

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2009

PHILADELPHIA, TUESDAY, JUNE 2, 2009

VOL 239 • NO. 105 An incisivemedia publication

## ANTITRUST LAW

### Administration's New Antitrust Policy Is on Collision Course With High Court

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*Special to the Legal*

Speeches and actions by Christine A. Varney, the new assistant attorney general in charge of antitrust for the Department of Justice, signal that the Obama administration intends to reinvigorate government antitrust enforcement. Varney stated, for example, that the antitrust division “will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers.”

Recent U.S. Supreme Court antitrust decisions, however, may impede this strategy. That is because over the last several years, the number of activities deemed by the U.S. Supreme Court anti-competitive under antitrust law has declined. The U.S. Supreme Court's most recent antitrust decision in *Pacific Bell Telephone Co. v. Linkline Communications Inc.* exemplifies that fact, as the court eliminated “price squeeze” antitrust claims and reiterated that antitrust claims premised on reduced prices cannot survive unless those prices are below-cost and create a dangerous probability of recoupment. As further examples, the court has made it more difficult to challenge vertical price agreements (*Leegin Creative Leather Products Inc. v. PSKS Inc.*), has held that a firm with no antitrust duty to deal with its rivals is not required to provide those rivals with a sufficient level of service (*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*), has raised the standards for pleading an antitrust conspiracy (*Bell Atlantic Corp. v. Twombly*), and has held that certain IPO stock underwriting practices are immune from antitrust scrutiny (*Credit Suisse Securities v. Billing*).

President Obama's nomination of Circuit Judge Sonia Sotomayor is unlikely to reverse this movement, regardless of her views on antitrust, because she replaces



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Justice David Souter, who — although not as “liberal” on antitrust as other issues — was not an essential vote in these decisions. Interestingly, however, Souter wrote the opinion in the game-changing antitrust and federal procedure decision of *Bell Atlantic v. Twombly*. He went on to dissent in the court's May 2009 *Ashcroft v. Iqbal* decision, which developed and expanded *Twombly* in a non-antitrust context. In any event, there is no indication in Sotomayor's judicial opinions to date that she will necessarily take strong pro-plaintiff antitrust positions. Of course, a circuit judge following Supreme Court precedent is in a very different position than

a Supreme Court justice determining the parameters of the Sherman Act, which has been developed by the court in a manner similar to the common law — weighing both policy and precedent.

Symbolic of the Obama administration's departure from its predecessor's greater emphasis on markets and less aggressive antitrust enforcement, Varney announced with much fanfare that the DOJ antitrust division has withdrawn a Sherman Act Section 2 report that the Bush administration issued last fall. This section of the Sherman Act regulates unilateral conduct by prohibiting a firm from illegally acquiring or maintaining a monopoly. That broad prohibition can include a wide range of single firm conduct, including predatory pricing, exclusive dealing, refusals to deal, bundled pricing, loyalty discounts and other potentially exclusionary conduct. Section 2 antitrust doctrine is currently somewhat in flux as courts, attorneys and economists continue to debate which conduct should lead to liability under the antitrust laws and how to prove that conduct.

Part of the Bush administration's purpose in releasing the report was to make single firm antitrust liability “more clear and administrable” so “businesses are more likely to comply with the law, violations will be easier to identify and remedy, and consumers will be better served.” Determining standards under the antitrust laws — particularly Section 2 — is not as easy as just outlawing anti-competitive activities. That is because proof in antitrust cases can be imprecise, difficult and costly. Indeed, the U.S. Supreme Court acknowledged that in *Twombly* when it warned “proceeding to antitrust discovery can be expensive.” The availability of treble damages also exacerbates the cost of administrative (or judicial) mistakes. Thus — not surprisingly — antitrust law as interpreted by the courts can substantially affect behavior. And since the relevant tests and standards for Section 2 liability are usually just a proxy for actual anti-competitive behavior,

they are often under- and over-inclusive. Treble damages offer some protection from under-inclusive standards, but over-inclusive antitrust standards may actually undercut the purpose of the antitrust laws by deterring competitive behavior. That is because there often is a fine line between strong competition and anti-competitive actions.

For example, a company with substantial market share that is cutting prices is competing in a way that is beneficial to consumers. If that same company, however, cuts prices below an appropriate measure of its own costs to destroy its competitors, and has a dangerous probability of recouping its investment in below-cost pricing, its actions may be anti-competitive. What is the appropriate measure of costs is a question that does not have a consensus answer. The answer to that question, however, may decide whether an action is beneficial to consumers or anti-competitive. Antitrust doctrine is full of these difficult questions. Thus, determining the appropriate antitrust standard requires a judgment on both the antitrust itself and the administrative costs and benefits of a particular rule. Oftentimes it comes down to a judgment of whether it is less harmful to sweep in too much behavior or not enough.

That is one place where the current and past administrations differ. The 213-page Section 2 report was criticized by some for being too lenient on companies with substantial market power, and for creating liability standards that were too difficult to reach. Interestingly, the FTC expressly declined to join the report even though it participated with the DOJ in the joint report's underlying hearings.

The DOJ antitrust division's withdrawal of this report was not a surprise as Varney explained in her confirmation hearings that dominant firm conduct could be subject to closer scrutiny than it was during the Bush administration. It is clear that the Obama administration disagrees with the Bush administration about the appropriate balance between under- and over-deterrence. Interestingly, similar to its strategy of increasing government involvement in other areas of the economy, the Obama administration is using the current economic crisis as an opportunity to support its more interventionist antitrust policy. In the press release announcing the report withdrawal, Varney states, "The recent developments in the marketplace should make it clear that we can no longer rely upon the marketplace alone to ensure that competition and consumers will be protected." And in a speech announcing the new antitrust policy, Varney elevated lack of antitrust scrutiny as a reason for the economic crisis, saying, "It appears that a combination of factors, including ineffective government regulation,

ill-considered deregulatory measures, and inadequate antitrust oversight contributed to the current conditions."

This increased government scrutiny, however, is not likely to be limited to Section 2, or even to the DOJ. Varney's recent speeches confirmed that Section 1 criminal and civil enforcement will "be an important part of the antitrust division's response to the distressed economy." She also signaled that the DOJ will be an active reviewer of mergers. Importantly, with regard to civil merger and non-merger enforcement, Varney stated in a speech that the antitrust division "will have the opportunity to explore vertical theories and other new areas of civil enforcement, such as those arising in high-tech and Internet-based markets." This is interesting for at least two reasons. First, antitrust doctrine has been moving away from liability based upon vertical relationships, so this statement indicates that the Obama administration wants to revive this increasingly narrow zone of antitrust scrutiny. Second, it confirms that the DOJ antitrust division is going to look very closely at companies in the technology and Internet

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sectors. Varney's public and private practice background emphasized these sectors.

The DOJ may not be the only government agency ramping up its antitrust enforcement; there are signs that the Federal Trade Commission is doing the same. The FTC has challenged two consummated transactions already this year, and at least one of its commissioners would like to make greater use of Section 5 of the FTC Act to challenge conduct that may not be illegal under the antitrust laws. Furthermore, it would not be surprising if the DOJ and FTC seek to revise the merger guidelines in the next several years, as both agencies apparently seek to depart from previous enforcement priorities.

The Obama administration's move for greater antitrust scrutiny, however, may collide with the U.S. Supreme Court, which

has been developing antitrust law in the opposite direction. The court has expressed great concern about deterring competitive behavior like price cutting, for example, and has made it more difficult for certain antitrust claims to survive. Recent decisions suggest that the court is increasingly concerned about sweeping too much activity under the antitrust umbrella — both because some of that behavior may be competitive (and therefore beneficial) and because the courts are not administratively suited to regulate certain behavior. Interestingly, since 2003 (10 cases) the Supreme Court itself has taken a renewed interest in antitrust cases compared to the previous five years (two cases). In these recent cases, the court typically narrowed or eliminated an antitrust claim, or raised the standards to state or prove that claim. It is uncertain what types of antitrust issues the Supreme Court will decide over the next several years, but its recent decisions by themselves create a barrier of sorts for the DOJ antitrust division's stated goals of reinvigorating antitrust enforcement and certain antitrust theories.

That is not to say that the Obama administration's new antitrust policies will not matter — they will matter a great deal. Just the threat, or even the possibility, of a government investigation is enough to change behavior — for better or worse. The same is true about mergers and acquisitions: The likelihood of a challenge may stop the transaction from even beginning. Moreover, as the government's antitrust arm, the DOJ antitrust division (as well as the FTC) state the government's antitrust policy, which itself has substantial and wide-ranging influence. For example, the merger guidelines issued in the past by the DOJ and FTC have had substantial influence on court decisions, even outside of merger contexts, as these guidelines also discussed the proper manner of defining a relevant market. Antitrust doctrine is still developing and it is possible that DOJ antitrust policy could affect lower court decisions on issues that have not been conclusively decided by the U.S. Supreme Court. Indeed, the Obama administration's activist policy may accelerate the development of antitrust law by generating more cases for the courts to decide. Stay tuned. •