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The Guns of August: FTC Announces Policy Change Lowering Barrier to Monetary Relief for Anticompetitive Behavior; Action Aimed at the Pharmaceutical “Pay-For-Delay” Cases and Other Top FTC Priorities

By Kenneth L. Glazer, Scott M. Mendel, Andrew J. Kozusko, III, G. Richard Murphy, Karen Kazmerzak

In a signal that it may seek monetary relief from pharmaceutical companies involved in so-called “pay-for-delay” agreements and from other firms engaged in other conduct believed to be anticompetitive, the Federal Trade Commission announced that it has withdrawn an earlier policy statement on monetary relief in antitrust cases in favor of a more flexible, and potentially more aggressive, approach.¹ Coming one week after achieving a major victory in the Third Circuit which breathed new life into the agency’s campaign against pay-for-delay settlements, the agency’s action seems especially directed at that conduct, though companies outside the pharmaceutical area should also take note.

In 2003, the FTC issued its Policy Statement on Monetary Equitable Remedies in Competition Cases.² That statement outlined a framework for determining when the Commission would seek equitable monetary remedies, such as disgorgement of ill-gotten gains, in competition cases.

Specifically, the 2003 Policy Statement focused on three factors as relevant to whether the Commission would seek monetary relief: (1) whether the challenged conduct is “clear”; (2) whether there is a reasonable basis to calculate the remedial payment; and (3) whether remedies in other civil or criminal litigation are likely to accomplish fully the purposes of the antitrust laws.³

In its July 31, 2012 statement on the withdrawal, the agency said it would no longer be bound by the first and third factors. In dropping the first factor, it explained that “some have erroneously interpreted the clarity factor to mean that disgorgement should not be sought in cases of first impression. Whether conduct is common or novel, clearly a violation or never before considered, has little to do with whether the conduct is anticompetitive.”⁴ Indeed, the agency noted that “some novel conduct can violate the antitrust laws and can be even more egregious than ‘clear’ violations.”⁵

The Commission jettisoned the third factor, according to the withdrawal statement, to avoid the impression that it must demonstrate the insufficiency of other actions before it can secure monetary equitable remedies. “If misinterpreted in that manner, such a burden is inappropriate. The question of whether there are alternative plaintiffs that may seek or are seeking monetary relief is relevant in this context, but it is not dispositive.”⁶

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Instead of these three factors, the Commission explained, it intends to rely on existing law and to use its prosecutorial discretion to apply those remedies on a case-by-case basis.⁷ And it noted, “It has been our experience that the Policy Statement has chilled the pursuit of monetary remedies in the years since the statement’s issuance. At a time when Supreme Court jurisprudence has increased burdens on plaintiffs, and legal thinking has begun to encourage greater seeking of disgorgement, the FTC has sought monetary equitable remedies in only two competition cases since we issued the Policy Statement in 2003.”⁸ One of those cases was in 2004; the other in 2010.⁹

This move by the FTC comes in the wake of an important ruling by the Court of Appeals for the Third Circuit, where the Court adopted the long-held position of the Federal Trade Commission that pay-for-delay, or “reverse payment,” settlements between brand-name and generic pharmaceutical manufacturers are presumptively unlawful under antitrust law.¹⁰ The ruling was a major victory in the agency’s decade-long campaign against pay-for-delay settlements, with the Third Circuit adopting the FTC’s position that any payment from a brand-drug patent holder to a generic patent challenger who agrees to delay entry into the market is *prima facie* evidence of an unreasonable restraint of trade.¹¹ For a fuller discussion of that opinion, see our recent antitrust alert on the Third Circuit’s decision in *K-Dur Antitrust Litigation*.¹²

Though there are no references in the announcement of the policy withdrawal to the *K-Dur* decision, the timing of the two events is too close to be coincidental. The agency’s withdrawal statement could plausibly be interpreted as a shot across the bow to pharmaceutical companies—a signal that the agency intends to seek disgorgement in pay-for-delay challenges.

At the same time, firms outside of the pharmaceutical industry should not assume this remedy would be used solely against pay-for-delay settlements. The agency has been aggressively challenging all manner of conduct in recent years, from the standard-setting cases,¹³ to loyalty policies,¹⁴ to joint negotiating with health care plans (the so-called “clinical integration” cases),¹⁵ to price signaling,¹⁶ to real estate cases.¹⁷

Time alone will tell what the Commission will do, but in-house counsel should take note that the Commission is signaling that it may start seeking significant monetary penalties more frequently and in a broader set of circumstances.

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- ¹ See FTC Press Release, FTC Withdraws Agency’s Policy Statement on Monetary Remedies in Competition Cases; Will Rely on Existing Law (July 31, 2012), *available at* <http://www.ftc.gov/opa/2012/07/disgorgement.shtm>.
- ² Fed. Trade Comm’n, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003), *available at* <http://www.ftc.gov/os/2003/07/disgorgementfrm.shtm>.
- ³ *Id.*
- ⁴ Fed. Trade Comm’n, Statement on the Withdrawal of the Commission’s Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012) (“FTC Withdrawal Statement”), *available at* <http://www.ftc.gov/os/2012/07/120731commissionstatement.pdf>.
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ *FTC v. Perrigo Co.*, No. 1:04CV1397 (D.D.C. Aug. 12, 2004); *FTC v. Lundbeck, Inc.*, No. 08-6379, 2010 WL 3810015 (D. Minn. Aug. 31, 2010).
- ¹⁰ See *In re K-DUR Antitrust Litig.*, No. 10-2077, 10-2078, 10-2079, 10-4571 (3d Cir. July 16, 2012).
- ¹¹ See *id.*
- ¹² Kenneth L. Glazer, Andrew J. Kozusko, III, G. Richard Murphy, “Third Circuit Sides with FTC Position on So-Called Pay-for-Delay Settlements, Virtually Guaranteeing Supreme Court Review on The Issue,” *available at* <http://www.klgates.com/third-circuit-sides-with-ftc-position-on-so-called-pay-for-delay-settlements-virtually-guaranteeing-supreme-court-review-on-the-issue-07-25-2012/>.
- ¹³ See, e.g., Consent Order, *In re Dell Corp.*, No. C-3658 (FTC Jun. 17, 1996); Consent Order, *In re Chevron and Unocal Corp.*, No. 9305 (FTC Jun. 10, 2005), *available at* <http://www.ftc.gov/os/adjpro/d9305/050610agreement9305.pdf>.
- ¹⁴ See, e.g., Complaint, *In re Pool Corp.*, No. C-4345 (FTC Nov. 21, 2011), *available at* <http://www.ftc.gov/os/caselist/1010115/120113poolcorpcmpt.pdf>; *In re Transitions Optical, Inc.*, No. C-4289 (FTC Apr. 22, 2010), *available at* <http://www.ftc.gov/os/caselist/0910062/100427transopticalcmpt.pdf>.
- ¹⁵ See, e.g., *In re Indep. Physician Assocs. Med. Group, Inc.*, No. C-4245 (FTC Feb. 3, 2009), *available at* <http://www.ftc.gov/os/caselist/0610258/090203allcareipacmpt.pdf>; *In re Boulder Valley Individual Practice Association*, No. C-4285, *available at* <http://www.ftc.gov/os/caselist/0510252/100406bouldercmpt.pdf>. One bright spot, however, is that the withdrawal statement explicitly stated that the agency does not intend to seek disgorgement when it challenges conduct solely under section 5 of the FTC Act—the so-called standalone Section 5 cases. FTC Withdrawal Statement at 2, n.6. For example, the FTC would not seek disgorgement in a case like *N-Data*.

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- ¹⁶ See, e.g., Consent Order, *In re Valassis Commc'ns, Inc.*, No. C-4160 (FTC Mar. 14, 2006), available at <http://www.ftc.gov/os/caselist/0510008/060314agr0510008.pdf>; Consent Order, *In re U-Haul Int'l, Inc.*, No. C-4294 (FTC Jun. 9, 2010), available at <http://www.ftc.gov/os/caselist/0810157/100609uhaulagree.pdf>.
- ¹⁷ See, e.g., Complaint, *In re Realcomp II Ltd.*, No. C-9320 (FTC Oct. 12, 2006), available at <http://www.ftc.gov/os/adjpro/d9320/061012admincomplaint.pdf>.

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