ANTITRUST ENFORCEMENT IN THE OBAMA ADMINISTRATION

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Antitrust Law Overview

Sherman Act (1890) §1 makes illegal any contract, combination or conspiracy in restraint of trade.

- Requires concerted action—it takes two (at least). A corporation cannot violate Sherman Act §1 acting alone.

Sherman Act §2 prohibits monopolization as well as attempts and conspiracies to monopolize.

- A corporation can violate Sherman Act §2 acting by itself.
- Monopoly means that a corporation has market power—the ability to raise prices or restrict output.

Antitrust Law Overview, cont.

- FTC Act § 5 prohibits entities from engaging in unfair or deceptive acts or practices in interstate commerce.
  - No private right of action
- Clayton Act § 7 authorizes the Commission and the DoJ to prevent mergers that may substantially lessen competition or tend to create a monopoly.

Section One Criminal Offenses

- Price Fixing
  - Horizontal
  - Vertical: Resale Price (not criminal)
- Allocation of Territory
- Allocation of Customers
- Bid Rigging

Resale Price Maintenance

- *Leegin* case (2007): Brighton brand handbags.
- Got agreement on resale price; terminated distributor
- Not per se illegal; rule of reason
- On remand, rejected Brighton bags as separate markets.
- *California v. Bioelements, Inc.*: $51k fine.

Rule of Reason

- Everything Else
  - Trade Associations
- Joint Ventures
  - Restraints on dealers
- Liability in Civil Litigation
- Government Civil Enforcement Action

Bush Administration

Section 1:

- In fiscal year 2007, the DOJ obtained $630 million in criminal antitrust fines (2nd highest total ever).
- Jail terms late in the administration averaged 19 months, twice the average jail sentence in the 1990s.
- The number of jail days imposed in 2007 more than doubled the previous record.
- In November 2008, LG Display Co. Ltd., Sharp Corp. and Chunghwa Picture Tubes Ltd pleaded guilty and agreed to pay a total of $585 million in fines in LCD display case.

Antitrust Criminal Penalty Enhancement and Reform Act of 2004

Enhancement

- Criminal Penalties
  - 10 year maximum prison sentence
  - $1,000,000 fine for individuals
  - $100,000,000 fine for corporations

Reform

- Leniency
  - Cooperation under Leniency Program avoids joint and several liability and treble damages in federal and state actions.

Candidate Obama

- The "current administration has what may be the weakest record of antitrust enforcement of any administration in the last half century."
- "As president, I will direct my administration to reinvigorate antitrust enforcement."

Bush Administration

- Merger Review
  - Low second request rate
  - Lack of challenges to proposed acquisitions
    - XM Radio/Sirius
    - Whirlpool/Maytag

Bush Administration

- Section 2/Monopolization cases
  - None
- Section 2 Report
  - Overly aggressive enforcement of Section 2 could harm innovation.
  - Conduct should be unlawful only if anticompetitive effects are "*substantially disproportionate* to procompetitive effects."
  - FTC refused to join. Three Commissioners condemn report.

Who's Who

- Christine Varney
  - FTC 94-97
    - Privacy, Internet

Varney

- Pulled Section 2 Report
- Back to weighing anti-competitive, pro-competitive effects
- Hired many litigators

Who's Who

- Jon Leibowitz
  - FTC 04-
  - Pharma, Energy
- w/ Julie Brill, Edith Ramirez

2010 Merger Guidelines

- Competitive Effects v. Market Definition
  - Direct Evidence:
    - Projections
    - Natural Experiments
    - Actual Effects
    - Disruptive Parties

2010 Merger Guidelines

- Two Year Rule Out
  - Rapid Entry In
- HHI Thresholds Up
- 35% Safe Harbor Out

Merger Statistics

- Second requests
- 2007: 3%
- 2008: 2.5%
- 2009: 4.5% of the 716 filed mergers
- 2010 4.1% of the 1,166 filed mergers
- The FTC challenged 22 transactions in 2010; the Antitrust Division challenged 19.

ProMedica Health Systems

- March 2011: First FTC preliminary injunction against a hospital merger in more than ten years.
- Promedica Health System's proposed $156 million acquisition of St. Luke's Hospital.
- Four to three merger.
- Business documents revealed that a principal motivation for the acquisition was to gain bargaining leverage with health plans, and the ability to raise prices.
- The court rejected the "failing firm" defense.

Mergers below the HSR threshold

- In May 2011, the Antitrust Division sued over Tyson Foods, Inc.'s sale of $3 million chicken plant.
- January 2010: AD sues over Dean Foods' $35 million milk plant acquisition. 4 to 3 merger; docs show Foremost Farms aggressive on price. Settled.
- February 2011, FTC lost PI Hearing over LabCorp acquisition of a Westcliff Medical Laboratories out of bankruptcy. No other buyers. 3-2 merger; Westcliff a maverick on price. Court disagreed on market definition.
- FTC challenged five consummated mergers in 2010, and the Antitrust Division challenged two.

Example of Divestiture

Ticketmaster - Live Nation Inc. merger January 2010:

- License its ticketing software to two competitors: Comcast-Spectacor and AEG
- Sell subsidiary Paciolan to Comcast-Spectacor
- Anti-retaliation provisions for venues

More Divestiture

- May 2010: FTC sues over Dun & Bradstreet's prior acquisition of Quality Education Data
- Settled by agreeing to divest to a Commission-approved buyer key assets acquired in the merger
- July 2009: AD requires Sapa Holdings, Indalex – aluminum sheathing – to divest NC plant: Catawba or Burlington.

More Divestiture

- November 2009: Stericycle Inc. merger with MedServe Inc. AD required divestiture of infectious waste collection and treatment service assets
- Those necessary to serve customers in Kansas, Missouri, Nebraska and Oklahoma, where the two firms were the only two viable firms to provide the services in issue.

Criminal Prosecutions 2010

- the Antitrust Division filed 60 criminal cases, charging 84 defendants
- obtaining fines of more than $550 million
- 76% of sentences were imprisonment, with an average sentence of 30 months

Criminal Enforcement: Amnesty

- Corporate Program
  - No jail
  - No fines
  - ACPERA reduction in civil liability
- Individual Program
  - No jail
  - No fines

Criminal Enforcement: Compliance

- Avoid Director and Officer Personal Liability
- Reduce fines and penalties under the Federal Sentencing Guidelines
- High-level employee no longer disqualifying, if
  - (1) the person having "operational responsibility" for the compliance program reported directly to the Company's Board or one of its committees;
  - (2) the program resulted in the detection of the crime before discovery by the government was "reasonably likely;"
  - (3) the offense was promptly reported to the government; and
  - (4) the person with "operational responsibility" for the program did not participate in the crime.

Ian Norris

- Extradited for obstruction of justice
- Created false scripts
- Directed destruction
- Co. lawyer testified

AU Optronics

- Its CEO and three of its other executives have had their passports seized while awaiting trial, and are confined to the Northern District of California.
- Foreign Nationals a priority.

Clayton Action Section 8

Interlocking Directorates

- No person may serve as an officer or director of corporations that compete with one another.
- No corporation may have two different individuals serving on competitors' boards—
- If the "capital, surplus, and undivided profits" of each corporation exceeds $26,867,000
- Unless competition is minor.

N.C. Board of Dental Examiners

- June 2010: FTC sues.
- State action immunity? No active supervision.
- Board strikes back in EDNC.
- May 9, 2011- board action dismissed.

Health Care

- State Action Immunity, pt. 2: *Phoebe Putney Health System, Inc.*
- Hospital Authority of Albany-Dougherty County owns Phoebe's assets.
- Phoebe planned for Authority to buy Palmyra and then lease it to a non-profit corporation controlled by Phoebe.
- FTC: transaction motivated and planned exclusively by Phoebe; Authority only a "strawman" in the purchase.

MFN Provisions

Blue Cross Blue Shield of Michigan

- In October 2010, the Antitrust Division sues under Section 1 over MFN
- Two types:
  - Larger hospitals: “MFN-plus”
  - Smaller community hospitals: “equal-to” MFN clauses
  - AD: BC/BS paid higher rates to disadvantage rivals

Purchasing

- September 2009: *Memorial Health, Inc & St. Joseph's/Candler Health System* – no challenge to joint purchasing agreement in between Savannah facilities. Could lead to lower costs for consumers.
- Antitrust safety zone in health care: (1) less than 35 percent of the total sales; and (2) the cost of the products is less than 20 percent of the total revenues by each participant.
- February 2010 *In the Matter of Roaring Fork Valley Physicians I.P.A.*, FTC sued and reached a settlement with doctors in Colorado who were alleged to have coordinated agreements to raise prices and to refuse to deal with insurers that would not comply with their demands.

Section 2 Rides Again

United States v. United Regional Healthcare System of Wichita Falls,Texas

- Substantial discount if United Regional was the only local hospital or outpatient service provider in the insurer's network.
- Raised barrier to entry; no valid procompetitive justification.
- United Regional settled the case, agreeing not to use such contractual provisions, or to retaliate against insurers who contracted with other hospitals.

Disgorgement

KeySpan Corporation

- June 2010: the Antitrust Division sued KeySpan Corporation, the largest seller of electricity generating capacity in the New York City market.
- Swap agreement with a financial services company that gave it a financial interest in competitor, Astoria Generating Company.
- The Federal Energy Regulatory Commission (FERC) had concluded that KeySpan had not violated FERC's market manipulation regulations.
- AD: swap eliminated KeySpan's incentive to cut prices.
- KeySpan settled the case by giving up its interest in Astoria, and disgorging $12 million in profits.
- Civil suit dismissed: filed rate doctrine.

Compare: Linkline

- On February 25, 2009, *Pacific Bell Telephone Co. et al. v. Linkline Communications, Inc., 555 U.S. ____* (2009).
- No price-squeeze claims under §2 when the defendant has no *antitrust* duty to deal with its rivals.
- AT&T is required (as a condition of a merger) to provide wholesale "DSL transport" service to independent firms at a price no greater than the retail price.
- Linkline (and other ISPs) sued AT&T for jacking up their price, dropping retail price.

And Trinko

- 2004: *Verizon Communications v. Law Offices of Curtis v. Trinko*, 540 U.S. 398 (2004)
- Verizon has obligation under the 1996 Telecommunications Act to provide competitors with access to its network. Failed.
- No antitrust liability. Regulatory framework created by the act "significantly diminishes the likelihood of major antitrust harm."
- Defendants in the Supreme Court: 15-0 in antitrust cases; 6-0 in cases monopolization or exclusionary conduct.

Varney: Aspen Skiing

- Varney cites *Aspen Skiing* case
- Ski Co. has 3 mountains; Highlands 1.
- Ski Co demands Highlands take cut in share of all-area ticket; refuses full price voucher.
- Varney: Ski Co. "willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on Highlands's business."
- "Dominant firms can be expected to deal with their rivals where cooperation is indispensable to effective competition."
- *Trinko*, *Linkline* are regulatory cases.

Pay for Delay Regulations

- FTC Report for Pharmaceuticals
- On January 13, 2010: “Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions.”
- Chairman Leibowitz called for Congress to ban payments for delay in generic drugs

FTC Endorsement Guidelines

- December 1, 2009: Revised Endorsement Guidelines.
- Applies to the use of celebrity and other paid endorsers and also undisclosed employees.
- A company can be held liable for false or misleading statements even if the company did not have control over the contents of the statement.
- “Results not typical”—no longer sufficient.
- FTC will focus on bloggers, social media, viral campaigns, celebrity guests on news and entertainment shows.

FTC Act Section 5: Intel

FTC sued in December 2009 alleging that the company used anticompetitive tactics to cut off rivals' access to the marketplace

- Settled 2010. Intel may not:
  - Condition benefits to computer makers in exchange for their promise to buy chips exclusively from Intel
  - Retaliate against computer makers if they do business with non-Intel suppliers by withholding benefits from them
- Intel must:
  - Modify agreements with AMD, Nvidia, and Via, so they may consider merger or JV without fear of infringement suit
  - Maintain a key interface, known as the PCI Express Bus, for at least six years
  - Disclose that Intel compilers discriminate against non-Intel chips

Privacy: Google Buzz

"Lardmarkish" remedy in March 2011 settlement

- Google Buzz made email contacts public without adequately disclosing that fact to people using the service.
- Now must obtain users' consent before sharing their information with third parties.
- For the next *20 years*, the company have biennial audits conducted by independent third parties to assess its privacy and data protection practices.
- Future violations carry penalty of up to $16,000.

Peer to Peer File Sharing

- On February 22, 2010, the FTC issued a press release on risks in peer-to-peer file sharing networks.
- 100 organizations that personal information had been shared from their peer-to-peer file sharing networks.
- Will use Section 5 of the FTC Act to pursue companies that do not adequately protect the security of data to prevent identity theft.

Gun Jumping

Smithfield Foods and Premium Standard Farms consent decree

- $900,000 fine for violating the Hart-Scott-Rodino Act.
- Premium shared price, volume of hog contract terms, sought approval.
- Varney: “Merging companies must remain independent in their ordinary business operations, including purchasing decisions, until the end of the premerger waiting period.”

Varney and Football

- Letter to NCAA: “the current Bowl Championship Series system may not be conducted consistent with the competition principles expressed in the federal antitrust laws.”
- NCAA: Don’t look at us.
- BCS: Contract among conferences, Notre Dame. Runs to 2014.

American Needle

- *Copperweld*: no intra-enterprise conspiracy.
- National Football League Properties gives Reebok an exclusive license.
- Deprives the marketplace of independent centers of decisionmaking and “actual or potential competition.”
- Coordination with JV partner, non-wholly owned sub risky.

Danger Zones

- Trade Associations
- Writings about competitors
- Mergers and Acquisitions
  - Gun Jumping
- Terminating a Distributor
- Privacy Issues

Best Practices in Documents

Indicate the source of competitive information in your files so that you can avoid an inference you are colluding with your competitor if a document is produced.

Avoid inflammatory language. Focus on how a plan or strategy will enhance your ability to compete and not on the consequences to your rivals.

Involve counsel in drafting risky documents (refusals to deal, distributor-termination, responding to distributor complaints, dealing with competitors).

Best Practices in Documents

Create context so that statements are not misleading.

Provide pro-competitive reasons for the actions you are taking in your documents.

Respond when necessary. Documents are sometimes created or sent from the outside that suggest an anticompetitive course of action that is never taken or even considered. If that is never documented, the inference of unlawful conduct from the initial document remains.

Best Practices in Documents

Treat emails like any other document.

Follow your document retention policy.

Ten "Don'ts" of Antitrust

1. Don't discuss prices with competitors ever.
2. Don't agree with competitors to restrict or increase levels of production.
3. Don't divide customers, markets or territories with competitors.
4. Don't require a customer to buy products only from you without approval by legal counsel.

Continued….

Ten "Don'ts" of Antitrust

5. Don't agree with competitors to boycott suppliers or customers.
6. Don't offer a customer prices or terms more favorable than those offered competing customers unless justified by cost savings, the need to meet competition, or changed market conditions.
7. Don't use one product as leverage to force or induce a customer to purchase another product without consulting legal counsel.

continued….

Ten "Don'ts" of Antitrust

8. Don't forget that the federal antitrust laws apply to activities engaged in overseas if they affect United States commerce. Also, foreign activities may give rise to liability under foreign antitrust laws.
9. Don't prepare documents or make presentations without considering the antitrust implications.
10. Don't cover up any wrongdoing, but report it promptly to legal counsel.

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