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Can the Justice Department Seek Disgorgement for a Sherman Act Violation?

Jeffrey May (Wolters Kluwer) · Wednesday, February 9th, 2011

The federal district court in New York City ruled last week that the Department of Justice was entitled to seek disgorgement as a remedy for an alleged Sherman Act violation. The court approved a consent decree, which required KeySpan Corporation to surrender $12 million to the U.S. Treasury to settle a federal antitrust lawsuit brought nearly a year ago.

In February 2010, the Department of Justice Antitrust Division filed a complaint against KeySpan, the largest supplier of electricity generating capacity in the New York City market, for violating Sec. 1 of the Sherman Act. The government contended that KeySpan entered into an agreement restraining competition in the New York City electricity capacity market. The challenged "swap agreement" had provided KeySpan with an indirect financial interest in the sale of electricity generating capacity by its largest competitor, which obviated KeySpan's need to bid competitively during the sale of its own electricity generating capacity at auction. KeySpan's alleged anticompetitive bidding drove up capacity prices as a whole and, in turn, increased the cost of electricity to consumers in New York City.

At the same time the government filed its lawsuit, it filed a proposed consent decree, settling the allegations. The consent decree would require KeySpan to disgorge $12 million in profits purportedly obtained through the anticompetitive swap agreement.

According to the government's competitive impact statement filed with the pending decree, disgorgement was an available remedy—even though the Antitrust Division had not previously sought disgorgement for a Sherman Act violation—and the best remedy in this case. "Requiring KeySpan to disgorge a portion of its ill-gotten gains from its recent illegal behavior is the only effective way of achieving relief against KeySpan, while sending a strong message to those considering similar anticompetitive conduct."

Because the swap agreement had expired and KeySpan no longer owned the generating assets associated with the anticompetitive conduct, injunctive relief would not have been meaningful, the government argued. Moreover, a private damages action against KeySpan would face significant obstacles imposed by the filed rate doctrine of *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922). The government

explained that the filed rate doctrine bars remedies that result, in effect, in payment by customers and receipt by sellers of a rate different from that on file for the regulated service.

Disgorgement was appropriate, the federal district court ruled. The broad language of Sec. 4 of the Sherman Act, which gave district courts "jurisdiction to prevent and restrain" violations of the Sherman Act and authorized the attorney general "to institute proceedings in equity to prevent and restrain" antitrust violations, did not contain language divesting a court of its inherent equitable powers to order disgorgement. Moreover, disgorgement was particularly appropriate in this case, since the alleged anticompetitive conduct had ceased. In addition, the court determined that disgorgement comports with established principles of antitrust law.

The court also addressed public comments from AARP and others, urging rejection of the consent decree. The public comments leveled three principal objections to the consent decree: (1) the government provided an insufficient factual basis for its calculation of the net revenues earned by KeySpan under the swap agreement; (2) $12 million in disgorgement was inadequate because it was neither commensurate with KeySpan's enrichment under the swap agreement nor sufficient to deter future anticompetitive conduct; and (3) the settlement proceeds should have been returned to New York City electricity customers, not the U.S. Treasury.

The court held, however, that the government's revenue calculations were adequately supported by the record; the disgorgement amount was adequate in light of the government's decision to forgo discovery and a trial in favor of settlement and adequate as a deterrent; and payment of the disgorged proceeds to the Treasury was "within the reaches of the public interest," especially in light of the government's valid concerns that return of the disgorged proceeds to New York City electricity customers could circumvent the filed-rate doctrine.

The court noted that there were no decisions concerning a district court's power to order disgorgement to remedy a Sherman Act violation. The court identified, however, a 2006 Second Circuit decision in which disgorgement was held to be available to remedy violations of the securities laws (*SEC v. Cavanagh*, 445 F.3d 105).

FTC's Use of Disgorgement in Competition Cases

Although the court did not mention the Federal Trade Commission's use of disgorgement as a remedy in competition cases, the agency has used disgorgement sparingly over the last decade.

In 2000, Mylan Laboratories, Inc., agreed to pay $100 million in disgorged profits to settle FTC charges that the pharmaceutical company conspired to deny its competitors ingredients necessary to manufacture two widely prescribed anti-anxiety drugs, lorazepam and clorazepate. At that time, the FTC's Bureau of Competition Director, Richard Parker, said that the settlement "serves notice of the Commission's determination to pursue investigations of such behavior and to seek disgorgement of ill-gotten gains in appropriate cases." The federal district court in Washington, D.C.

had ruled that the FTC was entitled to seek monetary relief, such as disgorgement of profits, under Sec. 13(b) of the FTC Act (*FTC v. Mylan Laboratories, Inc.*, **1999-2 Trade Cases ¶72,573**, 62 F. Supp. 2d 25).

More recently, the FTC sought disgorgement of unlawfully obtained profits in an action against global pharmaceutical company Lundbeck, Inc., challenging a 2006 acquisition. The case was dismissed (*FTC v. v. Lundbeck, Inc.*, **2010-2 Trade Cases ¶77,160**), but the agency has appealed.

The February 2, 2011, Memorandum and Order in *U.S. v. KeySpan Corp.*, 10-cv-1415 (WHP), will appear at **2011-1 Trade Cases ¶77,320**, and the corresponding final judgment will appear at **2011-1 Trade Cases ¶77,321**.