Obama's Antitrust Enforcers: What Can We Expect?

Sean Gates

A new president, elected on a platform of change, told the nation that the country had been "dying because trade and commerce had declined to dangerously low levels; prices for basic commodities were such as to destroy the value of the assets of national institutions such as banks, savings banks, insurance companies, and others. These institutions, because of their great needs, were foreclosing mortgages, calling loans, refusing credit."[1]

The president was Franklin D. Roosevelt. In an effort to shore up the economy, Roosevelt's National Industrial Recovery Act suspended the antitrust laws.[2] Some criticized this policy. The National Recovery Administrator responded that these critics "have really nothing to support them but the width of their mouths and the volumetric capacity of their lung power."[3]

In 2009, the country faces another economic crisis. Now, too, there are those who argue that "[d]uring tight economic times, antitrust 'is the first thing to go in terms of regulatory compliance.'"[4]

But someone seems to have forgotten to share this wisdom with President Obama. During the campaign, Obama sharply criticized the Bush administration, contending that it had "what may be the weakest record of antitrust enforcement of any administration in the last half century."[5] He vowed to "reinvigorate antitrust enforcement."[6] Now the President has chosen two outspoken advocates of expanded antitrust enforcement to head the nation's antitrust agencies: Christine Varney, a former Federal Trade Commissioner under President Clinton, to head the Antitrust Division, and Commissioner Jon Leibowitz to chair the FTC.

What can we now expect from the antitrust enforcement agencies? In a word, change. If their records are any indication, the two appointees will likely lead a resurgence of antitrust enforcement in both the conduct and merger areas.

More Aggressive Enforcement Against Single-Firm Conduct

Section 2 and the DOJ. Perhaps no area of antitrust law has created more controversy in the last few years than single-firm conduct. From 2006 to 2007, the DOJ and FTC jointly conducted a year-long series of hearings to study Section 2 enforcement. The result was not a joint report from the

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Sean Gates *is a partner with Morrison & Foerster LLP. He served at the FTC, including as a deputy assistant director, from 2004 to 2008. Matthew Sikes and Tej Srimushian, associates at Morrison & Foerster, provided invaluable research and editorial assistance.*

[1] Franklin D. Roosevelt, Second Fireside Chat (May 7, 1933), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=14636.

[2] Act of June 16, 1933, ch. 90, 48 Stat. 195 (codified as 15 U.S.C. § 703), invalidated by Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[3] Arthur M. Schlesinger, Jr., The Coming Of The New Deal: 1933–1935, The Age Of Roosevelt 131 (2003).

[4] Brian Wingfield, *Obama's Antitrust Dilemma*, Forbes.com, Feb. 1, 2009, http://www.forbes.com/2009/02/01/obama-antitrust-regulation-technology-enterprise_0201_antitrust.html (quoting Professor Daniel Crane).

[5] Barack Obama, Senator, Statement for the American Antitrust Institute (Sept. 27, 2007), *available at* http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

[6] *Id.*

agencies. Instead, the DOJ issued its own report,[7] which drew sharp criticism from FTC Commissioners Harbour, Leibowitz, and Rosch. These Commissioners called the DOJ report "a blueprint for radically weakened enforcement of Section 2 of the Sherman Act."[8]

President Obama's appointee to head the DOJ concurs. Ms. Varney declared in her confirmation hearings that she does not support the report's conclusions and is open to amending, withdrawing, or reworking the report.[9] More important, she rejects a central tenet of the DOJ's report.

According to the report, the application of antitrust law to single-firm conduct must be carefully tailored to avoid false positives—the mistaken condemnation of conduct that benefits competition—which the DOJ argued chill procompetitive conduct:

> Standards of section 2 liability that overdeter risk harmful disruption to the dynamic competitive process itself. . . . Importantly, rules that are overinclusive or unclear will sacrifice [the] benefits [of competition] not only in markets in which enforcers or courts impose liability erroneously, but in other markets as well. Firms with substantial market power . . . . must . . . determin[e] in advance whether a proposed course of action leaves their business open to antitrust liability or investigation and litigation. If the lines are in the wrong place, or if there is uncertainty about where those lines are, firms will pull their competitive punches unnecessarily, thereby depriving consumers of the benefits of their efforts.[10]

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Ms. Varney, however, has made it clear that she does not agree with this presupposition:

> [T]here is no such thing as a false positive, you know, let's get real. I have counseled numerous incumbents who are dominant as well as numerous new entrants. I can tell you, at least in my own experience, there is not a dominant incumbent who hasn't done something that was lawful because they were afraid that it might be reviewed by the DOJ or a state attorney general or the FTC. I just don't see it. Ten years back in the private sector I have never once seen it, so I think that this ruse of, you know, we have to be restrained in our enforcement because false positives will chill innovation, take an economic toll on society, and overall result in negative economic consequence, slowing output, increasing cost, I just think is false. I think the more people in the bar start rejecting this idea of false positives the better off we're going to be.[11]

The potential chilling effects of false positives has led to what some call "overly-cautious" Section 2 enforcement.[12] In fact, the Bush administration DOJ did not bring a single monopolization case. Ms. Varney's rejection of the DOJ report's key proposition will surely lead to more aggressive DOJ enforcement against single-firm conduct.

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[7] U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008), *available at* http://www.usdoj.gov/atr/public/reports/236681.pdf [hereinafter Section 2 Report].

[8] Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice at 1 (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf.

[9] *Hearing of the S. Judiciary Comm.: The Nomination of Christine Anne Varney to be Assistant Attorney General in the Antitrust Division*, Fed. News Service, Mar. 10, 2009 [hereinafter *Varney Confirmation Hearings*].

[10] Section 2 Report, *supra* note 7, at 14.

[11] Recorded Remarks, Panel: Re-Energizing Section 2 Enforcement, American Antitrust Institute Annual National Conference, *available at* http://www.antitrustinstitute.org/Archives/2008conferenceaudio.ashx.

[12] *See, e.g.*, Harvey J. Goldschmid, *Comment on Herbert Hovenkamp and the Dominant Firm: The Chicago School Has Made Us Too Cautious About False Positives and the Use of Section 2 of the Sherman Act*, *in* How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust (Robert Pitofsky, ed. 2008).

duct. Relying on *FTC v. Sperry & Hutchison Co.*,[13] the Chairman insists that the FTC has powers that reach beyond the bounds of Section 2, allowing the FTC to condemn conduct that neither the DOJ nor private antitrust litigants may challenge.

Chairman Leibowitz's position is contrary to the prevailing view, which holds that the FTC's authority under Section 5 is no broader than authority provided under the other antitrust laws.[14] This view is buttressed by a series of appellate court decisions rebuffing FTC attempts to go after conduct beyond the reach of the Sherman Act.[15] Chairman Leibowitz nonetheless challenges the prevailing view as "cramped or confused."[16] He argues that the "legislative history, statutory language, and Supreme Court interpretations reveal a Congressional purpose that is unambiguous and an Agency mandate that is broader than many realize."[17] He therefore encourages the Commission to "place greater emphasis on developing the full range of its jurisdiction."[18]

According to Chairman Leibowitz, unilateral conduct may violate Section 5 even if the FTC does not show actual competitive harm, so long as the FTC shows "sufficient anticompetitive attributes," such as "oppressiveness, lack of an independent business justification, anticompetitive intent, predation, collusion, deceit, [or] a tendency to impair competition."[19] This is a far lower standard than the "exclusionary conduct" and likely harm to competition needed to show a violation of Section 2. Chairman Leibowitz would have FTC enforcement efforts consider that "the framers of the FTC Act gave the Agency a mandate—one unique to the Commission—to use Section 5 to supplement and bolster the antitrust laws by providing, in essence, a jurisdictional 'penumbra' around them."[20]

If embraced by the full Commission, Chairman Leibowitz's views may lead to a substantially enhanced enforcement agenda. This is especially true, as Chairman Leibowitz himself has suggested, with regard to single-firm conduct in the areas of standard setting and pharmaceuticals.[21]

For instance, the FTC's use of Section 5 in *N-Data*[22] may well be a precursor of things to come. That case involved representations regarding intellectual property before a standard-setting

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[13] 405 U.S. 233, 244 (1972) (holding that Section 5 of the FTC Act is not limited to enjoining practices "likely to have anticompetitive consequences after the manner of the antitrust laws").

[14] Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 766 (2005) ("It used to be thought that 'unfair methods of competition' swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable. The Sherman and Clayton Acts have been interpreted so broadly that they no longer contain gaps that a broad interpretation of Section 5 of the FTC Act might be needed to fill."). *See also* 5 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 77.02 (2007) ("[T]he prevailing view is that there are limitations on Section 5's applicability to conduct which stretches beyond the letter of [the Sherman or Clayton Acts].").

[15] *See* E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); Official Airline Guides Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980).

[16] Rambus, Inc., FTC Docket No. 9302 (Aug. 2, 2006) (concurring opinion of Commissioner Jon Leibowitz), *available at* http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *See* Jon Leibowitz, "Tales from the Crypt," Episodes '08 and '09: The Return of Section 5 ("Unfair Methods of Competition in Commerce Are Hereby Declared Unlawful"), Remarks Before the FTC Section 5 Workshop (Oct. 17, 2008), *available at* http://www.ftc.gov/speeches/leibowitz/081017section5.pdf [hereinafter Tales from the Crypt].

[22] Satement of the Commission, Negotiated Data Solutions LLC, FTC File No. 051 0094 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122statement.pdf.

organization, but it was not the traditional "patent ambush" case. There was neither failure to disclose nor deception. Instead, the FTC alleged that N-Data had repudiated a prior licensing commitment made to a standard-setting organization, demanding royalties higher than the original offer made when the organization was deciding whether to adopt the patented technology. Because there was no failure to disclose or deception, this conduct arguably did not violate Section 2.

Then-Commissioner Leibowitz joined the majority in a sharply divided 3–2 decision to challenge the conduct under the FTC's Section 5 powers. The majority maintained that the conduct was an "unfair method of competition" because "[t]his form of patent hold-up is inherently 'coercive' and 'oppressive' with respect to firms that are, as a practical matter, locked into a standard."[23] In a sharp dissent, then-Chairman Majoras protested that condemning a party for breaching its prior licensing commitment without finding a concurrent Sherman Act violation set the Commission on a "slippery slope."[24] She charged the majority with failing to identify any "meaningful limiting principle" to discern an ordinary breach of contract case from an "unfair method of competition."[25]

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But the majority went even further. It also alleged that the conduct was an "unfair practice" under Section 5, an allegation normally reserved for consumer protection matters, not competition matters involving major corporations, such as those subject to N-Data's royalty demands. In response, then-Chairman Majoras expressed "serious policy concerns about using our consumer protection authority to intervene in a commercial transaction" to protect these "victims."[26]

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Good-bye to Reverse Payment Settlements?

Everyone's eyes should be on the FTC in this area.

The President's appointments may well be a death knell for so-called reverse payment patent infringement settlements, in which a branded pharmaceutical company makes payments to a generic to delay entry. The FTC has led an antitrust offensive against this practice. But the FTC's efforts have been at best unaided, and at worst undermined, by the DOJ. When the Eleventh Circuit vacated the FTC's decision condemning reverse-payment settlements in *Schering-Plough*,[27] the FTC petitioned for certiorari. Not only did the DOJ refuse to join the FTC's petition, when invited to file its views by the Supreme Court, the DOJ opposed the FTC's petition.[28] The Supreme Court denied the petition, and since then, two other federal courts of appeals have followed the Eleventh Circuit in holding that reverse payment settlements do not violate the antitrust laws absent a sham or overly broad settlement.[29]

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[23] Analysis of Proposed Consent Order to Aid Public Comment, Negotiated Data Solutions LLC, FTC File No. 051 0094 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf.

[24] Dissenting Statement of Chairman Majoras, Negotiated Data Solutions LLC, FTC File No. 051 0094 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf.

[25] *Id.*

[26] *Id.*

[27] Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1068 (11th Cir. 2005).

[28] *See* Brief of the United States as Amicus Curiae, FTC v. Schering-Plough Corp., No. 05-273 (May 2006).

[29] *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323 (Fed. Cir. 2008); *In re* Tamoxifen Citrate Antitrust Litig., 466 F.3d 187 (2d Cir. 2006).

Undeterred, Chairman Leibowitz has championed a two-pronged offensive—using litigation to create a circuit split to get the issue before the Supreme Court[30] and advocating legislative action.[31] Since *Schering-Plough*, the FTC has brought two cases challenging reverse payment settlements. In February 2008, the FTC sued a branded pharmaceutical company,[32] alleging that it entered into unlawful settlements with four generic companies.[33] Then-Commissioner Leibowitz wrote a partial dissent to the FTC's decision to sue, arguing that the agency should have gone further by suing the generic manufacturers as well.[34] Eleven months later, in January 2009, Leibowitz's views seem to have prevailed. The FTC filed suit against a brand company as well as two generic companies, alleging that the defendants entered into unlawful reverse payment settlements.[35] In a concurring statement, then-Commissioner Leibowitz maintained that "[e]liminating these pay-for-delay settlements is one of the most important objectives for antitrust enforcement in America today."[36]

With agency unity in this area, we may be saying good-bye to reverse payment settlements. Whether by legislation or litigation, this conduct will likely face a renewed challenge.

With Ms. Varney's appointment, Chairman Leibowitz will have an ally at the DOJ. In her confirmation hearings, Ms. Varney said that she "was disappointed that the Justice Department essentially lined up on the side of the parties making these deals and, in so doing, opposed the FTC petition."[37] She promised to "work with the Department of Justice to align the Federal Trade Commission and the DOJ on the reverse payment issue" as well as to support legislation to outlaw these settlements.[38]

With agency unity in this area, we may be saying good-bye to reverse payment settlements. Whether by legislation or litigation, this conduct will likely face a renewed challenge. Moreover, look for the agencies to further explore the patent-antitrust interface with a view to push back on practices such as "evergreening" of pharmaceutical franchises.[39]

Renewed Interest in Resale Price Maintenance

Another conduct area that is sure to get close scrutiny in the new administration is resale price maintenance (RPM). The Bush administration did not bring a single challenge to an RPM policy. Instead, it urged the Supreme Court to overturn the per se rule against RPM, which the Court did

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[30] *See* Jon Leibowitz, Cmm'r, Fed. Trade Comm'n, Exclusion Payments to Settle Pharmaceutical Patent Cases: They're B-a-a-a-ck! (The Role of the Commission, Congress, and the Courts), Remarks to Second Annual In-House Counsel's Forum on Pharmaceutical Antitrust 8–9 (Apr. 24, 2006), *available at* http://www.ftc.gov/speeches/leibowitz/060424PharmaSpeechACI.pdf.

[31] *See* FTC v. Watson Pharms., Inc., FTC File No. 071 0060 (Feb. 2, 2009) (Leibowitz, Cmm'r, concurring), *available at* http://www.ftc.gov/os/caselist/0710060/090202androgeleibowitzstmt.pdf.

[32] Complaint, TC v. Cephalon, Inc., Civ. A. No. 08-cv-2141-RBS (E.D. Pa. Feb. 13, 2008), *available at* http://www.ftc.gov/os/caselist/0610182/index.shtm.

[33] *See* Sean P. Gates & Jeffrey Jaeckel, *Cephalon: FTC's Shot at Reverse Payments*, COMPETITION LAW 360, Feb. 15, 2008.

[34] *See* Cephalon, Inc., FTC File No. 061-0182 (Feb. 13, 2008) (statement of Commissioner Jon Leibowitz concurring in part and dissenting in part), *available at* http://www.ftc.gov/os/caselist/0610182/080213comment.pdf.

[35] Complaint, FTC v. Watson Pharms., Inc., Civil No. CV-09-00598 (C.D. Cal. Feb. 2, 2009), *available at* http://www.ftc.gov/os/caselist/0710060/090202androgelcmpt.pdf.

[36] *See* FTC v. Watson Pharms., Inc., FTC File No. 071 0060 (Feb. 2, 2009) (Leibowitz, Cmm'r, concurring), *available at* http://www.ftc.gov/os/caselist/0710060/090202androgeleibowitzstmt.pdf.

[37] *Varney Confirmation Hearings*, *supra* note 9.

[38] *Id.*

[39] Liebowitz, Tales from the Crypt, *supra* note 21.

in *Leegin Creative Leather Products v. PSKS, Inc.*[40] Since that time, there has been much speculation regarding when, under a rule of reason analysis, RPM is unlawful.

During her confirmation hearings, Ms. Varney said she was "quite surprised" by the *Leegin* decision but thought that the decision "left the division a lot of room to continue to prosecute retail price maintenance where it results in anticompetitive consequences."[41] If her past enforcement positions are any indication, the DOJ will be exploring that room.

During her tenure at the FTC, Ms. Varney pushed for enforcement against RPM.[42] She joined in several important RPM challenges. In a case against American Cyanamid, for instance, Ms. Varney joined the majority in inferring the existence of an illegal RPM agreement despite the fact that the defendants had never announced resale prices nor sought a commitment from distributors to sell at or above a certain price level.[43] In a case against Reebok, Ms. Varney joined the Commission in condemning an RPM policy, enjoining Reebok from using "structured terminations" to effect RPM even though such a termination "falls into the 'gray' area of RPM jurisprudence."[44] Ms. Varney also joined in a number of other cases challenging vertical price fixing agreements.[45]

Revitalized Merger Enforcement

During his campaign, President Obama criticized the Bush administration's record in merger challenges. He cited statistics showing that between 2001 and 2006, the antitrust agencies challenged mergers at less than half the rate of the prior four years under the Clinton administration.[46] Obama promised to "step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare."[47] His appointees promise to do just that.

In a provocative statement before the Senate Judiciary Committee, Ms. Varney promised to "rebalance legal and economic theories in antitrust analysis."[48] She contended that in the last eight years "a lot of economic theory has been used to inhibit prosecuting mergers" and that "the Chicago school analysis" has lead to "a real reluctance for government to go forward and attempt to block mergers."[49] She therefore promised to bring "new rigor to economic analysis that underpins any prosecution."[50]

This may mean that we will see a resurgence of innovation market analysis and vertical merger challenges, two areas that were prominent during the Clinton administration but fell into relative disuse due to "conservative" economic analysis.

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[40] 127 S. Ct. 2705 (2007).

[41] *Varney Confirmation Hearings*, *supra* note 9.

[42] Christine Varney, Vertical Restraints Enforcement at the FTC, Remarks before the ALI-ABA Eleventh Annual Advanced Course on Product Distribution and Marketing (Jan. 16, 1996), *available at* http://www.ftc.gov/speeches/varney/varnmg.shtm [hereinafter Vertical Restraints].

[43] Am. Cyanamid Co., 123 F.T.C. 1257 (1997).

[44] Varney, Vertical Restraints, *supra* note 42.

[45] *See, e.g.*, New Balance Athletic Shoe, Inc., FTC Docket No. C-3683 (Sept. 13, 2006) (decision and order), *available at* http://www.ftc.gov/os/1996/09/c3683.do.pdf.

[46] Obama, *supra* note 5.

[47] *Id.*

[48] *Varney Confirmation Hearings*, *supra* note 9.

[49] *Id.*

[50] *Id.*

There are also indications that the FTC may be more willing to adopt novel approaches to merger enforcement. In a recent merger challenge, for instance, Commissioners Leibowitz and Rosch wanted to challenge a transfer of patent rights that did not result in any accumulation of patents or create a patent thicket. The Commissioners believed that the acquisition violated Section 7 merely because the acquiring firm did not have the same reputation-related constraints on its pricing that the selling firm had. Thus, the Commissioners would have challenged the acquisition because monopoly pricing was more likely to occur.[51]

Mergers in Innovative Industries. During her tenure at the FTC, Ms. Varney was on the leading edge of the development of innovation market analysis. In 1995, the FTC and the DOJ issued guidelines that formally recognized the concept of innovation markets—markets consisting of the research and development directed toward particular goods or services.[52] The agencies thereby defined a means to evaluate the competitive effects of merging competing research and development efforts, even if the product of the research and development may be years off. The idea is that preserving competing research and development efforts can spur innovation.

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The guidelines were criticized by some economists, but Ms. Varney defended this development as necessary for the antitrust agencies to "understand all of the dimensions of competition among firms" and to thereby protect innovation.[53] She also joined in several decisions applying innovation market analysis to require that merging parties make divestitures to protect innovation. For instance, the FTC used innovation market analysis as the basis for requiring American Cyanamid to out-license its vaccine research as a condition of being acquired by American Home Products.[54] Similarly, Ms. Varney joined the majority in using innovation market analysis to impose compulsory licensing in *Ciba-Geigy/Sandoz*.[55] The majority brushed aside objections that the licensing scheme was based on the much-maligned "essential facilities" doctrine and would put the Commission in the role of price regulator.[56]

During the Bush administration, however, innovation market analysis was used less often. In 2004, for instance, the FTC closed its investigation of the Genzyme/Novazyme merger even though the merging parties were the only two companies seeking to develop a particular drug. Dissenting, Commissioner Thompson argued that the FTC should challenge this merger to monopoly and apply the standard presumption that a merger to monopoly is anticompetitive.[57] In response, Chairman Muris wrote that even a merger to monopoly in an innovation market should not be presumed anticompetitive. Instead, Chairman Muris focused on the potential that the merger would be "efficient" by improving the likelihood of a successful product development.[58]

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[51] *See* FTC v. Ovation Pharms., Inc., FTC File No. 08-10156 (Dec. 16, 2008) (Rosch, Cmm'r, concurring), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf; FTC v. Ovation Pharms., Inc., FTC File No. 0810156 (Dec. 16, 2008) (Leibowitz, Cmm'r, concurring), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf.

[52] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/0558.pdf.

[53] Christine A. Varney, *Innovation Markets in Merger Review Analysis*, ANTITRUST, Summer 1995, at 16.

[54] Am. Home Prods. Corp., 59 Fed. Reg. 60,807 (Nov. 28, 1994) (proposed consent agreement with analysis to aid public comment).

[55] Separate Statement of Chairman Robert Pitofsky, and Commissioners Janet D. Steiger, Roscoe B. Starek, III, and Christine Varney, Ciba-Geigy, Ltd., FTC Docket No. C-3725 (Apr. 8, 1997), *available at* http://www.ftc.gov/os/1997/04/others.htm.

[56] *Id.*

[57] Genzyme Corp., FTC File No. 021-0026 (Jan. 13, 2004) (Thompson, Cmm'r, dissenting), *available at* http://www.ftc.gov/os/2004/01/thompsongenzymestmt.pdf.

[58] Genzyme Corp., FTC File No. 021-0026 (Jan. 13, 2004) (Statement of Chairman Timothy J. Muris), *available at* http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf.

Given her support for the use of innovation market analysis, Ms. Varney may well "rebalance" economic theory in this area. We may see this type of analysis become more common, especially if mergers in innovation-intensive industries increase.

Vertical Mergers. Ms. Varney's appointment may also signal a return to a more aggressive stance in vertical mergers. As with innovation market analysis, vertical merger enforcement was less prevalent in the Bush administration than it was in the Clinton administration.[59] While at the FTC, Ms. Varney emphasized that vertical mergers may create entry barriers, raise rivals' costs, and facilitate collusion.[60] Although she recognized that there is "a great deal of theoretical controversy about the effects of vertical mergers," Ms. Varney argued that antitrust enforcers have "the tools" to separate those vertical mergers that are likely to cause anticompetitive effects from those that are not.[61]

Ms. Varney's commitment to vertical merger enforcement was borne out in her enforcement decisions. In *Silicon Graphics*, Ms. Varney joined a 3–2 Commission decision that relied on a vertical foreclosure theory.[62] The majority was concerned that the merger would raise barriers to entry in the entertainment graphics workstation and software markets. It therefore required the merging parties to maintain an open architecture and publish their applications programming interfaces. Similarly, in *Cadence Design Systems*, Ms. Varney joined the majority in applying vertical merger theory to an acquisition in another software market.[63] The majority found that Cadence's acquisition of the only firm that developed the most advanced version of a particular software tool to be used with Cadence's dominant software could raise entry barriers. The Commission therefore required Cadence to allow other tool developers continued access to interface protocols for its software. Ms. Varney also joined the majority in the Commission's challenge to Time Warner's acquisition of Turner and TCI, which involved a vertical theory.[64]

Ms. Varney may well "rebalance" legal and economic theories in this area as well. No longer will vertical integration essentially be assumed to result in an efficient outcome. Especially where a firm has market power, vertical mergers are more likely to be challenged in the new administration.

Pushing the Merger Envelope at the FTC. The President's appointment of Mr. Leibowitz to chair the FTC also portends more aggressive merger enforcement. While the FTC has been assertive in this area even under the Bush administration, Chairman Leibowitz has indicated a willingness to push the envelope even further. For example, in December 2008, the FTC filed a complaint in

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[59] *See, e.g.*, Deborah A. Garza, *A Comparative Analysis of the Clinton Antitrust Program and Suggestion of Changes to Come*, ANTITRUST, Summer 2001, at 64, 67.

[60] *See* Christine Varney, Vertical Merger Enforcement Challenges at the FTC, Remarks before the PLI 36th Annual Antitrust Institute (July 17, 1995), *available at* http://www.ftc.gov/speeches/varney/varta.shtm [hereinafter Vertical Merger Enforcement]; *see also* Christine Varney, The Dangers of Health Industry Consolidation and Corporatization and the Effect on Quality, Cost and Access, Remarks before the Citizens Fund Conference (May 10, 1995), *available at* http://www.ftc.gov/speeches/varney/citi.shtm ("I am concerned about the overall competitive impact of vertical integration by drug companies into the pharmacy benefits management market."); Christine Varney, Efficiency Justifications in Hospital Mergers and Vertical Integration Concerns, Remarks before the Health Care Antitrust Forum (May 2, 1995), *available at* http://www.ftc.gov/speeches/varney/varht.shtm.

[61] *See* Varney, Vertical Merger Enforcement, *supra* note 60.

[62] *See* Press Release, Fed. Trade Comm'n, FTC Settlement Would Preserve Competition on Price and Innovation for Entertainment Graphics Software and Hardware (June 9, 1995), *available at* http://www.ftc.gov/opa/1995/06/sgi.shtm.

[63] *See* Cadence Design Systems, Inc., FTC File No. 971-0033 (May 8, 1997) (Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney), *available at* http://www.ftc.gov/os/1997/05/state01.htm.

[64] *See* Time Warner Inc., FTC File No. 961-0004 (Sept. 12, 1996) (separate statement of Chairman Pitofsky and Commissioners Steiger and Varney), *available at* http://www.ftc.gov/os/1996/09/twother.htm.

federal district court challenging Ovation Pharmaceuticals' 2006 acquisition of the drug NeoProfen.[65] NeoProfen is one of two pharmaceutical treatments sold in the United States for a congenital heart defect primarily affecting premature babies.[66] Prior to its acquisition of NeoProfen, Ovation had acquired the rights to Indocin, the only other pharmaceutical treatment for the condition, from Merck Pharmaceuticals. Commissioner Leibowitz joined Commissioner Rosch in the view that the FTC should also challenge this earlier acquisition, even though Ovation did not produce a competing product or possess any related patent rights at the time.

The Commissioners' theory for challenging Ovation's acquisition of the rights to Indocin was novel. Merck had not charged a monopoly price for Indocin because charging high prices for a drug used by premature babies might hurt its reputation.[67] As a smaller company without a broad product line, Ovation did not have these concerns. Thus, even though Ovation's acquisition of Indocin did not reduce the number of competitors, it made the imposition of a monopoly price for the product more likely. While no case has held that a transaction removing a reputation-related restraint violates the merger laws, Commissioners Rosch and Leibowitz argued that this is indeed a viable theory under Section 7.[68]

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The President promised change. He promised reinvigorated antitrust enforcement. Despite the poor economy and the resultant nay-sayers, the President's picks to lead the antitrust enforcement agencies are likely to fulfill these promises. ●

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[65] Complaint, FTC v. Ovation Pharms., Inc., No. 08-10156 (D. Minn. Dec. 16, 2008), *available at* http://www.ftc.gov/os/caselist/0810156/081216 ovationcmpt.pdf.

[66] *Id.* at 1–2.

[67] *See* FTC v. Ovation Pharms., Inc., FTC File No. 08-10156 (Dec. 16, 2008) (Rosch, Cmm'r, concurring), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf; FTC v. Ovation Pharms., Inc., FTC File No. 0810156 (Dec. 16, 2008) (Leibowitz, Cmm'r, concurring), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf.

[68] *Id.*