The FTC's Use of Disgorgement in Antitrust Actions Threatens to Undermine the Efficient Enforcement of Federal Antitrust Law

David K. Park and Richard Wolfram

In the last few years, the Federal Trade Commission has on several occasions sought disgorgement in antitrust actions.[1] To obtain such relief, the FTC has asserted authority under FTC Act Section 13(b), which, in express terms, permits the FTC merely to obtain injunctive relief.[2]

Previously, the FTC had for some time used Section 13(b) to obtain disgorgement in consumer fraud cases. Although two or three cases do not necessarily make a trend, stepped-up efforts by the FTC to seek monetary relief in antitrust cases are notable: The agency was vested by Congress with equitable powers to *enjoin* acts or transactions violating the FTC Act's proscription of unfair competition, and this has been its traditional enforcement role. Although the FTC's recent expansion of its traditional equitable enforcement role through its use of Section 13(b) to obtain disgorgement in antitrust cases may be an expedient means to wrest ill-gotten gains from wrongdoers, this effort strains the plain meaning of Section 13(b). More significantly, the FTC's expanded application of Section 13(b) conflicts with the *Illinois Brick* "direct purchaser rule" and its underlying policy rationale of minimizing the risk of duplicative remedies, reducing the complexity of damages determinations, and promoting efficient enforcement in illegal overcharge cases by giving standing only to direct purchasers to seek damages. The effect of this development should not be underestimated: it constitutes a significant change in the federal enforcement scheme in any antitrust case in which the FTC seeks disgorgement.

The authors, members of the New York Bar, work or have worked at firms that have represented defendants in antitrust disgorgement actions discussed in this article.

[1] As an equitable remedy for wrongful conduct, disgorgement wrests ill-gotten gains from the wrongdoer. It is intended to deny the wrongdoer his or her unjust enrichment and to serve as a deterrent against similar conduct in the future. In a multi-level chain of distribution, for instance, where each wholesaler/distributor may not only pass through an overcharge from the initial manufacturer but also add its own extra margin, disgorgement would equal only the amount of the alleged overcharge imposed on the first wholesaler/distributor by the manufacturer.

In contrast, restitution for an ultimate consumer, for instance, is the total amount of monetary harm (out-of-pocket loss) suffered by that consumer. Restitution thus restores that consumer to the status quo ante and is equal to the difference between the price the consumer paid before the illegal conduct and the (higher) price it paid after the illegal conduct began—and regardless of how much of the total monetary harm is attributable to the manufacturer or to downstream distributors before the product reaches the ultimate consumer.

[2] 15 U.S.C. § 53(b).

Although two or three cases do not necessarily make a trend, stepped-up efforts by the FTC to seek monetary relief in antitrust cases are notable . . .

Legislative and Case Law History

The FTC is authorized under Section 5 of the FTC Act[3] to issue "cease and desist" orders to enjoin unfair methods of competition. Section 13(b) of the Act authorizes the FTC to seek and obtain injunctions from federal district courts. There is no indication, however, that Congress ever intended Section 13(b) to be used to obtain monetary relief; instead, its use as authorization to seek and obtain disgorgement in antitrust cases is a creation only of the Commission itself and the courts.[4] The FTC's use of Section 13(b) to obtain disgorgement in antitrust cases is just the latest step in a gradual expansion of the Commission's enforcement powers under the FTC Act from injunctive to monetary relief, beginning with consumer protection cases involving deceptive and fraudulent conduct and most recently including antitrust rule of reason cases.

In 1969, the FTC asserted that its Section 5 cease and desist authority gave it the power to order the payment of refunds to consumers injured by a defendant's unfair or deceptive acts or practices. *Curtis Publishing Co.*, 78 F.T.C. 1472 (1970)), *aff'd on other grounds*, 78 F.T.C. 1472 (1971).

In 1974, in another consumer fraud case, a Ninth Circuit panel held that the FTC's remedial authority did not include the power to order restitution to defrauded merchants and franchisees. *Heater v. FTC*, 503 F.2d 321, 326–27 (9th Cir. 1974). The court noted that "statements, of courts, commentators, and congress throughout those years [the 60 years the FTC Act had been on the books] uniformly reflect an understanding that the Commission is without the power [to order restitution] it seeks to exercise." *Id.* at 326.

In the 1970s two pieces of legislation enhanced the FTC's remedial powers: (1) the Trans-Alaska Pipeline Act and (2) the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, both of which amended the FTC Act. In 1973, the Trans-Alaska Pipeline Act added Section 13(b). Section 13 empowers the FTC, whenever it believes that someone "is violating or is about to violate" any of the laws enforced by the FTC, to sue in district court to enjoin such activity pending issuance of an FTC complaint and final resolution of that action. It also authorizes the FTC to seek preliminary injunctions in court, without first having to complete an administrative hearing and obtain a cease and desist order.

Two years later, Magnuson-Moss added FTCA Section 19, which expressly authorizes the FTC to seek remedial monetary relief, but only in cases involving fraudulent or deceptive conduct.

Over time, finding the requirements imposed by Section 19 difficult to meet, the FTC changed tacks and argued that the proviso in Section 13(b) permitting a court to award a "permanent injunction" in "proper cases" is by itself sufficient to allow the FTC to seek remedial monetary relief, or any other form of equitable relief, from a court. The FTC further asserted that it could seek such

---

[3] Section 5 states, in part:

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition. . . in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it *shall issue and serve* upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing. . . . If upon such hearing the Commission *shall be of the opinion* that the method of competition . . . is prohibited . . . it shall issue . . . *an order* requiring such person, partnership, or corporation *to cease and desist* from using such method of competition. . . .

15 U.S.C. § 45(b) (emphasis added).

Congress made no provision for the FTC to seek damages or remedial monetary relief under the FTC Act. Congress also chose not to provide for any type of private right of action under the FTC Act.

[4] *See generally* Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?* 41 Am. U. L. Rev. 1139 (1992).

relief for any violation of the FTC Act (i.e., not limited to cases specified in Section 19).[5]

The Commission prevailed with this argument. In *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982), it argued that because Section 13(b) "gives the court authority to grant a permanent injunction, it also by implication gives the court authority to afford all necessary ancillary [equitable] relief, including rescission of contracts and restitution." *Id.* at 1112. The court agreed, citing a now much-relied upon statement by the Supreme Court in *Porter v. Warner*[6] about the scope of a federal court's equitable jurisdiction, and holding that "Congress, when it gave the district court authority to grant a permanent injunction against violations of any provisions of law enforced by the Commission, also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference." *Id.* at 1111. As a result, the court found, "Congress thereby gave the district court power to order rescission of contracts, and Section 13(b) provides a basis for an order freezing assets."[7] *Id.*

Since the *Singer* decision, courts consistently have held that Section 13(b)'s grant of authority to issue permanent injunctions to enjoin unfair or deceptive acts or practices that violate Section 5(a) of the FTC Act, impliedly also gives district courts authority to order any other equitable remedy, including redress in the form of disgorgement of illicit profits or restitution on behalf of persons who have been harmed thereby.[8]

The FTC has built on the *Singer* decision, winning a series of cases under Section 13(b) that have resulted in the provision becoming essentially open-ended and empowering the FTC to seek remedial monetary relief, or any other form of equitable relief, from the courts, even though such power is not expressly granted to the Commission under any part of the FTC Act.

The broad interpretation of Section 13(b) that has gained traction since *Singer* appears to nullify the limitations on the FTC's ability to seek consumer redress that Congress imposed under FTC Act Section 19.[9] If the court in *Singer* was correct that Congress intended to give courts authori-

---

[5] In *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir. 1982), the Fifth Circuit allowed the FTC to put a hold on assets temporarily, pursuant to Section 13(b)'s provision for preliminary injunctions, to protect the ability of the FTC to later seek a permanent injunction pursuant to Section 13(b) and/or restitution pursuant to Section 19, if it prevailed in the pending administrative proceeding. *Id.* at 720–21. The court observed that "the evident intent of these 1975 amendments was to add significant new weapons to the Commission's enforcement arsenal in order to make more meaningful and complete consumer relief possible." *Id.* at 720. This comment shows that Section 13(b) authorized the court to maintain the status quo in anticipation of the FTC obtaining restitution pursuant to Section 19. The court's statement that "the complete resolution of [this] matter will require a two-step process" indicates that in its view, Section 19 was the only source of potential consumer redress. *Id.*

[6] Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction . . . Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. "*Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. . . .* ") (emphasis added).

[7] The Ninth Circuit panel that decided Singer was different from the panel that decided *Heater v. FTC*.

[8] *See, e.g.*, FTC v. Febre, 128 F.3d 530, 534 (7th Cir. 1997) ("the power to grant ancillary relief [pursuant to Section 13(b)] includes the power to order repayment of money for consumer redress as restitution or recession"); FTC v. Gem Merchandising Corp., 87 F.3d 466, 470 (11th Cir. 1996)("Section 13(b) permits a district court to order a defendant to disgorge illegally obtained funds"); FTC v. Pantron I Corp., 33 F.3d 1088, 1102 (9th Cir. 1994) (the authority granted by Section 13(b) "includes the power to order restitution"); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991) (affirming award of monetary equivalent of rescission pursuant to Section 13(b)). In addition to these and many other consumer fraud cases, the FTC has also extended its Section 13(b) remedial powers into the realm of unfair competition.

[9] *See* Ward, *supra* note 4, at 1189–95.

ty to impose all equitable remedies for all violations of the FTC Act with Section 13(b), which was passed in 1973, it makes no sense, as a matter of statutory construction, for Congress two years later to have enacted Section 19, a provision that gives courts the same equitable power as under Section 13(b) but only with respect to a subset of cases. The logical conclusion is that Congress never intended Section 13(b) as an authorization to the FTC to seek and obtain disgorgement or restitution, either for consumer fraud cases or antitrust cases.

The FTC Seeks, and Ultimately Recovers, Disgorgement for Indirect Purchasers in Antitrust Actions

Although the FTC has sought and obtained remedial monetary relief pursuant to Section 13(b) in a number of consumer protection cases (involving fraudulent or deceptive conduct) since *Singer* was decided in 1982, it did not bring its first antitrust-based Section 13(b) cases until 1992.

In 1992, the FTC filed three substantively-related actions in federal court against the three leading manufacturers of infant formula, alleging a per se conspiracy to fix rebate bids and unilateral anticompetitive conduct, and seeking restitution under Section 13(b). The FTC obtained restitution from two of the three defendants, Mead Johnson & Co. and American Home Products, pursuant to consent decrees.[10] The third defendant, Abbott Laboratories, defeated the FTC at trial.[11] Because of the outcomes of these cases, no court decided what type of remedial monetary relief would be appropriate in the context of an antitrust violation of Section 5(a) of the FTC Act. The district court in *Abbott* did, however, address the FTC's request for remedial monetary relief as a threshold matter, rejecting the argument that it should rule as a matter of law that the FTC lacked the authority under Section 13(b) to obtain remedial monetary relief. Rather, the court said, "[w]hether or not the Court should issue a permanent injunction and/or restitution must await trial."[12]

The disgorgement issue was next raised most significantly in the collection of cases filed, beginning in 1998, by the FTC, a number of states, and various private plaintiffs against Mylan Laboratories,[13] the second-largest generic drug manufacturer in the United States.[14] A settlement of the FTC and states' suits, finalized in early 2002, provides for the distribution of some $100 million to indirect purchasers.[15] In a separate settlement, Mylan agreed to pay $35 million plus $4 million in attorneys fees to settle class action suits by certain private plaintiffs suing under state law. The FTC said that Mylan's total payment of approximately $147 million pursuant to the two settle-

---

[10] FTC v. Mead Johnson & Co., Civ. No. 92-1366 (D.D.C. June 11, 1992) (consent decree); FTC v. American Home Prods., Civ. No. 92-1367 (D.D.C. June 11, 1992) (consent decree).

[11] FTC v. Abbott Labs., Civ. A. No. 92-1364, 1992 WL 335442, *2 (D.D.C. Oct. 13, 1992), *dismissed on other grounds*, 853 F. Supp. 526 (D.D.C. 1994).

[12] *Id.*

[13] FTC v. Mylan Labs., Inc., 98CV03114, FTC File No. X990015 (D.D.C. filed Dec. 22, 1998), Order and Stipulated Permanent Injunction (Feb. 9, 2002).

[14] To the best of the authors' knowledge, the only other antitrust complaint seeking disgorgement or restitution filed by the FTC prior to *Mylan* was *FTC v. College of Physicians-Surgeons of Puerto Rico* (D.P.R. filed Oct. 2, 1997). In that case, the College of Physician-Surgeons and three physician groups agreed to settle charges that they violated Section 5 of the FTC Act by engaging, in part, in a group boycott. The complaint sought restitution, in part; the defendants agreed to pay $300,000 to the Department of Health of the Government of Puerto Rico. Final Order and Stipulated Permanent Injunction (Oct. 2, 1997), *available at* http://www.ftc.gov/os/1997/9710/prphyord.htm.

[15] Specifically, the settlement agreement provided, in part, that Mylan would pay disgorgement in the amount of $71,782,017 to satisfy the consumer claims in the states' lawsuit and $28,217,983 to satisfy the states' agency claims. In re Lorazepam & Clorazepate Antitrust Litigation, 289 F.3d 98, 100 (D.C. Cir. 2002).

ment agreements equaled roughly all of the profits earned from the conduct challenged by the Commission.[16]

The FTC action pitted the asserted power of the Commission to obtain remedial monetary relief under Section 13(b) against the rule from *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which grants standing to direct purchasers and denies standing to indirect purchasers for damages under federal antitrust law. The rule is intended to promote efficient enforcement of federal antitrust law through private treble damages actions by precluding multiple suits—e.g., by direct and indirect purchasers. The outcome in *Mylan* appears to undercut that policy goal.

The plaintiffs in the various suits all made substantially similar allegations: that Mylan had engaged in illegal restraint of trade, monopolization, attempted monopolization, and conspiracy to monopolize by entering into certain exclusive licensing agreements for the supply of essential raw materials (known as active pharmaceutical ingredients, or APIs) necessary for the manufacture of lorazepam and clorazepate, two generic, widely prescribed anti-anxiety drugs manufactured and sold by the company. The plaintiffs contended that Mylan, by obtaining long-term exclusive licenses from its API supplier, prevented Mylan's actual or potential competitors from gaining access to the APIs, which they needed to manufacture their own generic lorazepam and clorazepate, and that Mylan was thereby also able to significantly raise prices.[17] After obtaining these exclusive licensing rights, Mylan allegedly raised the price of its clorazepate tablets by approximately 1,900 to 3,200 percent, and raised the price of its lorazepam tablets by approximately 1,900 to 2,600 percent, on sales to state Medicaid programs, wholesalers, retail pharmacy chains and other customers.

The FTC sought, inter alia, restitution and disgorgement in an amount exceeding $120 million plus interest. The defendants had argued that the court lacked subject matter jurisdiction under Section 13(b) either because the statute does not authorize the Commission to seek a permanent injunction or does not permit disgorgement or any other form of monetary relief. The court ruled that the FTC was entitled to seek a permanent injunction and disgorgement under Section 13(b) and suggested that it was also entitled to seek restitution under Section 13(b).[18] The court reasoned that although Section 13(b) does not explicitly authorize the FTC to seek monetary remedies, "monetary relief is a natural extension of the remedial powers authorized under Section 13(b)."[19] For support, the court, like other courts before it opining on the FTC's powers under Section 13(b), cited *Porter v. Warner Holding Co.*[20] The Court in *Porter* said: "Unless a statute in so many words or by a necessary and inescapable inference restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."[21] In *Mylan*, Judge Hogan noted that "five courts of appeals and numerous district courts have permitted the FTC to pursue monetary relief under Section 13(b) . . . and that at least one court has upheld the FTC's ability to seek disgorgement in

[16] FTC Press Release (Nov. 29, 2000), *available at* http://www.ftc.gov/opa/2000/11/mylanfin.htm.

[17] The plaintiffs also named the foreign supplier of these raw materials, the supplier's parent company, and its U.S. distributor as defendants.

[18] FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25 (D.D.C. 1999).

[19] *Id.* at 36.

[20] 328 U.S. 395 (1946). In *Porter*, the Supreme Court upheld a district court's authority to refund illegal rent overcharges pursuant to Section 205(a) of the Emergency Price Control Act of 1942, which expressly granted only the power to enjoin illegal practices.

[21] *Id.* at 398.

the courts."[22] Thus, because the "defendant cite[d] no relevant case law that prohibits the FTC from seeking disgorgement or any other form of equitable ancillary relief"[23]—i.e., in the absence of negative authority—the court ruled that the FTC had the authority to obtain disgorgement.

The plaintiff states sued in their parens patriae capacity, under Sections 1 and 2 of the Sherman Act and their respective state competition laws, on behalf of each state's general economy and as injured purchasers or reimbursers under state Medicaid and other programs.[24] For relief, the states sought, inter alia, disgorgement and restitution. The court denied the states' claim for restitution/disgorgement under Section 16 of the Clayton Act.[25] The court reasoned that because private plaintiffs could already pursue damages under Section 4, and because the states could have sought damages under Section 4c of the Clayton Act, "permitting disgorgement under Section 16 would provide yet another route to defendants' allegedly ill-gotten gains, and would therefore heighten the possibility that defendants in antitrust actions could be exposed to multiple liability."[26] Characterizing the states' argument as an attempt to circumvent the *Illinois Brick* prohibition of standing for indirect purchasers, the court granted defendants' motion to dismiss insofar as the states sought disgorgement and/or restitution under Section 16.

Sixteen of the plaintiff states moved for reconsideration of the court's ruling on the grounds, in part, that the court had mistakenly dismissed various states' claims for equitable monetary relief. The court had dismissed a number of state restitution claims on the basis that because (a) the law of those states prompts courts to look to federal law in interpreting their unfair competition and consumer protection statutes, (b) the state statutes had to be construed with a view to the Clayton Act, and (c) the Clayton Act does not authorize restitution in light of *Illinois Brick*, then—(d) the states therefore could not state a claim for equitable monetary relief. As the court acknowledged on the motion for reconsideration, however, the Clayton Act is not the sole source or reference for states' competition and consumer protection statutes: some states' statutes prompt their courts to interpret those statutes in light of Section 5(a)(1) of the FTC Act rather than the Clayton Act.[27] Because the court had already held that the FTC could pursue equitable remedies such as disgorgement, based on Section 13(b) of the FTC Act, on the motion for reconsideration it held that states now found by the court to interpret their competition and consumer protection statutes in light of the FTC Act could state equitable claims for monetary relief.

The court reviewed the relevant statutes of the moving states and on most, but not all, of the motions upheld the claims of the states for equitable monetary relief on behalf of indirect pur-

---

[22] 62 F. Supp. 2d at 37 (citing, in support of the first proposition, FTC v. Febre, 128 F.3d 530, 534 (7th Cir. 1997); FTC v. Gem Merchandising, 87 F.3d 466, 470 (11th Cir. 1996); FTC v. Pantron, 33 F.3d 1088, 1102 (9th Cir. 1994); FTC v. Security Rare Coin, 931 F.2d 1312 (8th Cir. 1991); FTC v. Southwest Sunsites, Inc., 665 F.2d 711 (5th Cir. 1982); and R.A. Walker & Assocs., 1991 U.S. Dist. LEXIS 14114 (D.D.C. July 26, 1991); and citing, for the second proposition, *Gem Merchandising*, 87 F.3d at 470). For Judge Hogan, the fact that the court was now being asked to exercise in an antitrust case a power previously applied only in consumer protection cases, in no way constituted a limitation on the court, especially in light of *Porter*.

[23] 62 F. Supp. 2d at 37.

[24] Alaska v. Mylan Labs., Inc., No. 98CV03115 (D.D.C. filed Dec. 22, 1998).

[25] 62 F. Supp. 2d 25 (D.D.C. 1999) (*sub nom.* Connecticut v. Mylan Labs., Inc.). Section 16 states that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." 15 U.S.C. § 26.

[26] 62 F. Supp. 2d at 41.

[27] Section 5(a)(1) of the FTC Act provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

chasers. For instance, in the case of Alaska, the court found that the state's Unfair Trade Practices and Consumer Protection Act provides that "in interpreting [the Act] due consideration and great weight should be given the interpretation of 15 U.S.C. Section 45(a)(1) (Section 5(a)(1) of the Federal Trade Commission Act."[28] This result rests on a two-step logic: first, *Illinois Brick* held only that indirect purchasers lack standing to sue for monetary relief under the Clayton Act; the Court did not hold—or much less even address—whether they lacked standing to sue for monetary recovery on antitrust claims under federal laws other than the Clayton Act. Second, under *ARC America*,[29] *Illinois Brick* does not preempt the states' right to enact and enforce their own antitrust laws, including laws specifically granting a state the right to sue on behalf of indirect purchasers.

It could be argued that the *Illinois Brick* exclusion of federal antitrust claims by indirect purchasers for overcharges was made with reference only to the Clayton Act because at the time of that ruling, there was little or no precedent for, or contemplation of, monetary recovery by the government under any other federal antitrust provision, such as Section 13(b) of the FTC Act. Under this reasoning, the Supreme Court's rationale, if not its explicit words, would have required extending the prohibition on any recovery on behalf of indirect purchasers to claims under the FTC Act, in addition to the prohibition of indirect claims under the Clayton Act. However, under a literal interpretation of *Illinois Brick* (which limited itself to the Clayton Act), and as Judge Hogan interpreted it in *Mylan*, the FTC was entitled to equitable monetary relief under FTC Act Section 13(b)—relief that in effect would be on behalf of indirect purchasers, even if the FTC did not explicitly so characterize it. This literal interpretation of *Illinois Brick*, leaving open the possibility of recovery by the FTC on behalf of indirect purchasers under the FTC Act, thus opened the way, under the teaching of *ARC America*, to similar recovery by those states with competition laws based on the FTC Act.

The remaining various federal actions were coordinated as *In re Lorazepam & Clorazepate Antitrust Litigation* (discussed further below), and are ongoing in the District of Columbia.[30]

The latest FTC action seeking disgorgement pursuant to Section 13(b) in an antitrust case is *FTC v. The Hearst Trust*.[31] In *Hearst*, the FTC alleged that the defendants illegally monopolized a relevant market comprised of integratable drug data files (i.e., electronic data bases containing comprehensive information about prescription and non-prescription medicines). The complaint asserted that Hearst failed to substantially comply with the HSR rules by failing to submit or identify certain competitively sensitive documents that were required to have been submitted in response to Item 4(c) of the Premerger Notification Rules. It further asserted that a proper, timely disclosure of these documents would have prompted the Commission to seek to block the acquisition, whereas in fact the consummated acquisition enabled defendants to achieve a monopoly or near-monopoly in the relevant market. Consequently, the FTC asserted that defendants had violated Section 7 of the Clayton Act and Section 5 of the FTC Act.

As relief, the FTC sought divestiture of the company that had just been acquired and disgorgement of profits. Neither remedy had been sought previously in connection with a consummated acquisition. Pursuant to a proposed settlement of the case, the defendants agreed to divest the recently acquired company and to disgorge $19 million in profits, among other obliga-

[28] 99 F. Supp. 2d 1, 9 (D.D.C. 1999) (citing Alaska Stat. § 45.50.545).

[29] California v. ARC America Corp., 490 U.S. 93 (1989).

[30] MDL-1290 (TFH/JMF) (D.D.C.).

[31] FTC v. The Hearst Trust, Civ. No. 1:01CV00734 (D.D.C. filed Apr. 4, 2001), *available at* http://www.ftc.gov/os/2001/04/hearstcmp.htm.

tions.[32] The Commission vote approving the agreement was 5–0, with Commissioners Thomas B. Leary (dissenting in part) and Orson Swindle (concurring) noting that the $19 million the Commission obtained in disgorgement was to be turned over to private plaintiffs' counsel and included in (i.e., offset against) the $26 million settlement that private plaintiffs had negotiated with the defendants. In the face of the negotiated set-off, both Leary and Swindle suggested that the Commission might have obtained greater total relief if it had collected substantial civil penalties instead of disgorgement, and Leary added that he viewed disgorgement here as "unnecessary, it not affirmatively harmful."[33]

The FTC's Pursuit of Disgorgement in Antitrust Actions Violates the Supreme Court's Policy Against Duplicative Litigation and Damages

The FTC's pursuit of antitrust disgorgement actions under Section 13(b) threatens to undermine the efficient enforcement of federal antitrust law.

The FTC's pursuit of antitrust disgorgement actions under Section 13(b) threatens to undermine the efficient enforcement of federal antitrust law. First, the strained reading of Section 13(b) in support of such actions runs counter to the plain meaning of the statute and to the relevant legislative history; second, such actions undermine the Supreme Court's policy against duplicative litigation and damages; and third, the FTC's proposed cure for these ills—set-off—is inherently unreliable because its use and application are discretionary with the courts and it short-changes direct purchasers.

Statutory Interpretation. As a matter of statutory interpretation, interpreting Section 13(b) to enable the FTC to seek monetary relief in antitrust cases results in a dramatic change and expansion of the essentially restrictive power that Congress voted to give to the FTC with respect to antitrust enforcement.

As previously noted, the construction of Section 13(b) that enables the FTC to seek monetary relief for any violation of Section 5 is so broad that it contradicts and nullifies Section 19, which Congress passed two years after it passed Section 13(b).

In *Mylan*, three Commissioners, writing as part of the majority in a 4–1 vote to accept the proposed settlement, issued a statement spelling out the principal points supporting the use of Section 13(b) to seek disgorgement in this case (Majority Statement).[34] They argued that the FTC's authority to seek disgorgement in an antitrust case is based on clear Supreme Court precedent—*Porter v. Warner Holding Co.* Based on this, the Commissioners in the majority assert, federal courts have the power to order disgorgement or restitution because Section 13(b) expressly authorizes the issuance of the equitable remedy of injunctive relief, and nothing in Section 13(b), explicitly or by necessary and inescapable inference, deprives a court of the full range of its inherent equitable authority.

Reliance on *Porter* is misplaced, however, because it does not take into account more recent, contrary Supreme Court law. In *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), the Supreme Court takes a substantially narrower approach to statutory construction than it did fifty years earlier, in *Porter*. *KFC Western* instructs courts to no longer presume that once Congress expressly invokes a specific equitable power, Congress automatically intends to confer on the courts all other

---

[32] Order and Stipulated Permanent Injunction (Dec. 14, 2001), *available at* http://www.ftc.gov/opa/2001/12/hearst.htm.

[33] FTC v. The Hearst Trust, FTC File No. 991-0323 (Dec. 14, 2001) (Leary, Cmm'r, concurring in part and dissenting in part), *available at* http://www.ftc.gov/os/2001/12/learystate.htm.

[34] FTC v. Mylan Labs., Inc., FTC File No. X990015 (Nov. 29, 2000) (Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson), *available at* http://www.ftc.gov/os/2000/11/mylanpitofskystatment.htm.

equitable powers as well, particularly when there is an elaborate enforcement scheme. *KFC Western* confirms that courts should assume at the outset that Congress meant to limit Section 13(b) to injunctive relief only, especially in light of the elaborate enforcement scheme at issue here. Courts should infer additional, unarticulated remedies only upon a finding that Congress did, in fact, intend Section 13(b) to invoke this Court's other equitable powers, and that doing so would not disturb and undermine the policies of the FTC Act and the antitrust remedial scheme as a whole.

Seeking Disgorgement in Antitrust Cases Conflicts with the Rationale Articulated in* Illinois Brick *Against Duplicative Remedies. In *Illinois Brick*, the Supreme Court held that direct purchasers are deemed to be injured to the full extent of the overcharge paid by them and thus that only they—and not indirect purchasers—have standing to seek recovery for overcharges under federal antitrust law. Yet, in *Mylan*, a potential for multiple, duplicative recoveries (i.e., greater than treble damages) arose from the receipt of settlement funds by indirect purchasers and their third-party reimbursers, combined with a possible recovery by direct purchaser class action plaintiffs in *In re Lorazepam & Clorazepate Antitrust Litigation*[35] from the same defendants. The stage thus was set for a possible multiple recovery against the defendants for the same violation of federal antitrust law—a result that *Illinois Brick* sought to preclude.

Illinois Brick concerned a claim by a plaintiff indirect purchaser that it suffered antitrust injury when the direct purchaser passed on overcharges instituted by the defendant manufacturer (i.e., offensive pass-on).[36] The Court spelled out three major reasons for rejecting the argument that the unavailability of defensive pass-on (established in *Hanover Shoe*[37]) should not necessarily preclude the use of offensive pass-on by plaintiffs seeking treble damages against that defendant: (1) a serious risk of multiple liability, (2) the evidentiary complexity of damages determinations, and (3) the need for an efficient antitrust enforcer.

First, the Court characterized multiple liability for defendants as unwarranted, and concluded that "overlapping recoveries are certain to result from the two law-suits unless the indirect purchaser is unable to establish any pass-on whatsoever. . . . [and that] we are unwilling to open the door to duplicative recoveries."[38] Also, the Court rejected the position taken by some lower courts that procedures for apportioning damages adequately mitigate the risk of duplicative recoveries. Various procedural devices, it noted, such as the Multidistrict Litigation Act and statutory interpleader, have been relied upon to bring indirect and direct purchasers together in one action in order to apportion damages among them and thereby reduce the risk of duplicative recovery. But the Court dismissed these devices as unable to protect against multiple liability where the direct purchasers have already recovered by obtaining a judgment or by settling, as is often the case. In rejecting set-off, the Court was clear that awarding duplicative damages is not an acceptable

---

[35] 289 F.3d 98 (D.C. Cir. 2002).

[36] In *Illinois Brick*, the chain of distribution worked as follows: the defendant manufactured concrete blocks which it sold to masonry contractors, who used them to build masonry structures. These structures were then incorporated into buildings by general contractors. They in turn submitted bids for the buildings to the plaintiff governmental entities. These entities were thus indirect purchasers of the concrete block. They sued for treble damages under Section 4, alleging that a price-fixing conspiracy among the concrete block manufacturers resulted in the governmental entities having to pay $3 million more than they would have had to pay absent the conspiracy. Essential to their claim was the argument that the masonry and general contractors passed on all or at least part of the overcharge to the governmental entities.

[37] In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Supreme Court rejected as a matter of law the defense that indirect purchasers, rather than direct purchasers, might seek to recover damages under Section 4.

[38] 431 U.S. at 730–31 (internal citation omitted).

price to pay for insuring that an injured party will be compensated. And as for the argument that "it is better for the defendant to pay sixfold or more damages than for an injured party to go uncompensated [i.e., that] a little slop over on the shoulders of the wrongdoers . . . is acceptable)," the Court said that "[w]e do not find this risk acceptable."[39]

Second, the Court said, the principal basis of the *Hanover Shoe* decision was the prohibitive complexity of a damages determination in an overcharge pass-on case, because the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution.[40]

Commissioner Leary dissented from the financial terms of the settlement. He warned that the Mylan *cases could have a "particularly serious spillover effect" by conflicting with the rationale behind* Hanover Shoe *and* Illinois Brick *. . .*

Third, the Court said, as between direct and indirect purchasers, direct purchasers are more efficient 'antitrust enforcers'. *Hanover Shoe*, it said, "rest[ed] on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it."[41]

The Majority Statement in *Mylan* asserted that an FTC action for disgorgement, such as *Mylan*, does not undercut any policy articulated in *Illinois Brick* against multiple recovery and, indeed, that the Supreme Court did not even articulate such a policy in that case or subsequently. According to this view, the Court in *Illinois Brick* and *ARC America* was not concerned that a defendant's liability might exceed treble damages, but that multiple recoveries might be obtained under the same statute, which would violate the legislative intent of the Clayton Act. This logic is based on the recognition of dual sovereigns for antitrust enforcement—federal and state—as reflected in the Court's statement in *ARC America* that "[s]tate laws [permitting indirect purchaser recoveries] are consistent with the broad purposes of the federal antitrust laws."[42] Thus, the Majority Statement concluded, "[a]ccording to the Court's logic [in *ARC America*], the possibility that a defendant's total liability might exceed treble damages therefore does not constitute justification for denying relief under other statutes."

In a separate statement, Commissioner Leary dissented from the financial terms of the settlement.[43] He warned that the *Mylan* cases could have a "particularly serious spillover effect" by conflicting with the rationale behind *Hanover Shoe* and *Illinois Brick*—that is, by increasing rather than decreasing both the risk of multiple damages and the likelihood of complex determinations of damages (for indirect purchasers), and by repudiating the view that direct purchasers are the most efficient antitrust enforcers.

The reasoning of the Majority Statement is misguided. It is of course true that disgorgement under a federal statute other than Section 4 of the Clayton Act, such as Section 13(b) of the FTC Act, does not literally conflict with *Illinois Brick* and *Hanover Shoe*, which involved an interpretation only of Section 4 of the Clayton Act (there being no other federal statute providing for antitrust damages, according to then-prevailing precedent). The absence of literal conflict ostensibly lies in the fact that FTC Act Section 13(b) and Clayton Act Section 4 are two different statutes. Thus,

---

39 *Id.* at 731 n.11.

40 *Id.* at 732.

41 *Id.* at 734–35 (citations omitted).

42 490 U.S. at 102.

43 FTC v. Mylan Pharms., Inc., FTC File No. X990015 (Nov. 29, 2000) (Leary, Cmm'r, dissenting in part and concurring in part) (Leary Statement), *available at* http://www.ftc.gov/os/2000/11/mylanlearystatment.htm.

it is true that relief under Section 4 does not literally duplicate relief under Section 13(b). But this elevates form over substance, for, as Commissioner Leary stated in *Mylan*, "it can hardly be claimed that restitution to indirect purchasers under an alternative federal statute is consistent with the broad policy objectives of *Illinois Brick*, which also involved a federal statute."[44]

The logic for the non-applicability of *Illinois Brick*'s policy (against duplicative remedies) to the remedy of disgorgement in *Mylan* purportedly derives from *California v. ARC America Corp.*, which held that *Illinois Brick* does not preclude indirect purchaser recoveries under state—as contrasted with federal—statutes. But *ARC America* did not address the issue of any distinctions among federal laws; rather, it was simply based on the principle of federalism, which is careful to distinguish between the authority of the federal—as contrasted with state—sovereigns, and there is no such corresponding distinction between application of the FTC Act and application of the Clayton Act, which are both enforced by the same sovereign. Reliance on *ARC America* for the proposition that monetary relief is available to indirect purchasers for antitrust injury under Section 13(b) of the FTC Act is therefore misplaced, for *ARC America* would, if anything, counsel that the Sherman and Clayton Acts should be construed consistently with the FTC Act, as many other courts have done, as a matter of substantive law.

It should also be noted that although the majority in *Mylan* stated that the complexity of a damages proceeding awarding restitution to indirect purchasers is not brought into play by a disgorgement action such as this, because here the only calculation necessary was the measurement of Mylan's unjust enrichment, the fact remains that the FTC also sought restitution in its complaint, and restitution most certainly would require the very kind of complex calculation that the decision in *Illinois Brick* intended to preclude.

Set-Off Is Discretionary with the Courts; Short-Changes Direct Purchasers. In the FTC's view, as articulated in the Majority Statement in *Mylan*, set-off can, as a practical matter, mitigate any risk of multiple recovery in excess of treble damages: courts have routinely coordinated remedies in government disgorgement actions and private damage actions, and are readily able to surmount the potential problem of duplicative recovery. The FTC cites a number of securities cases involving set-off to illustrate the point.[45] In each case, either amounts obtained by private litigants were set off against amounts obtained by the SEC, or the court at least said such set-off was permissible. Also, in each case, the money obtained by the SEC was deemed to have been obtained on behalf of the persons who sued or with standing to sue in the related, private litigation. In other words, set-off operated to reduce the total amount of money from the two separate actions that the defendant would otherwise have to pay to the same persons.

According to this view, set-off similarly could mitigate any duplicative remedies obtained by the FTC through Section 13(b) disgorgement and by direct purchasers under Section 4; and set-off thus could help save FTC disgorgement in antitrust actions from undercutting the policies of *Hanover Shoe* and *Illinois Brick*.

---

[44] *Id.*

[45] The majority cited SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1966) (upholding award of disgorgement to agency with set-off of amounts paid to private litigants in prior settlement); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir.) (establishing escrow fund "[t]o protect [the defendants] from double liability"); McGhee v. Joutras, No. 94 C 7052, 1995 U.S. Dist. LEXIS 2040, at *1–3 (N.D. Ill. Feb. 14, 1995) (holding that private litigant's damages would be reduced by any amounts the litigant receives from disgorged funds paid to the SEC); SEC v. Penn Central Co., 425 F. Supp. 593, 599 (E.D. Pa. 1976) ("In the event that we deem disgorgement [to the SEC] appropriate, defendants will have the opportunity to prove that they have already relinquished their ill-gotten gains [in a private damages action].) It should be noted, however, that none of the cases cited by the Majority Statement concerned treble damages.

This argument is flawed because it places too much reliance on set-off generally and also ignores significant differences in how set-off would work in the antitrust context. First, set-off is not automatic but instead is discretionary with the court. The use of set-off to mitigate duplicative recoveries by the FTC (through disgorgement) and by direct purchasers therefore cannot be guaranteed. Thus, reliance on it to justify FTC disgorgement contemporaneously with the possibility of recovery by direct purchasers may be misplaced.

Second, even assuming a court did apply set-off in an antitrust case, such as *FTC v. Mylan*, set-off would operate not between amounts received by the same parties, as in the SEC cases, but between the amount received by the FTC in the settlement fund on behalf of indirect purchasers and any amount ultimately received by direct purchasers. This distinction is significant, and the question therefore arises whether set-off would operate as efficiently and equitably in these circumstances. Suppose, for instance, that the SEC wins a $15 million judgment and private litigants subsequently win judgment for $20 million. The court, exercising its discretion, would typically set off the $15 million against the $20 million, leaving the private litigants with $5 million and the SEC with $15 million to distribute to this same class of consumers. The private litigants would be deprived only of the windfall of an additional $15 million.

On the other hand, suppose (a) the FTC obtained judgment against Mylan for $15 million and direct purchasers subsequently won judgment for treble damages in the total amount of $45 million (i.e., $15 million single damages). A district court, exercising its discretion, would likely set off the FTC judgment amount against the direct purchasers' treble damages; thus, the direct purchasers would receive $30 million (while the FTC receives $15 million for indirect purchasers). Thus, the direct purchasers will receive less than the total they otherwise would have received pursuant to their judgment. Or, suppose (b) the direct purchasers first obtained $45 million in treble damages and the FTC then won judgment for $15 million in disgorgement on behalf of indirect purchasers. After set-off, the FTC would receive nothing, while the direct purchasers keep their $45 million. Conversely, suppose (c) the FTC obtained $45 million and then the direct purchasers won a judgment for $15 million (or less); after trebling, set-off would leave the direct purchasers with no monetary recovery. This last scenario, leaving the direct purchasers with no monetary recovery, directly contradicts *Illinois Brick*'s holding that only direct purchasers may recover and that they may recover treble damages.

. . . with two different levels of plaintiff competing for the same pot of money, set-off would trigger races to obtain recovery . . .

As these direct and indirect purchaser set-off examples involving two distinct parties illustrate, there would be a powerful incentive to be the first party to obtain judgment. Although duplicative recoveries may thus be mitigated in each of these scenarios, as in cases involving the same plaintiffs, it is certain that here, with two different levels of plaintiff competing for the same pot of money, set-off would trigger races to obtain recovery (because the judgment of the second party to obtain recovery will be set off against the judgment amount obtained by the first party). Furthermore, as noted above, whether set-off will be used at all, or, if so, how it would work arithmetically, is discretionary with the court. Thus, a defendant, in calculating its litigation and settlement strategy, cannot reliably predict how set-off would work; the same of course is also true for private plaintiffs. Indeed, these are some of the principal reasons why the Supreme Court in *Illinois Brick* rejected set-off as a solution to the problem of duplicative recoveries.[46]

The FTC's Policy Leaves It with a Free Hand to Determine Whether Given Conduct Is "Egregious." One of the FTC's strongest positions in the debate over disgorgement is the simple, equitable argument

[46] 431 U.S. at 731 n.11.

that parties that have engaged in egregious conduct in violation of Section 5 of the FTC Act and/or other antitrust statutes, should not be allowed to keep their ill-gotten gains, and that disgorgement is the best, most precise tool to wrest such gains from them.[47]

But this argument is self-referential: stating that the FTC will seek disgorgement only in cases of "egregious" conduct, when the Commission's case against Mylan was, after all, brought under the rule of reason and not the rule of per se illegality, begs the question of how a defendant can know in advance that its conduct is "egregious" and may thus be subject to the exceptional remedy of disgorgement. Per se conduct is subject to a bright-line rule; on the other hand, conduct that may be justified on the grounds of business efficiencies, by definition, is not subject to a bright-line rule and for that reason should be much less amenable to being characterized as "egregious." Thus, by allowing the FTC to pursue antitrust-based cases under the rule of reason pursuant to Section 13(b), courts subject to remedial monetary relief conduct which a defendant might reasonably believe to be legal. Entrusting the FTC to limit itself to seeking disgorgement only in cases of "egregious" conduct leaves the determination of what constitutes "egregious" entirely in the hands of the FTC itself, once a court has determined that the Commission indeed has the right to seek disgorgement under Section 13(b) in an antitrust case.[48]

The Ongoing Litigation in **In re Lorazepam & Clorazepate Antitrust Litigation** ***Illustrates the Uncertainty Surrounding the Use of Disgorgement.*** This action raises the question of how to apply the Supreme Court's ruling in *Illinois Brick* to private actions brought under Section 4 of the Clayton Act that challenge conduct for which the FTC has already recovered substantial monetary relief under federal antitrust law. Indeed, the pending class action by alleged direct purchasers raises the real possibility of the kind of duplicative recovery feared by Commissioner Leary in *Mylan*. Also, with the possibility of monetary recovery by the alleged direct purchasers, the symmetrical rejection of the pass-on theory—that is, for both defendants and plaintiffs—would be repudiated, with only plaintiffs, but not defendants, permitted to use it.

Judge Hogan, denying a motion to dismiss on standing grounds, acknowledged the possibility of duplicative recoveries in these circumstances to be an "ostensibly colorable concern" but nonetheless found "that such risks, unlike the risk identified in *Illinois Brick*, . . . are insufficient to defeat standing for the putative direct purchasers."[49] As justification, the court distinguished this situation, where the risk of duplicative recovery arises from the use of both Section 13(b) and Section 4, from the situation in *Illinois Brick*, where different plaintiffs were both seeking recovery under Section 4.

Like Judge Hogan, the majority Commissioners in the FTC case against Mylan also distinguished between the use of two different federal statutes versus the use of one federal statute by two levels of plaintiffs seeking monetary recovery. But this is a distinction without a difference. First, *Illinois Brick* did not involve—and therefore did not address—the use of two different federal statutes. Second, the possibility of duplicative recoveries is aggravated whether the potential for multi-layered recovery for a single federal antitrust violation stems from only one remedial statutory provision or two. As the defendants argue in their petition for leave to appeal,

---

[47] *See* Majority Statement ("The Commission should cautiously exercise its prosecutorial discretion to seek disgorgement in all cases. Such relief is best reserved for cases, like this one, in which the defendants have engaged in particularly egregious conduct.").

[48] *See, e.g.*, Leary Statement ("[I]t is essential that we somehow communicate our views on the appropriate parameters of the Section 13(b) remedy generally for antitrust cases. At the very least, we might indicate that the remedy will not be sought in cases where the violation is unclear and where private damage remedies are available and being pursued.").

[49] *In re* Lorazepam & Clorazepate Antitrust Litigation, 202 F.R.D. 12, 20 (D.D.C. 2002).

> Indeed, the potential for overlapping recoveries on behalf of direct and ultimate purchasers becomes a near certainty each time the FTC seeks monetary relief (restitution/disgorgement) under Section 13(b) for the benefit of consumers and "direct purchasers" sue for damages under Section 4. Inevitably, there will be "conflicting claims to a common fund, the amount of the alleged overcharge, thereby creating the danger of multiple liability for the fund."[50]

Judge Hogan added that "[i]f necessary, the court can utilize apportionment to avoid duplicative recovery at a later stage in this lawsuit." Opinion at 16. But as in the Majority Statement in *Mylan*, the passing mention of set-off fails to acknowledge substantial inefficiencies and arguable inequities that may well result from set-off between different levels of purchasers.

The use of set-off might, paradoxically, ultimately weaken the FTC's enforcement powers.

Set-off here may indeed "solve" the risk of duplicative recovery in the strict sense of reducing the overall assessment against the defendant, but whereas set-off in the SEC and similar cases works to reduce a windfall, here set-off would reduce the amount that a given party would otherwise be entitled to, and the race would merely go to the swift. As defendants' petition for leave to appeal puts it, "[r]ecovery for a plaintiff under the Clayton Act [would thus become] contingent on the time and amount of recovery made on behalf of another plaintiff under the FTC Act and vice versa. . . . [T]he use of set-off could promote wasteful races to judgment, as competing groups of plaintiffs each seek to be the first to recover in order to avoid a judgment reduction by virtue of set-off." Petition at 13–14.

The use of set-off might, paradoxically, ultimately weaken the FTC's enforcement powers. No defendant would agree to settle any claims under Section 13(b) prior to reaching a settlement with all potential plaintiffs, for fear of being assessed duplicative damages later. Such an outcome would in turn increase the incentives for a private defendant to litigate any action brought under Section 13(b) to the fullest extent possible—an undesirable policy goal. Finally, as noted above, the use of set-off to mitigate duplicative recoveries contradicts the Supreme Court's rejection in *Illinois Brick* of such procedural fixes.[51]

Conclusion

The tension between the FTC's use of disgorgement in antitrust actions and *Illinois Brick* is acute. Direct purchasers and defendants who ignore the practical implications of this enforcement trend do so at their peril. ●

---

[50] *In re* Lorazepam & Clorazepate Antitrust Litigation, Defendants' Joint Petition for Review under FRCP 23(f) (July 12, 2001) (citing Associated Gen'l Contractors v. California State Council of Carpenters, 459 U.S. 519, 544 (1983)).

[51] *See Illinois Brick*, 431 U.S. at 731 n.11.