



Federal Trade Commission

The Federal Trade Commission and Monetary Remedies*

Remarks of Joshua D. Wright**
Commissioner, Federal Trade Commission

at the

18th Annual Competition Law and Policy Workshop
European University Institute Department of Law

Florence, Italy

July 19, 2013

Good morning. Thank you for the kind introduction and warm welcome. I am delighted to be here today. I'd like to thank European University Institute Department

* A version of this speech will be published in Philip Lowe, Mel Marquis and Giorgio Monti, eds., *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law*, Hart Publishing, forthcoming.

** The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my advisor Derek Moore and to my intern Brady Cummins for their invaluable assistance in preparing this speech.

of Law for hosting me this morning, and Philip Lowe, Mel Marquis, and Giorgio Monti for organizing this workshop and inviting me to share my views.

I. INTRODUCTION

Today I would like to talk about the approach taken by the Federal Trade Commission (“FTC”) in pursuing monetary remedies against defendants in competition cases. Unlike the Department of Justice, which has the broad legal authority to pursue all sorts of remedies against antitrust defendants, the FTC’s authority is limited to pursuing so-called “equitable” remedies.¹ Equitable remedies typically involve court orders directing a defendant or defendants to engage or not engage in certain behavior, *i.e.*, an injunction. In a merger case, the FTC will often ask a court to direct the parties divest a business in a particular geographic market. Or in a case alleging anticompetitive conduct, the FTC might ask a court to issue an injunction preventing the defendants from engaging in the conduct the FTC alleges to be anticompetitive. Although monetary remedies are typically remedies awarded “at law” rather than “in equity” – this distinction is a function of the twin court systems of law and equity in Anglo-American law – a court exercising its equitable powers can order a defendant to pay monies in certain circumstances. One broad category of equitable remedies that

¹ 15 U.S.C. §53(b).

involves a defendant paying monies is “disgorgement,” which is a remedy requiring the defendant to in effect pay back his ill-gotten gains.²

The FTC did not pursue disgorgement against antitrust defendants until 1999 when it sought \$120 million from a pharmaceutical company the Commission alleged had overcharged consumers.³ In 2003, after accepting comments from interested parties, the FTC adopted a Policy Statement on Monetary Remedies in Competition Cases that was designed to provide guidance to the business community regarding when and under what conditions the FTC would seek monetary remedies against antitrust defendants.⁴ In 2012, before I joined the Commission, the Statement was clandestinely withdrawn – that is, without the opportunity for public comment from interested parties – over the dissent of Commissioner Ohlhausen.⁵

The Withdrawal of the Statement is concerning for several reasons. First, the Withdrawal was predicated upon a belief – that the Statement “chilled the pursuit of monetary remedies”⁶ while it was in effect – that has no empirical support. Second, the

² See *United States v. Grinnell Corp.*, 384 U.S. 563, 577 (1966) (stating that adequate relief in a monopolization case can include “depriv[ing] the defendants of any of the benefits of the illegal conduct”); 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 325a (3d ed. 2006) (“[E]quity relief may include . . . the disgorgement of improperly obtained gains.”).

³ *FTC v. Mylan Labs, Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999).

⁴ Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45820 (Aug. 4, 2003) [hereinafter Policy Statement or Statement].

⁵ Statement of the Commission, Effecting the Withdrawal of the Commission’s Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47070 (July 31, 2012) [hereinafter Withdrawal], available at <http://www.ftc.gov/os/2012/07/120731commissionstatement.pdf>.

⁶ *Id.*

Commission in withdrawing the Statement incorrectly suggests that, because recent decisions by the Supreme Court of the United States have made it more difficult for a private plaintiff to bring a successful antitrust case, antitrust enforcement agencies in the U.S. ought to “pick up the slack” by pursuing monetary remedies with more frequency. In other words, the Commission suggests a perceived reduction in private enforcement of the antitrust laws requires greater public enforcement efforts to achieve optimal deterrence. This proposition makes sense only if there is some evidence that the current state of the law results in under-deterrence of anticompetitive conduct. I am aware of no such evidence and, in fact, current economic thinking suggests that, at least in the context of single-firm conduct and vertical restraints, pursuing monetary penalties by seeking disgorgement against defendants with more frequency would almost certainly deter efficient behavior and harm consumers.

There can be no doubt that disgorgement is a useful tool for the antitrust enforcer. In many cases, disgorgement of profits may be superior to divestiture or other behavioral remedies that require costly oversight by regulators to ensure compliance. Disgorgement in such contexts may sufficiently deter potential wrongdoing and reduce the cost of administering the antitrust system. In my view, however, the Commission ought not to pursue disgorgement to remedy against conduct that has plausible efficiency justifications. This is because, in the context of conduct that can be efficient and benefit consumers in some contexts and harm competition and consumers in others

– here I am referring to vertical distribution restraints imposed by a firm with market power – antitrust enforcers should be more worried about over-deterrence than under-deterrence.

In any event, the Commission’s pursuit of certain remedies affects how businesses structure their dealings. Indeed, shaping the incentives of all market participants – and not punishment – is the point of pursuing remedies in many antitrust cases. For this reason, I am disappointed the Commission decided to withdraw the Policy Statement without a substantive discussion about the proper role of monetary remedies in the public antitrust enforcement system. Further, the Withdrawal is troubling because the absence of guidance creates uncertainty within the business community, which will undoubtedly affect firms’ behavior in ways that are unpredictable and will unnecessarily run the risk of harming the consumers we are charged with protecting.

II. Summary of the 2003 Policy Statement

In the late 1990s and early 2000s, the FTC sought disgorgement in two antitrust cases.⁷ Though the Commission had long sought disgorgement of profits in consumer protection cases, seeking disgorgement in antitrust cases was breaking new ground.⁸

⁷ See *Mylan*, 62 F. Supp. 2d 25; *FTC v. The Hearst Trust*, No. 1:01CV000734 (D.D.C. Dec. 14, 2001).

⁸ See Alden F. Abbott, *FTC Monetary Remedies Policy and the Limits of Antitrust*, ANTITRUST SOURCE, Dec. 2012, art. 2, at 1; David K. Park & Richard Wolfram, *The FTC’s Use of Disgorgement in Antitrust Actions Threatens to Undermine the Efficient Enforcement of Federal Antitrust Law*, ANTITRUST SOURCE, Sept. 2002, art. 5, at 1.

The Commission's efforts to pursue disgorgement in antitrust cases led to critical commentary⁹ and the Commission ultimately requested comments from the public about the conditions under which it would be appropriate for the Commission to pursue disgorgement and other monetary remedies in antitrust cases.¹⁰ After reviewing those comments, the Commission issued a Policy Statement in July 2003 with bipartisan support from all five commissioners.¹¹ The Statement outlined three factors the Commission would consider: (1) whether the violation of law is "clear"; (2) whether there is a reasonable basis upon which to calculate the disgorgement payment; and (3) whether remedies in other litigations are likely to fail to accomplish fully the purposes of the antitrust laws.¹² The Policy Statement was later endorsed without dissent by the Antitrust Modernization Commission.¹³

III. The Commission's 2012 Withdrawal

Without asking for public comments from the business community, the Commission decided to withdraw the Statement in 2012 and gave several reasons that, in my view, are less than satisfying.¹⁴ The Commission offered both legal and policy reasons for withdrawing the statement. First, the Commission criticized the legal basis for the three factors laid out in the Guidelines. On the Statement's guidance that

⁹ See Park & Wolfram, *supra* note 8.

¹⁰ Remedial Use of Disgorgement, 66 Fed. Reg. 67254 (Dec. 28, 2001).

¹¹ Policy Statement, *supra* note 4.

¹² *Id.*

¹³ ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 288 (2007).

¹⁴ Withdrawal, *supra* note 5.

monetary remedies will be pursued only when the violation is “clear,” the Commission observed that “rarity or clarity of the violation is not an element considered by courts in disgorgement requests Whether conduct is common or novel, clearly a violation or never before considered, has little to do with whether the conduct is anticompetitive; some novel conduct can violate the antitrust laws and can be even more egregious than clear violations.”¹⁵ Next, the Commission criticized the requirement in the Policy Statement that the Commission consider whether alternative plaintiffs may seek monetary relief, which could potentially obviate the need for the Commission to seek disgorgement. The Commission reasoned that the presence of alternative plaintiffs seeking monetary recovery “is relevant in this context, but it is not dispositive. It is only one of several questions that might usefully be asked in deciding whether a Commission imposed monetary remedy is appropriate and necessary.”¹⁶ Finally, notwithstanding that the factors set forth in the Statement were not legal requirements, the Commission in withdrawing the statement noted that it was “concerned that parties could mistakenly argue that the factors laid out in the Policy Statement are binding on the Commission, thus creating an unnecessary side issue in litigation.”¹⁷

The Commission also put forward two policy reasons for withdrawing the Statement. First, it argued that, in its “experience,” “the Policy Statement has chilled

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1 n.2.

the pursuit of monetary remedies in the years [since it was issued].”¹⁸ Second, and most interestingly from my perspective, the Commission also suggested that some recent decisions by the Supreme Court justify the Commission’s increased use of disgorgement as a remedy in antitrust cases: “[a]t 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.”¹⁹

IV. The Commission’s Reasons for Withdrawing the Statement are not Persuasive

The Commission’s Withdrawal is troubling in many respects. First, unlike its decision to adopt the Policy Statement in 2003, the Commission’s decision to withdraw the Statement in 2012 was not unanimous. My colleague Commissioner Ohlhausen dissented from the Commission’s withdrawal and, in doing so, raised several interesting and important issues.²⁰ Indeed, the fact that the Statement was withdrawn with minimal deliberation by the Commissioners, without a request for public comment, and over the dissent of a Commissioner is troubling by itself.²¹ Moreover, as Commissioner Ohlhausen points out, withdrawing the Statement obviates exactly what

¹⁸ *Id.* at 2.

¹⁹ *Id.* (citing Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79 (2009)).

²⁰ Statement of Commissioner Maureen K. Ohlhausen, Dissenting from the Commission’s Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47071 (July 31, 2012) [hereinafter Ohlhausen Dissent], *available at* <http://www.ftc.gov/os/2012/07/120731ohlhausenstatement.pdf>.

²¹ *Id.*

the Statement attempted to do in the first place: provide the business community with guidance regarding the Commission's pursuit of monetary remedies in antitrust cases.

Indeed, the Policy Statement was just that – a statement of policy regarding how the Commission would exercise its legal enforcement authority. If “rarity or clarity of the violation” was an element considered by courts in deciding whether to award disgorgement, then pursuing disgorgement only in such cases could not be a matter of Commission policy; under the law, the Commission would be forbidden from seeking disgorgement in cases in which the violation is somehow less than clear. This is simply another way of stating that a policy statement has no utility when it merely restates the law. Accordingly, it is of no moment to criticize a policy statement when it does something more than simply restate the law by arguing that the policy statement imposes a requirement that the law does not impose. As Commissioner Ohlhausen explains, a statement that the Commission will rely upon existing law could be used to justify virtually any decision by the Commission.²²

More fundamentally, the Commission suggests in its Withdrawal that *conduct* cannot be “novel” and constitute a “clear” violation of the law. I see no reason that this observation must be true; indeed, it is not difficult to come up with examples of novel yet clear violations. Clarity does not come only from past experience. Novel conduct can certainly constitute a clear violation of the antitrust laws if it harms competition by

²² *Id.*

restricting output and raising price and is without any efficiency justification. For example, there are myriad forms of deception, not all of which have been challenged in court as antitrust violations and, to the extent that an egregious example of deception by a firm with market power results in that firm increasing or maintaining monopoly power, that deception could constitute a clear violation of the antitrust laws that would justify disgorgement of profits even if it is not closely similar to a past successful antitrust case. The same can be said of rival firms concocting novel means of naked price-fixing. Novel or not in the form of their implementation, naked price-fixing schemes clearly violate Section 1 of the Sherman Act.

Another reason the Commission gave for withdrawing the Statement is that the Statement “chilled” the Commission from pursuing monetary remedies in antitrust cases.²³ Yet the Commission cited no data or other evidence to support this assertion. Indeed, Commissioner Ohlhausen stated, “I have not been presented with any evidence that the Policy Statement has inappropriately constrained the Commission in the nine years it has been in effect.”²⁴ Lack of data supporting this view is yet another troubling aspect of the Withdrawal. A review of Commission cases supports Commissioner Ohlhausen’s position. Indeed, the Commission sought disgorgement in two cases

²³ Withdrawal, *supra* note 5, at 2.

²⁴ Ohlhausen Dissent, *supra* note 20.

during the nine-year period before the Policy Statement was in effect,²⁵ and also sought disgorgement in two cases during the nine-year period while the Policy Statement was in effect.²⁶ These data could support the conclusion that the Commission does not pursue disgorgement very often in antitrust cases – only four times in eighteen years – but they do not provide support for the conclusion that the Policy Statement has had *any* effect on the Commission’s pursuit of monetary remedies, much less that the Statement has chilled Commission efforts to pursue disgorgement.

It is possible, however, to expand the relevant universe of cases to consider remedies that are similar to disgorgement but do not actually require a monetary payment from the defendant. The Commission has on a few occasions in recent years sought a remedy whereby the owner of standard-essential patents either cannot enforce the patents or must license the patents on a royalty-free basis.²⁷ Requiring a patent holder to grant a royalty-free license to certain patents is similar to disgorgement in that the remedy effectively takes profits away from the defendant. In the typical context, a would-be licensee of the defendant’s patents complains that the defendant is causing

²⁵ *FTC v. The Hearst Trust*, No. 1:01CV00734 (D.D.C. Dec. 14, 2001) (settlement resulting in defendant paying \$19 mil. in disgorgement); *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999) (holding that the FTC could sue for monetary damages as well as injunctive relief, and resulting in a \$100 million settlement).

²⁶ *FTC v. Lundbeck Inc.*, 650 F.3d 1236 (8th Cir 2011) (affirming the district court’s ruling denying any relief on antitrust grounds); *FTC v. Perrigo Co.*, No. 1:04CV01397 (RMC) (D.D.C. July 21, 2006) (resulting in a settlement that included a \$6.25 million disgorgement).

²⁷ *Union Oil Co. of Cal.*, 140 F.T.C. 123 (2005); *Dell Computer Corp.*, 121 F.T.C. 616 (1996); *Robert Bosch GmbH*, No. C-4377 (F.T.C. Nov. 21, 2012); *Opinion of the Commission on Remedy, Rambus, Inc.*, No. 9302 (F.T.C. Feb. 5, 2007), *available at* <http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf>.

“hold up” by engaging in conduct that does not comport with the typical promise SEP-holders make to license their patents on fair, reasonable, and non-discriminatory (“FRAND”) terms. This conduct can take the form of seeking an injunction against a willing licensee or demanding “supra-FRAND” royalty rates. In this context, when the Commission requires the patent-holder to license the patents royalty free, it is in effect “disgorging” any profit the defendant would have made had it been able to reach licensing agreements with the complaining licensees. Indeed, Unocal, a defendant in one of the cases, argued that the royalty-free licensing requirement in that case amounted to “confiscation and disgorgement.”²⁸

Adding the royalty-free licensing cases to the count of FTC actions further weakens the Commission’s claim that the Statement on monetary remedies has “chilled” the Commission’s disgorgement efforts. Because only one of the four royalty-free licensing cases occurred before the Statement was adopted, adding these cases to the mix would mean that the Commission has pursued disgorgement with *greater frequency after* the Statement was adopted. Of course, the sample size remains very small so it would be a mistake to make too much of the numbers other than to point out that they do not appear to support the Commission’s concern that the Policy Statement chilled pursuit of disgorgement. Still, these cases raise a number of interesting issues

²⁸ Respondent’s Trial Brief at 189, *Union Oil Co. of Cal.*, 140 F.T.C. 123 (2005)(No. 9305), *available at* <http://www.ftc.gov/os/adjpro/d9305/041008unocaltrialbrief.pdf> (“Even though framed as a ‘cease and desist’ remedy, there is no question that the essence of the relief sought in this action is a confiscation and disgorgement of Unocal’s patent rights in California.”).

regarding remedies. The *Bosch* case, the most recent decision by the Commission requiring royalty-free licensing, was followed six weeks later by the Commission's consent agreement with Google relating to Google's failure to license standard-essential patents.²⁹ In the provisionally accepted agreement with Google, the Commission did not require royalty-free licensing to remedy the alleged law violation, instead requiring that Google go through a dispute resolution process before seeking injunctive relief against a willing licensee.³⁰ The Commission failed to explain why it chose two different remedies in two cases involving similar conduct. Perhaps if the Policy Statement were in effect, the Commission would at least have had to grapple with this issue.

V. Would a Reduction in Private Antitrust Enforcement Justify Additional Efforts by Public Enforcers to Pursue Monetary Remedies?

I would like to spend the balance of my time discussing what I find to be the most interesting aspect of the Commission's decision to withdraw the Policy Statement: the idea that the FTC needs to pursue monetary remedies with more frequency because recent Supreme Court cases have made it more difficult for private plaintiffs to win antitrust cases. In its Complaint against Intel, former Chairman Leibowitz and former

²⁹ The Commission reached settlements with both defendants before I became Commissioner and I did not participate as Commissioner in considering the substance of either agreement.

³⁰ Motorola Mobility LLC, No. 121-0120, 2013 WL 124100 (F.T.C. Jan. 3, 2013).

Commissioner Rosch issued a joint statement explaining why the Commission sued Intel under Section 5 of the FTC Act rather than under Section 2 of the Sherman Act:

[C]oncern over class actions, treble damages awards, and costly jury trials have caused many courts in recent decades to limit the reach of antitrust. The result has been that some conduct harmful to consumers may be given a “free pass” under antitrust jurisprudence, not because the conduct is benign but out of a fear that the harm might be outweighed by the collateral consequences created by private enforcement. For this reason, we have seen an increasing amount of potentially anticompetitive conduct that is not easily reached under the antitrust laws, and it is more important than ever that the Commission actively consider whether it may be appropriate to exercise its full Congressional authority under Section 5.³¹

Though the argument is framed in the context of the FTC’s increased use of its power to prosecute “unfair methods of competition” under the FTC Act, the argument could just as easily apply to the FTC’s efforts to pursue disgorgement or other monetary relief from antitrust defendants. If certain defendants are given a “free pass” under the current antitrust laws, then the FTC ought to pursue harsher remedies against those defendants it does sue to make up for the cases that would have been brought but-for the Supreme Court’s decisions. For the former Commissioners’ position to make sense, two testable hypotheses would need to be confirmed: (1) private antitrust lawsuits have become more difficult to win; and (2) anticompetitive conduct is currently under-deterred by the antitrust laws. I discuss both in turn.

A. *Is It Now More Difficult for a Private Plaintiff to Win an Antitrust Case?*

³¹ Statement of Chairman Leibowitz & Commissioner Rosch, Intel Corp., No. 9341, 2010 WL 4542454 (F.T.C. Nov. 2, 2010), *available at* <http://www.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf>.

The most commonly cited cases for the proposition that it has become more difficult for plaintiffs to win antitrust cases is a series of recent decisions by the Supreme Court beginning with *Trinko* in 2004.³² In that case, the Court rejected a monopolization claim brought under Section 2 of the Sherman Act alleging that an incumbent local telephone exchange carrier illegally monopolized the local telephone market by refusing to offer exchange service to its competitors.³³ The Court held that any exception to the general proposition that a firm has the choice to deal or not deal with whomever it chooses was narrow and that, because the defendant had not discontinued a prior profitable course of dealing with competitors, the exception did not apply to the plaintiff's case.³⁴ Another case is *Twombly*, in which the Court altered the pleading standard a plaintiff must meet in alleging an illegal conspiracy in violation of Section 1 of the Sherman Act.³⁵ The Court held that alleging an illegal conspiracy "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement . . . simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."³⁶

³² Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

³³ *Id.* at 404-05.

³⁴ *Id.* at 409.

³⁵ Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)

³⁶ *Id.* at 556.

Another case is *linkLine*, in which the plaintiffs alleged that a vertically integrated defendant violated Section 2 by “squeezing” the profit margins of downstream competitors that also purchase inputs from the defendant by increasing input prices and simultaneously decreasing downstream prices.³⁷ The Court held that for a plaintiff to state a viable claim of “price squeezing,” the plaintiff must allege that the defendant charge a price below some relevant measure of cost and thereby satisfy the same test the Court applies to ordinary predatory pricing claims.³⁸

Yet another case is *Credit Suisse*, in which the Court held that certain antitrust claims reached conduct governed by federal securities law and, because the antitrust claims were “repugnant” to federal securities law, they could not proceed.³⁹

I think it is worth unpacking exactly what it means to suggest that it has become “more” difficult for private litigants to win antitrust cases. Saying the law has changed necessarily raises the question of identifying the appropriate benchmark by which to evaluate the change, not to mention asking whether the chosen benchmark is helpful. A soccer team might have won its last five matches, but observing that the team “always wins” based upon that information without the proper context can be misleading about the team’s overall results. Perhaps the team lost five consecutive matches immediately before its five-match winning streak. Or perhaps it had lost the prior fifteen matches. A

³⁷ *Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 555 U.S. 438 (2009).

³⁸ *Id.* at 451-52.

³⁹ *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007).

recent winning streak may suggest that the tide is turning, but we must be careful not to overstate the evidence.

And so it is with antitrust decisions made by the U.S. Supreme Court. Judge Douglas Ginsburg and Leah Brannon examined the Supreme Court's decisions in antitrust cases, looking at the last 45 years rather than at just the most recent ten.⁴⁰ They found that in each of the four decades, beginning from 1967 to 1976 and ending from 1997 to 2006, defendants won antitrust cases with increasing frequency. Whereas defendants won all 13 of the antitrust cases decided by the Supreme Court from 1997 to 2006, defendants won only 16 of 44 cases decided by the Supreme Court from 1967-1976. The authors found several other telling trends. The number of decisions signed on to by a "supermajority" of six or more of nine Justices increases over time, with 11 of the 13 pro-defendant decisions of the decade from 1997-2006 being decided by a supermajority of the justices. Also, the authors found that briefs submitted by the United States as an amici in a private antitrust dispute pending before the Supreme Court also favored the defendant's position with increasing frequency as time went on from 1967 to 2007, a period that includes presidential administrations of both political parties.

⁴⁰ Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, COMPETITION POL'Y INT'L, Autumn 2007, at 3.

Ginsburg and Brannon also argue convincingly that the Court's move to decide cases in favor of defendants is a result of economic analysis becoming more engrained in antitrust law, rather than a result of bias. As the authors note, "the Court, far from indulging in a pro-defendant or anti-antitrust bias, is [instead] methodically re-working antitrust doctrine to bring it into alignment with modern economic understanding."⁴¹ In a separate article, Ginsburg opines that "[t]he Court's reliance upon modern economic analysis reflects the near consensus among academics on proper antitrust analysis. There is now broad and nonpartisan agreement in academia, the bar, and the courts regarding the importance of sound economic analysis in antitrust decision making. Such analysis has utterly transformed the dialogue within the Supreme Court."⁴²

Putting aside the issue of whether the more recent pro-defendant decisions by the Supreme Court reflect a keener understanding of economics – and I most certainly agree that they do when compared to the antitrust decisions by the Supreme Court in the late 1960s and early 1970s – the data compiled by Ginsburg and Brannon are clear evidence of a different claim. The data show that, even if the Supreme Court has been deciding cases in favor of defendants in recent years, that trend simply reverses a prior trend in which the Supreme Court tended to decide cases in favor of plaintiffs. The

⁴¹ *Id.* at 4.

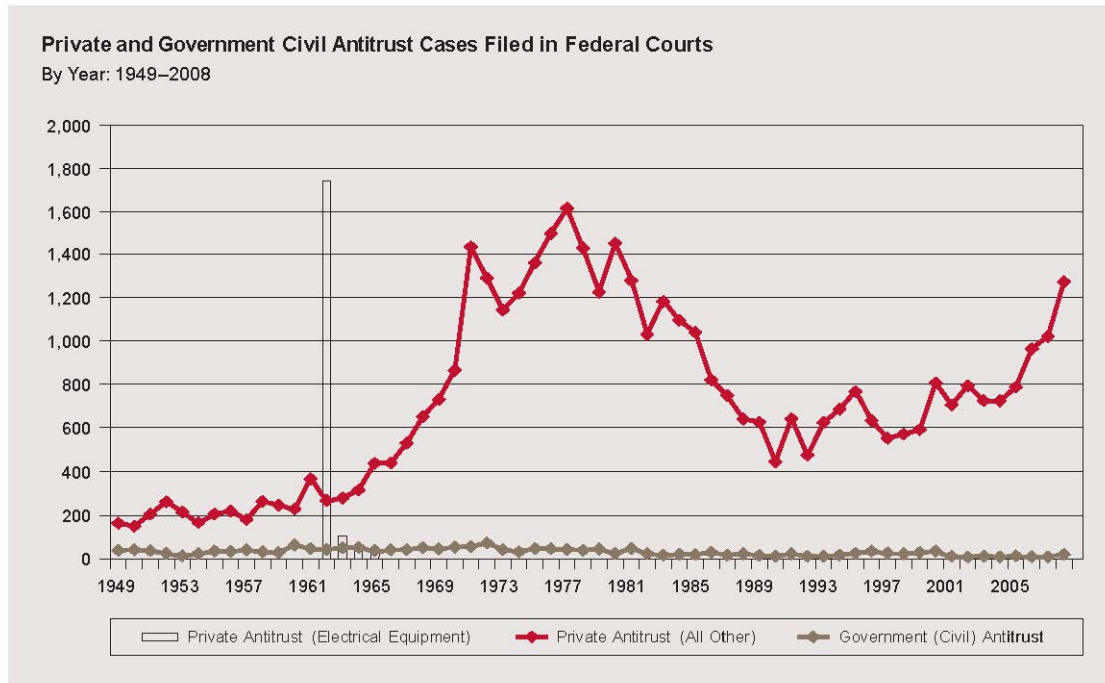
⁴² Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 222 (2010).

claim that the FTC needs to pursue monetary remedies against antitrust defendants to replace the deterrent value of private lawsuits that would have been successful but for the Supreme Court's recent jurisprudence simply assumes the law provided the proper incentives prior to the recent string of victories by defendants.

Before addressing that question – whether the pre-*Trinko* state of antitrust law provided the appropriate level of deterrence against anticompetitive conduct – I would first like to examine some data on private antitrust lawsuits in the United States. It is difficult to evaluate empirically whether recent decisions by the Supreme Court have made it more difficult for plaintiffs to win cases because so many lawsuits result in settlement. Looking only at cases that proceed to a certain phase and result in a victory for plaintiffs would obscure plaintiffs' true success rates. Case filings by private plaintiffs are a useful proxy, however, because a potential antitrust plaintiff will incorporate a higher or lower probability of success based upon a favorable or unfavorable decision by the Supreme Court into his decision regarding whether to file a lawsuit in the first place. Accordingly, one testable implication of the hypothesis that recent decisions have made life more difficult for antitrust plaintiffs is whether recent case filings have decreased.

The data suggest otherwise. Paul Godek has examined antitrust case filings in the United States, comparing the number of private suits to the number of suits brought

by the federal agencies through 2008.⁴³ According to Godek, in recent years private suits have outnumbered suits brought by the federal agencies by more than twenty to one.⁴⁴ With regard to private suits, the data show that they have increased significantly between 2004 when *Trinko* was decided and 2008.⁴⁵



46

The data on private suits between 2008 and 2012 tell a slightly different story.⁴⁷

These data show a lull in private enforcement after 2008, perhaps explained by the economic collapse, but with a surge in 2012.⁴⁸ It would be easy to make too much of this data; case filings are an imperfect proxy for win rates. Nevertheless, the data do

⁴³ Paul E. Godek, *Does the Tail Wag the Dog? Sixty Years of Government and Private Antitrust in the Federal Courts*, ANTITRUST SOURCE, Dec. 2009, art. 5, at 1.

⁴⁴ *Id.* at 2.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Jonathan Randles, *Reversing Trend, Antitrust Suits Spiked in 2012*, LAW 360 (Jan. 14, 2013), <http://www.law360.com/articles/406948/reversing-trend-antitrust-suits-spiked-in-2012>.

⁴⁸ *Id.*

indicate that the pro-defendant antitrust decisions starting with *Trinko* in 2004 have not resulted in a decrease in antitrust case filings by private plaintiffs.

B. *Even if It is More Difficult for a Private Plaintiff to Win an Antitrust Case, Does It Follow that Anticompetitive Conduct is Under-Deterred?*

Even if there was evidence to support the claim that private antitrust lawsuits are declining, it does not follow that anticompetitive conduct is being under-deterred. Former Chairman Leibowitz and former Commissioner Rosch argue that the recent string of defendant victories in antitrust cases before the Supreme Court is because the Court is concerned about “costly” *private* litigation – expensive discovery, class actions, treble damages – and not because the Court has substantive views about the competitive merits of the conduct alleged to be harmful in those cases.⁴⁹ A close examination of the decisions in question reveals quite clearly that the Court is motivated by substance, *i.e.*, the competitive merits of the conduct in question, and not solely by a concern about the cost of private litigation. This distinction is important because if the Court is motivated purely by a concern about designing antitrust rules to reduce the cost of *private* litigation, then those same concerns may not be present in antitrust cases brought by the Government.⁵⁰

⁴⁹ Statement of Chairman Leibowitz & Commissioner Rosch, *supra* note 31.

⁵⁰ *Is There Life After Trinko and Credit Suisse? The Role of Antitrust in Regulated Industries: Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary, 111th Cong.* (2010) (statement of Howard Shelanski, Deputy Dir. for Antitrust, Fed. Trade Comm’n).

To be sure, the Supreme Court has expressed concerns about the cost and uncertainty of private litigation.⁵¹ However, a much stronger theme in the Court's jurisprudence is a concern about any court's ability to separate anticompetitive conduct, which harms competition and consumers and ought to be condemned, from conduct that is benign or procompetitive.⁵² The Court further recognizes that a court's ability to distinguish between pro- and anticompetitive conduct is especially important in antitrust cases because it is a more severe error for a court incorrectly to condemn procompetitive behavior. This is because, as Judge Frank Easterbrook first explained, "the economic system corrects monopoly more readily than it corrects judicial errors."⁵³ Accordingly, the correct conclusion is that the Supreme Court has adopted rules designed to minimize the social costs of the antitrust system, which includes the cost of false negatives and false positives, but has explicitly recognized that the cost of false positives are greater and more intractable, and therefore are of greater concern in the

⁵¹ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-60 (2007) (explaining that discovery can be costly in antitrust cases and that a plaintiff with a "groundless" claim may use the threat of discovery to improve positioning in settlement negotiations); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 281-82 (2007) (stating that "antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries").

⁵² *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 451 (2009) ("To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low."); *Credit Suisse*, 551 U.S. at 283 ("[W]here the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets."); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect." (internal quotations omitted)).

⁵³ Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984).

antitrust system. The cost of discovery in suits brought by private plaintiffs is relevant to the Court's approach within this framework, but it is certainly not the most important factor, much less the sole motivating factor.

A close examination of the Court's recent decisions makes clear that the Court is designing legal rules to reflect its concern about over-detering conduct that is procompetitive or benign.⁵⁴ But potentially a more relevant question is what the economics literature says about the conditions under which certain conduct may harm the competitive process and reduce consumer welfare as a result. Perhaps the Supreme Court got it wrong and judicial modesty about a court's ability correctly to identify anticompetitive conduct is resulting in would-be antitrust defendants walking away unpunished. If this proposition were true, then the FTC would be on firmer ground in pursuing monetary remedies against the defendants it does sue. But there is no empirical support for this proposition.

In the realm of potentially exclusionary conduct by a dominant firm – a category that in my opinion includes vertical restraints, tying/bundling, discounting, and exclusive dealing, among other forms of conduct – there is a rich *theoretical* literature modeling conditions under which certain conduct by a monopolist may have a harmful

⁵⁴ William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago-Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 35-36 (2007) (“Chicago School and Harvard School commentators tend to share the view that the social costs of enforcing antitrust rules involving dominant firm conduct too aggressively exceed the costs of enforcing them too weakly . . . [and that] antitrust rules and decision-making tasks must be administrable for the central participants in the antitrust system (courts, enforcement agencies, the private bar, and business managers).”).

impact on consumer welfare.⁵⁵ The empirical analysis of these restraints tells a different story. One study, authored by a group of economists from the Federal Trade Commission and the Department of Justice in 2005 concludes that, although “some studies find evidence consistent with both pro- and anticompetitive effects . . . virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition.”⁵⁶ Another study from 2009 concludes that, “it appears that when manufacturers choose to impose restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision.”⁵⁷ Finally, in a paper considering newer empirical evidence concerning the competitive effects of vertical restraints, FTC economist Dan O’Brien concludes that, “with few exceptions, the literature does not support the view that [vertical restraints] are used for anticompetitive reasons” and that vertical restraints “are unlikely to be anticompetitive in most cases.”⁵⁸

The overall body of evidence supports a fairly strong conclusion that vertical restraints very rarely result in anticompetitive effects and most often benefit consumers.

⁵⁵ See Alden F. Abbott & Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing*, in ANTITRUST LAW AND ECONOMICS 183 (Keith N. Hylton ed., 2010) (highlighting literature); Chiara Fumagalli & Massimo Motta, *Exclusive Dealing and Entry, When Buyers Compete*, 96 AM. ECON. REV. 785 (2006); Eric B. Rasmusen, J. Mark Ramseyer & John S. Wiley, Jr., *Naked Exclusion*, 81 AM. ECON. REV. 1137 (1991); Ilya R. Segal & Michael D. Whinston, *Naked Exclusion: Comment*, 90 AM. ECON. REV. 296 (2000).

⁵⁶ James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639, 658 (2005).

⁵⁷ Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy* in HANDBOOK OF ANTITRUST ECONOMICS 391 (Paolo Buccirossi ed., 2009).

⁵⁸ Daniel O’Brien, *The Antitrust Treatment of Vertical Restraint: Beyond the Possibility Theorems*, in THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72-73 (2008).

There is no reason to alter the design of legal rules and provide remedies to deter firms from engaging in conduct that rarely if ever harms consumers, even if there were reason to believe that suits challenging such conduct as illegal were decreasing over time.

Moreover, in the United States at least, treble damages are available to private litigants in all antitrust actions arising under the two main U.S. antitrust statutes, the Sherman Act and the Clayton Act.⁵⁹ Economic theory teaches that penalties should be set at a level sufficient to induce offenders to internalize the full social cost of their crimes.⁶⁰ In a world with imperfect detection and punishment, profit-maximizing market participants will need to face a potential damage award calibrated such that the gains from engaging in the prohibited conduct – the profits that accrue as a result of the anticompetitive behavior – are less than or equal to the expected penalty at the time the firm decides to engage in the challenged conduct. The expected penalty is, of course, a function of the probability of punishment and the magnitude of the penalty. Using this simple model, a damage multiplier can be justified on deterrence grounds if there is reason to believe plaintiffs – including both regulators and private litigants – do not successfully challenge every example of anticompetitive conduct in court. If, every time a firm engages in anticompetitive conduct, it was sued in court and ordered to pay damages approximating the social harm caused by its conduct, then all firms would be

⁵⁹ 15 U.S.C. §15(a).

⁶⁰ Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON 169 (1968); see also William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983); Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, COMPETITION POL'Y INT'L, Autumn 2010, at 3.

properly deterred from engaging in such conduct in the future and there would be no need for a damage multiplier.

This simple model hypothesizes that the probability of a lawsuit is 100% and the expected magnitude of liability corresponds exactly to the amount of harm caused by the conduct. If the probability of a lawsuit falls significantly below 100%, then to achieve optimal deterrence, the magnitude of liability ought to be adjusted accordingly.⁶¹ In the case of price fixing cartels and other horizontal conspiracies, we can reasonably expect that regulators and private litigants do not ferret out and challenge every illegal conspiracy that exists because such conspiracies are clandestine by their very nature.⁶² On the other hand, most examples of potentially harmful single-firm conduct are open and notorious. A downstream distributor of a monopolist's product will be keenly aware of any restraints on distribution put in place by the monopolist and, to the extent the distributor is harmed by the restraint, will have the appropriate incentive to challenge the conduct. Accordingly, to the extent there are successful private suits challenging vertical restraints by a firm with monopoly power that result in trebled damage awards, those suits are likely to *over-deter* such conduct,

⁶¹ Landes, *supra* note 60, at 657; Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J. L. & ECON. 445, 454 (1985).

⁶² Ginsburg & Wright, *supra* note 60.

and therefore ought not to be supplemented by government enforcement actions seeking disgorgement.⁶³

Indeed, in the context of single firm conduct, regulators and courts should be primarily concerned with *over-deterrence* and not *under-deterrence*. As I mentioned earlier, antitrust liability rules should be designed to minimize all social costs associated with enforcement.⁶⁴ These costs include false convictions, false acquittals, and the costs of administering the system. Not only is there strong support for the notion that the Supreme Court actually uses this framework in designing legal rules,⁶⁵ economic analysis supports it as well. The reason to be more concerned with the costs of false positives than false negatives is that, if *bona fide* anticompetitive conduct goes unpunished, then market forces will in time almost certainly erode the monopolist's market position. Anticompetitive vertical restraints, like other forms of private monopoly power, are simply not strong enough to stem indefinitely the tidal wave of creative destruction.⁶⁶ By contrast, improper condemnation of a practice that does not

⁶³ Easterbrook, *supra* note 62, at 460 (“When the risk of false condemnation rises, and so the costs of engaging in beneficial conduct go up, the penalty should fall.”); Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 5 J. COMPETITION L. & ECON. 469, 509 (2009) (stating that the case for treble damages applied to “open and notorious” conduct is “weak”); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 798 (1987) (explaining that mandatory trebling “has adverse effects, not only encouraging baseless or trivial suits brought in hopes of coercing settlements, but also discouraging legitimate competitive behavior in the gray areas covered by the rule of reason”).

⁶⁴ See Easterbrook, *supra* note 53; see also Cooper et al., *supra* note 56; Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153 (2010).

⁶⁵ See *supra* notes 49 – 54 and accompanying text.

⁶⁶ JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 83 (3d ed. 1942).

harm consumers will remove that practice from the toolkits of firms operating in other industries and, because the literature has established that vertical restraints usually *benefit* consumers, will prevent consumers in all areas of the economy from reaping those benefits. The only hopes then are to use a different and potentially less efficient and effective practice to achieve the same result, or to convince a court to reverse course.⁶⁷

To summarize, it is my belief that recent pro-defendant decisions by the Supreme Court fail to justify increased efforts by the Commission to pursue monetary remedies against antitrust defendants for a number of reasons. First, there is no evidence to support the proposition that private antitrust lawsuits are decreasing as the result of recent Supreme Court decisions, which is a necessary but not sufficient condition to render plausible the Commission's increased efforts seek disgorgement to "replace" the foregone deterrent effect of fewer private lawsuits. Second, the "anti-plaintiff" decisions that former Commissioners Leibowitz and Rosch point to simply reverse a prior trend of decisions by the Supreme Court that were favorable to plaintiffs. Moreover, the correct view is that these recent decisions are motivated by economic learning and an acceptance of the error-cost approach to designing liability rules in

⁶⁷ Convincing the Supreme Court to reverse course is likely to take a very long time. Past experience suggests reversal could take at least ten years, *see* *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *reversed by* *Cont. TV, Inc. v. GTE Sylvania*, 433 U.S. 36 (1977), and as many as 96, *see* *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), *reversed by* *Leegin Creative Leather Prods. V. PSKS, Inc.*, 551 U.S. 877 (2007).

antitrust and *not* out of a concern related specifically to private antitrust suits. These factors together compel the conclusion, contrary to the Commission's analysis supporting the withdrawal of its Statement, that recent decisions by the Supreme Court provide no basis for the FTC to increase systematically its efforts to pursue monetary remedies.

VI. When is It Appropriate for an Enforcement Agency to Pursue Disgorgement?

I hope I have provided enough support to illustrate that the Commission's reasons for withdrawing the Policy Statement do not pass muster. The next – and perhaps more relevant – issues to consider are the conditions under which the agency ought to pursue disgorgement and other monetary remedies going forward. A look at the four cases in which the Commission sought disgorgement in the past may prove helpful. In its 1999 case against Mylan Laboratories, the FTC challenged an arrangement whereby Mylan and three other pharmaceutical companies conspired to make Mylan the monopoly producer of certain pharmaceuticals, which the FTC alleged resulted in \$120 million in overcharges.⁶⁸ In 2001, the FTC reached a consent agreement with Hearst after challenging a consummated merger in which the FTC alleged that the defendant did not timely disclose relevant documents in its pre-merger filings. The agreement required disgorgement of \$19 million as well as certain divestitures.⁶⁹ In

⁶⁸ FTC v. Mylan Labs, Inc., 62 F. Supp. 2d 25, 36 (D.D.C. 1999).

⁶⁹ FTC v. The Hearst Trust, No. 1:01CV000734 (D.D.C. Dec. 14, 2001).

Perrigo, the Commission again sought divestiture in a challenge to an agreement between drug manufacturers not to compete, which resulted in a price increase. In that case the FTC reached a consent agreement in which the two companies agreed to pay a total of \$6.25 million in disgorgement.⁷⁰ Finally, *Lundbeck* involved an FTC challenge to a consummated acquisition by a pharmaceutical company of the rights to a drug that was allegedly the sole competitor to its own drug. The FTC sought disgorgement because prices had increased substantially. The United States District Court for the District of Minnesota denied the FTC's request for relief on the ground that the two drugs did not compete in the same product market and the district court's decision was affirmed by the court of appeals.⁷¹

One principle to draw from these cases is that they all involve agreements or mergers between actual or would-be competitors, and not a single firm acting unilaterally. I would support a limitation on the FTC's ability to pursue disgorgement only against naked price fixing agreements among competitors or, in the case of single-firm conduct, only if the monopolist's conduct has no plausible efficiency justification. This latter category would include fraudulent or deceptive conduct, or tortious activity such as burning down a competitor's plant. Declining to pursue disgorgement in cases involving vertical restraints has the virtue of taking the remedy off the table in cases

⁷⁰ FTC v. Perrigo Co., No. 1:04CV01397 (RMC) (D.D.C. July 21, 2006).

⁷¹ FTC v. Lundbeck Inc., 650 F.3d 1236 (8th Cir 2011).

that present the most difficulty in distinguishing between anticompetitive conduct that harms consumers and procompetitive conduct that benefits them. Of course, the requirement in the withdrawn Policy Statement that the violation be “clear” also would seem to exclude disgorgement in cases that include plausible efficiency defenses. Because I was not a Commissioner when the Statement was adopted or when it was withdrawn and was not privy to all the commentary and discussion surrounding the relevant issues, it would be inappropriate for me to take a firm position on whether the Policy Statement itself supplies the correct guidelines for the Commission to follow in pursuing disgorgement in antitrust cases. I will say that the other two elements – that there be a reasonable basis for calculating the monetary relief and that the Commission consider the potential for monetary relief in related litigations – make sense at first blush.

I share the same concern Commissioner Ohlhausen expressed in dissenting from the Commission’s Withdrawal of the Statement: the business community is now without any guidance whatsoever regarding the conditions under which the Commission will pursue disgorgement or other monetary remedies in antitrust cases. Disgorgement can certainly be a useful item in the antitrust enforcer’s toolkit – indeed, there may be some support for the proposition that disgorgement can be more practical and have the same deterrent effect as behavioral remedies or divestiture in certain

circumstances.⁷² However, I fear that a lack of guidance from the Commission could cause much mischief. Risk averse companies concerned about the financial and reputational effects associated with a disgorgement order from the FTC could respond to the lack of guidance by not engaging in conduct that could plausibly benefit consumers. And the threat of disgorgement could lead a company to settle a case even if it has a strong position on the merits.

* * * * *

Thank you again for having me here today. I am happy to take a few questions.

⁷² Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 88-89 (2009).