Drug Administration*, 58 FOOD & DRUG L.J. (2003) (reviewing FDA's use of equitable authority in three consent decrees and one successfully litigated case); see also *United States v. Lane Labs-USA Inc.*, 427 F.3d 219 (3d Cir. 2005) (subsequent case upholding FDA's obtaining restitution). *But cf.* *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005) (disgorgement unavailable under RICO).

<sup>38</sup> See Kevin J. O'Connor, *Is the Illinois Brick Wall Crumbling?*, 15 ANTITRUST ABA 34 (Summer 2001) ("Even though only thirty-three states were party plaintiffs in the *Mylan* matter, the fact that the FTC had obtained a disgorgement remedy supported a national distribution of a significant portion of the settlement funds to all overcharged consumers, including those who resided in states with no apparent indirect purchaser right of action, in effect nationalizing the settlement.").

<sup>39</sup> One worrisome caveat: The FTC has not yet chosen to file any disgorgement actions against physicians, even though they may well represent good examples of the need for greater deterrence. Presumably that will change as the FTC seeks greater

### (3) The FTC's Policy is Very Limited

It is hard to overstate how limited is the FTC's policy on the use of monetary equitable remedies in traditional antitrust cases. After the Pitofsky-led Commission had established in court the availability of the remedy, the Muris-led Commission (as some had predicted<sup>40</sup>) carefully set out a Policy Statement on Monetary Equitable Remedies in Competition Cases.<sup>41</sup> As the Policy Statement observed, "in the competition area, . . . the Commission has moved cautiously and used its monetary remedial authority there sparingly."<sup>42</sup> The Commission said that it would seek monetary disgorgement only in "exceptional" competition cases,<sup>43</sup> chosen based on three factors: "where the underlying violation is clear;" where there is "a reasonable basis for calculating the amount of a remedial payment;" and after considering "the value of seeking monetary relief in light of any other remedies available in the matter, including private actions and criminal proceedings."<sup>44</sup> The Commission said that it would take "pains to ensure that injured

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deterrence of physician wrong-doing. See *Improving Health Care: A Dose of Competition*, A Report by the Federal Trade Commission and the Department of Justice (July 2004), at 19 ("The Agencies will carefully consider whether disgorgement is appropriate in all future cases.").

<sup>40</sup> Deborah A. Garza, *Is the Past Prologue? A Comparative Analysis of the Clinton Antitrust Program and Suggestion of Changes to Come*, 15 ANTITRUST ABA 64, 68 (2001).

<sup>41</sup> FTC Policy Statement on Monetary Equitable Remedies in Competition Cases (July 25, 2003), available at <http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

persons who recover losses through private damage actions under the Clayton Act not recover doubly for the same losses via FTC-obtained restitution.”<sup>45</sup> And, indeed, the Commission has obtained monetary redress in only a handful of competition cases<sup>46</sup>—three in the 2000's (*Mylan*,<sup>47</sup> *Hearst Trust*,<sup>48</sup> and *Perrigo*<sup>49</sup>). Only this month the Commission filed a complaint against what Chairman Majoras described as a “naked agreement not to compete and to share the resulting profits between a branded drug seller and its only prospective generic competitor,”<sup>50</sup>—yet the Commission’s complaint does not request disgorgement. This is not an agency that is running wild with a new remedy.

#### (4) The Counter-Arguments are Unpersuasive

When an agency is acting deliberately, in a restrained fashion, to use a power it has long enjoyed and that is essential to part of its mission (and that other agencies enjoy as

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<sup>45</sup> *Id.*

<sup>46</sup> A full list through 2003 is included in the FTC Policy Statement, *supra* note 41, at nn. 6-8.

<sup>47</sup> *FTC v. Mylan Labs, Inc.*, No. 1:98CV03114 (TFH) (D.D.C. Feb. 9, 2001); see 62 F. Supp. 2d 25, 36-37 (D.D.C.) (\$100 million restitution for alleged monopolization), *revised and reaffirmed in pertinent part*, 99 F. Supp. 2d 1, 4-5 (D.D.C. 1999).

<sup>48</sup> *FTC v. Hearst Trust*, No. 1:01CV00734 (TPJ) (D.D.C. Nov. 9, 2001) (consent) (\$19 million disgorgement for alleged anticompetitive acquisition and violation of pre-merger filing requirements).

<sup>49</sup> *FTC v. Perrigo Co.*, File No. 021 0197 (D.D.C. Aug. 12, 2004) (\$6.25 million disgorgement from two firms for alleged market division; another \$1.5 million paid to state attorneys general), see Press Release, available at <http://www.ftc.gov/opa/2004/08/perrigoalparma.htm>.

<sup>50</sup> *FTC v. Warner Chilcott Holdings Co. III, Ltd.* (D.D.C. filed Nov. 7, 2005); see FTC Press Release, *available at* <http://www.ftc.gov/opa/2005/11/galenbarr.htm>.

well), only a strong showing can justify tampering with or partially rescinding that power. No such showing has been made with respect to the Commission's use of Section 13(b).

It is noteworthy, in this regard, that the only public comment filed on remedies that addressed Section 13(b) supported its continued use to obtain monetary relief in competition cases.<sup>51</sup> Were the Commission's use of 13(b) a major problem, one would have expected *someone* to file a comment complaining about it. When the FTC invited comments on its use of disgorgement in competition cases, the American Bar Association Antitrust Section, while reserving on the ultimate legality of this remedy, observed that “[d]isgorgement could be justified if the treble damage recovery or imposition of other penalties were insufficient to deprive a defendant of his ill-gotten gains.”<sup>52</sup>

That invitation of comments did stimulate some objections;<sup>53</sup> objections also can be found in Commission opinions, in response to other Commission programs<sup>54</sup> and in the

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<sup>51</sup> See *AAI Remedies Comment*, *supra* note 31. Public comments on remedies are available at [http://www.amc.gov/public\\_studies\\_fr28902/remedies.htm](http://www.amc.gov/public_studies_fr28902/remedies.htm).

<sup>52</sup> Letter from Roxane C. Busey, Chair, Section of Antitrust Law, to Donald S. Clark, Esq., Secretary to the FTC (Mar. 11, 2002), at 8, *available at* <http://www.abanet.org/antitrust/comments/2002/disgorge.pdf>. Although the ABA Antitrust Section did not flatly oppose disgorgement in competition cases, it noted that there would be “few factual circumstances” where it was needed to deprive a defendant of ill-gotten gains (“for example, if follow-on litigation appeared unlikely because total damages are small”). *Id.* at 8-9.

<sup>53</sup> Comments are indexed at <http://www.ftc.gov/os/comments/disgorgement/index.htm>.

<sup>54</sup> Balto, *supra* note 9; *FTC Workshop – Protecting Consumer Interests in Class Actions, September 13-14, 2004: Workshop Transcript: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 GEO. J. L. ETHICS 1311 (2005).

literature.<sup>55</sup> Objections include the following:

(a) *Is it unnecessary?* A common argument is that there is no need for Section 13(b).<sup>56</sup> Private and state litigation will provide all that is needed, or so it is suggested. The simple answers are that (i) if action is unnecessary, the FTC can and under its policy should refrain from seeking monetary remedies, and (ii) logic suggests and experience with physician price coordination proves that this additional remedy is needed.

(b) *Will it result in duplicative recoveries?* Several commentators worry that the FTC's use of Section 13(b) will result in duplicative recoveries.<sup>57</sup> One answer is that the FTC policy expressly states that the Commission "is sensitive to the interest in avoiding duplicative recoveries by injured persons or 'excessive' multiple payments by defendants for the same injury," and the policy bars double recovery for injuries<sup>58</sup>—apparently

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<sup>55</sup> See *supra* note 11.

<sup>56</sup> See Balto, *supra* note 9, at 1122 ("First, it is not necessary to compensate consumers for anticompetitive harm because there are usually private direct and indirect purchaser actions pending at the time the agency enters its consent decrees."); Kenneth G. Starling, *Criminal Antitrust Enforcement*, 57 ANTITRUST L.J. 157, 158 (1988) ("if there were unrecovered overcharges in such matters, private plaintiffs or state attorneys general would have pursued them already, or will pursue them in the future, if there is sufficient incentive"), *submitted to FTC as comment on disgorgement*, Letter from Kenneth G. Starling to Donald S. Clark, Secretary, Federal Trade Commission (Feb. 6, 2002), available at <http://www.ftc.gov/os/comments/disgorgement/starling.pdf>.

<sup>57</sup> See Balto, *supra* note 9, at 1123 ("First, the use of Section 13(b) poses a significant risk of duplicative recovery."); Johnson, *supra* note 30, at 1027-1030; *FTC Workshop Transcript*, *supra* note 54, at 1315 (remarks of Kenneth Gallo) ("I think there's at least the potential for serious duplicative recovery in antitrust cases . . ."). Mr. Gallo quite properly disclosed that he had worked on one of the recent disgorgement cases.

<sup>58</sup> FTC Policy Statement, *supra* note 41.

notwithstanding the antitrust laws' prescription of *treble* damages. Another answer is that in practice the Commission has proven its sensitivity to this issue by how it has structured its 13(b) settlements.

At least three issues relating to multiple recoveries remain unresolved. First, would private recovery of single damages prevent the FTC from awarding money through Section 13(b)? The FTC policy suggests that it would, at least if it achieved sufficiently substantial disgorgement. Second, would a direct purchaser's private recovery prevent the FTC awarding money to an indirect purchaser? Here, the FTC statement promises sensitivity but not an absolute bar, and rightly so. So long as a defendant has not finished disgorging ill-gotten gains, there is no reason not to make injured individuals whole.<sup>59</sup> Third, what if the FTC distribution occurs first, and a year later a private cause of action is filed? Does this "create[] enormous logistical problems to be sure that the same consumers aren't getting redress twice and that the defendant isn't paying twice?"<sup>60</sup> But this has never

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<sup>59</sup> Some commentators view *Illinois Brick* as an important policy decision to keep federal compensation away from indirect purchasers. *Cf., e.g., FTC Workshop, supra* note 54, at 1317 (comments of Kenneth Gallo). The legal and policy issues are well debated by the dueling statements in *Mylan*, available at <http://www.ftc.gov/opa/2000/11/mylanfin.htm>. The heart of *Illinois Brick* is not about protecting defendants, but rather about avoiding undue complexity. See Stephen Calkins, *Illinois Brick and its Legislative Aftermath*, 47 ANTITRUST L.J. 967, 970 (1978). Where a relatively straightforward disgorgement action is necessary to deprive a wrong-doer of ill-gotten gains, the fact that indirect purchasers will benefit from this is no reason not to proceed (although the set-off implications are more tricky, see Health Care Hearings, *supra* note 25, at 22 (Remarks of Melvin H. Orlans)). As a practical matter, of course, total payments have rarely if ever surpassed government estimates of single damages.

<sup>60</sup> *FTC Workshop, supra* note 54, at 1317 (comments of Kenneth Gallo).

happened,<sup>61</sup> and the chance of it happening is remote, given incentives for prompt filing of private claims, normal delay in FTC actions, and statutes of limitations. This implausible hypothetical is no reason to object to an otherwise desirable remedy.

(c) *Isn't this all too complicated?* Another theme is the plea for relative simplicity, or, at least, the suggestion that disgorgement or restitution would unreasonably complicate already complicated proceedings. But the FTC's participation can simplify proceedings by facilitating a national settlement.<sup>62</sup> And where there otherwise would be no recovery and no disgorgement of wrongfully held gains, some additional procedural steps are worth taking.

(d) *Even if the policy is sound in theory, can it work in practice?* Proof of what would have happened had a different road been taken is exceedingly difficult. Commentator Gallo noted the reasonableness of the FTC's policies but added that his "problem" is that "I don't think it's actually worked out that way."<sup>63</sup> Critics point especially to the *Hearst* case, in which the Commission challenged what it said was a merger to monopoly through violation of the Hart-Scott-Rodino premerger notification program.<sup>64</sup> The premerger notification allegation was resolved by payment of \$4 million in civil

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<sup>61</sup> *Id.*

<sup>62</sup> See O'Connor, *supra* note 38.

<sup>63</sup> *FTC Workshop*, *supra* note 54, at 1316 (comments of Kenneth Gallo).

<sup>64</sup> FTC Press Release, *FTC Charges Heart Trust with Acquiring Monopoly in Vital Drug Information Market* (April 4, 2001), available at <http://www.ftc.gov/opa/2001/04/hearst.htm>.

penalties.<sup>65</sup> The monopolization allegation was resolved by divestiture and disgorgement of \$19 million.<sup>66</sup> Although Commissioners Anthony and Thompson wrote that without disgorgement, the asset divestiture alone “might have allowed Hearst to profit from its unlawful behavior,”<sup>67</sup> Commissioner Leary described the case as “a classic example of a situation where the remedy is unnecessary, if not affirmatively harmful.”<sup>68</sup> He explained that the \$19 million would be turned over to the plaintiffs’ counsel who filed actions shortly after the Commission filed its case and included in the total settlement of \$26 million. He speculated that without disgorgement, the Commission might well have won a larger civil penalty (which is not offset against the private damages), such that the effect of the Commission’s seeking disgorgement could well be “that the parties will wind up paying less money” in combined penalties/d disgorgement/damages.<sup>69</sup> (Another consequence of

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<sup>65</sup> FTC Press Release, *The Hearst Corporation Settles Charges of Filing Incomplete Pre-merger Report* (Oct. 11, 2001), available at <http://www.ftc.gov/opa/2001/10/hearst.htm>.

<sup>66</sup> FTC Press Release, *Hearst Corp. to Disgorge \$19 Million and Divest Business to Facts and Comparisons to Settle FTC Complaint* (Dec. 14, 2001), available at <http://www.ftc.gov/opa/2001/12/hearst.htm>.

<sup>67</sup> Statement of Commissioners Sheila F. Anthony and Mozelle W. Thompson, *The Hearst Trust et al.*, File No. 991-0323 (Dec. 14, 2001), available at <http://www.ftc.gov/os/2001/12/anthstate.htm>.

<sup>68</sup> Statement of Commissioner Thomas B. Leary, Concurring in Part and Dissenting in Part, *Federal Trade Commission v. The Hearst Trust*, File No. 991-0323 (Dec. 14, 2001), available at <http://www.ftc.gov/os/2001/12/learystate.htm>; see also *FTC Workshop*, *supra* note 54, at 1316 (comments of Kenneth Gallo).

<sup>69</sup> *Id.* Commission Leary was suitably cautious about this suggestion, noting that “hypothetical predictions about the ‘but for’ world are always risky.” *Id.*; see also Statement of Commissioner Orson Swindle Concurring, *Federal Trade Commission v.*

the FTC's obtaining disgorgement was that the direct plaintiffs' attorneys fees were limited to 30% of the incremental amount attributable to their efforts, which the court computed as \$8 million, yielding a fee of only \$2.4 million.<sup>70</sup>)

The reality is that the counter-factual is very hard to prove. When the Commission filed its *Hearst* lawsuit, no private class actions were pending, and the Commission believed that absent a disgorgement action, defendants "would be likely to retain their ill-gotten gains."<sup>71</sup> This seems a reasonable belief, since the alternative—an administrative challenge to a merger—rarely stimulate follow-on litigation,<sup>72</sup> and the Commission's other

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The Hearst Trust, File No. 991-0323 (Dec. 14, 2001) ("One thing seems clear: 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.").

<sup>70</sup> *In re: First Databank Antitrust Litig.*, 209 F. Supp. 2d 96, 101 (D.D.C. 2002) (the FTC intervened to object to the attorneys' fee being based on an amount that included the disgorgement).

<sup>71</sup> Health Care Hearings, *supra* note 25, at 19 (Remarks of Melvin H. Orlans); see *also* Statement of Chairman Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson, First Databank (Apr. 4, 2001) ("The alternative [to a disgorgement action], which would simply restore competition by divesting illegally acquired assets, is inadequate because it allows the respondent to walk off with profits gained as a result of its allegedly illegal behavior."), *available at* <http://www.ftc.gov/os/2001/04/hearstpitanthom.htm>. *But cf.* Dissenting Statement of Commissioners Orson Swindle and Thomas B. Leary, Hearst Trust and Hearst Corporation's Acquisition of J.B. Laughrey, Inc. (Apr. 4, 2001) ("Without expressing a view on whether that extraordinary remedy should ever be available in an antitrust case, we believe that, if a violation is proved, existing private remedies are adequate to ensure that respondents do not benefit from any possible wrongdoing and that their customers can be made whole."), *available at* <http://www.ftc.gov/os/2001/04/hearstdisswinleary.htm>.

<sup>72</sup> For instance, I believe that no follow-on lawsuits have been filed in *Evanston*.

basis for a challenge (violation of the Hart-Scott-Rodino Act) does not create a private cause of action.<sup>73</sup> Of course, shortly after the Commission filed its disgorgement action multiple class actions *were* filed, but that proves little about what would have happened had the Commission taken the alternative course: it is much easier for private litigants to share in disgorged profits than, for instance, to prove that a merger is unlawful and caused them antitrust injury.<sup>74</sup> It is thus entirely possible, and perhaps even likely, that disgorgement occurred only because of the FTC's lawsuit.<sup>75</sup>

Commentators also have complained about the FTC's *Mylan* case. It has been pointed out that by the time the FTC settled that case, multiple private and state cases pending, and the money obtained by the FTC went into a fund administered by the

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<sup>73</sup> See Health Care Hearings, *supra* note 25, at 19-20 (remarks of Melvin Orland).

<sup>74</sup> Clayton Act Section 5 specifically provides that “in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission.” 15 U.S.C. § 16(a). Nor are FTC decisions *prima facie* evidence in private antitrust suits. *Id.*

<sup>75</sup> One could ask a different question: not whether there would have been disgorgement without FTC action, but whether the FTC, having stimulated private lawsuits by suing for disgorgement, should then settle what it considered a meritorious case without obtaining disgorgement (reasoning that it's mission had been accomplished). By the time the FTC filed its case, however, its work was almost completed. It had conducted “an exhaustive 20-month investigation” costing more than 25,000 hours. *In re: First Databank Antitrust Litig.*, 209 F. Supp. 2d 96, 97 (D.D.C. 2002). Less than a week later, defendants offered to settle the case by disgorging \$18 million. *Id.* Little would have been gained by the FTC abandoning disgorgement at that point, and much could have been lost were the FTC, having done all the work, to have left resolution of the dispute to private lawyers who might or might not act in the public interest—and were the FTC to create a precedent that would make suspect the bonafides of the next disgorgement case it filed.

states.<sup>76</sup> But once again, when the Commission decided how to proceed, no private actions were pending.<sup>77</sup> The Commission doubted that full disgorgement was likely absent its action, because the direct purchasers were large drug wholesalers who might be reluctant to sue the pharmaceutical companies with whom they regularly dealt, especially where the wholesalers had largely passed on any price increase or even benefitted from a price increase when their percentage fee yielded more generous payments.<sup>78</sup> Also as in *Hearst*, the Commission's lawsuit stimulated private litigation—but, once again, that consequence does not prove what would have happened had the Commission not sought disgorgement.<sup>79</sup>

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<sup>76</sup> See Balto, *supra* note 9, at 1120-21, 1124; *FTC Workshop*, *supra* note 54, at 1317 (comments of Kenneth Gallo). Commissioner Leary dissented from the Commission's accepting of disgorgement in *Mylan* not because the remedy made no difference but rather because he had fundamental objections to the Commission's use of Section 13(b) in these cases. See Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part, *Federal Trade Commission v. Mylan Pharmaceuticals, Inc., et al.*, FTC File No. X990015 (Nov. 29, 2000), available at <http://www.ftc.gov/os/2000/11/mylanlearystatment.htm>.

<sup>77</sup> Health Care Hearings, *supra* note 25, at 17 (Remarks of Melvin H. Orlans).

<sup>78</sup> *Id.*; see also *More Than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773, 836 (2005) (comments of Robert Pitofsky) (“A simple cease-and-desist order would not have affected Mylan's profits [more than \$120 million in wrongfully additional profits a year], and consumers who paid monopoly prices to pharmacies for the drugs—often elderly consumers on fixed incomes—did not purchase directly from Mylan and probably were not entitled to damages under federal law.”).

<sup>79</sup> *Id.* at 18-19 (“Notably, the direct purchaser class action settled quite late and I think fairly cheaply, and that was because as the Commission had originally envisioned, many of the drug wholesalers opted out of that class action.”). When it issued the complaint in *Mylan*, the Commission announced that it was seeking at least \$120 million in disgorgement or restitution. FTC Press Release, *Mylan, Nation's Second Largest*

(e) *Will Disgorgement Lure the FTC Away from its Special Mission?* In his eloquent dissent in *Mylan*, Commissioner Leary warned that this kind of use of Section 13(b) was “almost too expedient and, dare I say, too seductive. It transforms the Commission into a prosecutor with an immensely powerful antitrust weapon.”<sup>80</sup> This is not the mission of the FTC, he argued: “Our 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.”<sup>81</sup>

This is a legitimate concern. The FTC *does* have a special role to play.<sup>82</sup> The FTC’s Bureau of Consumer Protection has become something of a lean, mean, court-

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*Generic Drug Maker, Charged with Restraint of Trade, Conspiracy & Monopolization* (Dec. 21, 1998).

My understanding is that in *Perrigo*, no private suits were pending when the FTC announced its complaint and settlement, but suits were filed shortly thereafter and continue to pend. The FTC committed to use the disgorged funds to compensate harmed customers, see FTC Press Release, *Generic Drug Marketers Settle FTC Charges* (Aug. 12, 2004), available at <http://www.ftc.gov/opa/2004/08/perrigoalpharma.htm>—with the expectation, as I understand it, that FTC-compensated customers would receive, at most, only some appropriately reduced private recovery.

Note that all three recent cases involved monopolization theories where it was not possible to write a simple, sweeping order. This additional factor helps make all three appropriate candidates for supplemental relief.

<sup>80</sup> Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part, *Federal Trade Commission v. Mylan Pharmaceuticals, Inc., et al.*, FTC File No. X990015 (Nov. 29, 2000), available at <http://www.ftc.gov/os/2000/11/mylanlearystatment.htm>.

<sup>81</sup> *Id.* David Balto also has vigorously stressed the same “special mission” theme. Balto, *supra* note 9.

<sup>82</sup> This is one the theme’s of the second Kirkpatrick Report, see *supra* note 32.

litigating machine, but at the very real cost of largely depriving consumer protection of any adjudicative contributions from the Commissioners.<sup>83</sup> Were the Commission to become merely a filer of federal court complaints, the talents of existing Commissioners would be wasted and the chance of attracting talented successors reduced.

Although the concern is thus legitimate, it is hard to see how a disgorgement case every couple of years poses a serious threat to the Commission's mission. Yes, as Commissioner Leary noted, these actions can be "seductive," and, yes, it is important not to be seduced (or at least not too often). The evidence thus far suggests that the Commission is fully capable of exercising restraint.

### III. Establishment of Civil Fines Should be Seriously Considered

Many of the same reasons why it makes sense for the FTC to be able to obtain monetary redress for selected antitrust violations counsel in favor of establishing a system of civil fines that could be obtained by the FTC and also, importantly, by the Department of Justice. Antitrust violations are of varying severity, yet the Antitrust Division is limited to seeking injunctive relief or seeking an indictment. No one would suggest anything other than the utmost good faith, but the incentive certainly is to err, on the margin, in favor of proceeding criminally. Conversely, there is relatively less attraction to proceeding civilly, a pattern that is born out by the numbers. During the five years starting in 2000, the Division has filed an average of only 2.4 civil nonmerger cases a year, compared to 44.6 criminal

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<sup>83</sup> The Commission's recent opinion in *Telebrands Corp.*, Dkt. 9313 (Sept. 19, 2005), was its first consumer protection opinion in more than five years.

cases.<sup>84</sup>

As AAG Pate observed civil fines could supply important additional deterrence while also aligning the U.S. system of remedies more closely with foreign legal systems.<sup>85</sup> As discussed previously in this paper, the antitrust system does not appear to be currently achieving sufficient deterrence of certain kinds of violations. That could be solved were the antitrust agencies empowered to obtain civil fines.

One other way that additional deterrence could be achieved would be for the Antitrust Division to seek to establish its right to obtain equitable relief just as the FTC does. The Justice Department appears to have taken the position, in the context of litigating disgorgement under RICO, that the Sherman Act's empowering of district courts "to prevent and restrain violations" of the Act authorizes the courts to award disgorgement to the government.<sup>86</sup> Depending on how litigation of related issues progresses through the courts, the Antitrust Division might decide to act on this view.

The cleaner way to help the Division address these mid-situation cases would be by Congress's authorizing civil fines. Fines have the benefit of helping to deter illegal conduct that does not result in gains suitable for disgorgement (for instance, because the

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<sup>84</sup> Antitrust Division Workload Statistics FT 1995 - 2004, available at <http://www.usdoj.gov/atr/public/workstats.htm>.

<sup>85</sup> See Pate, *supra* note 12, at 2 (endorsing study of possible civil fines and accompanying "adjustments to private damages remedies").

<sup>86</sup> Reply Brief for the United States on Petition for a Writ of Certiorari, *United States v. Philip Morris USA, Inc.*, No. 05-92 (filed Sept. 2005), at 4 & n.3, citing *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1221-22 (D.C. Cir. 2005) (Tatel, J., dissenting).

wrong-doing is stopped at an early stage). Another benefit of a system of civil fines is that it would keep the Antitrust Division in the business of challenging civil antitrust violations. (Although some might favor letting the FTC specialize in non-criminal antitrust, I prefer to have both agencies address a spectrum of conduct.)

Were the antitrust agencies authorized to impose civil fines for antitrust violations, coordination with private damages actions would be necessary. Even if general antitrust deterrence is too low, there is no reason why a few unlucky defendants should be singled out potentially to pay a civil fine plus treble damages (or perhaps more, to different classes of purchasers). If overall damages and penalties are too low, increase them. The point of creating civil fine authority should be to make sure that wrong-doers identified by the antitrust agencies part with sufficient funds that others will be deterred. It makes no difference, for purposes of deterrence, whether money is paid to the government or to a private claimant. The simplest way to accomplish this would be to provide that any civil fine will be held in escrow for a period of time, and refunded to the extent that equal amounts are paid out in damages. (This also means that the system favors payments to victims over payments to the general treasury, which makes sense both as a matter of equity and as an incentive to informing the government about violations.)<sup>87</sup>

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<sup>87</sup> One group of commentators, while recognizing the important role of the government antitrust agencies, opposed civil fines out of fear that “displacement of private remedies would reduce enforcement of the antitrust laws, and should be disfavored.” AAI Remedies Comment, *supra* note 31, at 13. Yet displacement of \$X of damages by an equal amount of penalties would leave deterrence unchanged. Deterrence would be reduced only were total resources available to fund private “attorneys general” to fall below some critical level need to preserve effective private litigators, which seems unlikely; or if a particular case saw just enough displacement as to make it no longer worth pursuing

#### IV. Conclusion

The most important conclusion is the most obvious: the FTC is proceeding responsibly to use its disgorgement authority and this is no time for Congress to get involved. The rapid pace of judicial developments with respect to other disgorgement issues provides further reason to Congress's taking no action at this time.

Whether Congress should consider creating civil fines is a harder question. The bottom line, however, is that the current system of "bi-modal penalties" makes little sense and imposes modest but real costs. Especially if Congress were to consider other remedy reforms, it should seriously consider adopting civil fines enforceable by the Antitrust Division and the FTC.

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privately, which couldn't happen very often; or if the displacement was keyed to single damages, such that a \$10 million civil penalty displaced not \$10 million in damages, but \$30 million. Given the paucity of government civil antitrust litigation, see Calkins, *supra* note 3, at 156, no effect would seem very large; but, in any event, the largest effect could be prevented simply by keying any displacement to the amount of actual paid damages foregone. And the problem could be prevented in its entirety simply by having the fines made payable only to the extent that damages are not.