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Gotta Get Those Ill-Gotten Gains: Improving the FTC's Authority to Seek Disgorgement in Antitrust Cases

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NOTE

GOTTA GET THOSE ILL-GOTTEN GAINS: IMPROVING THE FTC'S AUTHORITY TO SEEK DISGORGEMENT IN ANTITRUST CASES

Kathryn Buggs*

Disgorgement is an equitable monetary remedy that requires a defendant to give up all ill-gotten gains from their illegal conduct. Unlike damages, which can be compensatory, deterrent, or even punitive in nature, disgorgement focuses primarily on deterring future illegal conduct. It relies on the simple moral premise that wrongdoers should not be allowed to retain the profits of their wrongdoing. Especially in antitrust litigation involving complex, multilayered supply chains, damages can underestimate the true harm suffered as a result of anticompetitive conduct. Disgorgement, if calculated properly and litigated thoughtfully, has the potential to provide redress for the full amount of harm and therefore act as a more efficient deterrent.

Federal and state antitrust enforcers have sought disgorgement for anticompetitive conduct with limited success, and a recent Supreme Court decision casts doubt on the Federal Trade Commission's authority to seek disgorgement altogether. Still, there is bipartisan support in Congress and the White House to restore the FTC's disgorgement authority. This Note proposes enacting legislation to that effect, including a provision that would allow state attorneys general or private plaintiffs to seek disgorgement on the FTC's behalf (called a "qui tam" provision). Further, this Note outlines how leveraging existing litigation tools can alleviate concerns that disgorgement will lead to duplicative recovery. By restoring the FTC's authority to seek disgorgement and creating a qui tam

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mechanism for private enforcement, antitrust plaintiffs will benefit from increased leverage, enabling them to both recover the totality of harm caused by anticompetitive conduct and deter such conduct in the future.

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INTRODUCTION

Antitrust enforcement in the United States has been the subject of increased attention in recent years, with concern over growing concentration in major industries and the rise of new technologies that defy existing statutory remedies. There are calls to overhaul the current framework of antitrust enforcement, including affirming or expanding the authority of antitrust enforcers and updating antitrust laws and regulatory guidance to reflect an ever-changing economy.¹

Although it may not feature prominently in popular news coverage of antitrust enforcement, a common complaint among antitrust practitioners and consumer advocates is the complexity and inefficiency of the current framework for awarding monetary damages.² An alternative remedy available to antitrust enforcers (but one not often used by them) is disgorgement, which requires a defendant to give up the ill-gotten gains resulting from anticompetitive conduct.³ Rather than focus on the amount by which a plaintiff was harmed—as the damages remedy does—disgorgement focuses solely on the amount by which a defendant benefited.⁴

Disgorgement can be simpler to calculate and a more effective deterrent than damages, which often underestimate the true harm of anticompetitive conduct.⁵ Antitrust enforcers have sought disgorgement in the past with some success, but courts are often hostile to disgorgement as a remedy or worry that it will lead to multiple liability for defendants.⁶ Recent calls by antitrust enforcers to affirm and shore up disgorgement authority, particularly for the

1. See, e.g., Marguerite Reardon, *Regulation on Big Tech Is Coming Soon, Says Sen. Amy Klobuchar*, CNET (Oct. 19, 2021, 4:05 PM), <https://www.cnet.com/news/politics/regulation-on-big-tech-is-coming-soon-says-klobuchar> [perma.cc/3C99-P67N]; Jonathan Gleklen, C. Scott Lent & Wilson D. Mudge, *Analysis of the Proposed Competition and Antitrust Law Enforcement Reform Act of 2021*, ARNOLD & PORTER (Feb. 25, 2021), <https://www.arnoldporter.com/en/perspectives/publications/2021/02/analysis-of-proposed-antitrust-reform-act?p=1> [perma.cc/7UFF-VKUN]; Cecilia Kang, *Lawmakers, Taking Aim at Big Tech, Push Sweeping Overhaul of Antitrust*, N.Y. TIMES (June 29, 2021), <https://www.nytimes.com/2021/06/11/technology/big-tech-antitrust-bills.html> [perma.cc/3QDE-GJX5].

2. See, e.g., Schonette Walker, Stephen Scannell & Abigail Wood, *Bridging the Gorge: States Prevent Retention of Ill-Gotten Profits Through Disgorgement*, COMPETITION POL'Y INT'L (Aug. 30, 2021) [hereinafter *Bridging the Gorge*], <https://www.competitionpolicyinternational.com/bridging-the-gorge-states-prevent-retention-of-ill-gotten-profits-through-disgorgement> [perma.cc/T5G2-7KNM]; Martijn A. Han, Maarten Pieter Schinkel & Jan Tuinstra, *The Overcharge as a Measure for Antitrust Damages 1–4* (Amsterdam Ctr. for L. & Econ., Working Paper No. 2008-08, 2009).

3. See *infra* notes 38–40 and accompanying text.

4. See *infra* notes 38–40 and accompanying text.

5. See discussion *infra* Section I.E.

6. See, e.g., *FTC v. Mylan Lab's, Inc.*, 62 F. Supp. 2d 25, 41 (D.D.C. 1999) (“Although the Court’s concern for the complexity of the damages proceeding is not implicated by a disgorgement action, permitting disgorgement does raise the specter of duplicative recoveries.”); *In re Pre-Filled Propane Tank Antitrust Litig.*, 893 F.3d 1047, 1058–59 (8th Cir. 2018); *Minn. ex rel. Ellison v. Sanofi-Aventis U.S. LLC*, No. 3:18-cv-14999, 2020 WL 2394155, at *8 (D.N.J. Mar. 31,

Federal Trade Commission (FTC), have found support in Congress and the White House.⁷

This Note has two goals. First, it seeks to consolidate the most compelling justifications for disgorgement and address the common concerns and misconceptions that have prevented the remedy from being widely used as a deterrent mechanism in antitrust enforcement. Second, this Note proposes a system for making disgorgement a more workable remedy for the FTC in future cases, including through use of a *qui tam* provision that would allow private plaintiffs to bring disgorgement claims on behalf of the FTC.⁸ Rather than approach disgorgement as an alternative remedy to damages, this Note focuses on the potential for disgorgement to serve as a top-up mechanism ensuring that defendants pay back the full amount of ill-gotten gains, even when a traditional damages calculation is lower. This proposed system is based wholly on existing structures and practices within the U.S. justice system that are already familiar to judges who handle antitrust litigation.⁹ It will allow for more efficient and complete remedies for antitrust violations, which will in turn better deter future violations.¹⁰

Part I discusses disgorgement as a remedy generally, how disgorgement fits into the broader remedy landscape, policy justifications for disgorgement, and why disgorgement is a necessary remedy for antitrust enforcement. Part II outlines the current authority of the FTC, Department of Justice (DOJ) Antitrust Division, and various state attorneys general to seek disgorgement in antitrust actions. Part III proposes expanding the FTC's statutory authority to seek disgorgement for antitrust claims and adding a *qui tam* provision for state attorneys general and private plaintiffs to seek disgorgement on the FTC's behalf when the FTC declines to act. Part III also proposes procedures for managing disgorgement claims to avoid duplicative recovery, including using

2020) (citing *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 851 (3d Cir. 1996)). Note that these concerns are often intertwined with concerns that the plaintiffs bringing such claims for disgorgement are attempting to evade *Illinois Brick* limitations on standing for indirect purchasers. For a discussion of standing, see *infra* Section I.B.

7. See *infra* Section III.A.

8. A *qui tam* provision allows a private plaintiff to bring a suit on the government's behalf, giving the government advanced notice and opportunity to intervene if it chooses to. The plaintiff in a *qui tam* action is entitled to some portion of any monetary remedy awarded. See Bryan Lemons, *An Overview of "Qui Tam" Actions*, FED. L. ENFT TRAINING CTRS., https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/civil-actions/quitam.pdf [perma.cc/ZCD8-A4KH].

9. See discussion *infra* Part III.

10. This Note does not propose to change anything about how parties and courts currently approach overcharge, pass-on, or damages calculations in antitrust cases. While these are arguably overcomplicated and contentious calculations, this Note takes them as given and fits their role in antitrust litigation into the proposed framework. It is also not within the scope of this Note to propose repealing *Illinois Brick* limitations on indirect-purchaser standing, although there is ample support for repeal. Finally, this Note will focus on disgorgement as a remedy for violations of the antitrust laws due to illegal conduct rather than as a remedy within the merger and acquisition context.

multidistrict litigation, staying disgorgement claims until outstanding claims for actual damages have been fully adjudicated, and holding disgorged profits in escrow until the statute of limitations has run on any potential additional claims for actual damages.

Part IV addresses concerns with disgorgement as an antitrust remedy and implications for reaffirming the FTC's power to seek it. Specifically, it discusses why properly adjudicated claims for disgorgement need not lead to duplicative recovery, why disgorgement is not harder to calculate than the actual damages that courts handle routinely, why disgorgement is necessary even in cases where some plaintiffs could seek actual damages, why disgorgement need not conflict with limitations on indirect-purchaser standing, and why disgorgement need not lead to overzealous agency enforcement of antitrust laws.

In summary, this proposal relies less on a radical statutory overhaul than on making a conscious effort to harness the tools already available to the justice system—multidistrict litigation, *qui tam* doctrine, and funds held in escrow by the court—to ensure that antitrust defendants no longer profit from their illegal conduct where that profit exceeds any damages already awarded. Further, this proposal builds on the FTC's existing experience in seeking disgorgement for antitrust violations and the bipartisan political momentum behind reaffirming the FTC's statutory authority in order to effectively deter future violations.

I. AN OVERVIEW OF ANTITRUST, DISGORGEMENT, AND DISGORGEMENT IN AN ANTITRUST CONTEXT

Before we can assess disgorgement's role in the antitrust enforcement toolkit, we must understand how antitrust enforcement works more generally in the United States and what other remedies are available. This Part provides a brief introduction to the main antitrust laws, remedies, and roadblocks that both antitrust enforcers and private plaintiffs face. This Part then discusses disgorgement and its policy justifications, both generally and in the antitrust context.

A. *Statutory Overview*

Antitrust enforcement in the United States is shaped by three federal statutes—the Sherman Act, the Clayton Act, and the Federal Trade Commission Act—as well as by state antitrust and consumer protection statutes.¹¹ The Sherman Act bans unreasonable restraints of trade, including actual or attempted monopolization; the Clayton Act was intended to fill gaps that the Sherman Act did not cover, including certain discriminatory business practices and mergers deemed to illegally lessen competition; and the FTC Act bans unfair

11. U.S. DOJ, ANTITRUST ENFORCEMENT AND THE CONSUMER 2–3 (2015), <https://www.justice.gov/atr/file/800691/download> [perma.cc/3QEM-N4PN].

methods of competition.¹² Many states have their own antitrust laws, which are generally similar to the federal versions.¹³

Antitrust laws are enforced by the DOJ Antitrust Division, the FTC, and state attorneys general, as well as by private plaintiffs who allege that a defendant's conduct had some specific impact on them.¹⁴ Private plaintiffs often bring claims as part of a class action. Legal commentators have historically seen class actions as an appropriate and preferred mechanism for adjudicating antitrust claims.¹⁵ However, courts have become increasingly hostile to antitrust class actions in recent decades and have raised class certification requirements accordingly.¹⁶

Broadly speaking, cases alleging a violation of antitrust laws due to illegal conduct ("conduct cases," for the purpose of this Note) can be analyzed using three major questions: does the party bringing the case have standing to do so, does the conduct in question constitute a violation of the law, and what is the appropriate remedy? This Note focuses primarily on the question of appropriate remedies and will not discuss the various aspects of proving or defending against an alleged conduct violation. Standing merits a brief discussion because antitrust law—at least as currently enforced—places important limitations on the type of remedies certain plaintiffs may seek (and indeed, whether they have a case at all).

B. *A Quick Word on Standing*

To establish antitrust standing, a plaintiff must have suffered injury in fact, must have suffered an antitrust injury, and must be the appropriate party to bring claims under antitrust law.¹⁷ Antitrust standing varies between federal enforcers, state enforcers, and private plaintiffs. When suing under federal antitrust law, the FTC or DOJ only needs to establish an antitrust violation (i.e.,

12. *The Antitrust Laws*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [perma.cc/N6ZH-75WP].

13. See *infra* Section II.C.

14. *The Enforcers*, FTC, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers> [perma.cc/YET5-H27V].

15. See, e.g., Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 LOY. U. CHI. L.J. 629, 630–31 (2010); Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 83 (2009).

16. Elhauge, *supra* note 15, at 83–84. See also Brent W. Johnson & Emmy L. Levens, *Heightened Ascertainability Requirement Disregards Rule 23's Plain Language*, ANTITRUST, Spring 2016, at 68, and Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305 (2010) for a discussion of heightened requirements on "ascertainability," or the ability to identify class members, which courts increasingly rely on to deny certification of classes for small-value consumer claims.

17. E.g., *In re Aluminum Warehousing Antitrust Litig.*, 95 F. Supp. 3d 419, 440 (S.D.N.Y. 2015).

that there was some harm to competition).¹⁸ A state attorney general bringing an antitrust claim on behalf of consumers under what is known as *parens patriae* authority must establish both antitrust and *parens patriae* standing.¹⁹ The latter requires the state attorney general to show that the consumers in the state have a cause of action under antitrust law.²⁰

Standing for private plaintiffs is more complicated. In *Illinois Brick Co. v. Illinois*, the Supreme Court limited antitrust standing only to direct purchasers, which generally means those purchasers who bought the good or service at issue directly from the defendant whose conduct allegedly violated antitrust law.²¹ Often, these direct purchasers are middlemen in the supply chain or retailers who simply sell the product to consumers.²² Anyone further down the supply chain, including an end consumer, is considered an indirect purchaser and generally does not have standing to sue under *Illinois Brick*.²³

In practice, *Illinois Brick* has left “crater-sized holes in the viability of vigorous antitrust enforcement.”²⁴ Direct purchasers sometimes decline to bring suit, either because they do not wish to damage their business relationship with the alleged violator or because they are able to pass the full cost of the illegal conduct on to indirect purchasers.²⁵ This leaves the indirect purchasers who are actually harmed without an adequate legal remedy.²⁶ Many states have enacted “*Illinois Brick* repealer laws,” which restore antitrust standing for indirect purchasers, at least with respect to claims under state antitrust laws.²⁷

18. Dan Butrymowicz, *Antitrust Violation vs. Injury-in-Fact: A Distinction that Makes a Difference*, FTC (Feb. 26, 2016), <https://www.ftc.gov/enforcement/competition-matters/2016/02/antitrust-violation-vs-injury-fact-distinction-makes-difference> [perma.cc/QU68-CBM3].

19. *Parens Patriae*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen”).

20. *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 151 (D.D.C. 2002); *Pennsylvania v. Nat’l Collegiate Athletic Ass’n*, 948 F. Supp. 2d 416, 432 (M.D. Pa. 2013); PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 355 (5th ed. 2022).

21. 431 U.S. 720 (1977); Jeffrey Amato, *Antitrust 101: The Indirect Purchaser Rule of Illinois Brick*, WINSTON & STRAWN LLP (Jan. 21, 2020), <https://www.winston.com/en/competition-corner/antitrust-101-the-indirect-purchaser-rule-of-illinois-brick.html> [perma.cc/Q8WU-EY93].

22. See Amato, *supra* note 21.

23. See *Bridging the Gorge*, *supra* note 2.

24. *Id.* at 4.

25. Elhauge, *supra* note 15, at 83. See generally Nadine Watson, Frédéric Palomino, Justin Coombs & David Sevy, *Expert Q&A on Pass-On of Overcharge*, COMPASS LEXICON (Jan. 13, 2022), <https://www.compasslexicon.com/expert-qa-on-pass-on-of-overcharge> [perma.cc/KM72-CARP].

26. Elhauge, *supra* note 15, at 83; see also *Bridging the Gorge*, *supra* note 2, at 4.

27. PRACTICAL LAW ANTITRUST, STATE ILLINOIS BRICK REPEALER LAWS CHART (2023), Westlaw 8-521-6152.

There has been some discussion of repealing *Illinois Brick* for federal claims as well, but it currently remains the law of the land.²⁸

C. Types of Remedies in Antitrust Cases

Antitrust remedies have four key goals: compensating victims of unlawful conduct, punishing and deterring unlawful conduct, “[t]erminating and preventing the recurrence of unlawful conduct,” and “[r]estoring competitive conditions to the market harmed by . . . unlawful conduct.”²⁹ To achieve these goals, antitrust statutes provide for both monetary and equitable relief.³⁰ Under the Clayton Act, private plaintiffs can seek treble damages for violations of either the Clayton or Sherman Acts.³¹ This remedy greatly increases the potential financial liability that defendants face and has historically been a “very potent weapon in the civil enforcement arsenal.”³² Trebling damages is punitive, but since “antitrust violations are frequently difficult to detect and very expensive to prosecute,” trebling can “create[] strong incentives for private parties to investigate, detect, and prosecute antitrust violations.”³³

The DOJ and FTC can also seek a wide range of structural and behavioral injunctive remedies, depending on the conduct at issue.³⁴ Structural remedies, such as divestiture or dissolution, aim to fundamentally restructure a defend-

28. See, e.g., Leah Nylan & Joshua Sisco, *DOJ Demurs on Illinois Brick Repeal, This Time Anyway*, FTC WATCH (May 21, 2018), <https://www.mlexwatch.com/articles/3134/doj-demurs-on-illinois-brick-repeal-this-time-anyway> [perma.cc/2QJS-7LT3].

29. A. Douglas Melamed, *Afterword: The Purposes of Antitrust Remedies*, 76 ANTITRUST L.J. 359, 359–64 (2009).

30. *The Antitrust Laws*, *supra* note 12. While this Note focuses only on civil violations, the Sherman Act has an additional criminal component that can result in heavy fines and jail time. 15 U.S.C. § 1.

31. *Private Treble Damage Actions Under Federal Antitrust Law*, MAHLER L. FIRM LLC, <https://www.mahlerlawyers.com/publications/private-treble-damage-actions-under-federal-antitrust-law> [perma.cc/X4M2-FFRK]; 15 U.S.C. § 15(a).

32. Cavanagh, *supra* note 15, at 629 (citing *Blackburn v. Sweeney*, 53 F.3d 825, 829 (7th Cir. 1995)).

33. *Id.* at 631, 635–36.

34. Thomas O. Barnett, Assistant Att’y Gen., Dept. of Just. Antitrust Div., Section 2 Remedies: A Necessary Challenge, Presentation at the Fordham Competition Law Institute Annual Conference on International Antitrust Law & Policy 5–8 (Sept. 28, 2007), <https://www.justice.gov/atr/file/519221/download> [perma.cc/T7YD-ZEYL]; Robert E. Hauberg, *Compelling Disgorgement in Antitrust Cases*, LAW360 (Feb. 16, 2011, 12:51 PM), <https://www.law360.com/articles/225461/compelling-disgorgement-in-antitrust-cases> [perma.cc/28A6-8SBR]; see also John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 54 ANTITRUST BULL. 979, 981–983 (2012).

ant's business to remove the circumstances that allowed anticompetitive behavior to arise in the first place.³⁵ Because structural remedies involve restructuring companies or entire industries, they risk creating inefficiencies that ultimately harm consumers.³⁶ Behavioral or conduct remedies, such as an injunction to prohibit a specific type of anticompetitive conduct, can be difficult to enforce and may not deprive defendants of ill-gotten gains at all.³⁷

D. Disgorgement Generally

Now that we have a basic understanding of antitrust enforcement and the patchwork of remedies available, we can turn to disgorgement as a remedy generally. Disgorgement is a monetary equitable remedy that forces a defendant to give up (i.e., disgorge) ill-gotten profits that resulted from illegal conduct.³⁸ Unlike monetary damages, disgorgement is not tied—either in theory or calculation—to the harm suffered by plaintiffs and instead focuses only on the amount by which the defendant benefited.³⁹ As such, for cases in which “the defendant profited more from its wrongdoing than the value of the plaintiff's loss,” disgorgement may “offer the claimant a greater recovery than the value of its compensatory or actual damages.”⁴⁰

Disgorgement rests on the simple and morally-satisfying theory that a wrongdoer should not be allowed to keep the profit from its wrongdoing.⁴¹ Its “emphasis on public protection, as opposed to simple compensatory relief, illustrates the equitable nature of the remedy.”⁴² Disgorgement is not punitive on its own, as it does not require a defendant to pay back anything more than

35. U.S. DOJ, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT ch. 9, pt. IV, § B (Feb. 2023), <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-9> [perma.cc/J8PG-7URV].

36. *Id.*; Elhauge, *supra* note 15, at 88–89; Barnett, *supra* note 34, at 6 (“[T]he condemned conduct may or may not have altered the structure of the market that would have existed without the violation. Indeed, the size and structure of the firm might reflect the most efficient way to serve customers in the market.”).

37. Elhauge, *supra* note 15, at 87–88; Kwoka & Moss, *supra* note 34, at 981–983.

38. *Disgorgement*, BLACK'S LAW DICTIONARY (11th ed. 2019); David M. FitzGerald, Vice President and Deputy Chief Hearing Officer, Nat'l Ass'n of Sec. Dealers, The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act, Speech at the FTC 90th Anniversary Symposium 16 n.35, https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf [perma.cc/T28J-KNGY] (citing *Commodity Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1222 (7th Cir. 1979)).

39. *E.g.*, *FTC Affirms Use of Disgorgement and Restitution in Competition Cases*, FRIED FRANK ANTITRUST & COMPETITION L. ALERT (Sept. 8, 2003), https://www.friedfrank.com/site-Files/ffFiles/alert_030908.pdf [perma.cc/7A8P-Y2YR].

40. Ronald L. Israel & Brian P. O'Neill, *Disgorgement as a Viable Theory of Restitution Damages*, COM. DAMAGES REP., Jan. 2014, at 3 (2014).

41. *See, e.g., id.* at 4–5; *see also Bridging the Gorge*, *supra* note 2.

42. *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 638 (S.D.N.Y. 2011) (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)).

that which it gained as a result of its illegal conduct.⁴³ Rather, disgorgement is intended purely to deter future illegal conduct.⁴⁴

Since disgorgement focuses on gains to the wrongdoer rather than harm to the victims, there are multiple options for what to do with disgorged profits. The first and most straightforward option is to pay the disgorged funds directly into the U.S. Treasury, as happened in the DOJ's 2010 settlement of an electricity market manipulation case.⁴⁵ The second option is to distribute disgorged money to victims of the illegal conduct, outside of the constraints of a class action or other litigation setting. The Securities and Exchange Commission (SEC), which has frequently sought disgorgement for violations of federal securities laws, says it is their "general practice" to return [disgorged profits] to individual victims when it can locate them, and when it makes sense to distribute the money, that is, when the cost of distribution is not greater than the amount to be distributed to victims.⁴⁶ When such distribution to victims is not possible, disgorged funds are paid into the U.S. Treasury.⁴⁷ Like the SEC, the FTC has required in the past that disgorged profits be paid "into a fund to be distributed for the benefit of customers injured by the defendant's conduct."⁴⁸

As the primary purpose of disgorgement is deterrence rather than compensation, either option is theoretically appropriate.⁴⁹ Indeed, both options already apply in a closely-related area of antitrust enforcement. When state attorneys general seek treble damages on behalf of state residents, the damages award can be distributed according to the court's discretion or deposited in the state's general fund, with a goal in either case of allowing individuals affected by the anticompetitive conduct to secure a portion of the award.⁵⁰ As

43. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. k (AM. L. INST. 2011) ("Disgorgement of wrongful gain is not a punitive remedy.").

44. See Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45820, 45821 (Aug. 4, 2003) [hereinafter 2003 Policy Statement].

45. See J. Bruce McDonald, Kathryn M. Fenton & Leslie C. Overton, *Antitrust Alert: U.S. DOJ Pursues New Disgorgement Remedy in Market Manipulation Cases*, JONES DAY (July 2010), <https://www.jonesday.com/en/insights/2010/07/antitrust-alert--us-doj-pursues-new-disgorgement-remedy-in-market-manipulation-case> [perma.cc/DQ2H-HQGY].

46. Leonard L. Gordon, George Kostolampros & Daniel D. Lynch, *Liu v. SEC: Disgorgement in Danger*, VENABLE LLP (Mar. 4, 2020), <https://www.venable.com/insights/publications/2020/03/liu-v-sec-disgorgement-in-danger> [perma.cc/5AEA-6G43].

47. See *Distribution of Disgorgement Funds to Investors*, STENGER & STENGER, <https://www.stengerlaw.com/book/distribution-of-disgorgement-funds-to-investors> [perma.cc/EQ63-SGHD].

48. Daniel Hemli & Jackie Java, *FTC Obtains \$26.8 Million in Disgorgement to Settle Monopolization Claims*, JD SUPRA (Apr. 29, 2015), <https://www.jdsupra.com/legalnews/ftc-obtains-268-million-in-disgorgemen-18035> [perma.cc/A5S5-EMCL].

49. See McDonald et al., *supra* note 45.

50.

"Monetary relief recovered in an action under section 15c(a)(1) of this title shall—

discussed in Part III, this Note proposes that disgorged funds be distributed to parties harmed by illegal conduct where possible.

E. *Disgorgement's Place in the Remedy Landscape*

Disgorgement shares some similarities with other equitable remedies as well as with monetary damages, and confusion about these similarities is a key reason why courts have been reluctant to recognize disgorgement as an appropriate remedy in antitrust cases.⁵¹ It is therefore worth discussing how disgorgement is related to and different from concepts such as unjust enrichment, restitution, and monetary damages.⁵²

Given its focus on the defendant's ill-gotten gains rather than harm to the victim, disgorgement can be thought of as stemming from the broader concept of unjust enrichment.⁵³ Unjust enrichment is "[a] benefit obtained from another, . . . not legally justifiable, for which the beneficiary must make restitution or recompense."⁵⁴ Therefore, the relation between unjust enrichment and disgorgement is one of vantage point: unjust enrichment is the act or occurrence that provides a defendant with ill-gotten gains, and disgorgement is one option for redressing those gains.⁵⁵ Both are aligned in seeking to deter future or ongoing illegal conduct.⁵⁶

Similarly, disgorgement is often discussed in the context of restitution, which is another monetary equitable remedy.⁵⁷ In fact, the two terms can be interchangeable in certain contexts.⁵⁸ When a plaintiff who was harmed by a

(1) be distributed in such manner as the district court in its discretion may authorize; or

(2) be deemed a civil penalty by the court and deposited with the State as general revenues;

subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief."

15 U.S.C. § 15e; Kimberly J. Winbush, *Litigation of Hart-Scott-Rodino Antitrust Improvements Act of 1976*, *Pub. L. No. 94-435*, 90 Stat. 1383, 155 AM. JUR. 1 *Trials* § 78 (2022).

51. See Israel & O'Neill, *supra* note 40, at 7–8 (discussing confusion about the disgorgement remedy among New Jersey courts).

52. For an additional interesting discussion of disgorgement as it relates to punitive damages, see Daniel B. Kelly, *On Disgorgement and Punitive Damages in Trust Law*, 107 IOWA L. REV. 2081 (2022).

53. *Bridging the Gorge*, *supra* note 2; Caprice L. Roberts, *Supreme Disgorgement*, 68 FLA. L. REV. 1413, 1416 (2016).

54. *Unjust Enrichment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

55. See Roberts, *supra* note 53, at 1417.

56. *Id.*

57. See generally Israel & O'Neill, *supra* note 40.

58. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 350 F. Supp. 2d 160, 212 (D. Me. 2004) ("Case law and commentary state that where there is a breach of duty, the common

defendant's conduct sues on their own behalf, restitution and disgorgement reach the same result because the plaintiff will be awarded the defendant's ill-gotten gains.⁵⁹ However, when a government enforcer brings a claim for disgorgement and the ill-gotten profits may or may not be distributed to those who were actually harmed, restitution and disgorgement begin to diverge.⁶⁰ In theory, restitution is compensatory in nature while disgorgement is intended as a deterrent.⁶¹ Restitution focuses on restoring a plaintiff to the position they would have been in but for the defendant's illegal conduct and thus focuses on the amount by which the plaintiff was harmed rather than the amount by which the defendant benefited.⁶² Some courts have erroneously required plaintiffs to prove that they "conferred the benefit" sought to be recovered through disgorgement.⁶³ However, as the Restatement (Third) of Restitution and Unjust Enrichment explains, such requirements "are seriously out of place in any discussion of . . . wrongful gain."⁶⁴

Disgorgement is similar to actual damages in that both require a defendant to pay some amount of money as a consequence of illegal conduct.⁶⁵ However, because it is an equitable remedy, disgorgement differs from actual damages in that courts have "broad discretion" to determine whether disgorgement is appropriate, how much money a defendant must disgorge, and how the money will be distributed to injured parties, if at all.⁶⁶ Both disgorgement and actual damages can deter future illegal conduct, but disgorgement

law ordinarily permits a plaintiff to choose the remedy: damage to the plaintiff, or gain to the defendant. That principle seems a pertinent starting point in determining what remedy to permit for a statutory violation (itself a breach of duty) as well. It may be that the two recoveries are synonymous in this case, and that the antitrust injury to the plaintiff is identical to the antitrust gain to the defendant." (footnote omitted)).

59. Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 WASH. & LEE L. REV. 973, 979 (2011) ("[T]he court will measure the plaintiff's recovery to make the injurer give up all its gains to the victim. Measuring plaintiff's recovery by the defendant's gains is restitution. The defendant's payment to the plaintiff deters repetition by making the injurer indifferent to whether to continue the activity.").

60. See Hauberg, *supra* note 34 ("[A]dding disgorgement—even if not a restitution-type remedy compensating consumers directly—to the enforcement arsenal may promote tighter corporate compliance and even greater deterrence.").

61. *Id.*

62. 2003 Policy Statement, *supra* note 44; FRIED FRANK ANTITRUST & COMPETITION L. ALERT, *supra* note 39.

63. Israel & O'Neill, *supra* note 40, at 8.

64. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 reporter's note cmt. a (AM. L. INST. 2022).

65. See *Damages*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Money claimed by, or ordered to be paid to, a person as compensation for loss or injury"); *Actual Damages*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses").

66. See, e.g., *FTC v. Bronson Partners*, 654 F.3d 359, 372–73 (2d Cir. 2011); *SEC v. First Jersey Sec.*, 101 F.3d 1450, 1474–75 (2d Cir. 1996).

focuses solely on such deterrence while actual damages also aim to compensate a victim for specific harm.⁶⁷

The process for establishing actual damages can also be much more complex than for disgorgement.⁶⁸ Claims for both disgorgement and actual damages need to establish that there was illegal conduct in the first place, which involves satisfying any elements of the underlying substantive law.⁶⁹ For both types of claims, a plaintiff would need to establish the amount by which the defendant profited from the conduct; in the antitrust context, this is often called the “overcharge,” or the amount by which the defendant was able to over-price the product or service at issue.⁷⁰ For an actual damages claim, a plaintiff needs to go further to establish the actual harm they suffered.⁷¹ This will generally involve estimating how much of the overcharge was absorbed at each step in the supply chain versus passed on to later purchasers, as well as calculating harm to each person or entity at a given level of the supply chain.⁷² Antitrust litigation has evolved into a complex and expensive “battle of the experts,” with parties spending millions of dollars for economists to develop and then testify about their damages models over the course of many years.⁷³

Claims for disgorgement face an “apportionment problem” similar to the proximate cause analysis required for actual damages claims.⁷⁴ As a popular treatise on remedies explains, “courts have recognized that some apportionment must be made between those profits attributable to plaintiff’s property and those earned by defendant’s efforts and investment, limiting plaintiff to the profits fairly attributable to his share.”⁷⁵ However, as noted above, a disgorgement calculation “should focus exclusively on the defendant’s gains . . . and therefore . . . ‘may have no logical relation to any damages that plaintiff actually suffered.’”⁷⁶

67. 2003 Policy Statement, *supra* note 44 (citing SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989)); *see* Rendleman, *supra* note 59 (discussing the compensatory nature of damages).

68. *See generally* Patrick L. Anderson, Theodore R. Bolema, & Ilhan K. Geckil, *Damages in Antitrust Cases* (Anderson Econ. Grp., Working Paper No. 2007-2, 2007).

69. Butrymowicz, *supra* note 18.

70. Anderson et al., *supra* note 68, at 4–5; Han et al., *supra* note 2.

71. *Private Treble Damage Actions Under Federal Antitrust Law*, *supra* note 31.

72. Watson et. al., *supra* note 25.

73. *See* Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261, 1270–71 (2012); Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 361–62 (2020).

74. Israel & O’Neill, *supra* note 40, at 6.

75. DAN B. DOBBS & CAPRICE L. ROBERTS, *LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* § 4.4(3), at 445 (3d ed. 2018).

76. Israel & O’Neill, *supra* note 40, at 6–7 (quoting 1 ROBERT L. DUNN, *RECOVERY OF DAMAGES FOR LOST PROFITS* § 3.17(3)).

F. *Disgorgement as an Antitrust Remedy*

Noted antitrust scholar Professor Einer Elhauge observed that there is “surprisingly little doubt” that disgorgement is a viable equitable remedy under antitrust law.⁷⁷ Indeed, one court confirmed when entering a consent decree that “disgorgement comports with established principles of antitrust law.”⁷⁸ Another legal commentator noted that disgorgement “is, and always has been, a fitting theory of recovery” in price-fixing cases.⁷⁹ As discussed in the next Part, the FTC, DOJ, and state attorneys general have sought disgorgement in antitrust cases with some success in recent decades.

Why though, given the plethora of other remedies available under antitrust law, is disgorgement necessary? First and foremost, there is an “increasing inability of private damages claims to deter antitrust misconduct and force wrongdoers to cough up their illicit booty.”⁸⁰ As one commentator put it, “The damages remedy at law has been effectively eviscerated by courts over the past half-century.”⁸¹ This is due in large part to *Illinois Brick* limitations on indirect-purchaser standing, increasingly narrow avenues for class certification, and methodologies for calculating damages that often leave a gap between the amount that defendants benefit from illegal conduct and the damages ultimately paid to plaintiffs.⁸²

Even for cases in which plaintiffs have standing and their claims survive to the damages stage, those damages may not capture the entirety of harm suffered.⁸³ For instance, plaintiffs “usually cannot recover prejudgment interest, deadweight loss harm, or umbrella effect overcharges,” so treble damages end up “closer to single damages.”⁸⁴ Considered in the aggregate, recovery is even lower when accounting for the “odds and costs” of detecting anticompetitive conduct in the first place and successfully adjudicating a case.⁸⁵ This can leave potential wrongdoers with the sense that anticompetitive conduct can be profitable and that any damages liability is simply the “cost of doing business.”⁸⁶

Further, some types of conduct cannot be challenged by private plaintiffs under the Sherman Act and instead must be challenged under the FTC Act,

77. Elhauge, *supra* note 15, at 79.

78. *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 640 (S.D.N.Y. 2011).

79. Daniel R. Karon, *Undoing the Otherwise Perfect Crime—Applying Unjust Enrichment to Consumer Price-Fixing Claims*, 108 W. VA. L. REV. 395, 397 (2005).

80. Elhauge, *supra* note 15, at 86.

81. *Bridging the Gorge*, *supra* note 2, at Part II.

82. *Id.*; see also Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of Illinois Brick in Modern Antitrust Standing Analysis*, 68 GEO. WASH. L. REV. 1, 3 (1999) (“Adopting lost profits as the appropriate measure of damages for all plaintiffs would eliminate some of the problems *Illinois Brick* sought to address.”).

83. See Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 122 (1993).

84. Elhauge, *supra* note 15, at 85 n.23; see also Cavanagh, *supra* note 15, at 631–33.

85. Elhauge, *supra* note 15, at 85 n.23.

86. See *Bridging the Gorge*, *supra* note 2, at Part IV.

which only allows for equitable remedies.⁸⁷ If the scope of equitable remedies is not interpreted to include the monetary equitable remedy of disgorgement, these types of conduct may not be effectively punished or deterred.⁸⁸ One court noted that “[d]isgorgement is particularly appropriate where . . . the anticompetitive conduct in question has ceased,” such that the more common equitable remedy of injunctive relief would not be effective.⁸⁹

Disgorgement “eliminates any need for government and judicial entanglement in ongoing business operations” by “monetizing the obligation,” rather than resorting to unwieldy structural or behavioral remedies.⁹⁰ As Elhauge notes, the traditional thinking that injunctive relief is appropriate “only when damages cannot provide an adequate remedy” would suggest that the government should bring a claim for disgorgement first and a claim for injunctive relief later, “only when disgorgement would be inadequate.”⁹¹ Professors Phillip Areeda and Herbert Hovenkamp, authors of a seminal treatise on antitrust law, suggest a more moderate approach of combining injunctive relief and disgorgement, which could “serve as an adequate deterrent and make more aggressive structural relief unnecessary.”⁹²

Finally, the DOJ and FTC have limited ability to seek civil monetary penalties, so “adding disgorgement . . . to the enforcement arsenal may promote tighter corporate compliance and even greater deterrence.”⁹³ According to the DOJ, disgorgement “provides finality, certainty, avoidance of transaction costs, and potential to do the most good for the most people.”⁹⁴ Areeda and Hovenkamp confirm that the ability to seek disgorgement “seems essential,” especially when “private enforcement is not available.”⁹⁵ Particularly in a context like antitrust, where actual damages and injunctive relief can underestimate or inadequately address the true scope of harm, disgorgement will have a crucial deterrent effect on would-be offenders.⁹⁶ Putting potential antitrust violators on notice that a disgorgement claim is likely to be more costly and harder to evade than a typical damages claim has the potential to deter the behaviors most harmful to consumers and markets.

87. Elhauge, *supra* note 15, at 85.

88. *Id.*

89. *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 640 (S.D.N.Y. 2011); *see also* Logan Wilke, *Early Ruling in Martin Shkreli Drug-Pricing Lawsuit Clears Path for Heightened Role of State-Level Antitrust Enforcement*, J.L. & SOC. PROBS.: COMMON L. BLOG (Feb. 4, 2022), <http://blogs2.law.columbia.edu/jlsp/2022/02/04/early-ruling-in-martin-shkreli-drug-pricing-lawsuit-clears-path-for-heightened-role-of-state-level-antitrust-enforcement> [perma.cc/C8DB-ANMB] (noting that disgorgement “has become an increasingly important tool for antitrust enforcers to deter future violations where injunctive relief alone would not suffice”).

90. Elhauge, *supra* note 15, at 94.

91. *Id.* at 94–95.

92. AREEDA & HOVENKAMP, *supra* note 20, ¶ 325a.

93. Hauberg, *supra* note 34.

94. McDonald et al., *supra* note 45.

95. AREEDA & HOVENKAMP, *supra* note 20, ¶ 302a.

96. *See* Elhauge, *supra* note 15.

II. THE CONSTRICTED ROLE OF DISGORGEMENT TODAY

While this Note proposes improvements to the FTC's ability to seek disgorgement, it is useful to understand how other federal and state antitrust regulators approach disgorgement. This Part discusses the ability of the FTC, DOJ, and state attorneys general to seek disgorgement under existing antitrust laws. It also focuses on recent court decisions that have either limited the FTC's authority or confirmed the authority of some state attorneys general to seek disgorgement.

A. Federal Trade Commission

The FTC traditionally has “fairly circumscribed authority to obtain money judgments from defendants in enforcement actions.”⁹⁷ Section 5(a) of the FTC Act gives the FTC authority to, among other things, challenge “unfair methods of competition,” including any conduct that would violate the Sherman or Clayton Acts.⁹⁸ The FTC can pursue cases through administrative adjudication or by seeking injunctive relief in court, per FTC Act Sections 5(b) and 13(b), respectively.⁹⁹ It is beyond the scope of this Note to discuss the administrative adjudication process in detail, but claims for disgorgement have historically been brought in court via Section 13(b).¹⁰⁰ The plain language of 13(b) authorizes only injunctive relief, but courts have been willing to interpret injunctive relief broadly (i.e., as essentially synonymous with equitable relief) and, as a result, “have routinely permitted the FTC to pursue various forms of monetary relief” under the statute.¹⁰¹

In recent decades, the FTC's position on disgorgement has varied greatly. Between 1980 and 2002, the FTC sought disgorgement in just two cases, demonstrating what one Commissioner called “cautious discretion.”¹⁰² In a

97. Theodora McCormick & Jack Wenik, *Third Circuit Rules That Disgorgement Is Not an Available Remedy Under the FTC Act*, NAT'L L. REV. (Nov. 2, 2020), <https://www.natlawreview.com/article/third-circuit-rules-disgorgement-not-available-remedy-under-ftc-act> [perma.cc/NDN3-QQS7].

98. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FTC (May 2021), <https://www.ftc.gov/about-ftc/mission/enforcement-authority> [perma.cc/5MX9-KAB9]; 15 U.S.C. § 45(a).

99. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 98.

100. See McCormick & Wenik, *supra* note 97.

101. STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION § 10:5 (2022); see also *Bridging the Gorge*, *supra* note 2 (“Since the 1990's the FTC and courts have taken the broad view of 13(b)'s 'permanent injunction' authority in antitrust cases to include the pursuit of equitable monetary relief, such as restitution and disgorgement, without the prior use of traditional administrative proceedings.”).

102. Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission, Speech at the 2016 New York Annual Antitrust Spring Seminar 3–4 (Apr. 20, 2016), https://www.ftc.gov/system/files/documents/public_statements/945623/160420dollarsdoctrinespeech.pdf [perma.cc/7X9V-4T67].

2003 policy statement, the FTC said it would seek disgorgement only in “exceptional cases” based on three factors: (1) whether there is a reasonable basis for calculating remedial payment, (2) whether there has been a clear violation of antitrust laws, and (3) the extent to which other remedies would afford adequate monetary relief.¹⁰³ The American Bar Association’s Antitrust Law Section commented on the use of disgorgement as a remedy, noting concern about the “specter of multiple liabilities and complexity, particularly with class action treble damages litigation where recoveries go to consumers.”¹⁰⁴

In 2012, the FTC reversed course and revoked the 2003 policy statement.¹⁰⁵ Rather than limit itself to seeking disgorgement only in “exceptional cases,” the FTC said that antitrust cases “may often be appropriate candidates for monetary equitable relief.”¹⁰⁶ The FTC proceeded to seek disgorgement in at least four cases from 2012 to 2016.¹⁰⁷ However, not everyone within the FTC agreed that disgorgement should be sought in a wider range of cases. In response to *FTC v. Cephalon, Inc.*,¹⁰⁸ two FTC Commissioners wrote a statement explaining that, while they agreed with the agency’s decision to seek disgorgement because the specific case fit the 2003 policy statement’s three factors, they were concerned that the lack of guidance in other cases could make disgorgement inappropriate.¹⁰⁹

The Supreme Court’s 2021 decision in *AMG Capital Management, LLC v. FTC* struck a significant blow to the FTC’s power to seek disgorgement under 13(b).¹¹⁰ The Court unanimously held that 13(b) does not give the FTC authority to seek disgorgement as a remedy in court before it has exhausted all

103. Elhauge, *supra* note 15, at 81–83; Ohlhausen, *supra* note 102, at 4; 2003 Policy Statement, *supra* note 44.

104. Hauberg, *supra* note 34.

105. Press Release, Fed. Trade Comm’n, *FTC Withdraws Agency’s Policy Statement on Monetary Remedies in Competition Cases; Will Rely on Existing Law* (July 31, 2021), <https://www.ftc.gov/news-events/news/press-releases/2012/07/ftc-withdraws-agencys-policy-statement-monetary-remedies-competition-cases-will-rely-existing-law> [perma.cc/JM3T-ZQUB].

106. Ohlhausen, *supra* note 102, at 6 (emphasis omitted) (quoting Statement of the Commission: Withdrawal of the Commission’s Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), https://www.ftc.gov/system/files/documents/public_statements/296171/120731commstmt-monetaryremedies.pdf [perma.cc/GM2Y-RGK6]).

107. *Id.* at 7–13 (discussing *FTC v. Endo Pharms.*, No. 2:16-cv-1440, 2016 WL 6124376 (E.D. Pa. Aug. 21, 2017); *FTC v. Cardinal Health*, No. 15-cv-3031 (S.D.N.Y. Apr. 20, 2015); *FTC v. AbbVie, Inc.*, No. 2:14-cv-05151, 2015 WL 8623076 (E.D. Pa. Dec. 14, 2015); *FTC v. Cephalon, Inc.*, No. 2:08-cv-2141, 2015 WL 4931442 (E.D. Pa. June 17, 2015)).

108. 100 F. Supp. 3d 433 (E.D. Pa. 2015).

109. Maureen K. Ohlhausen & Joshua D. Wright, *Separate Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright: Federal Trade Commission v. Cephalon, Inc.*, FTC (May 28, 2015), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/separate-statement-commissioners-maureen-k-ohlhausen-joshua-d-wright-federal-trade-commission-v> [perma.cc/3C8E-TRZK].

110. *AMG v. FTC: US Supreme Court Severely Limits FTC’s Ability to Seek Monetary Relief*, COOLEY (Apr. 29, 2021), <https://www.cooley.com/news/insight/2021-04-29-amg-v-ftc> [perma.cc/NJ3W-U7Y9]; Theodora McCormick & Jack Wenik, *The Supreme Court Rules That Disgorgement Is Not an Available Remedy Under the FTC Act – What Comes Next?*, EPSTEIN

administrative procedures.¹¹¹ However, it is important to note that the Court's decision relied on a strongly textualist approach to the statutory language rather than an assessment of disgorgement's availability in antitrust cases generally.¹¹² In response to *AMG*, the FTC issued a statement saying that "the Court has deprived [the agency] of the strongest tool we had to help consumers when they need it most. We urge Congress to act swiftly to restore and strengthen" the agency's authority under 13(b).¹¹³ The Areeda and Hovenkamp treatise, which has been updated to reflect the *AMG* decision, declared that "[a]s a matter of enforcement economics, the power to seek disgorgement in appropriate cases seems essential to the FTC's power to control anticompetitive practices, particularly in situations where private enforcement is not available."¹¹⁴

B. U.S. Department of Justice (DOJ) Antitrust Division

The DOJ has not sought disgorgement often and generally seeks disgorgement only in contempt actions for violations of consent decrees.¹¹⁵ For instance, in 1999, the DOJ settled a civil contempt case that resulted in two companies paying the full \$13.1 million of ill-gotten joint venture profits.¹¹⁶

BECKER GREEN (Apr. 26, 2021), <https://www.commerciallitigationupdate.com/2021/04/26/the-supreme-court-rules-that-disgorgement-is-not-an-available-remedy-under-the-ftc-act-what-comes-next> [perma.cc/A533-XNAE].

111. *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1347–49 (2021); *Bridging the Gorge*, *supra* note 2.

112. *AMG*, 141 S. Ct. at 1352 ("Nothing we say today, however, prohibits the Commission from using its authority under § 5 and § 19 to obtain restitution on behalf of consumers [for unfair practice claims]. If the Commission believes that authority too cumbersome or otherwise inadequate, it is, of course, free to ask Congress to grant it further remedial authority We must conclude, however, that § 13(b) as currently written does not grant the Commission authority to obtain equitable monetary relief."); *Bridging the Gorge*, *supra* note 2, at 6–7.

113. Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC* (Apr. 22, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/04/statement-ftc-acting-chair-woman-rebecca-kelly-slaughter-us-supreme-court-ruling-amg-capital> [perma.cc/U4T8-APFN].

114. AREEDA & HOVENKAMP, *supra* note 20, ¶ 302e.

115. Hauberg, *supra* note 34; see also Juan A. Arteaga, *Enforcement of Merger Consent Decrees*, GLOB. COMPETITION REV. (Nov. 8, 2021), <https://globalcompetitionreview.com/guide/the-guide-merger-remedies/fourth-edition/article/enforcement-of-merger-consent-decrees> [perma.cc/EDQ9-WSGV] ("In civil contempt actions, the DOJ may seek injunctive relief, fines that accumulate daily until compliance is achieved, and attorney's fees and costs. Moreover, the DOJ may seek additional equitable remedies that are intended to ensure compliance with the decree and remedy the harm caused by the decree violation, including the rescission of the transaction in question, disgorgement of any unlawful profits and imposition of conditions on the violating party's ability to pursue future transactions." (footnote omitted)).

116. Press Release, U.S. Dept. of Just., Court Finds Smith International and Schlumberger Ltd. Guilty of Criminal Contempt for Violating Consent Decree (Dec. 9, 1999).

The 2011 case *United States v. Keyspan Corp.* marked the first time a court ordered disgorgement for a violation of the Sherman Act.¹¹⁷ The court analogized to cases involving the SEC's disgorgement authority and found that its own broad equitable powers allowed it to order disgorgement.¹¹⁸ The court reasoned that "depriving antitrust defendants of conspiratorially derived benefits was consistent with the goals of antitrust law."¹¹⁹ On disgorgement as a remedy in general, the court confirmed that disgorgement is not intended "to compensate investors [or consumers], but rather to divest a wrongdoer of the proceeds of their misconduct."¹²⁰

Since *Keyspan*, the DOJ has continued to seek disgorgement in some cases, albeit with less fanfare in the antitrust community than FTC cases generate. For instance, in 2015, the DOJ noted that it had secured disgorgement as part of settlements regarding an anticompetitive joint venture agreement between four bus companies and unlawful premerger coordination between rival particleboard manufacturers.¹²¹

C. State Attorneys General

Most states have enacted state antitrust laws that often mirror their federal counterparts.¹²² It is beyond the scope of this Note to detail the constitutional intricacies posed by overlapping state and federal antitrust laws. It is sufficient to say that state laws cover purely intrastate economic activity, which federal laws could conceivably miss, and federal laws provide an additional avenue through which to handle cases that would exceed the jurisdictional power of any one state.¹²³ State attorneys general have the authority to enforce both fed-

117. Hauberg, *supra* note 34.

118. *Id.*

119. *Id.*

120. *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 642 (S.D.N.Y. 2011) (quoting *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006)).

121. U.S. DOJ, *Depriving Wrongdoers of Ill-Gotten Gain*, U.S. DOJ ANTITRUST DIV. (2015), <https://www.justice.gov/atr/division-update/2015/depriving-wrongdoers-ill-gotten-gain> [perma.cc/JX4P-Z5FZ].

122. *Guide to Antitrust Laws*, WASH. STATE OFF. OF THE ATT'Y GEN. [hereinafter *Washington AG Guide*], <https://www.atg.wa.gov/antitrustguide.aspx#statelaw> [perma.cc/9DW9-X8HW]; *Antitrust Enforcement*, ANTITRUST BUREAU, N.Y. ATT'Y GEN. [hereinafter *New York AG Guide*], perma.cc/FY25-SY3Q; AREEDA & HOVENKAMP, *supra* note 20, ¶ 215 ("A particularly important instance of such laws is state antitrust law, which often expresses policies identical to or at least similar to those of the Sherman Act. However, as a matter of constructed congressional intent, the states have wide latitude to enact antitrust laws that differ in important ways from federal antitrust law.").

123. AREEDA & HOVENKAMP, *supra* note 20, ¶ 216; see Michael Murray, Deputy Assistant Att'y Gen., U.S. DOJ Antitrust Div., *Antitrust Federalism, Remarks as Prepared for Discussion at Antonin Scalia Law School 16-17* (Aug. 31, 2020), <https://www.justice.gov/opa/speech/file/1351066/download> [perma.cc/XMW5-SRBZ].

eral and state antitrust laws, often in concurrence with the FTC, DOJ, or attorneys general in other states also affected by the conduct in question.¹²⁴ They frequently sue under a combination of state law and Section 16 of the Clayton Act, which allows claims for injunctive relief.¹²⁵ State attorneys general can also sue on behalf of consumers in the state under their *parens patriae* authority.¹²⁶ To establish standing in these cases, they must show that consumers in the state were harmed by the conduct in question; however, this often implicates the *Illinois Brick* bar on indirect-purchaser standing.¹²⁷

Especially in cases where *Illinois Brick* prevents private plaintiffs or state attorneys general (in *parens patriae*) from suing, claims for disgorgement are “the only way the public can hold accountable those engaged in dishonest and anticompetitive business practices and bring about meaningful change to a corrupt business or industry.”¹²⁸ The antitrust laws in multiple states give attorneys general the authority to seek equitable monetary relief such as disgorgement.¹²⁹ For instance, New York’s attorney general is authorized to “bring an action in equity” to enforce the state’s antitrust law, known as the Donnelly Act.¹³⁰

In recent years, state attorneys general have brought cases seeking disgorgement under both federal and state antitrust law with mixed results. In *FTC v. Mylan Laboratories, Inc.*, state attorneys general sought disgorgement under Section 16 of the Clayton Act.¹³¹ The court noted that states could already seek treble actual damages under Section 4.¹³² It held that allowing states to pursue claims for disgorgement under Section 16 would impermissibly circumvent *Illinois Brick*’s limitations on indirect-purchaser standing and risk opening defendants to multiple liability.¹³³ The court concluded that indirect-

124. See, e.g., *Washington AG Guide*, *supra* note 122; *New York AG Guide*, *supra* note 122; see also *Bridging the Gorge*, *supra* note 2.

125. *Bridging the Gorge*, *supra* note 2.

126. Gwendolyn Payton, *Parens Patriae Representative Suits by State AGs: Parental Help with Strings Attached*, JD SUPRA (Oct. 23, 2017), <https://www.jdsupra.com/legalnews/parens-patriae-representative-suits-by-50795/> [perma.cc/C9T9-F8WZ]; Murray, *supra* note 123, at 2–3.

127. See, e.g., *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 151 (D.D.C. 2002); *Pennsylvania v. Nat’l Collegiate Athletic Ass’n*, 948 F. Supp. 2d 416, 432 (M.D. Pa. 2013); AREEDA & HOVENKAMP, *supra* note 20, at § 355.

128. *Bridging the Gorge*, *supra* note 2.

129. See *id.* (providing a sample of state statutes granting authority to seek broad equitable relief).

130. Emily Myers, *State Attorneys General May Obtain Disgorgement of Profits Obtained Outside the State*, NAT’L ASS’N OF ATT’YS GEN. (Dec. 14, 2021), <https://www.naag.org/attorney-general-journal/state-attorneys-general-may-obtain-disgorgement-of-profits-obtained-outside-the-state> [perma.cc/BN2T-4Y69].

131. 62 F. Supp. 2d 25, 32 (D.D.C. 1999).

132. *Mylan Lab’ys*, 62 F. Supp. 2d at 41.

133. *Id.* at 41–42.

purchaser claims for disgorgement should be “denied absent express authority for such relief under state law.”¹³⁴

In contrast, the court in *In re TFT-LCD (Flat Panel) Antitrust Litigation* held that, because the Sherman Act authorized disgorgement and Oregon’s state antitrust law “provided an expansive grant of authority to seek equitable relief,” Oregon’s Attorney General “had authority to seek disgorgement under state law.”¹³⁵ And in an even broader victory, a recent decision in *FTC v. Vvera Pharmaceuticals* held that the New York Attorney General could seek disgorgement under the Donnelly Act, including for profits obtained outside the state that stemmed from the pharmaceutical company’s New York-based operations.¹³⁶

III. CONFIRMING AND CLARIFYING DISGORGEMENT AS AN ANTITRUST REMEDY

This Part proposes a statutory expansion to affirm the FTC’s ability to seek disgorgement in antitrust conduct cases, implement a qui tam provision to allow state attorneys general and private plaintiffs to seek disgorgement on the FTC’s behalf, and formalize procedures for complex circumstances, such as when there are multiple cases proceeding at once or plaintiffs bring claims for both disgorgement and monetary damages.

A. *Establishing Clear Statutory Authority and a Qui Tam Provision*

In response to the Supreme Court’s decision in *AMG*, Representative Tony Cárdenas introduced H.R. 2668, the Consumer Protection and Recovery Act (CPRA).¹³⁷ This bill aims to restore the FTC’s power to seek equitable monetary relief, including through disgorgement.¹³⁸ The House of Representatives narrowly approved CPRA with some bipartisan support, and a Senate

134. *Id.* at 43.

135. *Bridging the Gorge*, *supra* note 2 (discussing *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 10-4346 SI, 2011 WL 2790179, at *4 (N.D. Cal. July 12, 2011)). Notably, the court in a related case held that “disgorgement [is] not a form of equitable relief contemplated by Oregon[s] antitrust act for private antitrust parties when the statute had a damages provision.” *AREEDA & HOVENKAMP*, *supra* note 20, ¶ 2412 n.1 (citing *In re TFT-LCD (Flat Panel) Antitrust Litig.*, C 10-4346 SI, 2011 WL 1113447 (N.D. Cal. Mar. 25, 2011)).

136. *Myers*, *supra* note 130; *Wilke*, *supra* note 89 (discussing *FTC v. Vvera Pharms., LLC*, No. 20CV00706, 2021 WL 4392481 (S.D.N.Y. Sept. 24, 2021) (ECF No. 482)).

137. Richard B. Newman, *House Passes Bill Aimed at Clarifying FTC Enforcement Authority*, NAT’L L. REV. (July 27, 2021), <https://www.natlawreview.com/article/house-passes-bill-aimed-clarifying-ftc-enforcement-authority> [perma.cc/45V3-8ZRS].

138. Consumer Protection and Recovery Act, H.R. 2668, 117th Cong. (2021); Andrew Kragie, *House Votes To Restore FTC Disgorgement Authority*, LAW360 (July 20, 2021, 8:10 PM), <https://www.law360.com/articles/1404337> [perma.cc/E3ZA-DKTW]; Newman, *supra* note 137.

version was introduced in December 2021.¹³⁹ CPRA has received vocal support from both the Biden administration and state attorneys general, who see it as a critical step in strengthening the FTC's enforcement ability.¹⁴⁰ But as of September 2022, CPRA has not progressed further in the Senate.¹⁴¹

This Note proposes either a revision to the proposed CPRA or an additional piece of legislation that would include a qui tam provision. A qui tam provision allows a private plaintiff to sue on behalf of the government for violation of a specific law.¹⁴² If successful, the private enforcer generally receives a portion of the government's recovery in the case.¹⁴³ For instance, the federal False Claims Act includes a qui tam provision that allows anyone with evidence of fraud against the federal government to sue on the government's behalf.¹⁴⁴ To incentivize enforcement, a private plaintiff suing under the False Claims Act can be awarded 15–30 percent of a favorable judgment or settlement.¹⁴⁵ As a state-level example, California's Private Attorneys General Act (PAGA) includes a qui tam provision that allows employees to sue for violations of California's labor code on behalf of themselves, other employees, or the state.¹⁴⁶ PAGA allows prevailing plaintiffs to recover attorneys' fees, and any settlement of a PAGA claim must be approved by the court.¹⁴⁷

The idea of bringing qui tam doctrine to antitrust is not new.¹⁴⁸ For the purpose of disgorgement claims in the antitrust context, this Note proposes a

139. J. Edward Moreno, *GOP Sen. Floats Bill to Restore FTC's Restitution Powers*, LAW360 (Dec. 16, 2021, 5:45 PM), <https://www.law360.com/articles/1449355/gop-sen-floats-bill-to-restore-ftc-s-restitution-powers> [perma.cc/CRP4-FJ5G].

140. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2668 - CONSUMER PROTECTION AND RECOVERY ACT (July 19, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/HR2668.SAP-Final.pdf> [perma.cc/FN6X-FVBD]; Matthew Perlman, *AGs Support Bill Giving FTC Disgorgement Authority*, LAW360 (June 28, 2021, 5:24 PM), <https://www.law360.com/articles/1398221/ags-support-bill-giving-ftc-disgorgement-authority> [perma.cc/ABQ5-F7RA].

141. See Consumer Protection and Due Process Act, S. 3410, 117th Cong. (2021).

142. See *supra* note 8 and accompanying text.

143. See Lemons, *supra* note 8.

144. *False Claims Act (Qui Tam) Whistleblower FAQ*, NAT'L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/faq/false-claims-act-qui-tam> [perma.cc/V366-GL94]; *Qui Tam Action*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/qui_tam_action [perma.cc/FKZ2-W46H].

145. *False Claims Act (Qui Tam) Whistleblower FAQ*, *supra* note 144.

146. *Private Attorneys General Act (PAGA) – Filing*, STATE OF CAL. DEP'T OF INDUS. RELS. (Dec. 2020), <https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html> [perma.cc/3QGT-H3T7]; see also ANTHONY J. ONCIDI, PHILIPPE A. LEBEL, MICHELLE L. LAPPEN & MORGAN J. PETERSON, CALIFORNIA PRIVATE ATTORNEYS GENERAL ACT (PAGA): OVERVIEW, Westlaw W-001-1283 (2023).

147. ONCIDI ET AL., *supra* note 146; *Private Attorneys General Act (PAGA)*, CAL. LAB. & WORKFORCE DEV. AGENCY [hereinafter *California PAGA*], <https://www.labor.ca.gov/resources/paga> [perma.cc/WX8S-9WDY].

148. See, e.g., Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, L. & CONTEMP. PROBS., Summer & Autumn 1997, at 167; Jonathan Wright, *Blow the Whistle! How Bringing Whistleblower Rewards to Antitrust Would Help Cartel Enforcement*, 69 ADMIN. L. REV.

qui tam structure that would allow both private plaintiffs and state attorneys general (“non-FTC plaintiffs,” for the purpose of this discussion) to bring claims for disgorgement under FTC Act Section 13(b) if the FTC chooses not to.¹⁴⁹

As under the False Claims Act, a non-FTC plaintiff should be required to notify the FTC before it files suit and give the FTC time to decide whether to take over the case.¹⁵⁰ If the non-FTC plaintiff is a private plaintiff rather than a state attorney general, there should be an additional requirement that they notify their state’s attorney general after the FTC declines to intervene, with an additional period for the state attorney general to decide whether or not to take over the case.¹⁵¹ As under the False Claims Act, only the first case filed should be allowed to proceed.¹⁵² This will ensure that there are not multiple disgorgement cases proceeding at once (which, in theory, would risk opening defendants to multiple liability).¹⁵³ If multiple state attorneys general wish to be involved in litigating a disgorgement claim, they should join the first case, much like they do now when suing for violations of the Sherman and Clayton Acts.¹⁵⁴ There should also be a provision, as in the False Claims Act, to allow the government to seek dismissal of a qui tam plaintiff’s claims if they lack merit or otherwise risk generating negative precedent that would limit future government enforcement.¹⁵⁵

For disgorgement to serve its purpose as an efficient deterrent and to avoid duplicative or punitive recovery, there must be a hierarchy for courts to

695 (2017); see also Ross Brooks, *Recent DOJ Settlement of Qui Tam and Antitrust Claims in Bid-Rigging Case Shows That an Additional Remedy Does Not Have to Be an Alternate Remedy*, CASETEXT (Jan. 9, 2019), <https://casetext.com/analysis/recent-doj-settlement-of-qui-tam-and-antitrust-claims-in-bid-rigging-case-shows-that-an-additional-remedy-does-not-have-to-be-an-alternate-remedy> [perma.cc/B94U-4Q2M] (discussing qui tam actions for enforcement of criminal antitrust claims under DOJ authority).

149. While the False Claims Act is not structured for a state attorney general to sue on behalf of the federal government instead of a private plaintiff, state versions of the False Claims Act include the intermediary option of a local government suing in a qui tam capacity. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 13, § 400.3 (2008).

150. CHARLES DOYLE, CONG. RSCH. SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES (2021) (noting that private plaintiffs are required to give the federal government sixty days to decide whether to take over a False Claims Act claim).

151. See, e.g., tit. 13, § 400.3.

152. *Frequently Asked Questions About Qui Tam and the False Claims Act*, GETNICK & GETNICK, <https://getnicklaw.com/areas-of-practice/whistleblower-practice/federal-and-state-false-claims-act/important-qui-tam-facts-you-should-know> [perma.cc/5QYR-MJJQ].

153. Fisch, *supra* note 148, at 197–200 (discussing the duplicative nature of private civil suits, particularly in antitrust, and the risk of overdeterrence).

154. See, e.g., *FTC v. Mylan Lab’s, Inc.*, 62 F. Supp. 2d 25, 32 (D.D.C. 1999) (thirty-two states suing alongside the FTC for violations of the Sherman Act).

155. See False Claims Act, 31 U.S.C. § 3730(c)(2)(A); Memorandum from Michael D. Granston, Director, DOJ Com. Litig. Branch, Fraud Section to Att’y, DOJ Com. Litig. Branch, Fraud Section (Jan. 10, 2018) [hereinafter Memo from Granston], <https://www.insidethefalse-claimsact.com/wp-content/uploads/sites/860/2018/12/Granston-Memo.pdf> [perma.cc/2HUK-EE5X].

follow in adjudicating claims. Claims for actual damages should take precedence, and claims for disgorgement should be stayed until all claims for actual damages are adjudicated. If a private plaintiff seeks disgorgement in the alternative to actual damages, that private plaintiff should be required to notify the FTC and relevant state attorney general prior to filing the case, to give each the option of bringing the disgorgement claim instead. Only if the FTC and state attorney general decline to bring a separate case should the alternative claim for disgorgement be allowed to proceed. This would reflect an “understanding that . . . enforcement agencies [are] to retain primacy over private enforcement efforts” where there is a *qui tam* option.¹⁵⁶ Whatever the mix of claims involved, a claim for disgorgement should be adjudicated last so that any ultimate disgorgement figure can be offset against actual damages already awarded.

B. *Disgorgement Within the Realities of Multidistrict Litigation*

While the addition of a *qui tam* action for disgorgement may seem straightforward in the abstract, the realities of modern antitrust litigation make it somewhat more complicated. With increasing frequency over the past several decades, civil antitrust claims have been consolidated into multidistrict litigation (MDL) actions.¹⁵⁷ An MDL allows related cases pending in multiple federal districts to be consolidated in one district under one judge with the authority to handle all pretrial proceedings, including motions to dismiss and motions for summary judgment.¹⁵⁸ To be consolidated into an MDL, cases need to share a common question of fact (e.g., stem from the same alleged anticompetitive conduct).¹⁵⁹ The underlying rationale of MDL consolidation is that having one judge manage pretrial proceedings, including discovery, is more efficient than if the cases continued in different courts around the country.¹⁶⁰ MDL courts have broad discretion to adapt court procedure to fit the needs of the cases pulled into the MDL.¹⁶¹ MDL courts are also already well-versed in managing actions that involve a mix of private, *parens patriae*, and *qui tam* plaintiffs.¹⁶²

156. Leonard H. Sansanowicz, *The Nature of PAGA Actions*, *ADVOC. MAG.* (May 2021) (citing *Arias v. Superior Ct.*, 209 P.3d 923, 929–30 (Cal. 2009)), <https://www.advocatemagazine.com/article/2021-may/the-nature-of-paga-actions> [perma.cc/6X3P-QMFP].

157. Daniel S. Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket*, *LITIG. NEWS*, Fall 2019, at 26.

158. 28 U.S.C. § 1407(a).

159. *Id.*

160. *Id.*

161. Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 *N.Y.U. L. REV.* 1, 7 (2021) (“Procedural innovation has long been common across MDLs . . .”).

162. For instance, an MDL related to generic drug pricing included numerous private plaintiffs, counties, and state attorneys general. *In re Generic Drug Pharms. Pricing Antitrust Litig.*, 472 F. Supp. 3d 111, 112–13 (E.D. Pa. 2020) (discussing the various types of plaintiffs and

Federal courts have exclusive subject-matter jurisdiction over claims brought under federal antitrust statutes, which means that such claims must be filed in federal rather than state court and can therefore be consolidated into an MDL action without issue.¹⁶³ As such, it will be possible to identify and consolidate claims that stem from the same allegedly anticompetitive scenario, including claims for disgorgement brought by qui tam plaintiffs, into one federal court rather than potentially having duplicative claims proceed in parallel in various state courts.¹⁶⁴ As noted above, only one claim for disgorgement should be permitted to proceed. It will also be relatively easy for an MDL court to consider the full set of plaintiffs bringing different claims stemming from the same allegedly anticompetitive conduct.¹⁶⁵ An MDL court can therefore follow the hierarchy proposed above when considering which claims should be adjudicated first to ensure that disgorgement claims are handled last and offset against any actual damages awards.¹⁶⁶

C. Distribution of Relief

A key consideration is what to do with disgorged profits. As noted in Part I, past disgorgement cases have disbursed ill-gotten gains to victims where possible and have paid the gains into the U.S. Treasury where not.¹⁶⁷ In its comments on the FTC's 2003 policy statement on disgorgement, the ABA Antitrust Law Section suggested that "disgorged funds be escrowed to use for paying judgments in private litigation."¹⁶⁸ Recognizing the common concern that disgorgement would allow for duplicative recovery, this Note instead proposes that disgorgement claims be adjudicated only after all claims for actual damages are first resolved. However, to avoid any potential duplicative recovery, it would be advisable to hold any disgorged funds in escrow until the statute of limitations on potential future claims for actual damages has run. This

claims). Qui tam claims brought under the False Claims Act also end up in MDL actions. See Memo from Granston, *supra* note 155.

163. 28 U.S.C. § 1337(a); 28 U.S.C. § 1407(a); see also PAUL H. SAINT-ANTOINE ET AL., PRIVATE ANTITRUST LITIGATION IN THE UNITED STATES: OVERVIEW (2019), Westlaw 6-632-8692.

164. The Judicial Panel on Multidistrict Litigation (JPML) has existing procedures for MDL practice. R. P. U.S. J.P.M.L. (2016).

165. An MDL court can assess the list of plaintiffs and claims in each complaint for cases pending transfer or transferred into its MDL jurisdiction. See, for example, the JPML's decision to transfer cases related to the Volkswagen "clean diesel" litigation to the Northern District of California in *In re Volkswagen "Clean Diesel" Litig.*, 148 F. Supp. 3d 1367, 1368–69 (U.S. J.P.M.L. 2015).

166. MDL courts have extensive experience with deciding which cases and claims to handle first, as when they determine which cases are appropriate to adjudicate during "bellwether trials." WILLIAM B. RUBENSTEIN, 4 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 11:11 (6th ed. 2022).

167. See discussion *supra* Part I.

168. Hauberg, *supra* note 34; see also Elhauge, *supra* note 15, at 95.

would be similar to the SEC's "fair funds" system, which holds disgorged profits until investors harmed by illegal conduct are identified and compensated.¹⁶⁹ It would also parallel existing trust-and-lien closure provisions sometimes included in MDL settlement agreements, which hold a defendant's assets in trust until all settlement claims have been paid out.¹⁷⁰

As discussed in Part I, disgorgement is intended as a deterrent rather than a compensatory remedy, so any decision about what to do with ill-gotten profits once they have been disgorged is ancillary. As a commentator on California's PAGA statute noted, "In a qui tam action, the monetary benefit is incidental to the enforcement effect of the statute."¹⁷¹ However, as disgorgement claims for antitrust violations would most likely arise in cases where the people actually harmed by the conduct lack standing to sue for actual damages under *Illinois Brick*, it is morally satisfying to distribute disgorged profits to those people wherever possible. This could happen outside of the litigation process, after disgorgement has been awarded.

Identifying people who were harmed may be difficult, such as in consumer product cases where millions of people bought a low-value item from stores across the country, many paying with cash and few keeping receipts. However, it would be sensible to borrow existing procedures from the class action space, such as allowing people to claim a certain amount of damages without a showing of proof (e.g., recovering \$10 after attesting they purchased something from a retailer between certain dates) and allowing them to claim a higher amount in damages pursuant to a showing of proof (e.g., providing receipts for impacted transactions).¹⁷² That the exact list of people impacted by anticompetitive conduct is not readily available at the outset need not prevent a court from awarding disgorgement.¹⁷³ In other cases, such as where there is a small set of indirect purchasers who are identifiable but lack standing to sue for damages under *Illinois Brick*, distributing disgorged funds would generally be much more straightforward.

A number of cases in which the FTC and DOJ successfully sought disgorgement ended with settlement agreements rather than a disposition at

169. As the SEC notes, "Typically, a distribution agent will implement a claims process or other notification process to identify injured investors who may be eligible for distribution from a fair fund or disgorgement fund." *Investor Bulletin: How Victims of Securities Law Violations May Recover Money*, SEC (June 21, 2018), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_recovermoney.html [perma.cc/7KPE-Z8R5].

170. D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 *FORDHAM L. REV.* 2175, 2186 (2017).

171. McKenzie D. McCammack, *PAGA is the New Qui Tam: Changing the Landscape of Employment Law in California*, 43 *W. ST. L. REV.* 199, 219 (2016).

172. See, for example, the claim-reporting website of a class action settlement for deceptive advertising at Old Navy. *Barba v. Old Navy et al.* (2023), <https://onpricingsettlement.com> [perma.cc/7G7Q-FT56].

173. See, e.g., James D. Cromley & Aphrodite Kokolis, *The Eleventh Circuit Joins the Majority in Rejecting a Heightened Ascertainability Requirement for Class Actions*, *NAT'L L. REV.* (May 25, 2021), <https://www.natlawreview.com/article/eleventh-circuit-joins-majority-rejecting-heightened-ascertainability-requirement> [perma.cc/P9SR-SXFH].

trial.¹⁷⁴ Allowing settlement of disgorgement claims brought by private plaintiffs suing under a qui tam provision would be somewhat more complicated, given concerns with duplicative recovery.¹⁷⁵ However, when no claims for actual damages are forthcoming, or when all such claims have been adjudicated fully, it would be appropriate for courts to approve settlements to ensure that some amount of ill-gotten profit is ultimately disgorged.¹⁷⁶ Courts are already accustomed to assessing settlement terms for fairness and adequacy, and such approval could assuage concerns in disgorgement cases.¹⁷⁷ For instance, courts must approve settlements of class actions,¹⁷⁸ the DOJ is required to seek court approval of antitrust settlements under the Tunney Act,¹⁷⁹ and California's PAGA statute requires court approval for settlement of qui tam actions.¹⁸⁰ In cases where some plaintiffs have opted out of a class action settlement or trial and have chosen instead to litigate on their own, claims for disgorgement can be stayed and adjudicated once all opt-out claims have been fully litigated.¹⁸¹

It is beyond the scope of this Note to propose exactly the level or mechanism of incentive appropriate to encourage qui tam plaintiffs to bring claims for disgorgement. However, something like the structure of the federal False Claims Act or California's PAGA system would be a good starting point.¹⁸² For instance, a qui tam plaintiff could be statutorily entitled to fifteen percent of a

174. See, e.g., *FTC Settlement of Cephalon Pay for Delay Case Ensures \$1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected By Anticompetitive Tactics*, FTC (May 28, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill-gotten-gains-relinquished-refunds-will> [perma.cc/4SH6-NA5U]; Hauberg, *supra* note 34.

175. See *supra* Section III.A (discussing a hierarchy to avoid duplicative recovery).

176. See *supra* Section I.F (discussing concern that treble damages fail to capture the full extent of ill-gotten gains and that injunctive relief is unavailable in some cases).

177. Courts are required to assess proposed settlement agreements in class actions for fairness, reasonableness, and adequacy, and to ensure that both the substantive terms and procedural circumstances properly protect the interests of absent class members. See RUBENSTEIN, *supra* note 166, § 13:39.

178. FED. R. CIV. P. 23(e).

179. Michael A. Gleason, Lauren Miller Forbes, William Coglianesi & Tommy Rucker, *It Ain't Over Till It's Over: Review of DOJ M&A Settlements Under the Tunney Act*, M&A LAW., Oct. 2019, at 1, 1.

180. *California PAGA*, *supra* note 147. Under PAGA, courts have authority to approve a settlement worth less than the full statutory penalty if doing so prevents an "unjust, arbitrary and oppressive, or confiscatory" result. Sansanowicz, *The Nature of PAGA Actions*, *supra* note 156 (quoting PAGA § 2699, subd. (e)(2)). While this exact language could lead skeptical courts to reduce a disgorgement settlement to zero, something similar could avoid this pitfall while still giving courts discretion to prevent settlements that would jeopardize a party's ability to stay in business, for example.

181. A court managing a class action or MDL will know which parties are involved and the status of the various claims, so adding opt-out claims to the hierarchy of claims outlined earlier in Part III would be workable.

182. See *supra* Section III.A (discussing incentive payments under the federal False Claims Act).

net disgorgement award (i.e., total disgorgement minus whatever actual damages were already adjudicated and paid out). Recognizing that the potential disgorgement award in an antitrust case is likely much larger than the money at issue for an FCA claim, the statute could allow the court to reduce the percentage at its discretion. Courts already have similar discretion under the common fund doctrine, which allows them to reduce percentage-based attorneys' fees for exceptionally large class action recoveries.¹⁸³

This incentive payment would not reflect an inappropriate windfall because it simply encourages willing qui tam plaintiffs to seek justice where anticompetitive conduct would otherwise go unpunished.¹⁸⁴ While the incentive payment would slightly reduce the amount of disgorged funds available to injured purchasers, a successful disgorgement claim likely indicates that purchasers would have been unable to recover actual damages in the alternative. Whatever the mechanism, rewarding private plaintiffs for enforcing antitrust laws and contributing to efficient deterrence will not constitute duplicative recovery as long as actual damages are litigated fully and deducted from calculated disgorgement before any incentive award is paid out.

D. *What to Do with Existing Statutory Authority?*

With proper application of a qui tam provision and the MDL mechanism, existing statutory authority need not change. The DOJ could continue to pursue disgorgement under the Sherman Act authority recognized in *Keyspan*, or it could agree to allow the FTC to pursue claims for disgorgement unilaterally. The two agencies already have systems in place to determine which agency will pursue a given case, such as their traditional division of industries in merger review.¹⁸⁵ Alternatively, the DOJ could agree to seek disgorgement only when it is incidental to criminal antitrust cases they alone are authorized to prosecute, rather than as a standalone remedy.

Similarly, state attorneys general could continue to pursue disgorgement under federal and state antitrust laws, because the same qui tam, MDL, escrow, and distribution mechanisms discussed above can ensure that there is

183. See Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 940 (2017) ("We continue to find a 'scaling' effect, in the sense that fees as a percentage of the recovery tend to decrease as the size of the recovery increases—an effect that appears to be due to the economies of scale that can sometimes be achieved in very large cases.").

184. For a discussion of how qui tam provisions incentivize private parties to investigate and uncover False Claims Act violations, see Elizabeth J. Kennedy, *Deputizing the Frontline: Enforcing Workplace Rights in a Post-Pandemic Economy*, 38 HOFSTRA LAB. & EMP. L.J. 203, 233–34 (2021).

185. Jeff Jaeckel, Alexander Okuliar & David J. Shaw, *United States: Merger Review Process*, GLOB. COMPETITION REV. (Dec. 20, 2021), <https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2022/article/united-states-merger-review-process> [perma.cc/W6CR-8THX].

no duplicative recovery.¹⁸⁶ Cases brought by state attorneys general will likely continue to face hurdles regarding *Illinois Brick* standing and whether each state's antitrust law reaches out-of-state profits. To minimize these hurdles, state legislatures are encouraged to align state antitrust laws authorizing disgorgement with the section of New York's Donnelly Act that *FTC v. Vvera Pharmaceuticals* held to cover out-of-state profits.¹⁸⁷

The proposed qui tam provision would, in theory, allow indirect purchasers to sue for disgorgement when they would not otherwise be able to sue for actual damages under *Illinois Brick*.¹⁸⁸ However, the system discussed above, which would stay claims for disgorgement until all actual damages claims are adjudicated and then hold disgorged profits in escrow until the statute of limitations has run, will ensure that indirect purchasers do not benefit beyond whatever incentive payment they are due for bringing the qui tam action.¹⁸⁹ As emphasized throughout this Note, the proposed qui tam hierarchy is not intended to turn disgorgement into a quick-fix or shortcut remedy for antitrust enforcement. Rather, it is intended as a deterrent mechanism to ensure that defendants ultimately pay back the full price of their illegal conduct.

IV. ADDRESSING COMMON CONCERNS

A major stumbling block disgorgement claims have faced in the past is that courts and critics often misunderstand the theoretical underpinnings of the remedy and overemphasize the risk of duplicative recovery. This Part consolidates responses to a number of common concerns and erroneous objections to disgorgement as an antitrust remedy, relying both on the law of disgorgement as it exists today and the proposed solutions presented in Part III.

A. Will Disgorgement Lead to Duplicative Recovery?

Disgorgement need not lead to duplicative recovery. By following the qui tam and escrow proposals outlined in Part III and leveraging the existing mechanism for consolidating related cases into MDL actions, it will be possible to ensure any ill-gotten profits ordered to be disgorged are not duplicative

186. Claims brought under state antitrust law are not ordinarily subject to consolidation in an MDL and the Supreme Court confirmed in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014), that *parens patriae* claims brought by state attorneys general are not subject to the Class Action Fairness Act (CAFA) jurisdiction that allows many class and mass actions to be pulled into federal court. *Mississippi v. AU Optronics: Will There Be an Increase in Parens Patriae Suits?*, BAKER STERCHI COWDEN & RICE (Jan. 22, 2014), <https://www.bscr-law.com/mississippi-v-au-optronics-will-there-be-an-increase-in-parens-patriae-suits> [perma.cc/ZZ6N-TTS9]. However, MDL courts are well-versed in managing actions where cases are proceeding in parallel in state court. See RUBENSTEIN, *supra* note 166, § 6.46.

187. *Supra* Section II.C.

188. See *supra* Section I.B (discussing *Illinois Brick* limitations on indirect-purchaser standing).

189. See *infra* Section IV.B (addressing concerns about *Illinois Brick*).

of any actual damages awarded.¹⁹⁰ For instance, if plaintiffs bring claims for disgorgement without claims for actual damages (as in cases where indirect purchasers lack standing to bring claims for actual damages and direct purchasers are disinclined to sue), any disgorged profits will be held in escrow by the court until the statute of limitations has run and no future claims for actual damages can be brought. Waiting until the statute of limitations has run ensures, for instance, that direct purchasers cannot change their minds and bring a case.¹⁹¹

If any such claims for actual damages do arise, they can be litigated, trebled, and paid out of the waiting disgorged profit pool. If those treble damages exceed the calculation of ill-gotten profits, the defendant would be required to pay the additional difference but nothing in disgorgement. However, the defendant would have been liable for the full amount of treble damages in the absence of a disgorgement claim anyway. And if ill-gotten profits exceed treble damages, the defendant would need to disgorge the remainder. In the case where multiple claims for actual damages are brought prior to any claims for disgorgement, the cases could be consolidated into an MDL action for efficient discovery and case management.¹⁹²

Whether a claim for disgorgement arises before, after, or in lieu of a claim for actual damages, it is clear that disgorgement as an antitrust remedy should not be perceived as a “get rich quick” scheme.¹⁹³ The only way for disgorgement to be an effective, efficient addition to the antitrust enforcement arsenal while legitimately assuaging fears of duplicative recovery is for any disgorged profits to remain safely in escrow until related litigation is resolved.

B. Will Disgorgement Allow Indirect-Purchaser Plaintiffs to Evade *Illinois Brick*?

Disgorgement will allow indirect-purchaser plaintiffs to bring a claim for disgorgement where *Illinois Brick* would otherwise bar their claim for actual damages, but it does not implicate the risk of duplicative recovery with which the *Illinois Brick* Court was concerned.¹⁹⁴ The proposed statutory scheme will allow indirect-purchaser plaintiffs to bring claims for disgorgement as a qui tam action only after the FTC and state attorneys general have declined to

190. See *supra* Section III.C (discussing staying claims for disgorgement until all actual damages claims are adjudicated and holding disgorged funds in escrow).

191. See *supra* Section III.C. This could correspond to any relevant statutes of limitations or repose. For discussion of statutes of limitations and repose for antitrust conduct claims, see, for example, Reid J. Shepard, Note, *Determining the Right Requirements for Restarting the Limitation Period in Private Antitrust Conspiracy Suits*, 104 IOWA L. REV. 957 (2019).

192. E.g., Terry Turner, *Multidistrict Litigation (MDL)*, DRUGWATCH (Nov. 4, 2022), <https://www.drugwatch.com/lawsuits/multidistrict-litigation> [perma.cc/48VF-6327].

193. See *supra* Section I.B (discussing the need to establish antitrust standing and estimate overcharge).

194. Amato, *supra* note 21.

pursue the case.¹⁹⁵ The claims for disgorgement will then be stayed until separate claims for actual damages have been litigated, trebled, and disbursed. Indirect-purchaser plaintiffs would still face *Illinois Brick* hurdles to establish actual damages claims, so there is no scenario in which they can recover both actual damages and any portion of a disgorgement award. As discussed in Part III, permitting an indirect-purchaser plaintiff who brings a disgorgement claim to receive some portion of the disgorgement award as an incentive payment is not an inappropriate windfall.¹⁹⁶ Instead, it reflects the value of more effective enforcement of antitrust laws.¹⁹⁷ If Congress permits disgorged funds to be distributed to injured parties including indirect purchasers (aside from the qui tam incentive award), this would reflect a valid policy choice rather than an impermissible evasion of *Illinois Brick*.

C. Will Disgorgement Be Difficult to Calculate?

Disgorgement will be no more difficult to calculate than actual damages, which courts handle in antitrust litigation every day.¹⁹⁸ Indeed, they will likely be less complicated. For instance, there is no need to calculate (or for parties to squabble over) the rate of pass-on to indirect purchasers, and it is unnecessary to calculate the exact harm to each purchaser during the litigation process.¹⁹⁹ Disgorgement requires wrongdoers to pay back the profits they earned as a result of anticompetitive conduct, regardless of the amount by which purchasers at any level of the supply chain were harmed. Once disgorgement is awarded and ill-gotten profits are repaid, any further process to distribute the funds to affected purchasers can happen outside the costly adversarial litigation sphere.²⁰⁰

D. Will Disgorgement Incentivize Overzealous Enforcement?

Confirming the FTC's authority to seek disgorgement and improving the process for managing disgorgement claims need not incentivize overzealous enforcement. As discussed in Part III, disgorged profits can be distributed to identifiable victims of the illegal anticompetitive conduct or deposited in the U.S. Treasury where such identification is not feasible.²⁰¹ Disgorged profits would not augment antitrust agency budgets (unless, of course, Congress

195. See *supra* Section III.A.

196. See *supra* Section III.C.

197. See *supra* Section III.C.

198. See *supra* Part I (discussing the current framework for establishing actual damages).

199. *Supra* Part I. See *supra* Part III for discussion of how disgorged funds could be distributed to injured parties, using something akin to the settlement claim mechanism in consumer class actions.

200. See *supra* Section III.C.

201. See *supra* Part I.

made the policy decision to allow that).²⁰² Private plaintiffs bringing qui tam claims would face the same high hurdles of establishing standing and an antitrust violation as they would in a case for actual damages, and they would stand only to gain whatever incentive payment Congress deemed to be appropriate.²⁰³

To further assuage concerns about overenforcement, the FTC could revisit the three factors it laid out in 2003 to guide determinations of appropriate cases for disgorgement. As noted in Part II, these factors are: (1) whether there is a reasonable basis for calculating remedial payment, (2) whether there has been a clear violation of antitrust laws, and (3) the extent to which other remedies would afford adequate monetary remedy.²⁰⁴ Abiding by the first factor would ensure that the FTC or other parties bringing qui tam actions have some idea of what specific conduct or profits they are targeting. The second factor is likely already in play due to ever-higher pleading requirements.²⁰⁵ Finally, the third factor could be reinterpreted to mean that the FTC and other parties are discouraged from bringing claims for disgorgement if there are already cases for actual damages ongoing and those appear likely to succeed.

E. *What Does Disgorgement Mean for Existing Antitrust Remedies?*

The availability of disgorgement does not impact other remedies because disgorgement is intended as a deterrent and top-up mechanism when other remedies fail to fully compensate victims or punish illegal conduct.²⁰⁶ Confirmation and clarification of antitrust enforcers' authority to seek disgorgement are merely intended to strengthen enforcers' ability to effectively and efficiently remedy anticompetitive conduct that currently goes un- or under-punished.

202. Elhauge, *supra* note 15, at 94 ("Probably the best way to minimize distortion is to make sure that, when there is no practicable way of delivering disgorged profits to the victims, such disgorgement proceeds should go to the general treasury and not affect the budget of the agencies. Which, conveniently enough, is precisely what U.S. law provides.")

203. See *supra* Parts I (discussing antitrust standing and damages), III (discussing qui tam incentive payments in existing statutes).

204. Elhauge, *supra* note 15, at 81–83; Ohlhausen, *supra* note 102, at 1; 2003 Policy Statement, *supra* note 44.

205. See, e.g., Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L. REV. BULL. 55 (2010); Joshua Stokes & Jordan Ludwig, *Pleading an Antitrust Conspiracy in a Post-Twombly World*, CROWELL & MORING (Oct. 2015), <https://www.crowell.com/files/201510-Pleading-Antitrust-Conspiracy-in-Post-Twombly-World-Ludwig.pdf> [perma.cc/72S7-5PZ8].

206. See *supra* Parts I (discussing the deterrent purpose of disgorgement), III (proposing how to handle parallel claims for disgorgement and actual damages).

CONCLUSION

Disgorgement is an antitrust remedy that has for decades faced an uphill battle in the courts and skepticism among antitrust commentators. The current mechanisms for seeking disgorgement are imperfect. However, a clearer statutory grant of authority for the FTC, a qui tam mechanism for private enforcement, and thoughtful use of existing multidistrict litigation tools would transform disgorgement into an effective, efficient mechanism for redressing and deterring anticompetitive conduct going forward.

