

# Litigation Update - Obama Administration Announces Policy of More Vigorous Antitrust Enforcement

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Presidential candidate Barack Obama decried the lack of active antitrust enforcement under the Bush administration, and public pronouncements by the Obama Justice Department indicate that antitrust enforcement will play a central role in the Department's priorities. In a recent speech to the United States Chamber of Commerce,<sup>1</sup> Christine Varney, the assistant attorney general chosen by President Obama to head the Justice Department's Antitrust Division, expressly disavowed a joint Department of Justice/Federal Trade Commission report released as recently as September 2008 that, in her view, created inappropriate hurdles to antitrust enforcement of Section 2 of the Sherman Act regarding anticompetitive conduct by single firms. According to the assistant attorney general, the policies reflected by this report gave undue weight to the objective of preserving economic efficiencies while understating the importance of redressing exclusionary acts and predatory conduct that harms competition, distorts markets, and creates barriers to entry.

In her remarks, Assistant Attorney General Varney referred with approval to two cases—*Lorain Journal v. United States*<sup>2</sup> and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*<sup>3</sup>—that concerned the circumstances under which a firm's unilateral refusal to deal with its competitors might constitute a violation of antitrust law. In both cases, a dominant firm was held to have acted unlawfully in refusing to deal with an economic rival where the refusal to deal had an adverse impact on competition and there was no justification for the refusal other than the desire to harm the competitive standing of the firm's competitor. A return to the principles of these cases marks a sharp departure from the antitrust enforcement policies of the Bush administration, where single firm conduct was largely ignored and firms were given great latitude in deciding with whom they would deal.

Assistant Attorney General Varney also stated the Antitrust Division's intention to assist agencies responsible for disbursing economic stimulus funds under the American Recovery and Investment Act in detecting and deterring collusive and fraudulent conduct. To the extent that efforts at deterrence are insufficient, the assistant attorney general also committed the Antitrust Division to vigorous use of its criminal enforcement authority.

The assistant attorney general also indicated her intention to explore "new areas of civil enforcement," particularly in relation to high-tech and Internet-based markets and intellectual property. In light of current economic conditions, the health care and financial services industries are also likely targets for heightened enforcement scrutiny.

Increased governmental enforcement will almost certainly lead to greater activity by private plaintiffs and the plaintiffs' antitrust bar. Of course, the Justice Department's change in course will take some time to work its way through the courts, and how this increased antitrust enforcement activity, both public and private, will be greeted by a generally conservative judiciary, not to mention a very conservative U.S. Supreme Court, remains to be seen.

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<sup>1</sup> Vigorous Antitrust Enforcement in a Challenging Era, Remarks by Assistant Attorney General Christine A. Varney prepared for the United States Chamber of Commerce, May 12, 2009, reprinted at <http://www.usdoj.gov/atr/public/speeches/245777.htm>.

<sup>2</sup> 342 U.S. 143 (1951).

<sup>3</sup> 472 U.S. 585 (1985).

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