



DEPARTMENT OF JUSTICE

Antitrust Doctrine, Competition Policy, and International Dialogue

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It is a pleasure to be here to visit with the antitrust bar and explain my role at the Department. Though it has been only four months since I returned to the Department, there is already much to look back on and much to look forward to. Today, I will briefly discuss what we have done and what we hope to do in three principal areas: (1) the development of legal doctrine; (2) the promotion of competition policy; and (3) the advancement of international cooperation and convergence.

I. The Development of Legal Doctrine

In describing the role she envisioned for me at the Antitrust Division, Christine Varney emphasized the importance of engaging the courts, the broad antitrust community, and academic commentators as we litigate cases to advance the development antitrust law. As the Supreme Court once famously put it, antitrust law is a “common law” framework that invites litigants and the courts to incorporate new learning into an inherently flexible doctrine.¹ With respect to thinking carefully about legal doctrine, our Appellate Section is a crown jewel of the Division, both developing our positions to present to the courts of appeals and aiding the development of the legal theories we present in our cases. Over the last four months, we have already taken some steps to present positions to the courts and the public that merit notice and discussion. For purposes of today’s talk, let me focus on three of them: (1) the Department’s amicus brief in the *American Needle* case;² (2) our amicus brief in the *Cipro* case;³ and (3) AAG Varney’s speech on RPM.⁴

In *American Needle*, the Supreme Court will evaluate the scope of the *Copperweld* doctrine and the NFL’s claim that it should be treated as a “single entity” for antitrust purposes. In practice, the NFL is asking the Court to rule that individual teams cannot be held liable for conspiring with one another to limit competition between them. In our brief, we rejected the NFL’s position and argued for a “functional analysis” based on the teaching of the Supreme Court’s earlier decisions in *Copperweld*⁵ and *Dagher*.⁶ This functional analysis focuses on the potential for the challenged conduct to eliminate actual or potential competition among the teams, asking whether the teams have previously effectively merged within the scope of their operations and whether the restraint at issue adversely impacts actual or potential competition outside its immediate scope.⁷ As our brief explained, this approach focuses on the facts of a particular case and eschews a broad rule that would raise questions about the “effect such an approach might

¹ E.g., *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978).

² Brief for the United States as Amicus Curiae Supporting Petitioner, *American Needle, Inc. v. National Football League*, No. 08-661 (U.S. Sept. 25, 2009), available at <http://www.justice.gov/atr/cases/f250300/250316.pdf>.

³ Brief for the United States in Response to the Court’s Invitation, *Arkansas Carpenters Health and Welfare Fund et al. v. Bayer AG et al.*, No. 05-2581 (2d Cir. July 6, 2009), available at <http://www.justice.gov/atr/cases/f247700/247708.pdf>.

⁴ Christine A. Varney, Assistant Attorney General, Antitrust Federalism: Enhancing Federal/State Cooperation, Remarks as Prepared for the National Association of Attorneys General (Oct. 7, 2009) available at <http://www.justice.gov/atr/public/speeches/250635.pdf>.

⁵ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

⁶ *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006).

⁷ *American Needle* Brief, *supra* note 2, at 16-26.

have on a broad spectrum of joint ventures outside the context of sports leagues.”⁸ Stated simply, “[a]ny more expansive application of the single-entity concept [than proposed in our brief] would unjustifiably limit the scope of the Sherman Act.”⁹

In the *Cipro* case, the Department filed an amicus brief with the Second Circuit to set forth our approach to the so-called “reverse payment” cases.¹⁰ In such cases, a brand name pharmaceutical company pays a generic firm not to take advantage of the entry rights provided by the Hatch-Waxman Act. The Hatch-Waxman Act is structured to encourage early litigation of patent infringement claims that might prevent generic entry. Under the Act, the first generic firm to challenge the patent of a brand name drug (say, on invalidity grounds) is afforded a special right to enter the market before rival generic firms can enter. In so doing, this Act also creates an incentive for the patent holder to settle the patent litigation on terms that amount to “buying off” its would-be rival, particularly if its patent is vulnerable to challenge. To date, the Courts of Appeal have differed on what antitrust standard should govern cases challenging a payment in return for a settlement providing for delayed entry, with the Second Circuit previously holding that, unless the claim for patent infringement is objectively baseless, dubiously large settlement payments resulting in delayed generic entry and withdrawal of a challenge to the patent are exempt from antitrust challenge.¹¹

Our brief in the *Cipro* case disagreed with the standard previously adopted by the Second Circuit (and the Federal Circuit) and instead called for a presumptive illegality standard.¹² As we explained in our brief, “Congress recognized that both the enforcement of patent rights and appropriate limits on the patentee’s ability to exclude rivals have important roles to play in fostering innovation.”¹³ Consequently, the Patent Act “offers the patentee a choice between exercising its statutory privilege to protect its interests through litigation to enforce the patent – with the attendant risk that the patent

⁸ *Id.* at 24.

⁹ *Id.* at 26. In particular, we concluded that, because the NFL is a legitimate joint venture,

[s]ingle entity treatment for the teams and the league is appropriate if, but only if, two conditions are satisfied. First, the teams and the league must have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere. Second, the challenged restraint must not significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations. Only a limited range of conduct would qualify for single-entity treatment under this standard, since most forms of collaboration are not equivalent to an effective merger, and many restraints have competitive effects on more than one aspect of operations.

¹⁰ *Id.* at 6-7.

¹¹ *Cipro Brief*, *supra* note 3.

¹² See *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 208-09 (2d Cir. 2006).

¹³ *Cipro Brief*, *supra* note 3, at 21.

¹⁴ *Id.* at 13 (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 147 (1989) (“From their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.”)).

may be invalidated – and relying on private measures that avoid the risk of patent invalidation but provide no antitrust immunity.”¹⁴ Given that the Hatch-Waxman Act provides powerful incentives for settlements that would undermine the statutory interest in invalidating improperly granted patents, we argued that a rule of antitrust immunity was particularly inappropriate in this context.¹⁵

Our Cipro brief declined to advocate a rule that all settlements were *per se* illegal. Rather, we recognized that some settlements might be pro-competitive by securing the value to both the parties and to society at large of avoiding unnecessary litigation. In particular, the test we suggested was one of only *presumptive* illegality, allowing the defendant to overcome the presumption by demonstrating that “the settlement preserved a degree of competition reasonably consistent with what had been expected if the infringement litigation went to judgment.”¹⁶ This might be done, for example, by showing that the settlement provides for the possibility of generic entry before the expiration of the patent.

The final area of legal doctrine that I want to touch on today is AAG Varney’s remarks as to how lower courts can develop a structured rule of reason in the wake of the Supreme Court’s conclusion in *Leegin* that minimum resale price maintenance (RPM) arrangements should be judged under the rule of reason (and not under the *per se* test).¹⁷ Her remarks take up the Court’s invitation to the lower courts to “establish the litigation structure to ensure the rule [of reason] operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses.”¹⁸ Specifically, she explained that the *Leegin* decision identified a set of circumstances that, if established by a plaintiff, would suffice to shift the burden of proof to the defendant to develop a legitimate business justification for the practice at issue.¹⁹ I won’t go through the specific analyses here, but I do want to call your attention to this effort to move the discussion on the proper jurisprudential treatment of RPM arrangements.

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 16-18. As the brief explained,

the economics of generic competition and the legal structure created by Hatch-Waxman create unique incentives and opportunities for settlements that threaten the public interest, incentives and opportunities apparently not found elsewhere. Hatch-Waxman was plainly structured to identify the patents that blocked generic competition and to induce firms to challenge those patents, so that consumers might benefit from earlier generic entry. The consequences of settlements ending such challenges can be severe. Allowing the patent holder to claim antitrust immunity for its contracts as if they were litigated injunctions, while evading the risk of patent invalidation, deprives consumers of significant benefits from price competition in the pharmaceutical industry.

Id. at 16-17.

¹⁶ *Id.* at 30.

¹⁷ *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007)

¹⁸ *Id.* at 898.

¹⁹ See Antitrust Federalism, *supra* note 4, at 11.

II. Competition Policy Advocacy

In her leadership at the Antitrust Division, Christine Varney has emphasized that the Division's industry expertise in an array of sectors, our talented cadre of lawyers and economists, and our well developed expertise in competition analysis can be put to important use in advocating sound competition goals to regulatory agencies charged with overseeing key sectors of our economy. To underscore this point, let me explain the animating goals behind such efforts and offer an important example of our current focus on this front.

To state matters succinctly, there are times when the Division's competition policy advocacy can be as significant as the successful prosecution of an antitrust case. Just last year, for example, the Division filed a thoughtful and important set of comments involving the Michigan Legislature's consideration of a certificate of need (or CON) requirement as a precondition to opening a new facility. CON are an obvious target for competition policy advocacy insofar as they can restrict entry without yielding any real offsetting advantages. In Michigan, the relevant comments focused on the CON standard for Proton Beam Therapy Services.¹²⁰ As the Division's letter stated,

The standards [in the proposed legislation] have the potential to delay or exclude a competing and perhaps superior technology from entering the marketplace, and therefore may have substantial negative health consequences for cancer patients in Michigan. By requiring a majority of the nine largest radiation oncology providers to agree to collaborate before a certificate of need for a PBT unit will be issued, the proposed standards create a significant economic incentive for the current providers of radiation oncology services to protect their revenues by delaying or defeating entry of a competing product.²¹

Invoking this very analysis, Michigan Governor Granholm vetoed the legislation and made clear that a policy of open competition would best serve Michigan consumers. That was particularly important because, as our letter noted, the adoption of such a program is often protected from antitrust enforcement under the state action doctrine.²² Consequently, competition policy was likely the only avenue for promoting competition in this context.

One notable ongoing effort at promoting competition is our unprecedented partnership with the U.S. Department of Agriculture to evaluate the state of competition in agricultural markets. This initiative will result in a broad and comprehensive inquiry that will enable the Department of Justice and the USDA, through input from interested parties, to evaluate the state of the marketplace so as to facilitate more effective law

²⁰ Letter from Joseph Miller, Assistant Chief, Litigation I Section, Antitrust Division, United States Department of Justice to State Senator Michael D. Bishop (Jun. 6, 2008), *available at* <http://www.justice.gov/atr/public/comments/234407.pdf>.

²¹ *Id.* at 2.

²² *Id.* at 3.

enforcement, regulatory advocacy, and public education in this important sector. The Department and USDA are already receiving comments from interested stakeholders and we will hold a series of workshops in 2010 to explore an array of important issues discussed in the comments. At the culmination of these workshops, we will take stock of what we have learned and, as a result, be able to advance our efforts in this area more effectively.

III. International Cooperation and Convergence

The coin of the realm in terms of international cooperation and convergence is dialogue. AAG Varney has thus emphasized the importance of the United States articulating its perspective on competition policy issues of international importance and taking a leadership role in this area.²³ Let me spend a few minutes highlighting some of the Department's key efforts.

In terms of multilateral organizations, the Division remains committed to providing U.S. leadership and engagement. At the Organization for Economic Cooperation and Development (OECD), for example, AAG Varney was elected the Chair of Working Party 3, which focuses on Competition Cooperation and Enforcement. That leadership role ensures that the United States can help shape the agenda, facilitate important discussions, and raise the level of discourse on competition law issues confronted by developed countries around the world. Similarly, AAG Varney is on the International Competition Network (ICN) Steering Group and I am the co-chair of the Mergers Working Group within the ICN, which brings together competition agencies from around the world and sets best practices for competition law enforcement. In both contexts, our investment of time and resources is guided by the maxim that "an ounce of prevention is worth a pound of cure." By working prospectively towards a common approach to antitrust issues, the chances of divergence are narrowed greatly and our ability to engage in respectful and cohesive discussions is increased.

On the developing nation front, our technical assistance efforts play a vital role. In this respect, the U.S. experience in a range of antitrust activities—merger review, cartel enforcement, unilateral conduct, utilizing economists within antitrust agencies, and developing a rule-of-law culture—are all relevant to emerging antitrust authorities. In particular, if DOJ employees are able to spend time and develop reciprocal relationships with officials at emerging antitrust regimes, we are far more likely to be in a position to provide useful advice and to approach issues from a common basis of understanding. Once again, our investments on this front can pay significant dividends down the road.

²³ Christine A. Varney, Assistant Attorney General, *Our Progress Towards International Convergence*, Remarks as Prepared for the 36th Annual Fordham Competition Law Institute Annual Conference on International Antitrust Law and Policy (Sept. 24, 2009), *available at* <http://www.justice.gov/atr/public/speeches/250264.pdf>; *see also* Christine A. Varney, Assistant Attorney General, *Striving for the Optimal Balance in Antitrust Enforcement: Single-Firm Conduct, Antitrust Remedies, and Procedural Fairness*, Remarks as Prepared for the Council on Foreign Relations (Oct. 8, 2009), *available at* <http://www.justice.gov/atr/public/speeches/250814.pdf>.

Conclusion

It is an important time to be at the Antitrust Division. I knew from my prior appointment at the DOJ that the institution is a special place, in terms of its culture, commitment to intellectual rigor and engagement, and focus on protecting competition and consumers. Those values remain strong and, in our current economic environment, they are being put to good use. As our nation's economy emerges from a difficult period, sound competition policy and antitrust enforcement will remain vital tools for promoting economic growth and innovation. It is an honor to be a part of that undertaking.