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KeySpan, *Ovation*, and the Agencies' Policies Regarding Monetary Remedies

BY GEOFFREY D. OLIVER

IN FEBRUARY OF THIS YEAR, FOR THE first time, the Department of Justice Antitrust Division sought monetary relief for a violation of the Sherman Act. Its consent order with KeySpan Corporation, if accepted by the court, will require KeySpan to disgorge $12 million in allegedly unlawfully acquired profits. At the same time, the Federal Trade Commission was in litigation seeking disgorgement of a potentially record-setting amount for an antitrust violation—possibly in excess of $105 million—from Ovation Pharmaceuticals, Inc. (subsequently acquired by Lundbeck, Inc.). When the FTC filed its complaint against Ovation, now-Chairman Leibowitz issued a statement asserting that the FTC "should use disgorgement in antitrust cases more often."[1]

These developments have raised questions as to whether the antitrust authorities under the new administration have shifted enforcement policies and intend to pursue monetary remedies more frequently. At this point, it is impossible to draw definitive conclusions. Available information indicates that the DOJ's pursuit of disgorgement in *KeySpan* most likely is intended to resolve an unusual situation rather than to launch a new policy initiative. Now that the DOJ has asserted its view that it has the authority to pursue monetary equitable remedies, however, it might be tempted to seek disgorgement again in the future.

The FTC's complaint in *Ovation*, and now-Chairman Leibowitz's statement in that matter in particular, raise the possibility that the FTC may pursue monetary remedies more frequently and more aggressively than it has in the past. The FTC has used monetary remedies sparingly in the past, and they are likely to remain the exception rather than the rule. Nevertheless, companies accused by one of the agencies of profiting from an antitrust violation may now have to consider whether they will face a stiffer remedy than a cease-and-desist order.

United States v. KeySpan

In February 2010, the DOJ filed a complaint against and proposed settlement agreement with KeySpan in U.S. District Court for the Southern District of New York.[2] The DOJ alleged that KeySpan entered into a financial swap arrangement that reduced its incentives to bid aggressively in auctions for electric generation capacity in New York City. The DOJ asserted that KeySpan possessed market power in a market for "installed capacity" to generate electric power for New York City. According to the complaint, transmission constraints limit the amount of electricity that can be imported into the New York area from the power grid. The New York Independent System Operator (NYISO) requires retail sellers of electricity in New York City to purchase 80 percent of their needs from local generators. The NYISO administers auctions that set the price of installed capacity in the New York City region. Also according to the complaint, KeySpan, Astoria Generating Company, and a third supplier controlled a substantial portion of the market, and retail electricity sellers (purchasers of installed capacity) required at least some of each of these three companies' output.[3]

The DOJ alleged that KeySpan, which had benefited from conditions of tight supply from 2003 to 2005, anticipated entry of new capacity in 2006, although demand growth and retirement of old generation units would restore tight supply conditions in 2009. KeySpan considered acquiring Astoria, KeySpan's largest competitor in the New York City installed capacity market, but recognized that such an acquisition would raise serious antitrust issues. Instead, the DOJ charged that KeySpan entered into an arrangement with a financial services company to acquire a financial interest in Astoria's revenues and capacity.[4] KeySpan agreed with the financial services company that, for a period of three years, KeySpan would pay an amount to the financial services company if the market price for capacity was below $7.57 per kW-month, and the financial services company would pay KeySpan if the market price was above this level.[5]

According to the complaint, KeySpan recognized that, to offset its risk, the financial services company would seek to enter into an offsetting arrangement with another capacity supplier and that Astoria was the only supplier with sufficient capacity to offset the KeySpan swap agreement. Indeed, the financial services company made its agreement with KeySpan contingent on successful conclusion of an offsetting agreement with Astoria. The financial services company in turn reached an agreement with Astoria pursuant to which the financial services company would pay Astoria if the market price for capacity was below $7.07 per kW-month, and

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Astoria would pay the financial services company if the market price was above this level.[6]

The effect of the back-to-back swaps was that, if prices remained high, a portion of Astoria's revenues would be transferred to the financial services company, and the financial services company would make payments to KeySpan. The payments to KeySpan made it profitable for KeySpan to offer its capacity at auction at high prices, even if a significant portion of its capacity remained unsold. The DOJ alleged that from May 2006 until February 2008, the arrangement led to higher prices for electricity in New York City than otherwise would have existed.[7]

Simultaneously with the complaint, the DOJ filed a proposed settlement reached with KeySpan. The proposed settlement agreement between the DOJ and KeySpan, if accepted by the court, will require KeySpan to pay $12 million to the United States in the form of disgorgement.[8]

FTC v. Ovation Pharmaceuticals

In December 2008, the FTC filed a complaint against Ovation in U.S. District Court for the District of Minnesota alleging that Ovation unlawfully acquired the U.S. rights to the pharmaceutical product NeoProfen. According to the complaint, in July, 2005, Ovation had acquired rights to the pharmaceutical product Indocin from Merck & Co.[9] Indocin is used to treat patent ductus arteriosus, a potentially fatal disorder affecting very low birthweight premature infants. According to the FTC, after acquiring Indocin, Ovation viewed NeoProfen as a threat because Ovation expected NeoProfen to take substantial sales from Indocin once it was approved by the Food and Drug Administration.

In January 2006, Ovation acquired the U.S. rights to NeoProfen from Abbott Laboratories in a non-reportable transaction. The FTC alleges that once Ovation removed NeoProfen as a competitive threat, it increased the price of Indocin by nearly 1300 percent.[10] The FTC's complaint alleges an unlawful acquisition in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act and unlawful monopolization in violation of Section 5 of the FTC Act.[11]

The FTC's complaint seeks remedies of divestiture of NeoProfen, injunctive relief prohibiting Ovation from acquiring simultaneous interests in Indocin and NeoProfen, and other equitable relief, including disgorgement of all unlawfully obtained profits.[12] Depending on the method of measurement used, this amount could exceed $105 million.[13] The parties have completed trial and submitted post-trial briefs and proposed findings of fact. At the time this article went to print, a court decision was expected shortly.

Availability of Monetary Equitable Remedies

A natural first question in light of *KeySpan* and *Ovation* is whether there are legal limits on when the FTC or DOJ may seek equitable monetary relief for a violation of the antitrust laws. There is surprisingly little law on the subject.

The FTC bases claims for monetary relief on the authority found in Section 13(b) of the FTC Act.[14] That section authorizes the FTC to file suit in federal district court to seek a temporary restraining order or preliminary injunction. That section also states, "*Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."[15] This language has given rise to at least two issues: what is a "proper" case for permanent injunctive relief; and does permanent injunctive relief include monetary equitable remedies?

On the first issue, a small number of courts have held that cases based on claims of unfair methods of competition are proper cases for permanent injunctive relief.[16] In *FTC v. Mylan Laboratories*, the district court considered whether proper cases under Section 13(b) should be limited to cases involving per se antitrust violations. It refused to limit Section 13(b) in that fashion, holding that "the permanent injunction proviso may be used to enjoin violations of 'any provision of law' enforced by the FTC."[17]

On the second issue, the *Mylan* court noted that "the plain language of §13(b) does not authorize the FTC to seek monetary remedies."[18] However, it relied on Supreme Court decisions interpreting other statutes, *Porter v. Warner Holding Co.* and *Mitchell v. DeMario Jewelry, Inc.*, for the proposition that a federal agency authorized to proceed in district court may call upon all the inherent equitable powers of the district court unless the statute explicitly provides otherwise.[19] It followed five courts of appeals and a number of district courts applying Section 13(b) of the FTC Act in the consumer protection context and held that Section 13(b) authorizes the FTC to seek and obtain monetary equitable relief, including disgorgement, in district court.[20] In its ongoing litigation, Ovation (Lundbeck) has not challenged the FTC's ability to seek disgorgement or the court's power to order disgorgement pursuant to Section 13(b).

As noted above, *KeySpan* represents the first time the DOJ has sought disgorgement as a remedy for a violation of the Sherman Act. Two sources of statutory authority might support a claim of disgorgement by the DOJ in district court: Section 16 of the Clayton Act, permitting a person to sue in district court for injunctive relief against threatened loss or damage by a violation of the antitrust laws;[21] and Section 4 of the Sherman Act, which permits the U.S. Attorney General to institute proceedings by equity to "prevent and restrain" violations of the Sherman Act.[22]

The potential use of Section 16 of the Clayton Act to pursue monetary equitable remedies has been called into question by two court decisions. Under Section 16, injunctive relief is permitted only with respect to "threatened" loss or damage by a violation of the antitrust laws.[23] The Ninth Circuit held that the equitable remedy of restitution therefore was not available under Section 16 for losses that already have occurred. Rather, "[r]ecovery for past losses is properly covered under § 4; it comes under the head of 'damages.'"[24] Similarly, the *Mylan* court relied in part on this language in Section 16 in holding that states could not maintain an action seeking disgorge-

ment under Section 16 of the Clayton Act.[25]

Thus, in its competitive impact statement in *KeySpan*, the DOJ based its authority to seek disgorgement on Section 4 of the Sherman Act.[26] Section 4 empowers a district court to "prevent and restrain" and "enjoin[]" violations of the Sherman Act.[27] In contrast to the purely forward-looking language of Section 16 of the Clayton Act, the DOJ appears to rely on the term "restrain" in Section 4 of the Sherman Act as implying that Section 4 is not limited to future harm. The DOJ also cited the *Porter* and *Mitchell* decisions for the proposition that, unless a statute explicitly or by necessary implication restricts a court's jurisdiction in equity, that jurisdiction is preserved.[28] The DOJ did not address the question of whether Section 16 of the Clayton Act should be interpreted as restricting in any way the monetary equitable remedies available under Section 4 of the Sherman Act.

Change in FTC Policy Regarding Monetary Remedies?

The FTC's decision to pursue disgorgement of over $100 million in litigation against Ovation indicates aggressive enforcement by the FTC but does not reflect a clear break with past policy. The accompanying statement of Commissioner, now-Chairman, Leibowitz, however, may signal an interest, at least on his part, in moving away from past policy and pursuing monetary equitable relief more frequently than the FTC has in recent years. Nevertheless, monetary relief is likely to remain a relatively rare exception in FTC enforcement actions in the immediate future.

Before 1988, the FTC's claims for monetary relief in antitrust cases were limited. From 1980 to 1998, the FTC obtained either disgorgement or restitution in eight competition matters.[29] Each of these matters involved conduct that was per se unlawful, each involved disgorgement or restitution of $1 million or less (to the extent an amount of monetary relief was specified), and each was resolved by a consent decree.[30]

In 1999, the FTC broke new ground in the *Mylan* case.[31] For the first time, the FTC sought disgorgement with respect to conduct that was not per se unlawful. In that matter, the FTC accused Mylan of entering into an exclusive agreement with the manufacturer of the active ingredient in the pharmaceutical products lorazepam and clorazepate, thereby foreclosing Mylan's competitors' access to the ingredient and to the market for the downstream pharmaceutical products. Mylan then raised its wholesale prices from $7.30 to $190.00 for a 500-tablet bottle of lorazepam and from $11.36 to $377.00 for a 500-tablet bottle of clorazepate. The FTC alleged that Mylan agreed with the supplier to restrain trade and conspired to monopolize the generic lorazepam and clorazepate markets in violation of Section 5 of the FTC Act.[32]

The *Mylan* case also raised the amount of monetary equitable relief to a whole new level. The FTC and states obtained restitution in the amount of $100 million—an amount two orders of magnitude larger than any previous monetary remedy.[33] The FTC followed this the next year with the *Hearst* matter, in which the FTC obtained disgorgement of $19 million for an anticompetitive acquisition in violation of Sections 7 and 7a of the Clayton Act.[34]

In response to concerns raised relating to the FTC's intentions to use monetary remedies in future actions, the FTC initiated a policy review. In December 2001, it issued a notice inviting comments, and in July 2003 it issued its Policy Statement on Monetary Equitable Remedies in Competition Cases.[35] In its Policy Statement, the FTC announced that it would base a decision of whether to pursue monetary equitable remedies on three considerations: (1) whether the underlying violation is clear; (2) whether there is a reasonable basis for calculating the amount of any remedial payment; and (3) what other remedies are available in a matter (including remedies in private actions). The FTC clarified that in the future, it would not limit claims for monetary equitable relief to cases involving per se unlawful conduct. Rather, it would consider a violation to be clear if, "based on existing precedent, a reasonable party should expect that the conduct at issue would likely be found to be illegal."[36] The FTC also stated that disgorgement is particularly valuable if the benefits obtained from an antitrust violation greatly exceed the penalties available under applicable laws and the amounts likely to be recovered in private damage actions. The FTC professed to be "sensitive" to the desire to avoid duplicative recoveries and "excessive" multiple payments by defendants for the same injury, but it did not rule out the possibility of seeking disgorgement or restitution even in cases in which the defendants are subject to civil penalties or private damages actions. The FTC concluded that it would not be appropriate to offset a civil penalty assessment against disgorgement or restitution. It did state, however, that it would seek to ensure that injured parties that recovered losses in private damages actions would not receive restitution for the same losses.

The Commission explicitly followed these principles in subsequent matters. In 2004, the FTC obtained $6.25 million from Perrigo Co. and Alpharma, Inc. in settlement of charges that Perrigo paid its sole competitor, Alpharma, to withdraw from the market for store-brand children's liquid ibuprofen.[37] Chairman Muris specifically noted in the FTC's press release that the case was the FTC's first "implementation of the disgorgement policy statement" issued in 2003 and involved "a clear antitrust violation."[38] Then-Commissioner Leibowitz also relied on the Policy Statement in at least two instances to explain why, in his view, the FTC's enforcement of Section 5 of the FTC Act is subject to practical restraints.[39]

In contrast to *Perrigo*, when the FTC voted in December 2008 to authorize a complaint seeking disgorgement in *Ovation*, it did not explain how the matter satisfied the three factors of its Policy Statement. (In the litigation, Lundbeck argued that the court should refuse to order disgorgement because doing so would be inconsistent with the FTC's Policy Statement.[40] The FTC disagreed, but again offered almost no analysis of the three factors.[41])

Of particular interest in *Ovation* is the question of whether there is a reasonable basis for calculating the amount of disgorgement. The critical issue is what the price of Indocin would have been absent Ovation's acquisition of the U.S. rights to NeoProfen. Had NeoProfen been on the market, the logical assumption would have been that the price for Indocin before Ovation acquired NeoProfen would have been the "but-for" price going forward absent the acquisition of NeoProfen. But while NeoProfen may have constituted a competitive threat, it had not yet been introduced, leaving uncertain the extent to which it had affected the pricing of Indocin. In addition, Commissioners Rosch and Leibowitz opined that Ovation's acquisition of Indocin from Merck removed a reputational constraint on pricing and permitted Ovation to increase the price for Indocin above that which Merck had charged.[42] If true, the "but-for" price of Indocin could have been higher than the pre-acquisition price of Indocin, which would eliminate any concrete benchmark against which unlawful profits could be measured. Tellingly, the FTC argues in its brief, "the circumstances here do not permit a precise calculation of Lundbeck's gains from the illegal acquisition. . . . But equity does not demand precision."[43] It added, the evidence showed that "over $105 million must be disgorged; in the alternative, there is also evidence supporting a minimum disgorgement amount of at least $20 million of profits on Indocin IV . . . plus a yet-to-be-calculated figure for NeoProfen profits."[44]

Also of interest in *Ovation* was the concurring statement of then-Commissioner Leibowitz. He stated, "Recent literature on the subject makes a persuasive case for seeking disgorgement more frequently. . . . I strongly agree; the Commission should use disgorgement in antitrust cases more often."[45] He cited to a recent article by Professor Einer Elhauge.[46] In his article, Professor Elhauge appeared to disagree with two of the three factors set forth in the FTC's Policy Statement. Professor Elhauge contrasted the requirement in the FTC's Policy Statement that the violation be clear with the absence of any such requirement in an action for antitrust damages. He stated, "The FTC statement offers no justification for why the degree of clarity necessary to recover damages should be lower than that to obtain public disgorgement."[47] Professor Elhauge concluded that the FTC's rare use of disgorgement appears based mainly on the premise that private actions provide adequate monetary relief, a premise that he rejected.[48] It is unclear whether, by citing Professor Elhauge so prominently in his concurring statement, now-Chairman Leibowitz intended to signal that he is prepared to depart from the FTC's Policy Statement.

The prospect of more aggressive litigation to obtain disgorgement could raise concerns in the pharmaceutical industry, in particular. Chairman Leibowitz has implied in the past that he would be willing to seek disgorgement in pharmaceutical patent settlement agreements.[49] Yet he has also recognized that courts have not supported the FTC position in these cases.[50] Under the new administration, the Commission thus far has continued to pursue monetary equitable remedies only in rare cases. Most matters challenged by the FTC do not justify the criteria for monetary equitable relief set forth in the FTC's Policy Statement. And despite Chairman Leibowitz's statement in *Ovation*, the FTC has not withdrawn its Policy Statement.

There is also some degree of tension between pursuing monetary relief in federal court and another FTC priority—use of its Part 3 litigation process to develop the law. The impact of the two new Commissioners remains unknown. Unless they support a new position, however, it appears most likely that the FTC will continue to rely primarily on traditional cease-and-desist orders in conduct cases.

Change in DOJ Policy Regarding Monetary Remedies?

The DOJ's decision to seek disgorgement for the first time for violation of the Sherman Act[51] has raised questions as to whether this reflects a change in DOJ policy and how the DOJ may seek to use this tool in the future. The *KeySpan* case itself is probably best understood as a specific effort to resolve a difficult factual situation rather than the introduction of a new policy towards use of monetary remedies. Now that the DOJ has asserted its authority to obtain disgorgement, however, *KeySpan* may lay the foundation for future pursuit of monetary remedies.

The DOJ provided relatively little explanation of why the remedy of disgorgement was appropriate in the *KeySpan* matter. It gave no general guidance on when monetary remedies might be appropriate. Nor did it discuss certain of the factors identified in the FTC's Policy Statement. It gave no indication, for example, of whether it had a reasonable basis for calculating the amount of disgorgement. Indeed, it provided no indication of how it and KeySpan arrived at the $12 million amount to be disgorged.

Similarly, the DOJ did not discuss whether it considered the violation to be clear. This would have been an interesting discussion. As discussed above, the DOJ charged KeySpan with violating Section 1 of the Sherman Act by entering into a vertical agreement with a financial services company. The agreement provided for a hedging arrangement of a type that many companies use, although the specific provisions were perhaps the opposite of what one might normally expect to see.[52] The DOJ asserted that this agreement affected KeySpan's incentives; by providing for payments from the financial services company to KeySpan if electricity capacity prices were high, the agreement would offset KeySpan's loss of volume and revenue if it bid high and thus encourage KeySpan to bid higher prices than it would have absent the agreement.[53] The DOJ emphasized that KeySpan expected the financial services company to enter into a corresponding countertrade with its largest competitor, Astoria.[54] Yet the DOJ did not charge Astoria or the financial services company with any violation.

Furthermore, the DOJ's complaint is based entirely on the effects of the hedging arrangement on *KeySpan's*, not Astoria's,

incentives.[55] In other words, the DOJ does not allege that KeySpan either sought to or did affect Astoria's behavior in the marketplace. Nor did the effect on KeySpan's incentives appear to depend on anything that Astoria might or might not do. Thus, had the financial services company hedged its arrangement with a different capacity provider, or chosen not to hedge its arrangement at all, the effect on KeySpan's incentives likely would have been identical. Presumably, the DOJ would not consider a single hedging agreement between a producer and a financial services company to violate the Sherman Act even if the hedging agreement influenced the producer's incentives and caused it potentially to compete less aggressively in the marketplace. The *KeySpan* case would appear to make sense only if the DOJ could prove that the agreement between KeySpan and the financial services company that changed KeySpan's incentives would not have been possible absent an agreement between the financial services company and Astoria. (The DOJ's complaint implies that this was the case but does not appear to contemplate that this would have been an element of the DOJ's burden of proof.)[56]

Further complicating the analysis was the fact that the Federal Energy Regulatory Commission conducted an investigation into whether KeySpan, Astoria, and/or the financial services company involved had violated FERC regulations prohibiting market manipulation. The FERC Enforcement Staff Report concluded that the bidding activities of KeySpan and Astoria in the marketplace "were unaffected by their swaps," their conduct was "done pursuant to legitimate business purposes," and the companies "did not engage in collusion to impair, obstruct, or defeat the functioning of the . . . market."[57] When viewed from this perspective, it is difficult to conclude that the violation in *KeySpan* was clear.

The driving factor in the DOJ's decision to seek disgorgement in this matter appears to have been the absence of any other meaningful remedy. A critical factor in this case was that KeySpan had sold its generating assets that produced power for New York City in 2008.[58] Thus, KeySpan was highly unlikely to repeat the conduct in question and a simple cease and desist order "would not be meaningful," in the DOJ's words.[59] In addition, the DOJ concluded that the filed rate doctrine likely would prevent any recovery by private plaintiffs. Thus, absent disgorgement, KeySpan might have escaped any significant remedy and been permitted to retain its profits from the arrangement. The DOJ concluded that, in these circumstances, disgorgement would serve to restrain KeySpan and others in the future and would "send . . . a strong message" to any others that would consider similar conduct.[60] The DOJ also noted that because damages or other private relief was unlikely, duplicative monetary remedies were unlikely.

Viewed in this context, the DOJ's use of disgorgement in the *KeySpan* case appears to be intended as a solution to a unique problem rather than any indication of a change in policy or strategy for future enforcement actions. Nevertheless, now that the DOJ has tested the waters, it remains to be seen whether it might consider seeking monetary remedies in other cases in the future.

Conclusion

KeySpan and *Ovation* indicate that the antitrust agencies are willing to be creative and aggressive with respect to remedies and to pursue monetary remedies in circumstances they believe to be appropriate. It is too early to conclude, however, that either agency has adopted a new policy. The DOJ's *KeySpan* case in particular appears to be a product of unusual circumstances rather than a deliberate policy. As a practical matter, however, it may lay the foundation for future pursuit of monetary remedies. The FTC's *Ovation* case and now-Chairman Leibowitz's concurring statement raise more significant questions about the future direction of FTC policy. So far, Chairman Leibowitz's suggestion that the FTC should seek disgorgement more frequently remains an aspiration rather than a statement of current enforcement policy. Whether that will change with the arrival of two new Commissioners remains to be seen. ■

1 Concurring Statement of Commissioner Jon Leibowitz, FTC v. Ovation Pharmaceuticals, Inc., FTC File No. 0810156 (Dec. 16, 2008), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf.

2 Complaint, United States v. KeySpan Corp., Civ. No. 10-1415 (S.D.N.Y. Feb. 22, 2010)), *available at* http://www.justice.gov/atr/cases/f255500/255507.htm; Proposed Final Judgment, *id.*, *available at* http://www.justice.gov/atr/cases/f255500/255509.htm.

3 Complaint, *KeySpan*, Civ. No. 10-1415, ¶¶ 12–19.

4 *Id.* ¶¶ 20–25.

5 *Id.* ¶¶ 26–27.

6 *Id.* ¶¶ 25, 28–29.

7 *Id.* ¶¶ 30–34.

8 Proposed Final Judgment, *KeySpan*, Civ. No. 10-1415, ¶ III.A.

9 Complaint for Permanent Injunction and Other Equitable Relief, Including Disgorgement of Unlawful Monopoly Profits ¶¶ 39–46, FTC v. Ovation Pharmaceuticals, Inc. (renamed FTC v. Lundbeck Inc.), Civ. No. 08-cv-6381 at 73–87 (D. Minn. Jan. 29, 2010), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationcmpt.pdf.

10 *Id.* ¶¶ 1–3, 18–25.

11 *Id.* ¶¶ 39–46.

12 *Id.* at 10–11, ¶¶ 1–4.

13 Post-Trial Brief of Plaintiffs Federal Trade Commission and State of Minnesota, FTC v. Lundbeck, Civ. No. 08-cv-6381 at 42 (D. Minn. Jan. 29, 2010).

14 15 U.S.C. § 53(b).

15 *Id.*

16 FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 36 (D.D.C. 1999); FTC v. Abbott Labs., Inc., 1992 U.S. Dist. LEXIS 18030 (D.D.C. 1992).

17 *Mylan*, 62 F. Supp. 2d at 36 (citing FTC v. Evans Prods. Co., 775 F.2d 1084, 1087 (9th Cir. 1985); FTC v. H.N. Singer, 668 F.2d 1107, 1111 (9th Cir. 1982); FTC v. Virginia Homes Mfg. Corp., 509 F. Supp. 51, 54 (D. Md.), *aff'd*, 661 F.2d 920 (4th Cir. 1981)).

18 *Mylan*, 62 F. Supp. 2d at 36.

19 *Id.* at 36–37 (citing Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288, 291092 (1960)).

[20] *Mylan*, 62 F. Supp. 2d at 37.

[21] 15 U.S.C. § 26.

[22] 15 U.S.C. § 4. In addition, Section 4A of the Clayton Act permits the United States to recover treble damages if it is injured in its business or property by an antitrust violation. 15 U.S.C. § 15a. This provision is limited, however, to losses suffered by the United States.

[23] 15 U.S.C. § 26.

[24] *In re* Multidistrict Vehicle Air Pollution Litig., 538 F.2d 231, 234 (9th Cir. 1976).

[25] *Mylan*, 62 F. Supp. 2d at 40–42. The court limited the states to pursuit of damages to state entities and citizens arising from direct purchases from the defendants of the products at issue. *Id.* at 42.

[26] Competitive Impact Statement, United States v. KeySpan Corp., Civ. No. 10-1415 at 8–9 (S.D.N.Y. Feb. 22, 2010), *available at* http://www.justice.gov/atr/cases/f255500/255578.pdf.

[27] 15 U.S.C. § 4.

[28] Keyspan Competitive Impact Statement, *supra* note 26, at 8.

[29] *See* John Graubert, Principal Deputy Gen. Counsel, Fed. Trade Comm'n, Civil Remedies Available to the Federal Trade Commission, Comments to the Antitrust Modernization Commission 2 nn.4–5 (Dec. 1, 2005), *available at* http://www.ftc.gov/os/2005/12/051202civil.pdf.

[30] See, e.g., Commonwealth Land Title Ins. Co., 126 F.T.C. 680, 688 (1998) (refund of excess charges for alleged price fixing and proposed anticompetitive merger); FTC v. College of Physicians-Surgeons of Puerto Rico, Civ. No. 97-2466 HL (D.P.R. Oct. 2, 1997) ($300,000 restitution to Puerto Rico for alleged price fixing); Binney & Smith Inc., 96 F.T.C. 625 (1980) ($1 million in consumer redress for alleged price fixing); Milton Bradley Co., 96 F.T.C. 638 (1980) ($200,000 in consumer redress for alleged price fixing); American Art Clay Co., 96 F.T.C. 809 (1980) ($25,000 in consumer redress for alleged price fixing); *see also* Fed. Trade Comm'n, Policy Statement on Monetary Equitable Remedies in Competition Cases at n.6 (July 25, 2003) [hereinafter FTC Policy Statement], *available at* http://www.ftc.gov/os/2003/07/disgorgementfrn.htm (describing FTC v. Mead Johnson & Co., involving restitution in kind for alleged bid rigging; FTC v. Am. Home Prods. Corp., same; and FTC v. Joseph Dixon Crucible Co., involving $525,000 in consumer redress and $75,000 civil penalty for alleged price fixing).

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

[32] *Id.* at 33–34; *see also* Amended Complaint, FTC v. Mylan Labs., Inc., Civ. No. 1:98CV03114 (D.D.C. Feb. 8, 1999), *available at* http://www.ftc.gov/os/1999/02/mylanamencmp.htm.

[33] *See* Order and Stipulated Permanent Injunction, FTC v. Mylan Labs., Inc., Civ. No. 1:98CV03114 (D.D.C. Nov. 29, 2000), *available at* http://www.ftc.gov/os/2000/11/mylanordandstip.htm.

[34] Final Order and Stipulated Permanent Injunction, FTC v. The Hearst Trust, Civ. No. 1:01CV00734 (D.D.C. Dec. 14, 2001), *available at* http://www.ftc.gov/os/2001/12/hearstfinalorder.pdf.

[35] FTC Policy Statement, *supra* note 30.

[36] *Id.*

[37] *See* Stipulated Final Order and Permanent Injunction, FTC v. Perrigo Co. and Alpharma Inc., Civ. No. 1:04CV01937 (D.D.C. Aug. 12, 2004), *available at* http://www.ftc.gov/os/caselist/0210197/040812perrigo.pdf and http://www.ftc.gov/os/caselist/0210197/040812alpharma.pdf.

[38] Press Release, Fed. Trade Comm'n, Generic Drug Marketers Settle FTC Charges (Aug. 12, 2004), *available at* http://www.ftc.gov/opa/2004/08/perrigoalpharma.shtm.

[39] Concurring Opinion of Commissioner Jon Leibowitz, Rambus, Inc., FTC Docket No. 9302 at 11–12 (Aug. 2, 2006), *available at* http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf; Jon Leibowitz, Commissioner, Fed. Trade Comm'n, Tales from the Crypt, Remarks at FTC Section 5 Workshop at 6 (Oct. 17, 2008), *available at* http://www.ftc.gov/speeches/leibowitz/081017section5.pdf ("our ability to seek restitution or disgorgement is . . . subject to our internal policy of not pursuing monetary relief except in cases of clear violations").

[40] Defendant Lundbeck Inc.'s Post-Trial Brief, FTC v. Lundbeck, Civ. No. 08-cv-6381 at 73–87 (D. Minn. Jan. 29, 2010).

[41] Post-Trial Response of Plaintiffs Federal Trade Commission and State of Minnesota, FTC v. Lundbeck, Civ. No. 08-cv-6381 at 28–30 (D. Minn. Feb. 19, 2010).

[42] *See* Concurring Statement of Commissioner J. Thomas Rosch, FTC v. Ovation Pharmaceuticals, Inc. (Dec. 16, 2008), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf ("there is reason to believe that Merck's sale of Indocin to Ovation had the effect of enabling Ovation to exercise monopoly power in its pricing of Indocin, which Merck could not profitably do prior to the transaction.").

[43] Post-Trial Brief of Plaintiffs Federal Trade Commission and State of Minnesota, FTC v. Lundbeck, Civ. No. 08-cv-6381 at 26–27 (D. Minn. Jan. 29, 2010).

[44] *Id.* at 42.

[45] Concurring Statement of Commissioner Jon Leibowitz, FTC v. Ovation Pharmaceuticals, Inc. at 2 (Dec. 16, 2008), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf.

[46] Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79 (2009).

[47] *Id.* at 82.

[48] *Id.* at 83.

[49] *See, e.g.*, Oral Statement of Commissioner Jon Leibowitz, *Hearing of the Senate Judiciary Comm.* 2 (Jan. 17, 2007), *available at* http://www.ftc.gov/speeches/leibowitz/071701oralstatement.pdf ("We put pharmaceutical companies 'on notice' that we would consider all available remedies—including disgorgement of profits—against this behavior in the future."); Oral Statement of Commissioner Jon Leibowitz, *Hearing of the Senate Special Comm. on Aging* 2 (July 20, 2006), *available at* http://www.ftc.gov/speeches/leibowitz/060720oralstatementliebowitz.pdf (same).

[50] *Id. But see* Arkansas Carpenters Health and Welfare Fund v. Bayer AG, Docket Nos. 05-2851-cv(L), 05-2852-cv(CON), slip op. (2d Cir. Apr. 29, 2010) (questioning Second Circuit opinion in *Joblove v. Barr Labs., Inc.* (*In re* Tamoxifen Citrate Antitrust Litig.), 466 F.3d 187 (2d Cir. 2005), and inviting petition for en banc rehearing).

[51] Competitive Impact Statement, United States v. KeySpan Corp., Civ. No. 10-1415 (S.D.N.Y. Feb. 22, 2010), *available at* http://www.justice.gov/atr/cases/f255500/255578.pdf. The DOJ has obtained monetary relief in instances in which a party has violated a court order. *See* Settlement Agreement and Order, United States v. Cal Dive Int'l Inc., Civ. No. 1:05CV02041 (D.D.C. Nov. 26, 2007), *available at* http://www.justice.gov/atr/cases/f227900/227965.htm) (civil payment of $2 million); Settlement Agreement and Order, United States v. Smith Int'l, Inc., Civ. No. 93-2621 (D.D.C. Dec. 22, 1999), *available at* http://www.justice.gov/atr/cases/f240000/240019.htm (payment of $13.1 million).

[52] Typically, a company might hedge against low prices and corresponding reduced profits by entering into a contract that would compensate the company if prices were low at the price of giving up some revenues if prices were high. The hedge arranged by KeySpan did the opposite.

[53] Complaint at ¶¶ 30–32, United States v. KeySpan Corp., Civ. No. 10-1415 (S.D.N.Y. Feb. 22, 2010).

[54] *Id.* ¶ 25.

[55] *Id.* ¶¶ 30–32.

[56] *See id.*, introductory paragraph and ¶¶ 30–35 (discussing the competitive effect of the "KeySpan Swap," defined as the agreement between KeySpan and the financial services company, rather than the competitive effect of the combination of the KeySpan Swap and the offsetting agreement between the financial services company and Astoria).

[57] FED. ENERGY REGULATORY COMM'N, ENFORCEMENT STAFF REPORT, FINDINGS OF A NON-PUBLIC INVESTIGATION OF POTENTIAL MARKET MANIPULATION BY SUPPLIERS IN THE NEW YORK CITY CAPACITY MARKET 3 (Feb. 28, 2008), *available at* http://www.ferc.gov/legal/staff-reports.asp.

[58] *Keyspan* Competitive Impact Statement, *supra* note 26, at 7 n.2.

[59] *Id.* at 9.

[60] *Id.* at 10.