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INSIGHTS

FTC Obtains $26.8 Million in Disgorgement to Settle Monopolization Claims

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On April 17, 2015, the Federal Trade Commission (FTC) entered into a settlement with Cardinal Health, Inc. (Cardinal) to resolve allegations that Cardinal, the largest and in certain areas the sole operator of radiopharmacies, illegally monopolized the market for the sale and distribution of radiopharmaceuticals. ***Federal Trade Commission v. Cardinal Health, Inc.***, 1:15-cv-03031 (S.D.N.Y. 2015). As part of the settlement, Cardinal agreed to disgorge $26.8 million of unlawfully obtained profits. This case marks the FTC's first disgorgement order in over ten years and provides insight into the FTC's considerations when seeking such monetary remedies.

Factual Background

Radiopharmaceuticals are drugs containing radioactive isotopes which aid in the diagnosis and treatment of various illnesses. A radiopharmacy typically receives 60% or more of its revenue from a specific type of radiopharmaceutical, known as heart perfusion agents (HPAs), which are used to conduct heart stress tests. Therefore, as a practical matter, access to an HPA is necessary for a radiopharmacy to operate and compete. During the relevant timeframe, there were only two manufacturers of HPAs. According to the FTC majority in a 3-2 decision, Cardinal obtained a distribution monopoly of the only two HPA brands in 25 geographic markets and unlawfully maintained that monopoly by employing various tactics to cause both HPA manufacturers to deny distribution rights to numerous potential market entrants. Cardinal's resulting *de facto* exclusive distribution rights denied customers in those markets the benefits of competition and allowed Cardinal to charge up to twenty percent higher prices for the drugs than in competitive markets.

Under the terms of the proposed Final Order and Stipulated Permanent Injunction (Proposed Order), Cardinal is prohibited from engaging in conduct similar to that complained of by the FTC. In addition, for the next ten years, Cardinal must submit prior notification to the FTC before it can acquire any interest in a radiopharmacy located within sixty miles of one of its existing facilities, irrespective of whether the acquisition would otherwise be reportable under the Hart-Scott-Rodino Act.

The Proposed Order also requires Cardinal to disgorge unlawfully earned profits of $26.8 million into a fund to be distributed for the benefit of customers injured by its conduct. This disgorgement amount is the second highest ever obtained by the FTC, and the first since the FTC withdrew its 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases (2003 Policy). *See* August 7, 2012 Bracewell Update: ***FTC Signals Potential for Greater Use of Monetary Remedies in Competition Cases***.

Legal Analysis
According to the Statement of the FTC in this case, the FTC withdrew the 2003 Policy "to dispel the notion that the FTC would seek disgorgement and restitution remedies only in 'exceptional' cases." Since the withdrawal, the FTC has sought disgorgement in more instances than the previous nine years that the 2003 Policy was in effect. (Two requests for disgorgement are pending.) Nevertheless, in the *Cardinal* case, the majority seems to have applied the same key criteria from the 2003 Policy: (1) a clear violation of the antitrust laws, (2) a reasonable basis for calculating the amount of ill-gotten gains, and (3) the availability of other means for seeking monetary relief, such as private lawsuits (which, in the present case, could face statute-of-limitation hurdles).

The majority's opinion highlighted the Commission's dual role to both prevent future harm and remedy "actual, realized effects of antitrust violations." It echoed the U.S. Supreme Court in stating that when the government is unable to prevent harm "at the incipient stages of the unlawful project," it would frustrate the objectives of the antitrust laws to permit companies to retain their unlawful profits.

Commissioners Maureen K. Ohlhausen and Joshua D. Wright issued separate dissenting statements asserting that disgorgement was not appropriate in this case. Commissioner Ohlhausen questioned whether Cardinal's behavior was a clear violation of the antitrust laws, and Commissioner Wright argued that the majority failed to acknowledge plausible efficiency justifications for Cardinal's conduct. They also reiterated their shared opposition to the withdrawal of the 2003 Policy, arguing that there is now a lack of guidance on the pursuit of disgorgement as a remedy and questioning, as a policy matter, the types of competition cases in which disgorgement may be appropriate.

Takeaways
The *Cardinal* case is further evidence that the FTC may increasingly seek disgorgement or restitution remedies in competition cases, especially where it has reason to believe that an injunction alone will not provide adequate relief. Quoting from the U.S. Supreme Court, the majority emphasized that "adequate relief" in a monopolization case should both end the anticompetitive conduct and deprive the defendants of any of the benefits. Such remedies may no longer be limited to "exceptional" cases.

While noting that disgorgement is just "one of many remedial tools" at its disposal, the majority in this case clearly believes that monetary equitable relief such as restitution and disgorgement are within the FTC's jurisdiction and an appropriate use of its powers, noting that eight circuit courts of appeal and district courts in the remaining four federal circuits have held that the FTC may seek such relief. This case also demonstrates that conduct that took place several years ago may still be subject to antitrust agency scrutiny today.

Above all, businesses must exercise caution to act within the constraints of legitimate competitive conduct and not run afoul of the antitrust laws, and should seek expert guidance when in doubt.