[Alerts and Updates]

More Aggressive Antitrust Enforcement Ahead

May 13, 2009

Setting the tone for more vigorous antitrust enforcement in the Obama administration, especially with respect to unilateral conduct of market-leading firms, on May 11, 2009, Christine Varney delivered her first public remarks as the new Assistant Attorney General for Antitrust ("Varney" or "AAG Varney"). Most significantly, Ms. Varney took quick and decisive action and formally withdrew and repudiated Sherman Act Section 2 enforcement policy articulated in a 215-page report issued by the Antitrust Division under the Bush administration in September 2008. AAG Varney declared that the Antitrust Division will aggressively enforce antitrust laws against predatory or unjustified exclusionary acts by dominant firms. Varney cautioned that businesses, lawyers and courts should not rely on the 2008 report as either a current reflection of Antitrust Division enforcement policy or an appropriate interpretation of Section 2 of the Sherman Act.

General Enforcement Policy

AAG Varney touched upon a number of points that provide insights into the direction of antitrust policy anticipated under the new administration. She affirmed that active antitrust enforcement would be a part of the federal government's response to the distressed economy, indicating that relaxation of antitrust enforcement was inappropriate, even in a recession. AAG Varney also:

- expressed concern about the potential for collusive activities, such as bid rigging, among participants in distressed industries, particularly those receiving government funds;
- suggested that the Antitrust Division would explore new theories of enforcement in merger and non-merger cases, including examining new theories of vertical restraints, and would be particularly watchful of high-tech and Internet-based markets;
- explained that the Division would seek to "find the right balance to ensure that when intellectual property is at issue, competition is not thwarted through its misuse or illegal extension";
- suggested the need to "recalibrate" economic analysis and bring to bear a comprehensive knowledge of the economic and regulatory environments in various industries; and
- noted that the Division will contribute its experience and expertise to the Obama administration's efforts to reform industries such as banking, healthcare, energy, telecommunications and transportation.

Market Leaders Beware

The clearest shift in enforcement policy signaled by AAG Varney is in the area of Section 2 of the Sherman Act, which prohibits monopolization, attempted monopolization and conspiracies to monopolize. Unlike Section 1 violations requiring concerted action among two or more persons in restraint of trade, a firm can violate Section 2 through its own unilateral conduct.

Under the Bush administration, the Antitrust Division issued an extensive report regarding single-firm conduct, titled *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*. Based on the view that vague or overbroad prohibitions against single-firm conduct are likely to undermine economic growth and harm consumers, the report was intended to reflect the Antitrust Division's enforcement policy and provide objective standards for analyzing single-firm conduct under Section 2. Among

the practices on which the report offered guidance were predatory pricing, tying, bundled and loyalty discounts, unilateral and unconditional refusals to deal with rivals, and exclusive dealing.

The Antitrust Division sought in the 2008 report to define clear lines, or "safe harbors," that leading firms could observe to avoid violating Section 2 of the Sherman Act, and voiced a preference for standards under which conduct should not be deemed to violate Section 2 unless its anticompetitive effects disproportionately outweighed potential procompetitive benefits. The Federal Trade Commission (FTC) had conducted joint hearings on Section 2 with the Antitrust Division in 2006 and 2007, but the FTC declined to join in the Antitrust Division's report. Indeed, three of the four FTC commissioners issued a statement that criticized the report as a "blueprint for radically weakened enforcement of Section 2 of the Sherman Act."

During her confirmation hearing AAG Varney had expressed disagreement with the conclusions of the Section 2 report. In her May 11 speech, Varney expressly withdrew the report and declared that it "no longer represents the policy of the Department of Justice with regard to antitrust enforcement under Section 2 of the Sherman Act." AAG Varney further advised that it "should not be used as guidance by courts, antitrust practitioners, and the business community." She took particular exception to what she characterized as "an excessive concern with the risks of over-deterrence and a resulting preference for an overly lenient approach to enforcement."

Rejection of the report is likely to bring the Antitrust Division back in line with the FTC on enforcement policy under Section 2. In addition, AAG Varney withdrew the report in the same week during which the European Commission is expected to announce a very significant fine against Intel for conduct directed against its smaller competitor AMD. Although the details of current Section 2 enforcement policy have not yet been articulated, renouncing the report likely brings the Antitrust Division closer to the enforcement policy of the European Commission with respect to single-firm conduct.

AAG Varney did explain, however, that "[r]einvigorated Section 2 enforcement will . . . require the Division to go 'back to the basics' and evaluate single-firm conduct against" the "tried and true standards" set forth in earlier Supreme Court cases. Specifically, she discussed *Lorain Journal v. United States*,[1] in which the Court enjoined a monopolist newspaper publisher from refusing to accept advertising from any entity that also advertised on a new radio station; and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[2] in which the Court found a Section 2 violation when the operator of three of four ski facilities refused to continue participating in a joint ticketing program with the operator of the fourth competing ski facility. AAG Varney also cited *United States v. Microsoft*[3] (tying, exclusive dealing and threats), *United States v. Dentsply International, Inc.*[4] (dominant firm exclusive distribution arrangements) and *Conwood Co. v. United States Tobacco Co.*[5] (removal of rival's displays, misleading information to retailers and leading firm exclusive dealing) as models of Section 2 enforcement that the Antitrust Division was likely to follow.

Many commentators have suggested that two recent Supreme Court antitrust decisions—*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*[6] and *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*[7]—limited the scope of *Aspen Skiing*. AAG Varney countered that *Aspen Skiing* means "dominant firms can be expected to deal with their rivals where 'cooperation is indispensible to effective competition.'" She disagreed that enforcement policy should avoid "false positives" by only pursuing conduct when likely anticompetitive effects disproportionately outweigh potential procompetitive benefits, rejecting that "disproportionality test" either for enforcement discretion or as a rule of law to be applied by the courts.

The Supreme Court has ruled in favor of antitrust defendants in most cases in the last 15 years, typically in opinions issued by a wide majority. Many of those decisions push in the opposite direction of the policies suggested by AAG Varney. However, almost all of those cases were civil antitrust lawsuits brought by private parties, not government enforcement actions; and in several of them,

the federal government concurred in *amicus* briefs with the positions of corporate defendants. With the government as plaintiff, and a new solicitor general, that trend may change.

The simple message from AAG Varney is that leading firms can no longer look to the 2008 report to find safe harbors immunizing unilateral business practices from federal antitrust enforcement. Whether a leading firm's conduct exposes it to liability under Section 2 will depend upon intent, actual monopoly power (or the probability of obtaining it), and the impact in the marketplace of practices such as loyalty discounts, bundling, exclusive distribution arrangements, and refusals to deal.

Businesses with a leading market share should be mindful of the more aggressive level of antitrust enforcement signaled by the Antitrust Division. While it remains to be seen whether courts will be receptive to this more activist Section 2 enforcement approach, the costs of complying with an Antitrust Division investigation or defending an enforcement action are significant, even if challenged conduct is ultimately found to be legal. And, of course, increased civil litigation by private plaintiffs is likely to follow in the wake of accelerated enforcement by the Antitrust Division.

For Further Information

If you would like more information regarding the impact of this development or regarding other antitrust matters, please contact Antitrust and Competition Practice Group co-chairs Edward G. Biester or Wayne A. Mack, a member of the Antitrust and Competition Practice Group or the attorney in the firm with whom you are regularly in contact.

Notes

1. *Lorain Journal v. United States*, 342 U.S. 143 (1951).
2. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).
3. *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).
4. *United States v. Dentsply International, Inc.*, 399 F.3d 181 (3d Cir. 2005).
5. *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002).
6. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
7. *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 129 S. Ct. 1109 (2009).