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REPORT

Monopoly Is What Happens While You're Busy Making Speeches: Change We Can Believe In Comes To The Antitrust Division

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The Senate confirmed Christine A. Varney as Assistant Attorney General for the Antitrust Division on April 20, 2009. In her first post-confirmation speech three weeks later, Ms. Varney announced the withdrawal, effective immediately, of the Division's controversial 2008 report, ''Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act.''[1] The so-called ''Section 2 Report,'' Ms. Varney said in the Division's announcement release, ''raised too many hurdles to government antitrust enforcement and favored extreme caution'' in dealing with conduct within Section 2's reach.[2] Although the point could hardly be missed, Ms. Varney emphasized that her action represented a ''shift in philosophy,'' and was designed to ''let everyone know 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 . . . .''[3]

Antitrust is rarely good theatre. But this was high drama, indeed, not only for antitrust practitioners, but for the public at large. The *New York Times* ran the withdrawal as a Page 1, top left-margin story.[4] To put into context the significance of Ms.Varney's action, let us recall the abyss into which Section 2 had fallen during the past administration. After that, I will try to read the tea leaves going forward.

The Crusade to Limit Section 2 Enforcement

Under President Bush, Section 2 actions left-over from earlier administrations proceeded, most notably

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[1] Department of Justice Press Release, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009) (''DOJ Withdrawal Release''), *available at* **http://www.usdoj.gov/atr/public/press_releases/2009/245710.htm**. Ms. Varney's remarks for the Center for American Progress – ''Vigorous Antitrust Enforcement in this Challenging Era'' (''Varney Speech'') – are *available at* **http://www.usdoj.gov/atr/public/speeches/245711.htm**.

[2] DOJ Withdrawal Release; *see also* Varney Speech.at 6.

[3] DOJ Withdrawal Release. The Section 2 Report itself remains available on the Antitrust Division's website, with the posted notation ''Update: Justice Department Withdraws Report on Antitrust Monopoly Law (05/11/2009),'' linking to the withdrawal announcement. *See* **http://www.usdoj.gov/atr/public/reports/236681.htm**. The Division's September 8, 2008 press release announcing the report is likewise flagged. *See* **http://www.usdoj.gov/atr/public/press_releases/2008/236975.htm**.

[4] Administration Plans to Strengthen Antitrust Rules, NY Times, May 11, 2009, at 1, col 1, *available at* **http://www.nytimes.com/2009/05/11/business/11antitrust.html**. *See also* U.S. Clears the Way for Antitrust Crackdown, Washington Post, May 12, 2009, *available at* **http://www.washingtonpost.com/wp-dyn/content/article/2009/05/11/AR2009051101189_pf.html**.

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Dentsply (a victory)[5] and *American Airlines* (a defeat).[6] Also, the oft-criticized settlement in *Microsoft*[7] was negotiated, followed by on-going judgment compliance and monitoring activity led by a specially-created, full-time group of software engineers, known as the ''Technical Committee.''[8] However, the Bush Antitrust Division itself was unable to identify a single monopolist whose conduct needed to be curbed.[9]

At the same time, top-level Antitrust Division officials advocated enforcement-lite in dealing with monopolies. The notes may have changed — from ''gales of creative destruction,''[10] to ''catching the tiger by the tail,''[11] to ''navigating Scylla and Charybdis''[12] — but the drumbeat rhythm of non-intervention recurred:

- The holy grail of monopoly profits drives the innovation that grows the economy.[13]
- Distinguishing robust competitive behavior from conduct with anticompetitive effects is difficult. And, ''false positives'' — erroneous condemnation of competitive conduct — are more harmful than ''false negatives'' — mistaken tolerance of anticompetitive conduct — because, after all, sooner or later markets will self-correct, even if captured by a monopolist.[14]
- Business-persons need clear, objective rules of law — even safe harbors — or else they will pull their competitive punches, thereby denying consumers the benefits that unbridled competition brings.[15]
- Courts, for their part, need clear, administrable rules, even if that means acquiescing in the anticompetitive effects of exclusionary or predatory conduct by monopolists. The machinery of justice simply is limited in its ability both to distinguish vigorous competition from the really bad stuff, and effectively to remedy the violation where anticompetitive conduct can be reliably identified.[16]

Meanwhile, in June 2006, the Antitrust Division and the FTC began their joint Section 2 inquiry. A year-long series of hearings, held in Berkeley, Chicago and Washington, ensued at which 119 witnesses appeared, and for which voluminous filings were made.[17] A joint report was envisioned, but ''that proved to be impos-

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[5] United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3rd Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006).

[6] United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003).

[7] *See* United States v. Microsoft Corp., 84 F.Supp.2d 9 (D.D.C. 1999) (findings of fact), 87 F.Supp.2d 30 and 97 F.Supp.2d 59 (D.D.C. 2000) (findings of fact, conclusions of law and remedy order, respectively), *aff'd, rev'd, remanded in part*, 253 F.3d 34 (D.C. Cir.) (*en banc*) (liability affirmance), *cert. denied*, 534 U.S. 952 (2001); 224 F.Supp.2d 76 (D.D.C. 2002) (remedy ruling after hearing), 231 F.Supp.2d 144 (D.D.C. 2002) (Tunney Act ruling on settlement) and 231 F.Supp.2d 203 (D.D.C. 2002) (ruling on States' settlement), *aff'd sub nom*, Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004) (*en banc*) (remedy and settlement affirmance).

[8] Half the State-plaintiffs in Microsoft — the ''New York Group'' — settled with the Antitrust Division, and, in consequence, assumed joint responsibility with the Division for overseeing the Technical Committee, as well as responsibility for the judgment enforcement generally. The remaining State-plaintiffs — the California Group — have enforcement responsibility under their slightly different litigated final judgment. The three enforcers groups generally coordinate closely, albeit not without disagreement from time to time.

[9] Although not involving single-firm conduct, the Division's response to the 2008 Google-Yahoo! arrangement warrants comment. After Microsoft made an uninvited offer to buy Yahoo!, Google came to the rescue by giving Yahoo! the option to use Google-delivered ads in response to some user searches on Yahoo!. The parties further agreed to split the resulting revenue. In late 2008, the Division concluded that the arrangement presented Section 1 and 2 issues and stated its intention to sue. Google thereupon walked from the deal. Department of Justice Press Release, Yahoo! Inc. and Google, Inc. Abandon Their Advertising Agreement (Nov. 5, 2008), *available at* **http://www.usdoj.gov/atr/public/press_releases/2008/239167.pdf**; Hogan's Litvack Discusses Google/Yahoo, The AmLaw Daily (Dec. 2, 2008), *available at* **http://amlawdaily.typepad.com/amlawdaily/2008/12/hogans-litvack.html**.

[10] Thomas O. Barnett, The Gales of Creative Destruction: The Need for Clear and Objective Standards for Enforcing Section 2 of the Sherman Act (June 20, 2006) (''Gales Speech''), *available at* **http://www.usdoj.gov/atr/public/speeches/216738.pdf**.

[11] Thomas O. Barnett, Section 2 Remedies: What to Do After Catching the Tiger by the Tail (June 4, 2008) (''Tiger Speech''), *available at* **http://www.usdoj.gov/atr/public/speeches/233884.pdf**.

[12] Thomas O. Barnett, Navigating Scylla and Charybdis: Three Stages in the Journey to Effective Section 2 Enforcement (Sep. 23, 2008) (''Navigation Speech''), *available at* **http://www.usdoj.gov/atr/public/speeches/237527.pdf**.

[13] *See, e.g.*, Gales Speech at 6, 17; Tiger Speech at 8-9; Navigation Speech at 4; Thomas O. Barnett, Section 2 Remedies: A Necessary Challenge, at 5 (Sep. 28, 2007) (''Challenges Speech''), *available at* **http://www.usdoj.gov/atr/public/speeches/226537.pdf**; Thomas O. Barnett, Maximizing Welfare Through Technological Innovation, at 18-19 (Oct. 31, 2007), *available at* **http://www.usdoj.gov/atr/public/speeches/227291.pdf**; Thomas O. Barnett and Hill B. Wellford, The DOJ's Single-Firm Conduct Report: Promoting Consumer Welfare Through Clearer Standards for Section 2 of the Sherman Act, at 10 (Oct. 8, 2008) (''Clearer Standards Paper''), *available at* **http://www.usdoj.gov/atr/public/speeches/238599.pdf**.

[14] *See, e.g.*, Gales Speech at 10-11; Challenges Speech at 4, 8, 12; Clearer Standards Speech, at 6, 10-11; J. Bruce McDonald, The Struggle for Standards, at 1, 6-7 (Apr. 1, 2004), *available at* **http://www.usdoj.gov/atr/public/speeches/203780.pdf**; J. Bruce McDonald, The Trans-Atlantic Antitrust Dialogue: What Do You Know?, at 8 (July 6, 2006) (''Trans-Atlantic Dialogue Speech''), *available at* **http://www.usdoj.gov/atr/public/speeches/221052.pdf**; Gerald F. Masoudi, The Best Approach to Enforcement Against Single-Firm Conduct: Caution, at 3-4 (Nov. 17, 2006) (''Caution Speech''), *available at* **http://www.usdoj.gov/atr/public/speeches/220403.pdf**.

[15] *See, e.g.*, Gales Speech at 7-8, 16-17; Tiger Speech at 16; Navigation Speech at 7-9, 10-11, 14; Challenges Speech at 8; Clearer Standards Paper at 6, 8, 15; Thomas O. Barnett, Remarks at the Bundeskartellamt Ceremony Celebrating Fifty Years of the German Competition Act, at 4-7 (Jan. 15, 2008) (''Ceremony Speech''), *available at* **http://www.usdoj.gov/atr/public/speeches/229477.pdf**; Trans-Atlantic Dialogue Speech at 7-8; Caution Speech at 5-9.

[16] *See, e.g.*, Gales Speech at 8-12; Tiger Speech at 3, 5-7, 12-13, 17; Navigation Speech at 4-6, 9-10, 14; Challenges Speech at 5, 9, 12, 13-14; Ceremony Speech at 6-7; Trans-Atlantic Dialogue Speech at 8.

[17] *See* Section 2 Report at 1. The public record of the investigation may be accessed at Antitrust Division and Federal Trade Commission websites, **http://www.usdoj.gov/atr/public/**

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sible.''[18] So, in the twilight of the Bush administration, the Antitrust Division issued its own 200+ page Section 2 Report. The Report's announced ''consensus'' of Section 2's ''core principles'' mapped nicely to the Division's public message during the Bush years.[19] Herbert Hovenkamp, ''a leading antitrust scholar regarded as a centrist,'' described the Report as ''a brief for defendants.''[20]

The Division's Section 2 Report Ignites Opposition in the Federal Trade Commission

As soon as the Section 2 Report hit the antitrust newsstands, three FTC Commissioners — Harbor, Leibowitz and Rosch — issued a statement that disavowed the conclusions in the Report, and that distanced the Commission itself from the Report, in uncharacteristically animated terms.[21] The three Commissioners expressed two over-arching concerns.

First, despite the Supreme Court's admonition that ''the welfare of consumers'' is antitrust's ''primary goal,'' the Division's Report was ''chiefly concerned with firms that enjoy monopoly or near-monopoly power . . . .''[22] As the three Commissioners put it, the Report ''would place a thumb on the scales'' in favor of these firms, and against consumers and ''other equally significant stakeholders.''[23] Second, in the Commissioners' view, the Report ''overstate[d] the level of legal, economic, and academic consensus regarding Section 2.''[24] Hearing participants differed ''about what the settled law was, much less what it should be,'' while the hearings themselves were ''not representative of the views of all Section 2 stakeholders . . . .''[25] Finally, they noted, economic theory, although important in applying antitrust law, ''is not tantamount to the law itself.''[26]

The FTC trio criticized the Division for ''adopt[ing] law enforcement standards that would make it nearly impossible to prosecute a case under Section 2 of the Sherman Act,''[27] and they described those standards that as ''tougher – and in some cases much tougher – than existing standards as defined by Section 2 case law.''[28] The three Commissioners concluded by emphasizing that ''[t]his Commission stands ready to fill any Sherman Act enforcement void that might be created if the Department actually implements the policy decisions expressed in its Report.''[29] Subsequently, the FTC released its staff working papers on Section 2, thereby providing a publicly accessible counterweight of discussion and analysis to the Antitrust Division work.[30]

The Antitrust Division defended its Report.[31] But after November 3, 2008, twilight was rapidly giving way to sunset for the Bush administration. The likelihood that the Section 2 Report would guide Antitrust Division policy going forward plummeted. The real question was what, exactly, the new leadership at the Division would do to break from the past.

Antitrust enforcers around the world, accustomed to hearing the American message of convergence, no doubt chuckled at the dissonance reverberating from the Section 2 Report. To those making their livelihood in antitrust, however, the controversy simply confirmed that the FTC marched to the beat of a different drummer when it came to enforcement against dominant firms. Although the agencies joined in some areas, the FTC filed its own Supreme Court petition for certiorari in its pharma settlement case against Schering-Plough for allegedly restricting generic entry into a drug market. The Solicitor General, advised by the Antitrust Division, opposed certiorari in an *amicus curiae* filing, and the Court declined review.[32] More recently, after the Solicitor General supported certiorari to reverse the Ninth Circuit's ruling in *linkLine*[33] — which upheld a Section 2 ''price squeeze'' claim — the FTC issued a

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hearings/single_firm/sfchearing.htm and **http://www.ftc.gov/os/sectiontwohearings/index.shtm**.

[18] J. Thomas Rosch, One Retrospective View of the Commission's Activities, at 12 (Nov. 6, 2008), *available at* **http://www.ftc.gov/speeches/rosch/081106rosch-washingtonstatebarassoc.pdf**.

[19] *Compare* Section 2 Report at 8-9 (Sep. 2008) *with, e.g.,* Trans-Atlantic Dialogue Speech at 6-8 (July 6, 2006).

[20] Administration Plans to Strengthen Antitrust Rules, NY Times, May 11, 2009, at 1, col. 1, *available at* **http://www.nytimes.com/2009/05/11/business/11antitrust.html**.

[21] Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sep. 8, 2008) (''Three Commissioners' Statement''), *available at* **http://www.ftc.gov/os/2008/09/080908section2stmt.pdf**. Then-Chair Kovacic issued an individual statement that neither supported nor criticized the contents of the Section 2 Report itself. Rather, Commissioner Kovacic summarized his prior published views on the evolution of Section 2 doctrine, with particular reference to his ''double helix'' metaphor to describe the influence of the Chicago and Harvard schools of antitrust learning during the past generation. Statement of Federal Trade Commission Chairman William E. Kovacic, Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act (Sep. 8, 2008), *available at* **http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf**.

[22] Three Commissioners' Statement at 1.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Three Commissioners' Statement at 1-2.

[27] *Id.* at 5.

[28] *Id. See also* J. Thomas Rosch, Some Views on the European Microsoft Case, at 4 (Oct. 29, 2008) (''The [Section 2] Report prized certainty and predictability in the law virtually above all else, and thus embraced a series of safe harbors and rules of per se legality which we felt might shelter from liability a firm with monopoly power in the event it employed practices in a fashion that would foreclose competitors and thereby insulate the firm from competitive constraints it might otherwise face''), *available at* **http://www.ftc.gov/speeches/rosch/081029roschrviewsoneuro.pdf**.

[29] *Id.* at 11.

[30] *See* Federal Trade Commission Release, Staff Working Papers on Section 2 Posted on Federal Trade Commission Web Site (Jan. 16, 2009), *available at* **http://www.ftc.gov/opa/2009/01/section2.shtm**, and the FTC's Section 2 website, **www.ftc.gov/os/sectiontwohearings/index.shtm**, linking to the working papers.

[31] *See* Clearer Standards Paper, *available at* **http://www.usdoj.gov/atr/public/speeches/238599.pdf**.

[32] *See* Brief for the United States as Amicus Curiae in FTC v. Schering-Plough Corp (U.S. Sup. Ct. No. 05-273 May 17, 2006), *available at* **http://www.usdoj.gov/atr/cases/f216300/216358.pdf**. The decision sought to be reviewed is Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006).

[33] 503 F.3d 876 (9th Cir. 2007).

public statement explaining its disagreement with the Solicitor General's view.[34]

The Antitrust Division Jumps Ship In *Microsoft*

Another event during the latter part of the Bush administration speaks volumes about the Antitrust Division's dis-engagement from Section 2 enforcement. The final judgment in the *Microsoft* case had a five-year term that would expire in November 2007.[35] Part of the decree — referred to as the ''§ III.E provisions'' — requires Microsoft to license technology to allow competing servers and software applications delivered over the internet to interoperate with Windows desktop computers. Microsoft, however, was unable, over literally years, to produce quality technical documents.[36] In mid-2006, Microsoft consented to a two-year extension of the § III.E provisions.[37]

The ***non***-§ III.E provisions — which impose on Microsoft conduct prohibitions and additional affirmative technology obligations — were not extended, however. As their November 2007 expiration date approached, a number of State-plaintiffs concluded that these provisions, too, needed to be extended to allow the final judgment to operate as an overall, reinforcing package of prohibitions and affirmative obligations. That, the Antitrust Division told the Court at the time of the 2001 settlement, was the intent.[38] Thus, a group of States, led by California and New York, moved to extend the final judgment's non-§ III.E provisions.[39]

Microsoft, of course, opposed an extension. And, so too did the Antitrust Division itself.[40] Moreover, while Microsoft and the States agreed temporarily to extend their decree past its November 2007 expiration to give the Court an opportunity to rule, the Antitrust Division simply allowed the non-§ III.E provisions of its own final judgment to dissolve on schedule in November 2007.[41] The Division, in effect, announced its disinterest in enforcing these provisions any longer, regardless of how the Court was to rule on the States' motion to extend.

In January 2008, the Court sided with the States, extending the non-§ III.E provisions in the States' final judgment by two years, thereby running them coterminous with the § III.E provisions.[42] In the Antitrust Division's most important Section 2 case in recent years, the States took over enforcing the parts of the decree that the Division abandoned.[43]

In sum, whatever lip-service the Bush Antitrust Division paid to Section 2's role in the antitrust arsenal, the Division brought no new cases, bailed from *Microsoft* as soon as it could, and counseled ''caution'' generally to avoid disrupting the affairs of monopolists.

What's Past is Prologue

In withdrawing the Section 2 Report, Ms. Varney plainly aligned the Division with the three FTC Commissioners. The ''greatest weakness'' of the Report, Ms. Varney said, ''is that it raises many hurdles to Government antitrust enforcement.''[44] Having identified this weakness, Ms. Varney rejected considerations that informed the Bush Antitrust Division's enforcement philosophy. Thus:

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[34] *See* Brief for the United States as Amicus Curiae in Pacific Bell Telephone Co. v. linkLine Communications, Inc (U.S. Sup. Ct. No. 07-512 May 22, 2008), *available at* **http://www.usdoj.gov/atr/cases/f233500/233594.pdf**; FTC Release, FTC Issues Statement Regarding Solicitor General's Amicus Brief Filing in Pacific Bell Telephone Co. v. linkLine Communications (May 23, 2008), *available at* **http://www.ftc.gov/opa/2008/05/linkLine.shtm**. The Supreme Court granted certiorari and reversed, as the Solicitor General had urged. Pacific Bell Telephone Co. v. linkLine Communications, Inc., ___ U.S. ___ , 129 S.Ct. 1109 (2009).

[35] Strictly speaking, there are three Microsoft final judgments — one in the Antitrust Division's case, a second in the States' case entered on behalf of the New York Group, which settled with the Division in 2001, and a third, also in the States' case, entered on behalf of the California Group, which litigated for a different remedy. For purposes of discussion here, the three decrees are identical. *See generally* New York v. Microsoft Corp., 531 F.Supp.2d 141, 149-50 & n. 16 (D.D.C. 2008) (''Microsoft Extension Ruling'').

[36] *Id*. at 152, 158-64; Transcript, May 17, 2006, at 56:6-9 (Microsoft's Robert Muglia noted that ''the work that had been done to date . . . wasn't really meeting the needs of anyone, and in fact the way we were thinking about the problem was incorrect''), United States v. Microsoft Corp., Civil Action 98-1232 (D.D.C.) (''Microsoft, Civil Action 98-1232''), and New York v. Microsoft Corp., Civil Action 98-1233 (D.D.C.) (''Microsoft, Civil Action 98-1233''). This technology overlaps significantly that which the European Commission ordered Microsoft to provide, which resulted in an €899 million ($1.4 billion) EC fine for non-compliance. *See* EC Press Release, Antitrust: Commission imposes €899 million penalty on Microsoft for non-compliance with March 2004 Decision (Feb. 27, 2008), *available at* **http://europa.eu/rapid/pressReleasesAction.do reference=IP/08/318&format=HTML&aged=0&language=EN&guiLanguage=en**.

[37] Microsoft Extension Ruling, 531 F.Supp.2d at 161; Modified Final Judgment, Microsoft, Civil Action 98-1232 (Sep. 7, 2006); Modified Final Judgment Pursuant to Rule 54(b), Microsoft, Civil Action 98-1233 (Sep. 7, 2006).

[38] Response of the United States to Public Comments on the Revised Final Judgment, ¶ 413, at 205 (''it is the overall impact of the various decree provisions *working together* over the course of the five-year term that will restore competitive conditions in the market'') (emphasis added), Microsoft, Civil Action 98-1232 (Feb. 27, 2002), *available at* **http://www.usdoj.gov/atr/cases/f223700/223752.pdf**.

[39] Microsoft Extension Ruling, 531 F.Supp.2d at 164-65.

[40] Brief of the United States in Opposition to the Motions to Extend the States' Final Judgments, Microsoft, Civil Action 98-1233 (Nov. 9, 2007), *available at* **http://www.usdoj.gov/atr/cases/f227500/227585.pdf**.

[41] Microsoft Extension Ruling, 531 F.Supp.2d at 165; Order, Microsoft, Civil Action 98-1233 (Oct. 30, 2007).

[42] Microsoft Extension Ruling, 531 F.Supp.2d at 163, 164 (''Although the technical documentation project is complex and novel, it is clear, at least to the Court, that Microsoft is culpable for this inexcusable delay . . . . [B]ecause of the delay, the various provisions of the Final Judgments have never been given an opportunity to operate together as the Court and the parties envisioned when the Final Judgments were entered''), 171 (''The delay in Section III.E's implementation, which has deprived the provisions of the Final Judgments the chance to operate together as intended, is entirely incongruous with the original expectations of the parties and the Court''); Order, Microsoft, Civil Action 98-1233 (Jan. 29, 2008).

[43] The parties have since stipulated to extend the entire final judgment an additional 18 months. *See* Orders, Microsoft, Civil Actions 98-1232 and 98-1233 (Apr. 22, 2009); Joint Motion to Modify Final Judgment and Supporting Memorandum of Points and Authorities, Microsoft, Civil Action 98-1232 (Apr. 16, 2009), *available at* http://www.usdoj.gov/atr/cases/f244900/244921.pdf. The States, however, continue to have exclusive enforcement authority over the non-§ III.E provisions.

[44] Varney Speech at 6.

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- Ms. Varney took issue with the assumption that enforcers should refrain from intervening because markets invariably ''self-police'' and ''self-correct.''[45]
- Ms. Varney rejected the notion that enforcers and courts cannot distinguish anticompetitive acts from lawful conduct, and discounted as exaggerated the risk that Section 2 enforcement will deter procompetitive business conduct.[46]
- She similarly rejected the importance of preserving a dominant firm's ability to act efficiently at the expense of tolerating exclusionary or predatory conduct that impaired consumer welfare.[47]
- Ms. Varney also decried the Section 2 Report's ''excessive concern with the risks of over-deterrence,'' and its ''resulting preference for an overly lenient approach to enforcement'' as ''effectively straightjacket[ing] antitrust enforcers and courts from redressing monopolistic abuses . . . .''[48]

Announcing an intention to go ''back to the basics,''[49] Ms. Varney highlighted two Supreme Court Section 2 decisions — *Lorain Journal v. United States*[50] and *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*[51] — as reflecting ''balanced analyses,'' from which to anchor the Division's ''return to fundamental principles of antitrust enforcement.''[52] These decisions, Ms. Varney asserted, formed the basis for the Antitrust Division's recent successes in *Dentsply*[53] and *Microsoft*,[54] as well as for the private plaintiff's success in *Conwood Co. v. United States Tobacco Co.*[55] Ms. Varney singled out *Microsoft*, as recognizing the ''need to look closely at both the perceived procompetitive and anticompetitive aspects of dominant firm's conduct''[56] in resolving Section 2 cases.

Meanwhile, more recent Supreme Court rulings — *Trinko*,[57] the Bush administration's Section 2 award-winner, and *linkLine*,[58] its progeny — were relegated to a footnote. There was ''no question,'' Ms. Varney said, that these two rulings ''reaffirmed *Aspen Skiing*'s limits on a monopolist's ability to engage in exclusionary or predatory conduct.''[59]

For those who regard *Aspen Skiing* as an eccentric relative, best hidden away in antitrust's attic, a readjustment in thinking may be warranted. Under Ms. Varney, the Antitrust Division appears poised to jettison the doctrinaire approach to Section 2, supplemented by safe-harbors, that so captivated the Division under President Bush. Ms. Varney's discussion may foreshadow advocating a Section 2 Rule of Reason analysis — first suggested in the Supreme Court's 1911 *Standard Oil*[60] decision, and more recently applied in the D.C. Circuit's *Microsoft* case. Advocating is one thing, of course. Translating the advocacy into favorable court rulings is another — particularly given not only rulings such as *Trinko* and *linkLine*, but also the need to litigate cases before lower federal court judges, many of whom were nurtured during the heyday of Chicago School economics. Nevertheless, there is other case law to work with here. Further, even the Bush Antitrust Division's now withdrawn Section 2 Report recognized that one size does not fit all where Section 2 is concerned.[61] And that, after all, is a central teaching of antitrust's Rule of Reason.

Equally important, however, is Ms. Varney's overall tone. To chant, as antitrust fundamentalists are prone to do, that antitrust laws were enacted to protect ''competition, not competitors''[62] should be the beginning of the mantra, not the end of it. For there to be competition, there need to be competitors, and — as Section 2 recognizes — there need to be limits on what dominant firms may do to try to win the competitive battle. As Ms. Varney appears to recognize, monopolists and near monopolists, left to their own devices, find countless ways to compete, many of which do not involve competition on the basis of product merit. Dominant firms do not also need the law's favor nearly so much as consumers and competitors do to assure that markets are not distorted or captured through conduct that erects or increases entry barriers, raises rivals' costs, or denies product choice.

It matters whether government enforcers begin with the notion that monopolies are disfavored – even dangerous — aggregations of power and are, accordingly, subject to particularly close scrutiny, rather than acceptable — indeed, encouraged — by-products of the sharp-elbowed competition that will eventually make us all fat, dumb, and happy. Dedicated and able career attorneys recognize when the leadership message is throttle up, and not down. As complaints from industry participants and consumers are received, the starting vantage point influences not only what you see, but also where and how hard you look to determine competitive impact. It influences, as well, whether to sue, the evidence marshaled to prove the case, and the remedy sought upon proof of the violation. On all these fronts, the new Division leadership offers a sharp break from the past administration.

Many Section 2 issues are percolating in the lower courts — bundled pricing, loyalty discounts, refusals to

[45] *Id.* at 4.
[46] *Id.* at 6-7.
[47] *Id.* at 7.
[48] *Id.* at 8.
[49] *Id*. at 9.
[50] 342 U.S. 143 (1951).
[51] 472 U.S. 585 (1985).
[52] Varney Speech at 9.
[53] 399 F.3d 181 (3rd Cir. 2005).
[54] 253 F.3d 34 (D.C. Cir. 2001) (en banc).
[55] 290 F.3d 768 (6th Cir. 2002).
[56] Varney Speech at 13.
[57] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).
[58] Pacific Bell Telephone Co. v. linkLine Communications, Inc., ___ U.S. ___, 129 S.Ct. 1109 (2009).
[59] Varney Speech at 11 n. 22.
[60] Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911) (''the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of [Section 2] have been committed[] is the rule of reason''). *See generally* Brief for the State of New York and 14 Other States as Amici Curiae in Support of Respondent, Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, at 13-15 (U.S. Sup. Ct. No. 02-682 Aug. 2003), *available at* **http://www.oag.state.ny.us/bureaus/antitrust/pdfs/verizon_vs_trinko.pdf**; William Kolasky, The Justice Department's Section 2 Report: A Mixed Review, The Antitrust Source (Oct. 2008) (arguing for a ''sliding-scale'' rule of reason analytic approach), *available at* **http://www.abanet.org/antitrust/at-source/08/10/Oct08-Kolasky10-24f.pdf**.
[61] *See, e.g.*, Section 2 Report, at viii, 33-34, 46.
[62] *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

deal, exclusive dealing arrangements, and conduct in standard setting contexts, to name only a few. Moreover, the incentives for dominant firms to engage in anticompetitive strategic conduct are strong, and their means to do so are bounded only by the limits of human imagination. Thus, whether cases are pursued under a Section 2 Rule of Reason, under a theory of shifting presumptions and burdens of proof, or under yet-to-be-developed analytic frameworks, the Antitrust Division's new leadership will have ample opportunity to do what their immediate predecessors lacked either the vision or the inclination to do: identify anticompetitive conduct by dominant firms that calls for enforcement action in federal court.

Ms. Varney has announced a ''recalibration of economic and legal analysis and theories''[63] with a view to more vigorous antitrust enforcement. If she delivers on that commitment — in enforcing Section 2 as well as the other areas of civil enforcement where the past administration also fell off the charts — then we can expect the benefits that robust competition brings: lower prices, better quality, greater choice and more innovation.

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[63] Varney Speech at 5. For a comprehensive and thoughtful illlustration of ''recalibration,'' *see* American Antitrust Institute, The Next Antitrust Agenda, ch. 2 (''Monopoly, Exclusion and Intrabrand Competition'') (2008), *available at* **http://www.antitrustinstitute.org/archives/files/Monopoly%20Chapter%20from%20%20AAI%20Transition%20Report_100520082111.pdf**.

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