

**Ms. Varney Goes to Washington:  
The Obama Administration's Reinvigoration of Section 1 of the Sherman Act**

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**Introduction**

In 2008, the United States struggled under the weight of a severe economic recession. While there was no shortage of blame to go around for the cause of the recession, a surprising number found fault with the Bush administration's reputation for a lax approach to antitrust enforcement – allowing companies to engage in anticompetitive practices at the expense of consumers and, ultimately, the marketplace. Regardless of whether this proved to be the case, the 2008 presidential candidates seized the opportunity to lend unprecedented support for a more vigorous approach to antitrust enforcement.<sup>1</sup> Then-Senator Barack Obama vowed to renew antitrust enforcement and install a tougher antitrust regime if elected president.<sup>2</sup> His appointment of Christine Varney, soon after his election, to head the Department of Justice's ("DOJ") Antitrust Division was seen by many as a sign of his intent to fulfill that promise.<sup>3</sup> Yet, the game-changing antitrust lawsuit did not come. Months passed without any action from Varney and the DOJ that would indicate their resolve to be tough on anticompetitive conduct. Then, beginning in September 2010, the DOJ filed three separate civil lawsuits under Section 1 of the Sherman Act. These lawsuits mark the beginning of the Antitrust Division's resolution to fulfill President Obama's promise of renewed antitrust enforcement of Section 1.

This article will first give an overview of the Obama administration's approach to antitrust enforcement. It will then discuss in detail three of the recent civil lawsuits filed by the Antitrust Division under Section 1. Finally, this article will consider the impact of each of these lawsuits on antitrust enforcement in their respective industries and what we can expect in the area of Section 1 enforcement in the coming years.

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<sup>1</sup>Katrina Vanden Heuvel, *Obama Would Pursue Antitrust Policies*, THE NATION, May 19, 2008; Stephanie Kirchaessner, *Obama in Antitrust Pledge*, FIN. TIMES (U.S. Ed), May 19, 2008, at 2. Few preceding presidential candidates had incorporated antitrust reform as a central part of their campaign platform, and consumer advocates had high hopes for a more consumer-friendly administration. John D. Harkrider, *Obama: The First Year*, ANTITRUST, September, 2010, at 8.

<sup>2</sup> Heuvel, *supra* note 1.

<sup>3</sup> Sean Gates & Tej Srimushnam, *New Directions in Antitrust Enforcement: Obama Appoints Christine Varney to Head DOJ Antitrust Division*, MONDAQ, Feb. 4, 2009, available at <http://www.mondaq.com/unitedstates/article.asp?articleid=73376> (last visited Feb. 2, 2011).

## Promises, Promises

President Barack Obama appointed Christine Varney as Assistant Attorney General of the DOJ's Antitrust Division on January 22, 2009.<sup>4</sup> Varney, a former FTC Commissioner, had a reputation for taking an aggressive stance on merger enforcement, primarily in the areas of high-tech and innovation-focused industries, as well as in cases involving vertical integration and non-merger cases involving vertical restraints.<sup>5</sup> In her first speech as Assistant Attorney General, Varney left no doubt of her intent to vigorously enforce federal antitrust laws.<sup>6</sup> Citing the recent economic recession, she stated that “a recalibration of economic and legal analysis and theories and a clearer plan for action” was necessary within the DOJ.<sup>7</sup> No longer could antitrust enforcers “sit on the sidelines,” she said, and allow ineffective government regulation, ill-considered regulatory measures, and inadequate antitrust oversight to continue.<sup>8</sup>

Varney's plan for reinvigoration focused on renewed antitrust enforcement of Section 1 and 2 of the Sherman Act. Varney promised to reinvigorate criminal and civil enforcement of Section 1 by continuing to prosecute criminal violations and exploring new areas of civil enforcement, such as in the high-tech, agriculture, energy, health care, telecommunications and financial services industries.<sup>9</sup> Regarding enforcement under Section 2, Varney took a major step and rejected the Section 2 policy adopted by the Bush administration,<sup>10</sup> which she characterized as advocating for “extreme hesitancy” in the face of potential abuses by monopoly firms,<sup>11</sup> and announced that the DOJ would not go easy on Section 2 enforcement during weak economic times because severe recessions can provide dangerous incentives for large firms to engage in predatory behavior that harms consumers and weakens competition.<sup>12</sup> Her landmark speech gave consumer advocates high hopes that the DOJ would immediately begin enforcement proceedings against corporations engaged in anticompetitive practices and expand its review to new industries and corporate practices.<sup>13</sup>

Yet, in the two years following Varney's appointment, the DOJ has yet to bring one monopolization lawsuit.<sup>14</sup> Surprisingly, it is Section 1 violations that have stirred the DOJ to action in recent months. Beginning in September 2010, the DOJ has filed three separate civil lawsuits under Section 1 against high-profile defendants in the high-tech, banking, and health care industries. These three lawsuits signal the beginning of the DOJ's efforts to vigorously pursue violations of Section 1 in these industries.

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<sup>4</sup> Press Release, The White House, Office of the Press Secretary, President Barack Obama Announces Key DOJ Appointees (Jan. 22, 2009) (on file with author). Christine Varney was confirmed by the U.S. Senate as Assistant Attorney General for the Antitrust Division on April 20, 2009.

<sup>5</sup> Gates, *supra* note 3.

<sup>6</sup> Christine Varney, Ass. Attorney General, U.S. Dep't of Justice, Speech to the Center for American Progress: Vigorous Antitrust Enforcement in This Challenging Era (May 11, 2009) (hereinafter “CAP Speech”).

<sup>7</sup> *Id.* ¶ 11.

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

<sup>9</sup> *Id.* ¶ 27-32; Stephen Labaton, *Obama Takes Tougher Antitrust Line*, N.Y. TIMES, May 12, 2009.

<sup>10</sup> Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), available at [http://www.justice.gov/atr/public/press\\_releases/2009/245710.htm](http://www.justice.gov/atr/public/press_releases/2009/245710.htm) (last visited Feb. 2, 2011).

<sup>11</sup> CAP Speech, *supra* note 6, at ¶ 19.

<sup>12</sup> *Id.* ¶ 33-37.

<sup>13</sup> *Return of the Trustbusters*, ECONOMIST, Aug. 29, 2009, at 53.

<sup>14</sup> Press Release, U.S. Dep't of Justice, Justice Department Files Lawsuit Against Dean Foods Company (Jan. 22, 2010), available at [http://www.justice.gov/atr/public/press\\_release/2010/254435.htm](http://www.justice.gov/atr/public/press_release/2010/254435.htm) (last visited Feb. 2, 2011).

## The Section 1 Lawsuits

The Antitrust Division of the DOJ brought the following three lawsuits under Section 1 of the Sherman Act, *United States v. Adobe Systems, Inc., et al.*, *United States, et al. v. American Express, et al.*, and *United States, et al. v. Blue Cross Blue Shield of Michigan*, alleging anticompetitive conduct in the areas of high-tech, banking, and health-care. In bringing these lawsuits, the DOJ took on areas of industry that until recently were left relatively free from antitrust scrutiny.

### *United States v. Adobe Systems, Inc., et al.*

On September 24, 2010, the DOJ filed a civil complaint against six of the largest high-tech companies in the United States: Adobe Systems, Inc. (“Adobe”), Apple Inc. (“Apple”), Google Inc. (“Google”), Intuit, Inc. (“Intuit”), Intel Corporation (“Intel”), and Pixar, alleging that the companies entered into employee “no cold-calling” agreements with one another in violation of Section 1.<sup>15</sup> The high-tech industry is one of the fastest moving labor markets in the world.<sup>16</sup> The need for talented engineers and employees with specialized skills has led to increased competition among the top high-tech companies for employees.<sup>17</sup> Job-hopping between high-tech companies is commonplace.<sup>18</sup> One of the primary methods high-tech companies use to recruit employees is to solicit them directly from other companies in a process referred to as “cold calling.”<sup>19</sup>

According to the DOJ, between 2005 and 2007, high level executives of the six defendant companies - direct competitors for employees - entered into five substantially similar agreements in which a defendant agreed not to cold call another defendant’s employees for employment opportunities.<sup>20</sup> The agreements were between Apple and Google, Apple and Adobe, Apple and Pixar, Google and Intel, and Google and Intuit.<sup>21</sup> According to the complaint, each company would place the other party to the agreement on a no-contact list, so that the other party’s employees would not be recruited.<sup>22</sup> The agreement applied only to direct solicitations and did not restrict the hiring of employees who applied for positions on their own.<sup>23</sup> The employees of the defendant companies were not aware of the agreements.<sup>24</sup>

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<sup>15</sup>Complaint at ¶ 33-35, *United States v. Adobe Systems, Inc., et al.*, No. 10-01629 (D.C. Dist. Ct. Sept. 24, 2010) (hereinafter “Adobe Complaint”).

<sup>16</sup>Steve Lohr, *Six Technology Firms Agree To More Hiring Competition*, N.Y. TIMES, Sept. 25, 2010, at B4.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>Press Release, U.S. Dep’t of Justice, Justice Department Requires Six High Tech Companies To Stop Entering Into Anticompetitive Employee Solicitation Agreements, Sept. 24, 2010, *available at* [www.justice.gov/atr/public/press\\_releases/2010/262648.htm](http://www.justice.gov/atr/public/press_releases/2010/262648.htm) (last visited Feb. 2, 2011) (hereinafter “Adobe Press Release”).

<sup>20</sup>Adobe Complaint, *supra* note 15, at ¶ 15.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.* ¶ 17-32.

<sup>23</sup>*Id.* On December 21, 2010, the DOJ brought a similar charge against Lucasfilm, Ltd. alleging that the high-tech company entered into an anticompetitive agreement with Pixar, a direct competitor for highly skilled digital animators, to not cold call each other’s employees in violation of Section 1. Complaint at ¶ 2, *United States v. Lucasfilm, Ltd.*, No. 10-02220 (D.C. Dist. Ct. Dec. 21, 2010). The agreement at issue extended beyond no cold-calling, as was the case in *Adobe Systems*, to agreeing not to make counteroffers to the other’s employees under certain circumstances and to provide notice to the other when making employment offer’s to the other’s employees.

The DOJ alleged that the agreements were facially anticompetitive, *i.e.* per se illegal, because they eliminated a significant form of competition to attract high-tech employees and substantially diminished competition to the detriment of the affected employees who were likely to be deprived of competitively important information and access to better job opportunities.<sup>25</sup> The agreements reduced the defendant companies' abilities to compete for employees and disrupted the normal price-setting mechanisms that apply in the labor setting.<sup>26</sup> Furthermore, according to the DOJ, the agreements were not ancillary to any legitimate pro-competitive collaboration.<sup>27</sup> None of the agreements were limited by geography, job function, product group or time period.<sup>28</sup> Therefore, the DOJ argued that the agreements should be treated as naked restraints of trade, under which there was no need to show evidence of anticompetitive effects such as reduced wages or benefits for employees.<sup>29</sup>

The defendants justified the agreements as being temporary, as an attempt to promote good relations with other companies at a time when companies were hiring aggressively, and as an effort to ensure collaboration between companies that would be less likely to occur if there were fear the partner company intended to hire away the company's best employees.<sup>30</sup> Nevertheless, simultaneously with the filing of the complaint, the DOJ announced it had reached a settlement with the defendants.<sup>31</sup> The defendants entered into a consent decree whereby they were enjoined from attempting to enter into, entering into, or enforcing any agreement with any person requesting or pressuring that person in any way to "refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person" for five years.<sup>32</sup>

*United States, et al. v. American Express, et al.*

The DOJ, along with the states of Connecticut, Iowa, Maryland, Michigan, Missouri, Ohio and Texas, next took on the financial services industry, filing a civil complaint on October 4, 2010 against American Express, Visa, and MasterCard, the three largest credit card companies in the United States, alleging the companies' restraints imposed on merchants who accepted their credit cards resulted in the elimination of competition between credit card companies in violation of Section 1.<sup>33</sup> All three defendants provide network services for general purpose credit cards -

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*Id.* The DOJ argued that the agreements were naked restraints on trade and, thus, per se illegal, because the agreement reduced Lucasfilm and Pixar's ability to compete for highly-skilled employees and deprived employees of competitive information and access to job opportunities. *Id.*

<sup>24</sup>*Id.* ¶ 18, 22, 25, 28, 31.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* ¶ 14.

<sup>27</sup>*Id.* ¶ 16.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.* ¶ 35. *See also* Competitive Impact Statement at ¶ 13-22, *United States v. Adobe Systems, Inc., et al.*, No. 10-01629 (D.C. Dist. Ct. Sept. 24, 2010) (hereinafter "Adobe Competitive Impact Statement") (detailing the DOJ's argument for per se review).

<sup>30</sup>Lohr, *supra* note 16.

<sup>31</sup>Adobe Press Release, *supra* note 19.

<sup>32</sup>Adobe Competitive Impact Statement, *supra* note 29, at ¶ 24. The decree did not absolutely prohibit the use of non-solicitation agreements where they are ancillary to, and reasonably necessary in, for example, employee severance agreements, merger agreements, consulting agreements, legal settlements, and joint venture agreements; provided that they are appropriately tailored and otherwise comply with antitrust laws. *Id.* ¶ 25-32.

<sup>33</sup>Complaint for Equitable Relief for Violation of Section 1 of the Sherman Act, 15 U.S.C. §1, *United States, et al. v. American Express Co., et al.*, No. 10-04496, (N.Y. Dist. Ct. Oct. 4, 2010) (hereinafter "AmEx Complaint").

cards that allow consumers to make purchases from merchants without accessing or reserving the consumers' funds at the time of sale.<sup>34</sup> General purpose credit cards include credit or charge cards issued to individuals or business, but do not include department store cards, debit cards or gift cards.<sup>35</sup> Acceptance by merchants of general purpose credit cards is widespread because it is the preferred method of payment for most consumers.<sup>36</sup> In the majority of cases, merchants must accept all the defendants' credit cards in order to remain competitive with other merchants.<sup>37</sup> However, in order to accept a particular credit card, the merchant must use that credit card company's network services.<sup>38</sup>

According to the complaint, under the terms of the defendants' individual agreements with each merchant to provide network services for their credit cards, merchants must pay a "swipe fee" or "card acceptance fee," typically a percentage of the transaction price, every time a credit card is used.<sup>39</sup> In addition, merchants are prohibited from encouraging consumers to use lower-cost payment methods when making purchases, such as cash or checks, or offering discounts or other incentives to pay with credit cards that cost the merchant less to accept.<sup>40</sup> As a result of these merchant restraints, the complaint alleged, merchants charged higher prices to consumers in order to off-set the high fees associated with the defendants' credit cards.<sup>41</sup>

Arguing under a rule-of-reason analysis, the DOJ alleged that these merchant restraints had the anticompetitive effect of suppressing price and non-price competition at the "point of sale," where merchants interacted daily with consumers, and prohibited merchants from fostering competition among credit card networks.<sup>42</sup> In addition, the complaint alleged that merchant restraints reduced the frequency of lower-cost payment methods, stifled innovation in network services and card offerings, denied information to consumers about the relative costs of credit cards that would cause more consumers to choose lower-cost payment methods, and increased the already high barriers to entry in the general purpose credit card market.<sup>43</sup> The vertical restraints imposed by the defendants effectively obstructed horizontal interbrand competition between the defendant credit card companies.<sup>44</sup>

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<sup>34</sup>*Id.* ¶ 12.

<sup>35</sup>*Id.* ¶ 13-14.

<sup>36</sup>Competitive Impact Statement at ¶ 5, *United States, et al. v. American Express Co., et al.*, No. 10-4496 (N.Y. Dist. Ct. Oct. 4, 2010) (hereinafter "AmEx Competitive Impact Statement").

<sup>37</sup>AmEx Complaint, *supra* note 33, at ¶ 58.

<sup>38</sup>AmEx Competitive Impact Statement, *supra* note 36, at ¶ 6.

<sup>39</sup>AmEx Complaint, *supra* note 33, at ¶ 1.

<sup>40</sup>*Id.* ¶ 3. In 2009, these fees cost merchants \$35 billion. Andrew Martin, *Visa and MasterCard Settle Antitrust Suit*, N.Y. TIMES, Oct. 5, 2010, at B1. Failure to comply with the merchant restraints resulted in penalties, and the possible termination of contracts. Press Release, U.S. Dep't of Justice, Remarks as Prepared for Delivery by Assistant Attorney General for the Antitrust Division Christine Varney at the Visa, MasterCard and American Express Announcement (Oct. 4, 2010), available at [http://www.justice.gov/atr/public/press\\_release/2010/262887.htm](http://www.justice.gov/atr/public/press_release/2010/262887.htm) (last visited Feb. 2, 2011).

<sup>41</sup>AmEx Complaint, *supra* note 33, at ¶ 1.

<sup>42</sup>*Id.* ¶ 3.

<sup>43</sup>*Id.* ¶ 69-75.

<sup>44</sup>AmEx Complaint, *supra* note 33, at ¶ 30.

Simultaneously with the filing of the complaint, the DOJ announced that it had reached a proposed settlement with Visa and MasterCard.<sup>45</sup> Under the terms of the proposed settlement, Visa and MasterCard agreed to allow merchants to offer discounts, incentives, and information to consumers which would encourage the use of payment methods that are less costly.<sup>46</sup> The proposed settlement allows merchants which only accept Visa or MasterCard to take advantage of relief immediately.<sup>47</sup> American Express did not participate in the settlement and, as a result, merchants which accept all three of the defendants' credit cards are not yet able to take advantage of the new options under the proposed settlement.<sup>48</sup> On December 21, 2010, an additional eleven states joined the DOJ in its lawsuit against the credit card companies.<sup>49</sup>

*United States, et al. v. Blue Cross Blue Shield of Michigan*

Most recently, on October 18, 2010, the DOJ, along with the State of Michigan, took on the health insurance industry by filing a civil complaint against Blue Cross Blue Shield of Michigan ("BCBS") alleging BCBS's use of most-favored-nation ("MFN") clauses in contracts with Michigan hospitals violated Section 1 by inhibiting competition from other insurers and raising its competitors' costs.<sup>50</sup> MFN clauses typically require a party to do business with another party on terms no less advantageous than the terms on which it deals with others.<sup>51</sup> BCBS allegedly used two varieties of MFN clauses, one referred to as "equal to MFN," which required that hospitals charge BCBS's competitor commercial insurers at least as much as they charge BCBS for health services, and the other, referred to as "MFN-plus," which required that hospitals charge BCBS's competitor commercial insurers more than they charge BCBS.<sup>52</sup> In exchange for acceptance of MFN-plus clauses, BCBS agreed to pay more for the hospital's health services, sometimes up to forty percent more.<sup>53</sup>

MFN clauses are not inherently illegal.<sup>54</sup> Arguing under the rule-of-reason analysis, however, the DOJ alleged that because of BCBS's dominant position in the commercial insurance market in Michigan, the intent and effect of BCBS's use of MFN clauses was unreasonably anticompetitive.<sup>55</sup> BCBS is the largest provider of commercial health insurance in Michigan, covering more than 60% of commercially insured individuals, nine times as many as

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<sup>45</sup>Press Release, U.S. Dep't of Justice, Justice Department Sues American Express, MasterCard and Visa to Eliminate Rules Restricting Price Competition; Reaches Settlement with Visa and MasterCard, Department of Justice (Oct. 4, 2010), *available at* [http://www.justice.gov/atr/public/press\\_release/2010/262867.htm](http://www.justice.gov/atr/public/press_release/2010/262867.htm) (last visited Feb. 2, 2011) (hereinafter "AmEx Press Release").

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>Amended Complaint for Equitable Relief for Violation of Section 1 of the Sherman Act, *United States, et al. v. American Express Co., et al.*, No. 10-4496 (N.Y. Dist. Ct. Dec. 12, 2010).

<sup>50</sup>Complaint, *United States et al. v. Blue Cross Blue Shield of Michigan*, No. 10-15155 (Mich. Dist. Ct. Oct. 18, 2010) (hereinafter "BCBS Complaint").

<sup>51</sup>*Id.* ¶ 4.

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>Neal R. Stoll and Shepard Goldfein, *Challenges to Health Insurer's Most Favored Nation Clauses*, 244 N.Y. L. J. 3 (2010) (discussing the history of prior challenges to MFN clauses).

<sup>55</sup>Press Release, U.S. Dep't of Justice, Remarks as Prepared for Delivery by Assistant Attorney General Christine Varney at Pen-and-Pad Briefing on Antitrust Health Care Matter (Oct. 18, 2010), *available at* [http://www.justice.gov/atr/public/press\\_release/2010/263229.htm](http://www.justice.gov/atr/public/press_release/2010/263229.htm) (last visited Feb. 2, 2011) (hereinafter, "Pen-and Pad Press Release").

the next largest health insurance competitor.<sup>56</sup> The DOJ argued that BCBS's MFN clauses raised prices for commercial health insurance in Michigan.<sup>57</sup> According to the complaint, BCBS has successfully contracted for MFN clauses with more than half of Michigan's acute care hospitals.<sup>58</sup> The DOJ argued BCBS has effectively "purchased protection from competition by causing hospitals to raise the minimum prices they can charge to BCBS's competitors, but in doing so has also increased its own costs."<sup>59</sup> BCBS did not seek or use MFN clauses to lower its own costs of obtaining hospital services.<sup>60</sup> As a result of MFN clauses, Michigan hospitals have had to raise prices to competing insurers or demand prices that are too high for competing insurers to compete, causing them to be kept out of the market.<sup>61</sup> The DOJ sought to enjoin BCBS from entering into or enforcing any MFN clauses with any hospital in Michigan.<sup>62</sup>

No settlement has been reached in the lawsuit and BCBS has indicated it will vigorously defend the lawsuit.<sup>63</sup> Most recently BCBS filed a motion to dismiss the complaint in its entirety on the grounds that MFN clauses are lawful and effective in keeping consumer costs low.<sup>64</sup>

### **Renewed Approach to Section 1 Enforcement**

The three civil Section 1 lawsuits detailed above signal what is likely to be a much more vigorous approach to Section 1 enforcement in the coming years under Varney's tenure as Assistant Attorney General of the Antitrust Division in the high-tech, financing services and health care industries, all vital industries in the U.S. economy.

Varney's comments made during her first speech as Assistant Attorney General,<sup>65</sup> coupled with the filing of *Adobe Systems Inc.*, suggest that Varney intends to vigorously pursue antitrust enforcement against high-tech firms. *Adobe Systems Inc.* grew out of a larger DOJ investigation into employment practices by high-tech firms.<sup>66</sup> In a statement to the press regarding the investigation, Varney said that the DOJ would continue to investigate other similar no-solicitation agreements.<sup>67</sup> In addition, the DOJ is currently investigating whether Google Books' recent settlement with authors and publishers for copyright infringement violated Section 1,<sup>68</sup> as well as whether IBM abused its position in the mainframe computer market by engaging in anticompetitive practices such as prohibiting customers from using its mainframe operating

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<sup>56</sup> BCBS Complaint, *supra* note 50, at ¶ 1.

<sup>57</sup> *Id.* ¶ 6.

<sup>58</sup> *Id.* ¶ 3.

<sup>59</sup> *Id.* ¶ 5.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* ¶ 6.

<sup>62</sup> *Id.* ¶ 91.

<sup>63</sup> Press Release, Blue Cross Blue Shield of Michigan, Blue Cross Blue Shield of Michigan Defense Use of Deepest Discount Contract Provisions to Secure Lowest Hospital Costs for More Than 4 Million Michigan Consumers (Oct. 18, 2010), available at [http://news.bcbsm.com/news/2010/news\\_2010-10-18-11474.shtml](http://news.bcbsm.com/news/2010/news_2010-10-18-11474.shtml) (last visited Feb. 2, 2011).

<sup>64</sup> Meghan McCarthy, *BCBS of Michigan Fires Back at Federal Lawsuit*, NAT'L L.J. DAILY, Dec. 17, 2010.

<sup>65</sup> Remarks, *supra* note 40.

<sup>66</sup> Adobe Press Release, *supra* note 19.

<sup>67</sup> *Id.*

<sup>68</sup> Dale R. Grimes, Steel Clayton and Matt Sinback, *High-Tech Sector Sees Uptick in Scrutiny: Recent Investigations Offer Insight Into What Targeted Industries May Expect*, 32 NAT'L L.J. 12, Nov. 2, 2009. The Division has requested information on pricing, strategy, and communication among publishers regarding the settlement, and has recently submitted objections to the settlement alleging that it will permit authors and publishers to collectively set prices in violation of Section 1, as well as give Google an unfair advantage in the digital distribution of books. *Id.*

system on competitor's hardware.<sup>69</sup> Finally, the DOJ is pursuing cartel issues in the high-tech industry, by investigating and prosecuting cases of alleged price-fixing of dynamic random access memory computer chips, liquid-crystal display panels, and cathode-ray tubes.<sup>70</sup> Therefore, high-tech companies have been put on notice that the DOJ has the industry on its radar and will likely continue to vigorously investigate Section 1 violations.

Similarly, *American Express* signals an uptick in the DOJ's Section 1 scrutiny of practices in the financial services industry. During a press conference regarding the lawsuit, U.S. Attorney General Eric Holder gave a strong statement regarding the intent of the DOJ's investigations in the credit card industry: "With today's lawsuit we are sending a clear message: We will not tolerate anticompetitive practices....We want to put more money in consumer's pockets, and by eliminating credit card companies' anticompetitive rules, we will accomplish that."<sup>71</sup> Varney echoed this statement, emphasizing that "[m]y staff and I have our eye on the ultimate goal – to ensure that EVERY consumer and merchant benefits from a competitive marketplace in this industry."<sup>72</sup> This signals continued Section 1 scrutiny in the financial services industry, especially in the area of credit services. In addition, for antitrust enforcement in the financial services industry, the eighteen states that joined the lawsuit suggests widespread support from the States that will likely encourage the DOJ to continue to pursue Section 1 antitrust lawsuits like *American Express* in the future.

Finally, *BCBS* reinforces the DOJ's intent to vigorously pursue Section 1 antitrust violations in the health care industry. The state of the health care industry is the subject of increasingly polarized national debate over the cost of health care and health insurance. The Patient Protection and Affordable Care Act, enacted by Congress on March 21, 2010, relies, in part, on the belief that competition and more choices for consumers will result in greater coverage at lower cost.<sup>73</sup> Varney, in a speech at the Antitrust in Healthcare Conference, stated that the success of the Act will, in part, depend upon "healthy competitive markets free from undue concentration and anticompetitive behavior."<sup>74</sup> As a result, she stated that the health insurance industry should expect the DOJ to "carefully scrutinize and continue to challenge exclusionary practices by dominant firms...that substantially increase the cost of entry or expansion" into the health insurance industry, particularly with respect to MFN clauses and exclusive contacts between insurers and significant providers that reduce the ability or incentive of providers to negotiate discourse with aggressive insurance entrants.<sup>75</sup> *BCBS* is likely the beginning of many Section 1 lawsuits brought by the DOJ against the anticompetitive practices of dominant health insurers' agreements with health providers across the country. Moreover, this Section 1 focus is likely to extend beyond health insurance, to other areas of the health care industry, as the DOJ attempts to fulfill its goal of "provid[ing] clear and accessible guidance to

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> AmEx Press Release, *supra* note 45.

<sup>72</sup> Pen-and-Pad Press Release, *supra* note 55.

<sup>73</sup> Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2010).

<sup>74</sup> Press Release, U.S. Dep't of Justice, Remarks as Prepared for the American Bar Association/American Health Lawyers Association Antitrust in Healthcare Conference (May 24, 2010), *available at* [www.justice.gov/atr/public/speeches/258898.com](http://www.justice.gov/atr/public/speeches/258898.com) (last visited Feb. 2, 2011) (hereinafter "Antitrust in Healthcare Speech").

<sup>75</sup> *Id.*

health care consumers, providers, and payers so that there is the predictability needed for health care reform to succeed.<sup>76</sup>

### **Conclusion**

Christine Varney began her position as Assistant Attorney General of the Antitrust Division with a strong plan of action. Despite later criticisms that DOJ antitrust enforcement under her leadership was nothing more than business as usual, it is clear that, over the past year, Varney has begun to implement her plan, at least in the area of Section 1 violations. Not only has she filed new civil Section 1 lawsuits, but these lawsuits take on the anticompetitive conduct of new industries that previously had not seen their fair share of scrutiny from antitrust law enforcers. While it remains to be seen whether Varney fulfills the Obama administration's ultimate goal of renewed enforcement of the antitrust laws overall, it is apparent that, given the three lawsuits discussed above, Varney and the DOJ have begun a course to reinvigorate Section 1 enforcement and will be a force to be reckoned with in the years to come.

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<sup>76</sup> *Id.*