RETURNING TO THE ELMAN VISION OF THE FEDERAL TRADE COMMISSION: REASSESSING THE APPROACH TO FTC REMEDIES

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It is appropriate on the Federal Trade Commission's 90th Anniversary to engage in a critical assessment of the agency's strengths and weaknesses. As the FTC and the Antitrust Division of the Department of Justice continue to vie for primacy as the chief federal antitrust enforcement authority, the differences between the two agencies have tended to blur. However, the FTC was born in an era in which there was great dissatisfaction with the enforcement of the antitrust laws by federal courts, and was intended to be a very different agency from its older colleague. The vision of the FTC was to create an expert body whose purpose was to focus on both competition and consumer protection issues that might not be effectively addressed through enforcement via the generalist federal courts. Congress intended the FTC to serve as a "uniquely effective vehicle for advancing the development of antitrust law in complex settings in which the agency's expertise can make a measurable difference."[1]

The promise of the unique role of the FTC has been realized only in part. In particular, its unique institutional capabilities often are overlooked and misunderstood. Moreover, its key purpose of addressing the more ambiguous conduct that cannot be effectively addressed by conventional judicial procedures and remedies is largely unfulfilled. In a seminal speech given almost four decades ago, Commissioner Philip Elman articulated a vision for how the FTC fit into the Congressional scheme for federal antitrust enforcement. He explained that the Congress of 1914 intended the Commission to supplement, not duplicate, the work of the Antitrust Division and private antitrust enforcement. The Commission, unlike the federal judiciary, is "a single tribunal whose only duty is trade regulation," and is intended "to make reliable predictive

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[1] D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present and Future,* 71 Antitrust L.J. 319, 320 (2003).

judgments regarding the competitive effects of questioned business conduct."[2] Yet, he observed that "conventional case-by-case litigation in the courts" continued to be the principal method of antitrust enforcement "even in the gray problem areas where novel and difficult questions of law and policy are presented" and require analysis of complex economic facts.[3] Elman suggested that the Commission use its distinct powers of gathering information and unique expertise to address complex questions and enhance the development of antitrust law, leaving the roles of policeman and prosecutor to the Department of Justice.

One of the most intriguing areas of the FTC's unique institutional capabilities is antitrust remedies. In this commentary, I provide an overview of the FTC's distinctive remedial authority and explain how the FTC is far better suited to devise remedies than a federal court. Next, I illustrate how the FTC has underutilized its unique powers when addressing competition problems both generally and in individual cases. Finally, I discuss how the FTC has strayed from its original vision in an important but unfortunate fashion. In recent years, the Commission has sought disgorgement or restitution under Section 13(b) of the FTC Act in competition cases. Although these actions may have brought some benefit to consumers, they largely duplicate the efforts of private and state enforcers and ultimately detract from the FTC's most effective role as an antitrust enforcer.

I. THE FTC'S REMEDIAL AUTHORITY: UNIQUE AND UNDERUTILIZED

The Supreme Court has described the FTC as an expert body with the power to "determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed."[4] The Court has also made clear that the FTC has wide discretion for "judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."[5] Section 5 of the FTC Act gives the FTC the power to issue an order requiring a respondent "to cease and desist" from using a practice that the FTC determines to be unfair. In addition, the Supreme Court has implied that the FTC has the power to order divestitures under Section 5.

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[2] Philip Elman, Federal Trade Commissioner, Antitrust Enforcement: Retrospect and Prospect, Remarks at the First New England Antitrust Conference (Mar. 31, 1967) (transcript available at the Federal Trade Commission Library).

[3] *Id.*

[4] Jacob Siegel Co. v. FTC, 327 U.S. 608, 612 (1946).

[5] *Id.* at 613 (applying principle to competition cases).

The FTC has employed considerable discretion in fashioning remedies and is fairly innovative on questions of relief. For example, the agency acts prospectively through its power to seek injunctions and also challenges violations after they have occurred. It employs bans on future acquisitions in merger cases and uses various combinations of remedies, such as mandatory patent licensing. It also institutes orders requiring affirmative conduct and prohibits otherwise lawful business practices. As the Supreme Court explained in *FTC v. Ruberoid Co.*, Congress gave the Commission the primary responsibility for devising orders and expected the Commission to "exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices."[6]

The FTC's administrative litigation process is far better suited than a federal court to address difficult issues of remedies. First, unlike a generalist federal district court judge, an administrative law judge (ALJ) focuses on the individual matter presented rather than facing the competing interest of numerous non-antitrust matters. Second, an ALJ and the Commission bring greater expertise and familiarity with other, often complex, antitrust cases that they manage on a daily basis, and the FTC's combination of lawyers and economists is invaluable in fashioning and monitoring relief. Third, the FTC continually learns from the remedies in numerous settled cases. For example, the Commission has extensive experience in requiring licensing arrangements, which may be a particularly adept manner of addressing competitive problems in high-tech industries. Similarly, the Commission's expertise in consumer protection matters may provide instruction on how remedies will impact consumers.[7]

Finally, the FTC is in a far superior position to implement regulatory orders that require some type of continuing supervision.[8] As an administrative agency with power to review its orders, the FTC is institutionally more capable than a federal court to utilize regulatory forms of relief. Unlike a generalist judge, who "knows about a general economic problem little more than what he can extract from the record of the particular

[6] 343 U.S. 470, 473 (1952).

[7] *See, e.g.*, Detroit Auto Dealers Ass'n, Inc., 111 F.T.C. 417 (1989), *aff'd in part and remanded in part*, 955 F.2d 457 (6th Cir. 1992) (requiring auto dealers to stay open a certain number of hours); National Ass'n of Social Workers, 116 F.T.C. 140 (1993) (consent order) (permitting certain limits on solicitation to protect physician-patient relationship).

[8] For example in *GM/Toyota* the FTC permitted a joint venture between two of the largest car manufacturers with a comprehensive consent decree that required an information firewall and regular review of the firewall by FTC staff. *See, e.g.,* General Motors Corp., 103 F.T.C. 374 (1984), *vacated* 5 Trade Reg. Rep. (CCH) ¶ 23,491, 1993 WL 767061 (FTC Oct. 29, 1993).

case," the Commission draws upon its institutional experience and specialized expertise to advance the development of antitrust law.[9]

A. Underutilizing its Powers

Although the FTC has devised some innovative remedies and is far better suited than a federal court to fashion such remedies, it has failed to use its full range of remedial powers in the area of competition. There are at least three examples of the agency's underutilization of its remedial power: (1) failing to hold hearings on relief in consummated mergers, (2) neglecting its ability to use rulemaking to address competitive problems, and (3) its reluctance to conduct post-order reviews of the effectiveness of remedies.

1. *Hearings on Relief in Consummated Mergers*

As many commentators have noted, antitrust jurisprudence is relatively undeveloped on the issue of remedies. Although there are general maxims that are stated in decades-old antitrust cases about the importance of relief, there are relatively few federal court antitrust cases in either the merger or civil nonmerger areas that have struggled with the issue of how to fashion an appropriate remedy. This is a substantial problem, particularly in monopolization cases, and is well illustrated by the *United States v. Microsoft Corp.*[10] litigation. In *Microsoft* the parties primarily relied on generations-old antitrust jurisprudence for conventional industries. This precedent was not of great value to the difficult issues that were posed in the case. Moreover, the district court failed to hold a hearing on the issue of remedy, which was a critical failure considering that the court subsequently ordered massive structural relief as the remedy.

The FTC seems to have repeated the *Microsoft* error in the litigation of *In re Chicago Bridge & Iron Co., N.V.*,[11] a challenge to a consummated merger. In that case the Commission staff sought to have the consummated merger remedied by splitting the new company into two separate companies. Both complaint counsel and respondents offered substantial evidence on the divestiture remedy, which the Commission analyzed.[12] There was some testimony by customers that a divestiture would not be a preferable remedy. There was, however, no separate hearing held to

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[9] Elman, *supra* note 2.

[10] 253 F.3d 34 (D.C. Cir. 2001).

[11] FTC Docket No. 9300 (Jan. 6, 2005), *available at* http://www.ftc.gov/os/2001/10/chicagobridgeadmincmp.htm.

[12] *See, e.g.,* Chicago Bridge & Iron, N.V., FTC Docket No. 9300, slip op. at 102–04 (Jan. 6, 2005), *available at* http://www.ftc.gov/os/adjpro/d9300/050106opionpublicrecordversion9300.pdf.

test the parties' submissions on the question of whether this relief was "definitively efficacious and feasible."[13] There was no determination whether a form of relief less stringent than divestiture might have been effective.[14] Simply, the failure to hold a separate remedy hearing prevented full exploration of whether the relief ordered was the best relief to fully restore competition.

2. *Rulemaking*

The Commission was formed in part as a result of a judgment that case-by-case adjudication often can be inadequate. Case-by-case adjudication only resolves an individual matter for an individual entity (or, at most, a group of similarly situated plaintiffs). In many cases, a court may be reluctant to apply remedies if liability is unclear. Moreover, a court may be reluctant to find liability because the damages imposed under the antitrust laws can be substantial. As Commissioner Elman observed, case-by-case adjudication is perhaps the least efficient and most costly and time-consuming method of dealing with a pervasive economic problem.

Thus, Congress gave the Commission a unique power to address competitive problems on a more general basis via rulemaking.[15] Section 18 of the FTC Act authorizes the FTC to issue "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5.[16] The FTC may use this power to fashion suitable remedies to address competition issues.[17]

The reality, however, is that this power to address competitive problems through studies, guidelines, and trade regulation rules has largely been neglected. In fact, unlike in the area of consumer protection, there have

[13] *Id.* at 102.

[14] *Id.* at 102–04 (describing the evidence that had been submitted on remedy and declining to impose any burden on complaint counsel to prove that the remedy would be definitively efficacious and feasible) (citations omitted).

[15] 15 U.S.C. §§ 46, 57a. Specifically, under Section 6 of the FTC Act, the Commission is authorized to make rules and regulations for the purpose of carrying out the provisions of the Act.

[16] 15 U.S.C. § 57a(a)(1)(B).

[17] One unusual additional power is the FTC's authority to serve as special master to a court. Under Section 7 of the FTC Act, 15 U.S.C. § 47, a court in a suit for injunctive relief may, upon finding that the complainant is entitled to relief, refer the suit to the FTC to fashion a decree. The FTC is particularly well-suited to be a special master because of its unique expertise in designing remedies. This important power, however, is seldom used by the courts. In fact, it was used on only one occasion in 1916, by Judge Learned Hand. United States v. Corn Prods. Ref. Co., 234 F. 964, 1018 (S.D.N.Y. 1916). It is not clear why the FTC failed to encourage courts to take advantage of this remedial power, especially when courts may need the assistance of an expert body.

been no competition rules enacted in over thirty years. This lack of trade regulation rules, or even consideration of trade regulation rules, seems puzzling. The Commission and Antitrust Division seem willing to issue guidelines in important areas of the law, such as mergers, international antitrust jurisdiction, and intellectual property licensing. The Commission and Antitrust Division also seem willing to hold hearings, issue reports, and engage in competition advocacy. Thus, the federal antitrust agencies are active policymakers in other fora.

There are various reasons why rulemaking may be more effective than case-by-case adjudication in devising antitrust remedies. Rulemaking can be tailored in a more precise and careful fashion than divestitures, avoids the problem of finding liability or proving an agreement or anticompetitive act, and attacks specific types of conduct that facilitate anticompetitive coordination. In addition, rulemaking does not attempt to find specific firms liable for their past behavior and reduces the likelihood that an enforcement action leads to significant treble damage liability. Finally, rulemaking may be a more efficient way to address competitive problems that are fairly pervasive within a particular market. The Commission's burden in showing a violation of a rulemaking order is a relatively modest one and does not require that the Commission demonstrate that a particular defendant's conduct was unlawful.[18]

For example, FTC rulemaking can provide an effective approach to difficult remedial issues in oligopolistic industries. As courts and commentators have observed for decades, parallel conduct in concentrated industries, without proof of an agreement, does not violate Section 1 of the Sherman Act. It is extremely difficult to identify anticompetitive oligopolistic conduct, establish liability, and create a suitable remedy. One type of relief may be to require the breakup of the large enterprises involved in the industry; this could result, however, in the loss of significant scale and scope economies. Thus, the use of rulemaking by the FTC may be the appropriate answer to such difficult questions of remedy. Jonathan Baker, addressing the problem of detecting and remedying oligopolistic conduct, notes: "As with all regulation, a rule prohibiting the prospective employment of a specific practice merely reflects a policy judgment, based on an evidentiary record developed with procedural

[18] 15 U.S.C. § 45(m)(1)(A). Under this section of the FTC Act, the Commission may seek civil penalties for rule violations if the defendant had "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule." The provision for constructive or implied knowledge gives the Commission some leeway in showing a violation. *See, e.g.,* Novartis Corp. v. FTC, 223 F.3d 783, 787 n.4 (D.C. Cir. 2000).

protections to the firms that will be affected, that the industry would likely perform better if the practice were changed."[19]

Another example where rulemaking would be far more efficient than adjudication is in the area of standard setting. The FTC has spent considerable resources bringing prominent enforcement actions in the past several years concerning the obligations of firms to disclose their intellectual property rights when participating in certain standard-setting processes. This issue of disclosure is endemic in the standard-setting environment. Numerous articles have been written on the subject, and there was significant testimony at the FTC/DOJ hearings on this subject and the intersection of intellectual property and antitrust law.[20]

Enforcement actions to prevent the anticompetitive abuse of standard-setting processes are important and necessary in some situations. The business community, however, would benefit from the clearer sort of guidance—touching a broad range of standard-setting disclosure issues—that could be provided through the issuance by the FTC of a trade regulation rule or standard-setting guidelines.

3. *Post-Order Analysis of the Effectiveness of Remedies*

Under Section 6 of the FTC Act, the FTC is authorized to conduct after-action reviews to determine whether particular remedies are effective. However, this power continues to be largely ignored by the FTC. The agency did conduct one recent study of remedies in the 1999 FTC Divestiture Report.[21] The Report illuminated some difficulties in the effectiveness of merger remedies and increased the transparency of the Commission's method of negotiating remedies.[22] In spite of the continual controversy and debate on the effectiveness of remedies, this report stands alone in performing a post-order review.

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[19] Jonathan B. Baker, *Two Sherman Act § 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Query*, 38 ANTITRUST BULL. 143, 209–10 (1993).

[20] *See, e.g.*, David A. Balto, FTC v. Rambus: *Time to Re-examine Standard Setting Rules,* FTC: WATCH, July 1, 2002; David J. Teece & Edward F. Sherry, *Standards Setting and Antitrust,* 87 MINN. L. REV. 1913 (2003); Mark R. Patterson, *Antitrust and the Costs of Standards Setting: A Commentary on Teece & Sherry*, 87 MINN. L. REV. 1995 (2003); Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889 (2002).

[21] STAFF OF THE BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999), *available at* http://www.ftc.gov/os/1999/08/divestiture.pdf.

[22] *See* David A. Balto, *Lessons from the Clinton Administration: The Evolving Approach to Merger Remedies*, 69 GEO. WASH. L. REV. 952 (2001).

B. A Misguided Detour: Seeking Disgorgement or Restitution

In recent years, the FTC has strayed far from the Elman vision of an administrative agency that focuses on complex antitrust issues and seeks injunctive relief. Rather, with increasing frequency, it has tried to duplicate the role of private and state antitrust enforcers by seeking disgorgement or restitution under Section 13(b) of the FTC Act.

Congress added Section 13(b) to the FTC Act in 1973, authorizing the agency to seek, and the district courts to grant, preliminary and permanent injunctions against conduct that violates any of the laws enforced by the Commission.[23] Congress and the courts have uniformly acknowledged that the Commission is authorized under Section 13(b) to seek a full range of equitable remedies, including the authority to award monetary equitable relief, such as restitution, rescission, or disgorgement of funds. The Bureau of Consumer Protection has used Section 13(b) to seek monetary relief in unfair or deceptive practices cases since the early 1980s, and it has become the foundation of the FTC's consumer fraud program.[24]

1. *FTC Disgorgement Actions*

The purpose of the FTC's disgorgement actions is to rectify competitive harm in cases involving clearcut anticompetitive conduct. However, while the purposes in enacting Section 13(b) are laudable, the FTC's actions under Section 13(b) in competition cases are simply misguided and largely duplicate state and private enforcement actions. As many commentators have observed, the combination of state, federal, and private enforcers simultaneously seeking monetary relief creates an incoherent system of remedies.[25]

The FTC did not use Section 13(b) in competition cases until the late 1990s, beginning with *FTC v. Mylan Labs, Inc.*[26] In *Mylan* the FTC brought suit against Mylan and three drug suppliers alleging that Mylan entered into long-term exclusive supply licenses with other defendants in order

[23] 15 U.S.C. § 53(b).

[24] *See generally* David M. FitzGerald, The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act, Paper at the FTC 90th Anniversary Symposium (Sept. 23, 2004), *available at* http://www.ftc.gov/ftc/history/docs/fitzgeraldremedies.pdf (providing an overview of the evolution of Section 13(b)).

[25] *See* Spencer Weber Waller, *Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT. L. REV. 207 (2003); *see also* ABA SECTION OF ANTITRUST LAW, REPORT ON REMEDIES (2004), *available at* http://www.abanet.org/antitrust/comments/2004/RemediesReportCouncil.doc.

[26] 62 F. Supp. 2d 25 (D.D.C.), *amended on other grounds*, 99 F. Supp. 2d 1 (D.D.C. 1999).

to monopolize the markets and drive up prices substantially. The conduct was judged particularly egregious, and the amount of consumer harm was substantial. The FTC sought disgorgement in the amount of $100 million in order to compensate consumers who submitted claims for overcharges on the drugs, whether they purchased them directly from Mylan or not.

If the FTC enforcement action resolved all the claims and secured relief for the harmed parties, the use of Section 13(b) could be perceived as efficient. However, that was not the result. In addition to the FTC's case, private plaintiffs and a number of state attorneys general sued Mylan for the same conduct alleged in the FTC's complaint. There were numerous private suits filed, and several of them continue to this day.[27]

Commissioner Leary dissented from the FTC's *Mylan* enforcement action not because he disagreed with the agency's findings regarding the underlying violation, but because of his view that the FTC was ill-advised in seeking disgorgement. He viewed the court's ruling allowing the Commission to obtain disgorgement as creating an undesirable precedent for both federal and state antitrust enforcement. He cautioned the Commission to seek disgorgement under Section 13(b) only in the most extraordinary cases involving egregious conduct and harm, and suggested that such remedies should not be sought in cases where the violation is unclear and where private damages are available and being pursued. In addition, he noted that the Commission's use of such remedies is hardly what Congress intended when it passed the FTC Act in 1914 or when it gave the Commission the power to seek injunctive relief in 1973.[28]

2. *The FTC's Policy Statement on Monetary Equitable Remedies*

In 2003 the Commission issued a policy statement on the use of monetary relief in competition cases.[29] The Commission developed its

[27] The FTC also sought disgorgement in two recent cases, *FTC v. The Hearst Trust*, No. 1:10CV00734 (D.D.C. Apr. 5, 2001), and *FTC v. Perrigo Co. and Alpharma Inc.*, No. 021 0197 (D.D.C. Aug. 12, 2004). In *The Hearst Trust* Hearst was ordered to disgorge $19 million of profits as a result of its unlawful acquisition. In *Perrigo Co.* the FTC challenged a noncompete agreement between two generic drug companies requiring that they disgorge over $6 million in illegal profits. In addition to the FTC's final order, defendants agreed to pay various state attorneys general $1.5 million to resolve claims challenging the same conduct.

[28] Statement of Commissioner Thomas B. Leary, Dissenting in Part, and Concurring in Part, FTC v. Mylan Labs., Inc., *available at* http://www.ftc.gov/os/2000/11/mylanleary statment.htm.

[29] FTC 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/disgorgement frn.htm.

statement after reviewing comments filed in response to a Federal Register notice, information gathered from public discussions, case law and literature, and its own staff experience. In its statement, the Commission observed that disgorgement and restitution will be useful in some competition cases, but it will generally rely on more familiar prospective remedies and obtain disgorgement and restitution only in exceptional cases. Specifically, it stated that disgorgement is appropriate in cases "designed to deprive a wrongdoer of his unjust enrichment and to deter others" from future violations, and that restitution "is intended to restore the victims of a violation to the position they would have been in without the violation."[30]

The Commission's statement identified three factors it will consider in determining whether to seek disgorgement or restitution in competition cases. First, the Commission will seek monetary relief only where the underlying violation is clear. The Commission explained that a violation is clear when, based on existing precedent, a reasonable party should expect the conduct at issue to be illegal. Second, there must be a reasonable basis for calculating the amount of remedial payment. Finally, the Commission will consider the value of seeking monetary relief in light of other remedies available in the matter, including private actions and criminal proceedings.

3. *A Misguided Detour*

Is disgorgement an appropriate remedy in competition cases? Does it further the goals identified in the FTC's Policy Statement? The arguments for disgorgement are not convincing. 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. Furthermore, even if private suits are not pending, there is no reason to assume that suits will not be filed shortly after the FTC's action is filed. Moreover, even if the amount of disgorgement may seem substantial, it is not apparent that consumers benefit. Therefore, it is questionable whether disgorgement serves any useful purpose that is not achieved in private plaintiff lawsuits. As FTC Commissioners Swindle and Leary aptly put it in their dissent in *FTC v. The Hearst Trust,*[31] "[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

[30] *Id.* at 45,821.

[31] No. 1:10CV00734 (D.D.C. Apr. 5, 2001).

not benefit from any possible wrongdoing and that their customers can be made whole."[32]

Although the Commission's policy statement provides a clear articulation of its rationale in seeking monetary relief, it does not address the difficult issues raised by the Commission's actions. First, the use of Section 13(b) poses a significant risk of duplicative recovery. As the Supreme Court observed in *United States v. United States Gypsum Co.*, overdeterrence and excessive antitrust remedies do not "redound to the public's benefit."[33] Rather, they may have the unfortunate consequence of chilling competitive conduct. Of course the Commission's power to bring a 13(b) action may foster settlement in some cases, but that may result in overdeterrence rather than underdeterrence.

In dissenting to the relief ordered in *Mylan*, Commissioner Leary observed of the potential dangers of the use of Section 13(b):

> An action of this kind is almost too expedient and, dare I say, too seductive. It transforms the Commission into a prosecutor with an immensely powerful antitrust weapon. . . . 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. As we stray progressively further away from that vision—even for reasons of expediency, efficiency and equity that may seem compelling at the time—we may unwittingly neglect our special mission.[34]

Although a literal interpretation of Section 13(b) seems to permit securing monetary relief, the question is whether securing this relief is ever necessary or appropriate in competition cases. Indeed, there is no lack of private enforcement against the types of antitrust violations attacked by the FTC. FTC enforcement under Section 13(b) might be appropriate, as commentators like Judge Posner have suggested, if there were a single federal entity that could bring cases seeking relief and preempt private antitrust suits.[35] However, the FTC's actions seeking disgorgement are simply duplicative of private antitrust enforcement actions. Since disgorgement will be used in only obvious violations, the chances of a failure of private enforcement seem slight.

Moreover, such actions might be appropriate if they could somehow bring coherence to seeking relief in competition cases. For example, an

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[32] Dissenting Statement of Commissioners Orson Swindle and Thomas B. Leary, Hearst Trust and Hearst Corporation's Acquisition of J.B. Laughrey Inc., *available at* http://www.ftc.gov/os/2001/04/hearstdisswinleary.htm.

[33] 438 U.S. 422, 442 n.17 (1978).

[34] Statement of Commissioner Thomas B. Leary, *supra* note 28.

[35] *See* Richard A. Posner, *Antitrust in the New Economy,* 68 ANTITRUST L.J. 925 (2001).

FTC disgorgement action might secure almost all the relief necessary and obviate the need for private litigation. Yet in the FTC's disgorgement cases, there have always been follow-on private suits, some of which were litigated for several years. In *Mylan*, for example, the FTC and several states secured over $100 million of relief, but private parties are still litigating and trying to secure ultimate relief. As Commissioner Swindle observed in *Hearst*, "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."[36]

The more efficient approach is for the FTC to seek injunctive relief and permit the states and private parties to seek disgorgement, restitution, or other forms of damages. Two recent examples illustrate this approach. For example, in *Nine West Group Inc.*[37] the FTC secured injunctive relief against the conduct of a shoe manufacturer engaging in resale price maintenance with certain dealers in violation of federal and state antitrust laws. At the same time, attorneys general for fifty-six U.S. states, territories, commonwealths, and possessions secured $34 million in consumer relief.[38] Notably, not only were the anticompetitive practices stopped in this case, but consumers received relief in a timely and efficient manner due to coordinated federal and state enforcement actions.

Similarly, in *Bristol-Meyers Squibb Co.*[39] the states, private parties, and FTC worked effectively to secure both injunctive and monetary relief. The case involved a variety of anticompetitive tactics by Bristol to monopolize markets for Taxol, Paxil, and BuSpar by abusing government regulatory processes. According to the FTC's complaint, when Bristol faced imminent entry of low-cost generic drug products, it paid a prospective competitor millions of dollars to abandon its challenge to a Bristol patent and to remain off the market until Bristol's patent expired. The FTC alleged that Bristol abused FDA regulations to block generic entry and made false statements to the FDA regarding listing patents in the Orange Book. Additionally, Bristol was accused of filing baseless infringement suits and engaging in inequitable conduct before the U.S. Patent and Trademark Office. Bristol's anticompetitive conduct secured nearly $2 billion in annual sales at the expense of consumers.

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[36] Statement of Commissioner Orson Swindle, FTC v. The Hearst Trust, *available at* http://www.ftc.gov/os/2001/12/swindlestate.htm.

[37] FTC No. C-3937 (Mar. 6, 2000).

[38] *See* Press Release, Federal Trade Commission, Nine West Settles State and Federal Price Fixing Charges (Mar. 6, 2000), *available at* http://www.ftc.gov/opa/2000/03/ninewest.htm.

[39] No. C-0476 (Mar. 7, 2003).

The FTC secured injunctive relief preventing Bristol from engaging in anticompetitive practices and, at the same time, the states and several private parties secured injunctive relief and substantial monetary relief in class action litigation, settling these cases. Bristol paid a total of $55 million to the states—$14.5 million for consumer restitution, $37.5 million to government entities, and $3 million to compensate the states for their administrative and litigation costs. In addition, Bristol is subject to injunctive action for ten years to prevent it from engaging in anticompetitive conduct in the future.[40]

III. CONCLUSION

The FTC's enforcement of U.S. competition laws should not simply duplicate the enforcement efforts of the Department of Justice, the state attorneys general, and the private antitrust bar. Instead of merely pursuing case-by-base enforcement against antitrust violations, the FTC should embrace its role as a regulator and should focus on identifying practices that harm competition and designing innovative remedies. On its 90th anniversary, the FTC should seek to fulfill the vision of Commissioner Elman. It should recognize its unique capabilities to solve the difficult competitive problems of the 21st century, and use its entire range of powers to solve those problems.

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[40] *See* Press Release, Federal Trade Commission, FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government Processes to Stifle Generic Drug Competition (Mar. 7, 2003), *available at* http://www.ftc.gov/opa/2003/03/bms.htm.