

STATEMENT OF COMMISSIONER THOMAS B. LEARY,
CONCURRING IN PART AND DISSENTING IN PARTFederal Trade Commission v. The Hearst Trust
File No. 991-0323

The Commission has approved a proposed Final Order, subject to judicial approval, to settle the litigation arising from the 1998 acquisition of Medi-Span, Inc. by The Hearst Trust and First DataBank, Inc. I concur in the result. This litigation should be settled and the former Medi-Span business should be divested to Wolters Kluwer nv. This divestiture and the order provisions that allow customers of First DataBank to terminate their existing contracts, which contain inflated prices, are important to restore competition in the market and end on-going consumer harm resulting from a merger that the Commission claimed was illegal. I dissent, however, from the portion of the proposed Final Order that requires Hearst to pay \$19 million for disgorgement of profits.

I have in the past voiced disagreement with the Commission's decisions to seek disgorgement in specific antitrust cases.⁽¹⁾ My reservations about the use of this remedy have not changed.

I do not go so far as to say that disgorgement should never be sought in an antitrust case. This particular case, however, is a classic example of a situation where the remedy is unnecessary, if not affirmatively harmful. This case could probably have been settled by the Commission with payment of civil penalties substantially larger than those that have been paid in this situation. These civil penalties, for violations of the Hart-Scott-Rodino premerger notification requirements, would be levied on top of any amounts that the parties would have to pay out in private damages cases.

As Commissioner Swindle and I anticipated in our earlier statement on this matter, private class actions followed promptly after the Commission brought its action. The eight class action complaints that followed each tracked the language of the Commission's complaint. After no discovery and only minimal negotiation, the private cases were settled for \$26 million, including attorneys fees.

The \$19 million the Commission obtained in disgorgement will be turned over to plaintiffs' counsel and included in the \$26 million plus funds distributed to eligible parties in the private class action lawsuits. Thus, the incremental award for injured customers negotiated by the attorneys for the class action plaintiffs will ultimately amount to only approximately \$7 million, from which their attorneys fees must be subtracted. Although hypothetical predictions about the "but for" world are always risky, it is entirely possible that the parties will wind up paying less money than they would have paid if the Commission had settled the case months ago for a substantially higher civil penalty that would not offset private damages, as will happen under the disgorgement remedy negotiated here.

Endnote:

1. See Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part, Federal Trade Commission v. Mylan Pharmaceuticals, Inc., FTC File No. X990015, available at <www.ftc.gov/os/2000/11/mylanlearystatement.htm>; Dissenting Statement of Commissioners Orson Swindle and Thomas B. Leary, Hearst Trust and Hearst Corporation's Acquisition of J.B. Laughrey, Inc., FTC File No. 991 0323, available at <www.ftc.gov/os/2001/04/hearstdiswinleary.htm>.