



# **DEPARTMENT OF JUSTICE**

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## **VIGOROUSLY ENFORCING THE ANTITRUST LAWS IN THE OBAMA ADMINISTRATION**

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**Remarks as Prepared for  
The Center for American Progress**

**Washington, DC**

**July 12, 2011**

## **Introduction**

Good afternoon. More than two years have passed since I gave my first public remarks as the Assistant Attorney General (AAG) for Antitrust here at the Center for American Progress. I am pleased to be back, not only to examine our accomplishments, but also to consider what there is still to do.

The Division has had significant success on a variety of fronts. Civil merger and non-merger enforcement is healthy and active. We have renewed international cooperation. We have fostered unprecedented competition advocacy, infusing competitive analysis into far-ranging, important public policy endeavors. Our criminal program is focused on prosecuting cartel activity, a particularly pernicious problem in ever-increasing global markets.

There are also areas where we have, up to now, had fewer opportunities to facilitate competitive marketplaces that would benefit the American consumer. I recognize that there are limits to what we can accomplish within the confines of the antitrust laws, but the antitrust laws remain an essential element in preserving competition. Some have confused recent court precedent to suggest that the antitrust laws are minimized in industries when we find other governing regulatory regimes. I strongly believe that is a misreading of the law, and the Division has demonstrated through our vigorous enforcement efforts—and sought through reasoned court filings—that the antitrust laws remain fully vibrant. As AAG, I have sought to ensure that vibrancy through steadfast and pragmatic enforcement of the antitrust laws.

## **I. Merger Enforcement**

I pledged to vigorously enforce the law to keep markets open and competitive, which in turn allows for innovation and lower prices for the benefit of the American consumer. I also committed that under my leadership, the Antitrust Division would be transparent, and fair, in order to give business as much certainty as possible. The Division's record of the last two years demonstrates that we have done that. I am a pragmatist—I have served as counsel to clients with complex legal issues, as a Director to corporations, as a community advocate, and in government at a variety of levels of responsibility. These experiences lead me to the conclusion that most challenges can be met, compromise is not always bad, and doing the right thing is usually not universally popular.

The Division has successfully preserved competition when we inform parties that they will face a legal challenge in court unless they restructure or abandon a transaction that we conclude harms competition. The decision to restructure or abandon a transaction is significant. Businesses coming before the Division with a proposed transaction have not entered into their merger agreements lightly. Their willingness to modify a transaction's terms is a testament to the strength of the Division's competitive and economic analysis, as well as our commitment to litigate when necessary.

Recent enforcement actions include a number of complex combinations implicating vertical theories—that is, transactions in which the businesses seeking to

merge were situated above and below each other in the supply chain.<sup>1</sup> In the past two and half years, the Division has reviewed important vertical transactions (some of which also had horizontal aspects), including Live Nation/Ticketmaster,<sup>2</sup> NBC/Comcast,<sup>3</sup> and Google/ITA.<sup>4</sup> As with all of its merger reviews, the Division reviewed these transactions in light of their specific facts and market conditions, and then evaluated the competitive harms. We concluded that each transaction, as proposed, would give rise to competitive harm. We were prepared to sue, but the parties agreed to consent decrees to address fully our competitive concern raised by the proposed transaction.

The NBCU/Comcast settlement is a good example. As originally proposed, the joint venture between NBCU and Comcast would have allowed Comcast, the largest cable company in the United States, to limit competition by either withholding or raising the price of NBCU content and effectively stifling new competition in the online video market.<sup>5</sup> Hearing the facts that supported our complaint, the parties agreed to a consent decree that included a variety of conduct provisions that preserve existing and potential

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<sup>1</sup> Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, *Vigorous Antitrust Enforcement in this Challenging Era*, Address Before the U.S. Chamber of Commerce (May 11, 2009), available at <http://www.usdoj.gov/atr/public/speeches/245711.pdf>.

<sup>2</sup> See U.S. Dep't of Justice, *Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc.* (Jan. 25, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/254540.pdf](http://www.justice.gov/atr/public/press_releases/2010/254540.pdf).

<sup>3</sup> See U.S. Dep't of Justice, *Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions* (Jan. 8, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/266149.htm](http://www.justice.gov/atr/public/press_releases/2011/266149.htm).

<sup>4</sup> See U.S. Dep't of Justice, *Justice Department Requires Google Inc. to Develop and License Travel Software in Order to Proceed with Its Acquisition of ITA Software Inc.* (Apr. 8, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/269589.htm](http://www.justice.gov/atr/public/press_releases/2011/269589.htm).

<sup>5</sup> Competitive Impact Statement at 22-23, *United States and Plaintiff States v. Comcast Corp., et al.*, (D.D.C. 2011) (No. 1:11-cv-00106) (filed Jan. 18, 2011), available at <http://www.justice.gov/atr/cases/f266100/266158.htm>.

competition in the nascent online video market but without regulating how the market should work.<sup>6</sup>

The Federal Communications Commission (FCC) also had jurisdiction to review the NBCU/Comcast proposed joint venture, and we coordinated closely with them throughout our investigation. Through this coordination, which included a joint review of documents, we worked closely with the FCC and achieved complementary results across the agencies that should yield consistent and thorough enforcement of pro-competitive decree conditions. This is just one example of how the Division seeks to be a good steward of government resources through coordinated efficient and effective enforcement that achieves the right result.

The Division was presented with another important vertical case when Google sought to acquire ITA Software Inc., a company that develops and licenses a search software product used by the travel industry to perform flight searches and offer airfare comparison and booking websites.<sup>7</sup> Google also had plans to offer its own online travel search product that would compete with those in the travel industry that rely on the ITA product.<sup>8</sup>

Preserving competition in the flight search industry is important. Innovation in flight service tools provides travelers with quick and convenient access to the most prices and useful itineraries, and absent a remedy, the Google/ITA transaction would have reduced that innovation. The consent decree resolves those concerns in a variety of ways.

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<sup>6</sup> *Id.* at 30-40.

<sup>7</sup> Competitive Impact Statement, *United States v. Google Inc. et al.* (D.D.C. 2011) (No. 1-11-cv-00688) (filed Apr. 8, 2011), *available at* <http://www.justice.gov/atr/cases/f269600/269620.pdf>.

<sup>8</sup> *Id.* at 2.

It requires Google to continue to develop and license the ITA travel software, establish strict internal firewall procedures, continue software research and development, and offer mandatory arbitration and a formal reporting mechanism for complainants.<sup>9</sup>

Some want the Division to block rather than remedy the anticompetitive effects of a merger, while others urge the Division to simply let transactions proceed without restriction. Fortunately, although the Division's mandate is confined to enforcement of the antitrust laws, we are not limited to this binary choice. In this environment of global mergers and complex vertical transactions, the Antitrust Division has demonstrated its dexterity by adopting and enforcing effective remedies that both preserve competition and promote innovation. Google now has the opportunity to offer new flight search tools for travelers but may not use ITA's assets to harm competition in the market.

By now it should be clear: We focus on identifying remedies that work, without adopting a particular ideology. Again, I would call this a pragmatic, forward-looking approach. It is one that also is reflected in the Division's recently updated Remedies Guide.<sup>10</sup> The policy guide is a tool for Antitrust Division staff to use in analyzing proposed remedies in its merger matters, but it also is made available on our website as part of our continued commitment to provide transparency for the business community, the antitrust bar, and the broader public.

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<sup>9</sup> *Id.* at 9-15.

<sup>10</sup> *Antitrust Division Policy Guide to Merger Remedies*, U.S. Dep't of Justice, June 17, 2011, available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

## II. Civil Non-Merger Enforcement

When I was last here, I withdrew the Section 2 report, stating that I disagreed with the Report's conclusions. The hard work that went into the Report remains a testament to the DOJ's staff commitment to excellence. As I explained at the time, the conclusion was simply wrong. The Report concluded, contrary to well-established precedent, that a modicum of efficiency could overcome an anticompetitive behavior. That conclusion was wrong then and remains wrong today. Section 2 enforcement sets a high bar—both for enforcement and for conduct by those who enjoy market power. We continue to investigate potential abuses of market power and take action when the evidence warrants.

To that end, the Division brought its first case since 1999 that challenges a monopolist with engaging in traditional anticompetitive unilateral conduct.<sup>11</sup> In that case, we challenged what were in essence exclusive dealing contracts used by United Regional Health Care System—a dominant health care provider—to maintain its monopoly for hospital services in violation of Section 2 of the Sherman Act.<sup>12</sup>

The Sherman Act also has a Section 1 and we have been busy there as well. We have two matters in ongoing litigation—the Division's lawsuit challenging Blue Cross Blue Shield of Michigan's use of anticompetitive most-favored-nation clauses<sup>13</sup> and the

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<sup>11</sup> See Complaint, *United States and State of Texas v. United Regional Health Care System* (D. Tex. 2011) (Filed Feb. 25, 2011), available at <http://www.justice.gov/atr/cases/f267600/267651.pdf>

<sup>12</sup> *Id.* See also U.S. Dep't of Justice, *Justice Department Reaches Settlement with Texas Hospital Prohibiting Anticompetitive Contracts with Health Insurers* (Feb. 25, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/267648.htm](http://www.justice.gov/atr/public/press_releases/2011/267648.htm).

<sup>13</sup> Complaint, *United States and State of Michigan v. Blue Cross Blue Shield of Michigan*, (D. Mich. 2010) (No. 2:10-cv-15155-DPH-MKM) (filed Oct. 10, 2010), available at <http://www.justice.gov/atr/cases/f263200/263235.htm>.

Division's challenge to restrictions on competition in its lawsuit against American Express.<sup>14</sup>

Finally, in discussing the Division's enforcement work, it is also important to highlight our criminal enforcement efforts, which represent a significant portion of our resources and a major priority. The Division continues to be the global leader in the pursuit and prosecution of criminal price-fixing, bid-rigging, and market allocation cartels that raise prices to both businesses and individual consumers, restrict supply, reduce innovation, and inflict damage on our global economy. In Fiscal Year 2010, the Division filed 60 criminal cases and imposed more than \$550 million in criminal fines for illegal conduct. In these cases, 21 corporations and 63 individuals were charged. In addition, 29 individuals received jail sentences that totaled more than 26,000 jail days, an overall increase in jail sentences for individuals—76% of sentenced defendants received jail sentences in 2010 as compared to only 37% in the 1990s.

Our criminal enforcement program has remained robust in Fiscal Year 2011. In just the first nine months of Fiscal Year 2011, the Division has nearly eclipsed the total number of cases we filed all of last Fiscal Year.

Over the past two years, our criminal investigations and cases have examined and prosecuted anticompetitive conduct in a variety of industries important to American businesses and consumers, including the financial services, air transportation services, and the real estate industries, to name only a few. For example, the Division's ongoing investigation into the municipal bonds industry has now resulted in criminal charges

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<sup>14</sup> Complaint, *United States and Plaintiff States v. American Express Company, et al.*, (S.D.N.Y. 2010) (No. No.1:10-cv-04496) (filed Oct. 4, 2010), *available at* <http://www.justice.gov/atr/cases/f262800/262864.htm>.



against 18 former executives of various financial services companies and one corporation, and payments to affected municipalities and federal agencies of restitution, disgorgement, and civil penalties, totaling more than \$500 million. Just last week, JPMorgan Chase & Co. entered into an agreement with the Department of Justice to resolve the company's role in anticompetitive activity in the municipal bond investments market and agreed to pay a total of \$228 million in restitution, penalties and disgorgement to federal and state agencies, monies that will in substantial part be returned to municipalities that were harmed by the conduct under investigation.

The municipal bonds matter also is part of a broader collaborative effort—the President's Financial Fraud Enforcement Task Force. I have been an active member of this Task Force and have seen that collaboration with our law enforcement partners can yield tremendous results.

Our ongoing investigation into the air transportation services industry has produced similarly impressive results, with a total of 21 airlines and 19 executives charged and more than \$1.7 billion in criminal fines imposed to date.

Beyond convictions and fine totals, the success of the Division's criminal program is reflected by the continuing efforts of other jurisdictions to implement cartel enforcement programs modeled on the Division's program. In particular, over the last decade, numerous jurisdictions around the world—over fifty to be exact—have implemented leniency programs modeled after the Antitrust Division's Leniency Program. This growth in leniency programs has led to the detection and dismantling of the largest global cartels ever prosecuted and resulted in record-breaking fines here, in the

United States, as well as other jurisdictions around the world, such as Australia, Brazil, Canada, the European Union, Japan, Korea and the United Kingdom.

### **III. Competition Advocacy**

Our enforcement matters are only one of the ways that we seek to preserve competition. The Division has a treasure trove of lawyers and economists who have developed, through the course of our investigations, extensive industry and economic expertise across sectors. Sharing that knowledge—another Division priority—is good government that helps us all. Thus, I have sought opportunities to deploy Division leadership, management, and staff at all levels to serve the needs of the federal government for a broad variety of policy matters that involve competition policy. This has included (1) detailing Division employees to Congressional committees, federal agencies and other parts of the Administration; (2) actively participating in White House interagency taskforces in areas such as Internet Policy Principles, standard setting, Accountable Care Organization (ACO) implementation; and (3) engaging in a continual dialogue with Members of Congress, including through increased responsiveness to requests for briefings on competition policy in health care, telecommunications, agriculture, and other important areas. Moreover, we have and will continue to collaborate with the Federal Trade Commission (FTC) regarding harmful conduct that might violate Section 5 of the Federal Trade Commission Act.

Another important facet of our competition advocacy work has been hearing from individuals, constituent groups and industry participants who have concerns about bottlenecks to robust competition and innovation. This has included hearing from third parties on specific transactions or particular conduct (within the confines of legal

confidentiality limitations), as well as more generally on industry-related concerns. All interested parties should have the opportunity to approach the Division and get a clear assessment of whether their concerns fall within the boundaries of our enforcement authority. Even for those matters that do not fit in the confines of the antitrust laws, the Division plays a key role in helping identify the right source of redress within the government. In this way, the Division has been a conduit for more than expert practitioners in Washington, but for anyone. We have sought to help farmers, small business owners, factory workers and others identify where in the government they can seek appropriate redress, if not at the Antitrust Division.

The Division played a key role in convening a series of public outreach workshops on competition in the agriculture industry, jointly sponsored by the Department of Justice and the Department of Agriculture. More than 4,000 people attended the workshops in Alabama, Colorado, Iowa, Washington, D.C., and Wisconsin, and the Division received more than 18,000 public comments as part of the process. The Division also has joined with the USDA and the Department of Justice's Civil Division to in formalizing the interagency cooperation initiated during the workshops. The intense interest those events drew mirrors the intense interest we at the Department of Justice have in ensuring sound, healthy competition through every stage of agriculture supply chain.

However, we also learned through that effort that significant problems in the agriculture industry cannot be solved at the Antitrust Division. We put a spotlight on the issues and where we can, we have sought to address problems in agriculture markets through our enforcement actions.

For example, we challenged George's acquisition of Tyson's Harrisonburg, Virginia chicken processing facility. Prior to the acquisition, three chicken processors—Tyson, George's and JBS/Pilgrim's Pride—competed in Virginia's Shenandoah Valley region for the services of local chicken growers. By combining the Tyson plant with George's Edinburg, Va., operations, the transaction decreased the number of processors in the area to two, reducing competition for grower services.

Upon learning of the proposed acquisition, which was not reportable under the Hart-Scott-Rodino Act, we opened an investigation seeking information on its potential competitive effects and George's proposed business justifications for the transaction. The parties proceeded to close, despite their awareness of our serious antitrust concerns, and without providing a response to the information we requested—and we filed our lawsuit.

We recently reached a settlement that requires George's to make important capital improvements to a Harrisonburg, Va., chicken processing plant. The proposed settlement enhances the competitive viability and increases the production of the Harrisonburg poultry processing plant, which translates into more opportunities to grow and process poultry. This resolution benefits poultry growers and the Shenandoah Valley community.

We also reached a settlement in our lawsuit challenging the 2009 merger of Dean Foods and Foremost Dairy. That settlement requires Dean Foods Company to divest a significant milk processing plant in Waukesha, Wis., and related assets that it acquired. The proposed settlement also requires that Dean notify the department before it makes any future acquisition of milk processing plants for which the purchase price is more than \$3 million. The attorney general for the state of Michigan filed a separate settlement to

address competitive concerns regarding school milk in that state. Combined, these settlements restore competition so that school children and consumers in Illinois, Wisconsin and Michigan will pay lower prices for their milk. The divestiture of a significant milk processing plant and the provision that requires Dean to notify the department of future milk plant acquisitions will preserve competition going forward.

What we heard during the agricultural workshops informs our work, including these enforcement efforts—the “evidence” stood before us and told all participants directly what was happening in the marketplace. We will use this learning to remain vigilant in our efforts to preserve competition in the agriculture industry.

Another important aspect of our competition advocacy efforts includes our *amicus* program, through which we engage courts that are considering important competition issues. This is important even when the United States is not a party to the lawsuit or when the case does not arise under the antitrust laws because competition issues are at stake. Three Division *amicus* matters demonstrate that approach: *American Needle*, *Cipro*, and *Myriad*.

In May 2010, the Supreme Court issued its *American Needle* decision. In the context of a dispute involving the licensing of National Football League (NFL) logos and trademarks for use on baseball caps and other headwear, the Court rejected the reasoning of the Seventh Circuit Court of Appeals and held that the National Football League was not a single entity incapable of conspiring with itself. The Court concluded that the legality of the agreement at issue—formed by the 32 member teams of the NFL—must be judged under the rule of reason. That ruling was entirely in keeping with the Solicitor General’s brief, which had advocated a functional and pragmatic analysis based on the

specific facts of each situation as opposed to the categorical rule laid out by the Seventh Circuit and the NFL.

In effect, the NFL asked the Court to rule that individual teams could not be held liable for conspiring with one another to limit competition between them—with regard not only to their intellectual property, and a wide range of other conditions, including decisions such as hiring coaches. We believe that collective bargaining is a critically important component of vibrant labor markets. In our brief, we rejected the NFL’s position and articulated a measured, fact-driven approach that preserved important competition principles. *American Needle* also offered the first opportunity for the Obama Administration to participate in an antitrust case before the Supreme Court. It also marked the Court’s first decision in favor of an antitrust plaintiff since 1992.

In contrast, courts have thus far declined to adopt our position on reverse payment cases. In the *Cipro* case, we filed an *amicus* brief with the Second Circuit setting forth our approach to reverse-payment cases where pharmaceutical companies producing brand name drugs pay firms making generics not to exercise the entry rights provided under the Hatch-Waxman Act.

Our *Cipro* brief called for a presumptive illegality standard. Significantly, the United States declined to advocate a rule that all reverse-payment settlements are *per se* illegal and instead recognized that some settlements might be procompetitive by avoiding unnecessary litigation. The test we suggested would have allowed defendants 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. That could be the case, for instance, if the parties could

show that the settlement provides for the possibility of generic entry before the expiration of the patent. Unfortunately, the Second Circuit rejected this view, citing prior Circuit precedent. Our view, however, has not changed, and we continue to look for opportunities to advance the balanced, pro-consumer standard we explained to the Second Circuit. We have recently filed a brief articulating this position in the *K-Dur* case pending in the Third Circuit.

The United States also filed an amicus brief in the Federal Circuit Court of Appeals in the *Myriad* case. *Myriad* deals with the extent to which discoveries in genetics may be patented—an issue that, as the brief of the United States points out, implicates the expertise and responsibilities of the Antitrust Division. To help ensure that the position of the United States reflects sound, pro-consumer competition principles, we worked collaboratively on the brief with our colleagues both within the Department and in other parts of the government, including the Patent and Trademark Office, the National Institutes of Health, the Centers for Disease Control and Prevention, the Office of Science and Technology Policy, and the National Economic Council. We believe the position delineated in that brief—distinguishing between engineered DNA molecules, which are patentable, and isolated but otherwise unmodified genomic DNA, which is not—achieves that goal, and we look forward to the Federal Circuit’s decision in the matter.

Competition advocacy also extends to the international arena. As Assistant Attorney General, I have promoted, both within the United States and around the world, the concept of procedural fairness as a way to achieve the goals of transparency and certainty. This is just one aspect of maintaining a competitive market around the world.

The Division's international efforts have been supported by the Division's bilateral and multilateral relationships, and the Division continues to look for new opportunities in this regard. We have particularly focused on working with emerging economies. In November 2009, we signed a Memorandum of Understanding (MOU) with Russia's competition authority. We, along with the FTC, also look forward to officially signing an MOU with all three competition agencies in China later this summer. The MOU will outline the commitment of five agencies—two U.S. and three Chinese—to coordinate and work together when we can. We are also pursuing a similar agreement with India as it builds its antitrust regime.

These are important achievements. MOUs provide a sound basis for enhanced cooperation on a day-to-day basis, while minimizing possible conflicts between the signatories' antitrust enforcement activities. However, our work does not end with a signing ceremony.

#### **IV. Looking Forward**

Finally, as we look to the future, there are areas where I hope we, at the Division, can accomplish more. In particular, we have sought opportunities to establish the appropriate boundaries for antitrust intervention in the marketplace and to demonstrate that antitrust enforcement can be effective when coordinated with other regulatory regimes. This remains an area that needs careful attention, including through targeted enforcement that maintains a role for antitrust in light of existing Supreme Court precedents, including *Twombly*, *Credit Suisse*, *Trinko* and *linkLine*.



## **A. Twombly**

The Supreme Court's 7-2 decision in *Twombly* retired language in *Conley v. Gibson* that had often been read to permit parties to abide by rather loose pleading standards in litigation complaints. Instead, under *Twombly* requires antitrust plaintiffs to draft complaints with allegations that cross the line from "possibility" and into "plausibility." Since the Court's decision, *Twombly* has been often cited by defendants in motions to dismiss, with some success. The practical consequences of requiring plaintiffs, at the complaint stage, to allege facts likely to be known only to the defendants, can be severe, leaving anticompetitive activity unabated.

The Antitrust Division successfully opposed *Twombly* motions to dismiss in two of our recent cases: *Blue Cross and Blue Shield of Michigan* and *Dean Foods*. In both, defendants sought dismissal on the ground that the United States had failed to plead a proper geographic market. The courts denied the motions, appropriately limiting the reach of *Twombly*, and preventing it from being inappropriately applied to the intensely fact-driven issue of geographic market definition.

In spite of these successes, the *Twombly* decision remains open to misuse and abuse by defendants seeking to extend its reach beyond the facts of the *Twombly* case. Defendants are entitled to demand notice pleading pursuant to the Federal Rules of Civil Procedure. Deciding cases on their merits at the pleading stage, however, goes too far. We have sought more opportunities in the courts to confine *Twombly* to its appropriate circumstances, but they have not arisen, and it is an area where I hope the Division will do more.

## **B. Credit Suisse**

The Supreme Court's 2007 decision in *Credit Suisse* also is relevant to our enforcement work, and here again we have sought to maintain the role of antitrust enforcement in highly regulated industries. In that case, the Court, in a 7-1 decision, held that the securities laws implicitly precluded application of the antitrust laws to conduct that was the subject of the private plaintiffs' complaint. The decision should not be read to establish that government antitrust enforcers do not have a role in regulated industries. There is a long history of courts applying the antitrust laws in highly regulated industries and *Credit Suisse* did not overturn those cases. Instead, the opinion makes clear that the antitrust laws are suspended *only* where a regulatory agency can and does actively supervise the conduct in question, occupying the field relating to the conduct at issue and where enforcement of the antitrust laws would clearly conflict with the regulatory scheme.

Thus, the Division has continued to work collaboratively with our sectoral regulator colleagues on merger and non-merger enforcement activities, including the Securities Exchange Commission (SEC), the FCC, the Federal Energy Regulatory Commission (FERC), the Commodities Futures Trading Commission, and still others. One need only look at some of our recent activities in the financial services sector to see that we continue to investigate and when necessary prosecute banks, exchanges, and other financial actors who are subject to SEC regulation.

We also successfully brought enforcement actions in the highly regulated electricity industry. In February 2011, the United States District for the Southern District of New York approved our proposed settlement with KeySpan Corporation involving

anticompetitive activity in the electricity market—notwithstanding the FERC’s review of the same facts and public determination not to proceed against KeySpan.<sup>15</sup>

### **C. Trinko and linkLine**

Finally, let me turn to two other recent Supreme Court decisions—*Trinko* and *linkLine*—and what they say about Section 2 of the Sherman Act’s requirements that a monopolist deal with its competitors and, more generally, the Antitrust Division’s perspective on Section 2.

Three Justices would have dismissed the customers’ claims as too remote to form the basis of an antitrust claim, observing that “whatever antitrust injury respondent suffered because of Verizon’s conduct was purely derivative of the injury that AT&T suffered.” The other six Justices, however, chose to address the merits rather than standing and concluded that the customer had failed to state a claim under the Sherman Act.

The factual circumstances presented by this case were unusual and unlikely to arise in many other situations. Although *Trinko* is sometimes described as an unadorned refusal-to-deal case, the Court itself described the issue in the case in light of its factual circumstances—*i.e.*, “whether a complaint alleging breach of the incumbent’s duty under the 1996 Act to share its network with competitors states a claim under Section 2 of the Sherman Act.” The Court held that the conduct did not amount to a violation of Section

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<sup>15</sup> The settlement is an important landmark in antitrust jurisprudence in another respect. Under the court’s order, *KeySpan* is required to disgorge to the United States \$12 million earned under anticompetitive swap agreements that manipulated competition in the New York City electricity markets. This is the first time in the Sherman Act’s 120-year history that a court has found that a disgorgement award to the United States was appropriate to remedy harm to competition. The court appropriately recognized the case as “an important marker for enforcement agencies and utility regulators alike” because it “tilts incentives back in favor of competitive bidding and deters the use of derivatives as tools to manipulate a market.”

2 under its existing precedents—the breach of a duty under the 1996 Act was not a breach of any antitrust duty that the Court had thus far recognized—and decided not to expand its prior holdings to find a Section 2 violation. Its decision not to expand the reach of Section 2 in that case rests on a variety of inter-related conclusions that are unlikely to cumulatively arise in many situations. Most prominently, the Court, recognizing that any expansion of its precedents to reach the conduct alleged should be sensitive to the economic context, concluded that the context included “a regulatory structure designed to deter and remedy anticompetitive harm” (and indeed that the FCC and state regulatory agencies had served as “an effective steward of the antitrust function”). That finding helps place the Court’s lack of concern for a customer of Verizon’s injured rival, whose injuries already had been effectively addressed according to the Court, in a more understandable light. Indeed, it is unlikely that the Antitrust Division would, in the ordinary course, pursue a matter if a regulatory agency already had obtained relief that effectively protected the consumer and competition interests underlying the antitrust laws. Where antitrust relief would be in addition to, or a complement to, a regulatory scheme, however, antitrust enforcement continues to play an important and critical role.

The Court also found that treating claims like that of the injured customer’s as antitrust violations would lead to “interminable litigation” in the federal courts and that burdensome litigation would be an unnecessary addition to the “variety of litigation routes already available”—namely, the regulatory proceedings that had, according to the Court, fully and effectively remedied any harm to competition. The Court also found that a federal court would not be able to effectively minister the particular relief request by the AT&T customer.

This mix of unusual factors is unlikely to arise in other contexts, and the Court’s holding regarding expanding the reach of Section 2 is thus appropriately viewed as a narrow one, limited to the precise circumstances before it. The Court did not in any respect overturn such prior decisions as *Aspen Skiing*, *Otter Tail*, *Terminal Railroad, Associated Press*, *Eastman Kodak*, *Lorain Journal*, or the D.C. Circuit’s Microsoft decision. The Court simply did not see the need to go beyond them in *Trinko*.

*linkLine* also arose under limited circumstances and occupies an even narrower corner of Section 2 jurisprudence. The Supreme Court’s decision in *linkLine* grew out of an interlocutory appeal from the dismissal of a complaint that had been amended post-dismissal. In other words, the litigants had moved on from the decision the Court was reviewing. Indeed, the petitioner had even abandoned its prior assertion that it could state a claim on a price squeeze theory in the absence of an antitrust duty to deal and retail pricing that satisfied the standards for demonstrating predatory pricing. Petitioner actually asked the Court to vacate the order under review as it was no longer pursuing the claims of the dismissed complaint, and indeed had adopted the view of the appellate dissent that it had to meet predatory pricing standards.

Despite the procedural morass, the Court proceeded to decide the case on the merits. The holding, however, is necessarily limited to price squeeze claims lacking both an antitrust duty to deal and allegations sufficient to demonstrate predatory pricing. We have little doubt that future complaints will include at least one of these elements—as, indeed, the petitioner claimed its amended complaint did. The relevance of *linkLine* to future litigation should accordingly be insignificant.

That brings me back to the Division's analysis of Section 2. We have sought opportunities to explain to the courts that *Trinko* and *linkLine*, properly construed, are narrow decisions arising from unusual circumstances.

## **V. Conclusion**

As I have described today, the Division has met many challenges, but continues to look for opportunities, in a pragmatic way, to preserve competition in the marketplace for the benefit of the economy and the American consumer and to remain a good steward of government. We are limited by the facts of the transactions that come before us and the activity we discover, as well as by our mandate and authority under the antitrust laws and judicial precedent, but there is much we can and are prepared to do to enhance the robust application of competition analyses to all aspects of the public policy formulation.