WRITTEN TESTIMONY OF KEVIN ARQUIT

BEFORE THE ANTITRUST MODERNIZATION COMMISSION

December 1, 2005 Hearing on Government Civil Remedies

Summary of Testimony

In my testimony below, I argue that a serious case for giving the agencies specifically defined power to seek disgorgement and restitution in competition matters has not been established by the agencies or other commentators. I elaborate on three points in my testimony: (i) Any proposal to change public enforcement remedies should be predicated on modifications to private enforcement as well because the objectives of consistency and fairness can only be accomplished if public and private enforcement work in tandem; (ii) The FTC has not made a persuasive case that it can identify situations in which private enforcement remedies are not sufficient, or that it can seek disgorgement or restitution without affirmatively harming the current system by risking multiple recovery and chilling pro-competitive behavior; and (iii) Congress should clarify 15 U.S.C. § 53(b) because the FTC risks its consumer protection mission in its efforts to stretch its Section 13(b) authority into its antitrust mission.

Main Testimony

Change in Government Remedies Would Require Change in Private Remedies

To borrow Commissioner Leary's phrasing from his *Mylan* statement, there is something "seductive" about the idea of government civil remedies, such as disgorgement or restitution, for substantive antitrust violations.[1] If one constructed an antitrust enforcement system from scratch, one could build a solid case for why civil fine authority should be a weapon in the agencies' arsenal of antitrust remedies *if* one did not also have in place parallel private enforcement.

To take a simple example, imagine a situation where a company with market power entered into various arrangements that effectively locked up necessary suppliers, thus preventing horizontal entry. Also, suppose the government didn't detect, investigate, or take enforcement action on this agreement until year ten. However, by that time, the agreement had become largely irrelevant because technology had evolved so that there were alternate ways to enter the market. In this scenario, unless there is private relief, the parties have, in effect, gotten away with their anticompetitive plan. Even if the FTC wins an injunction voiding the anticompetitive contract going forward, this has little prospective significance because the market has changed. Moreover, the parties keep the gains from their decade of deterring entry. Thus, if one considers only remedies from government enforcement, the agencies, without civil monetary remedies, lack the ability to pursue a wide range of past harms, reducing the overall effectiveness resulting from enforcement efforts.

Of course, the rub is that our current system is more than public enforcement. Instead, public and private enforcement mesh together to form a complete enforcement scheme that provides deterrence and compensates victims. Typically, government enforcement action (both state and federal) represents just the first step in punishing the violators and compensating

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[1] 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, at 7, available at http://www.ftc.gov/os/2000/11/mylanlearystatment.htm

victims. As we all know, private suits frequently follow on the heels of a public enforcement action. In fact, often the government has done the heavy lifting for the private plaintiffs, who frequently copy their allegations wholesale from the government's complaint. And the prospect of treble damages provides victims sufficient incentive to pursue their claims.

Further, the current system consists of features, which aid private plaintiffs in recovering following a public enforcement action. One example of the coherent blending of public and private enforcement is the tolling provision of Section 5(i) of the Clayton Act, which provides that the statute of limitations as to private suits is suspended during the pendency of a government antitrust suit, provided certain conditions are met.[2] Thus, the system provides encouragement for private parties to piggy-back on the government enforcement efforts in seeking their individual recoveries, and allows the government more freedom of movement by not having to contend with collateral issues that could arise if a parallel private action is simultaneously proceeding.

Because private and public enforcement work in tandem to provide comprehensive enforcement, a predicate for any alterations should be a strong showing that the change maintains the coherence of the system. Victims already may get relief (trebled) through available private remedies, and any proposal adding government civil monetary remedies should account for those remedies and avoid the potential for further addition of remedies.[3] Thus,

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2 Clayton Act § 5(i), as amended, 15 U.S.C.A. § 16(i)

3 The system already carries the risk of multiple remedies because of state indirect purchaser statutes. In *California v. ARC America Corp.*, 490 U.S. 93 at 102 (1989), the Supreme Court said that the *Illinois Brick* repealer state statutes were "consistent with the broad purposes of the federal antitrust laws," despite the risk of multiple recovery.

restructuring public enforcement also requires restructuring private enforcement to maintain even the semblance of coherence to a system that is already imperfect.

One option for maintaining system coherence while adding public monetary remedies is to abolish private remedies altogether. We can dispose of this option quickly. While there is private litigation abuse, the elimination of all private relief would, in my view, constitute a serious over-reaction. Indeed, doing so would compromise some of the current system's central benefits. It would restrict the ability of victims to pursue their own relief, and instead have them rely on the discretion and will of federal agencies to detect and prosecute violations of the antitrust laws. To date, the case hasn't been made for antitrust enforcement to consist entirely of two federal agencies with limited resources monitoring the entire economy, even assuming the continuation of robust enforcement by State Attorneys General.

Other than an argument that private remedies should be abolished, the question is whether restitution and disgorgement could be grafted onto the existing system in a way that increases the system's effectiveness while not disincentivizing parties from engaging in efficient behavior. The main criticism that additional remedies would detract from the enforcement scheme is that government monetary remedies would risk award duplication because victims also could recover through private direct and indirect purchaser actions.[4] Thus, defendants would pay multiple times for the same violation. Moreover, there is inefficiency because in seeking monetary relief, agencies are duplicating work that can be handled by private plaintiffs.[5] And, of course, as the multiplication of potential damages mounts, so too does the incentive of parties to

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4 *See*, *e.g.*, David Balto, "Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to the FTC Remedies," 72 *Antitrust L. J.* 1113, 1120-24 (2005)

5 *Id*.

fear the consequences of antitrust liability so much that they will be deterred from efficient behavior. While the fear of over-deterrence may seem trivial when considering criminal cartel behavior, automatic trebling of damages applies to any antitrust violation, even exclusive dealing, intra-brand non-price restraints or other activity viewed under the somewhat unpredictable test of the Rule of Reason.

Given these twin risks of multiple recovery and duplicative efforts, an advocate of government civil remedies should be required to show that there are systematic gaps in current enforcement which can be filled by disgorgement and restitution. I have seen little academic commentary promoting this position. Instead, the most ambitious attempt to advocate such remedies are necessary appears to be from the FTC itself as laid out in the *Policy Statement on Monetary Equitable Remedies in Competition Cases* ("*Policy Statement*").[6]

FTC Policy Statement on Monetary Equitable Remedies in Competition Cases

In the FTC's *Policy Statement*, the government seeks to define those "appropriate circumstances" in which it makes sense to pursue monetary remedies, but fails to do so. The FTC falls far short of providing guidance as to how the FTC or others could identify those situations that raise "appropriate circumstances" to the extent that any such situations exist. Indeed, I come away with the impression that the FTC is really saying that it suspects there are situations in which monetary equitable remedies might make sense even though it *ex ante* cannot describe when that might be so. According to the *Policy Statement*,

6 FTC, "Policy Statement on Monetary Equitable Remedies in Competition Cases," July 25, 2003, available at http://www.ftc.gov/os/2003/07/disgorgementfrn.htm

> The Commission continues to believe that disgorgement and restitution can play a useful role in competition cases, complementing more familiar remedies such as divestiture, conduct remedies, private damages, and civil and criminal penalties. The competition enforcement regime in the United States is multifaceted, and it is important and beneficial that there be a number of flexible tools, as well as a number of potential enforcers, available to address competitive problems in a particular case.[7]

The Commission's view, typical of any general agency enforcement statement, prefers not to take any remedial options off the table.[8]

Yet, the Commission fails in providing guidance on when it may wield that weapon. The Commission states it will weigh three factors in deciding when to seek disgorgement or restitution: (1) whether there is a clear violation; (2) whether there is a reasonable basis for calculation of remedy; and (3) whether any value is added by the Commission's monetary remedy.[9] The government offers little guidance on weighing these factors, except to state that a strong showing on any one factor could "tilt the balance" on when

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[7] *Id*.

[8] This is not intended as a criticism of the FTC, but just stating a fact of life that the agencies tend to be conservative in giving assurances about conduct or taking remedial options off the table in order to deal with the occasional outlier case. For example, when creating safe harbors, the agencies face the risk of setting the safe harbors too high, which can tie their hands in dealing with the outlier that causes anticompetitive effects, even though technically within the safe harbor. Thus, the agencies will set the safe harbors at a conservative level, even though they will not challenge many arrangements that fall outside the safe harbor. *See* "Statements of Antitrust Enforcement Policy in Health Care Issued by the U.S. Department of Justice and the Federal Trade Commission," August 1996, available at http://www.usdoj.gov/atr/public/guidelines/0000.htm ("The Agencies are aware that some parties have interpreted the safety zones as defining the limits of joint conduct that is permissible under the antitrust laws. This view is incorrect. The inclusion of certain conduct within the antitrust safety zones does not imply that conduct falling outside the safety zones is likely to be challenged by the Agencies.")

[9] *See Policy Statement*, supra note 6.

to seek monetary remedies.[10] So, as a preliminary matter, even if one accepts the Commission's three factors as relevant, the Commission is not setting out a test that provides any clear guidance to the public or to itself.

However, the factors the Commission sets out are flawed or ill-defined. First, consider the last factor, i.e., that the Commission's monetary remedy adds value. Although listed as the third factor in the *Policy Statement*, this should be the most significant, as well as the threshold factor. This factor restates the primary concern regarding the appropriateness of disgorgement and restitution, i.e. when do such remedies add to overall enforcement given the available private remedies? The Commission acknowledges the concern: "The Commission is sensitive to the interest in avoiding duplicative recoveries by injured persons or 'excessive' multiple payments from defendants for the same injury."[11]

At the heart of this factor is whether the Commission can articulate how to identify those circumstances where private remedies will not result in complete relief, and where its enforcement will plug the gap without risking multiple recovery. Instead of clear guidance, the Commission lists certain generic descriptions of when disgorgement might be appropriate. According to the *Policy Statement*, these examples involve private actions where violators remain enriched from the illegal conduct; when practical or legal difficulties are likely to preclude compensation for those injured by a violation; or when the violator reaps some advantage from the violation because available penalties are not sufficient.[12] However, the Commission offers no persuasive evidence or explanation of when or how often such situations

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10 *Id*.

11 *Id*.

12 *See id*.

may occur; of how these situations can be identified; and of whether the Commission is able to identify such situations. Simply put, from the Commission's general descriptions, it is not evident that there are many real-world examples in which public monetary remedies will add to private action.

Indeed, the examples cited in the *Policy Statement*, namely the *Mylan*[13] and *Hearst*[14] cases, undermine the Commission's arguments that it can identify situations in which its monetary remedies can usefully add to private action. In both matters, private plaintiffs and states stepped in with private actions soon after the FTC settlements. Both serve as examples where the FTC's pursuit of disgorgement doesn't establish clear added value to the existing network of private enforcement remedies.

In *Mylan*, Commissioner Leary stated that the Commission was setting an undesirable precedent for future federal and state antitrust enforcement. According to Commissioner Leary:

> Widespread use of Section 13(b), or equivalent state authority can directly undermine the final policy foundation for *Illinois Brick*, namely, avoidance of duplicative recoveries. This proceeding has opened the door for other cases where we (and perhaps myriad states) obtain restitution on behalf of consumers and respondents are still liable for full treble damage recoveries by direct purchasers.[15]

Similarly, in *Hearst*, two Commissioners effectively recognized that the Commission's disgorgement remedy did not advance the goals identified in the FTC's *Policy*

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13 *FTC v. Mylan Labs., Inc.*, File No. X990015, No. 1:98CV03114 (TFH).

14 *FTC v. The Hearst Trust*, No. 1:10CV00734 (TPJ).

15 Statement of Commissioner Thomas B. Leary, *supra* note 1, at 6.

Statement, and indeed probably undermined them. As Commissioners Leary and Swindle stated in *Hearst*:

> [W]e particularly dissent from the Commission's decision to seek disgorgement in this situation . . . [because] 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.[16]

Later when the Commission approved the ultimate settlement in *Hearst*, Commissioner Leary explained how the Commission had ended up with a result that was less of a penalty to the defendants than if the Commission had sought available penalties other than disgorgement:

> The $19 million the Commission obtained in disgorgement will be turned over to plaintiffs' counsel and included in the $26 million plus funds distributed to eligible parties in the private class action lawsuits. Thus, the incremental award for injured customers negotiated by the attorneys for the class action plaintiffs will ultimately amount to only approximately $7 million, from which their attorneys fees must be subtracted. Although hypothetical predictions about the "but for" world are always risky, it is entirely possible that the parties will wind up paying less money than they would have paid if the Commission had settled the case months ago for a substantially higher civil penalty that would not offset private damages, as will happen under the disgorgement remedy negotiated here.[17]

Thus, even if all the allegations were to be believed, neither *Hearst* nor *Mylan* clearly establish a situation in which private remedies would not provide adequate relief to victims. Moreover, the Commission's misidentification of proper cases for disgorgement is not

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[16] Dissenting Statement of Commissioners Orson Swindle and Thomas B. Leary, *Hearst Trust and Hearst Corporation's Acquisition of J.B. Laughrey Inc.*, FTC File No. 991 0323, available at http://www.ftc.gov/os/2001/04/hearstdisswinleary.htm

[17] Statement of Commissioner Thomas B. Leary, Concurring in Part and Dissenting in Part, *Federal Trade Commission v. The Hearst Trust*, File No. 991 0323, available at http://www.ftc.gov/os/2001/12/learystate.htm

harmless. In the *Policy Statement*, the Commission assumes that courts can easily take measures to ensure that injured persons do not recover both through private damages actions and FTC-obtained restitution. The Commission says, "…[W]e believe that courts considering equitable remedies have sufficient flexibility to craft orders to avoid unjust results."[18] However, as Ken Gallo has argued, creating mechanisms where restitution funds are setoff against private damages is more complicated than the Commission assumes.[19] For example, private actions can arise long after an equity court has determined how restitution or disgorgement funds should be allocated, which would impossibly complicate the attempt to avoid multiple recovery. Moreover, even if the courts could avoid duplicative relief, the FTC never addresses what is gained by having the system bear the extra cost of the judicial processes necessary to avoid excessive relief.

In addition to not developing a convincing statement that there are situations where the FTC can add value, or if there are such situations that the FTC is capable of identifying them, the Commission never explains why the "value add" factor is not the start, as well as the end of the analysis. Instead, the FTC includes two additional factors: i) a clear violation; and ii) a reasonable basis for calculation of remedy.[20] These factors are in tension with the "value add" factor. Indeed, those instances, when the violation is clear and when there is a reasonable basis for calculation of remedies, are precisely when private litigation is most likely to compensate the victims, because this is where private litigation will be successful. Thus, in

18 *Policy Statement*, supra note 6.

19 *See* FTC Workshop, "Class Actions As An Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers And Follow-On Lawsuits," 18 *Geo. J. Legal Ethics* 1311 (Fall 2005)

20 *Policy Statement*, supra note 6.

such circumstances there would least be an argument that there was "value added by the Commission's monetary remedy" and it is in those instances when the extra government remedy is absolutely not needed.[21]

Risk to Consumer Protection Enforcement

The AMC also seeks views on whether Congress should clarify, expand, or limit the FTC's authority to seek monetary relief under 15 U.S.C. § 53(b). In my opinion, it is critical that Congress clarify the FTC's authority to seek monetary relief under 15 U.S.C. § 53(b), because the FTC's present reach for an additional antitrust remedy could undermine its consumer protection mission.

The FTC's belief and basis that it can seek equitable monetary remedies under Section 13(b) stems primarily from its consumer protection work, not from its antitrust activities.[22] Previous to asserting monetary damages in consumer protection cases, the Commission relied on administrative proceedings leading to "cease and desist" orders. The shortcoming of this approach was that a "cease and desist" order did not remedy the injury to the public caused by the challenged practice before the Commission obtained the order, nor did it effectively deter unlawful conduct because the defendant could keep its gains from the transgression. The Commission sought to establish that it had powers to seek equitable remedies broader than an injunction under Section 13(b) to address this shortcoming in its remedies. The

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21 *See id*.

22 *See* David M. FitzGerald, "The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act." (Paper presented at FTC's 90th Anniversary Symposium, September 23, 2004), available at http://www.ftc.gov/ftc/history/docs/fitzgeraldremedies.pdf

Commission won a series of cases which affirmed that it had a monetary remedy under 13(b) in consumer protection cases.

On the consumer protection side, this authority was much more clearly beneficial to the public interest. With the 13(b) monetary remedy, the FTC has demonstrably filled a gap and achieved more effective consumer protection enforcement. Section 13(b) has become a potent tool for the Commission in its fight against consumer fraud. The FTC recognized this early on. Indeed, as described by David Fitzgerald at the FTC's 90th Anniversary Symposium, after establishing the 13(b) authority in several initial cases, the FTC realigned its internal resources from a focus on administrative litigation and rulemaking to one focused on litigating Section 13(b) cases in federal court.[23]

Despite its success using monetary remedies on the consumer protection side, bringing over this authority generally into the FTC's competition efforts is quite a leap. First, as mentioned above, the FTC's court victories affirming authority under 13(b) were established in consumer protection cases, not in antitrust cases. Second, in the antitrust realm, the FTC has not demonstrated a similar need that its enforcement activities are hampered without the civil monetary remedy. In antitrust, the availability of treble damages has assured that private actions follow (or occur simultaneously) with the FTC's (or DOJ's) enforcement action and often the government's prosecution accomplishes the heavy lifting so that plaintiffs have an easier time obtaining monetary recovery. As discussed throughout my testimony, I believe there is little that FTC civil remedy power adds to antitrust enforcement, because as currently structured, the public enforcement and private litigation form a coherent and complete scheme of antitrust

[23] *Id.* at 19.

enforcement. In contrast, in the consumer protection area there was not as wide a body of law that allows private rights of damages. A court could very well take the view that the FTC has a weak claim to authority to seek disgorgement in competition matters.

By pushing for disgorgement authority in antitrust enforcement that it itself cannot persuasively argue the need for, the FTC faces the danger of putting its entire 13(b) authority in play. In doing so, it risks a judgment by a court that 13(b) authority is unjustified.[24] Such a judgment would undermine the FTC's efforts on the consumer protection side, where the use of 13(b) authority has added to a coherent enforcement regime. Consumer protection enforcement would be risked in a bold and unnecessary reach for authority in competition cases, where an effective enforcement scheme already exists. Given this risk, Congress's clarification would benefit the FTC and consumers generally.

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24 While at one time a better case could be made for 13(b) disgorgement authority, there is more recent precedent than *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) which casts some doubt on that authority. In *Meghrig v. KFC Western, Inc.* 516 U.S. 479 (1996), when there is an elaborate enforcement scheme already in place, the Supreme Court does not assume that Congress intended to confer the full scope of equitable powers just because one aspect of the court's equitable powers is invoked. This holding would require courts to infer additional equitable monetary remedies under 13(b) only upon finding that Congress did intend there to be such remedies available and that such remedies would not undermine the scheme of antitrust remedies already available. Recently, in the United States' case against the tobacco companies, the D.C. Circuit has held that disgorgement remedies were not available under the RICO statute. *See United States v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005).