

## The Congressional Agenda in Antitrust

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The Obama administration, in conjunction with Congress, appears as though it is in the process of beefing up enforcement of the antitrust laws. On February 27, the President nominated Jon Liebowitz to chair the Federal Trade Commission. Mr. Liebowitz is the only Democratic commissioner on the FTC. Mr. Liebowitz joined the commission in 2004. Prior to his appointment to the FTC, he was vice president for Congressional affairs at the Motion Picture Association of America. Before that post, he was Democratic chief counsel and staff director of the Senate antitrust panel. Mr. Liebowitz has taken a tough stance against “pay for delay” tactics of drug makers. The tactic, by which a branded drug maker pays a generic drug manufacturer to delay the release of the generic drug, has the effect of raising drug prices. Mr. Liebowitz will replace Republican William Kovacic.

The shift toward more aggressive antitrust enforcement might be more dramatic at the Justice Department. On January 22, President Obama nominated Christine Varney to head the DOJ’s antitrust division. Ms. Varney is a former FTC member and an expert on internet law. She has a reputation for strong enforcement. As a lawyer for Netscape in the late 1990’s, Ms. Varney persuaded the Justice Department to bring a successful case against Microsoft.

The House Judiciary Committee has been reorganized so that antitrust is now part of the Subcommittee on Courts and Competition Policy. Hank Johnson, a Democrat from Georgia’s Fourth District, heads the Subcommittee. Antitrust matters used to fall within the purview of a

full committee under Chairman John Conyers. A primary benefit to this change is that there are now Members who have specific responsibilities regarding antitrust and can more easily schedule hearings. The Committee has already begun hearing testimony on the proposed merger between Ticketmaster and Live Nation.

Additionally, a spate of new legislative proposals has already appeared in Congress, despite Congressional preoccupation with President Obama's transition, the economic crisis, and the 2009 Budget. Senator Herb Kohl (D-WI) introduced S.148, the Discount Pricing Consumer Protection Act, before the Senate Committee on the Judiciary on January 16, 2009. The bill would restore the rule that agreements between manufacturers and retailers, distributors, or wholesalers to set the minimum price below which the manufacturer's product or service cannot be sold violates the Sherman Act.

It seeks to make illegal any agreement setting a minimum price for a product or service. From 1911 until the June 2007 *Leegin* decision, the Supreme Court had ruled that the Sherman Act forbid in all circumstances the practice of a manufacturer setting a minimum price below which any retailer, wholesaler or distributor could not sell the manufacturer's product. After *Leegin*, the practice of establishing minimum prices, known as resale price maintenance or vertical price fixing, is subject to analysis under the rule of reason on a case-by-case basis.

The bill alleges that the per se restriction against such arrangements worked to the benefit of consumers by lowering prices on goods and services and, conversely, that overturning the restriction has operated to the detriment of consumers. Further, the bill states that allowing agreements setting minimum prices drives consumer discount stores out of business. The bill would amend Section 1 of the Sherman Act by adding after the first sentence: "Any contract,

combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler, or distributor shall violate this Act.”

On January 12, Senator Kohl also introduced the No Oil Producing and Exporting Cartels Act of 2009 (NOPEC). The Bill would amend the Sherman Act to subject OPEC’s price and production manipulation to antitrust enforcement by the Department of Justice. The Bill would make oil-producing and exporting cartels illegal by removing certain defenses such as sovereign immunity and the act of state doctrine from any governmental enforcement action. It currently has ten cosponsors and is in the Senate Judiciary Committee.

The Railroad Antitrust Enforcement Act, House Resolution 233, is intended to amend the Federal Antitrust laws to provide coverage and to eliminate exemptions from such laws that are contrary to the public interest with respect to railroads. Rep. Tammy Baldwin introduced the Resolution on 1/7/2009 and the Resolution has six cosponsors. The Resolution would amend the Clayton Act to make federal antitrust laws applicable to all common carriers subject to the Surface Transportation Board regardless of whether the carrier filed a rail carrier rate or whether a complain challenging a rate is filed. The Resolution would eliminate for rail carriers any exemptions they enjoy from the federal antitrust laws and would increase the administrative burden on the Surface Transportation Board.

Senator Kohl also introduced the same Act in the Senate in the form of S. 146 on 1/6/2009.<sup>1</sup> The resolution has 9 cosponsors. As introduced in the Senate Judiciary Committee, the Act amends the Clayton Act to grant the United States exclusive authority to bring suit for injunctive relief against a common carrier that is not a rail common carrier subject to the jurisdiction of the Surface Transportation Board (SBT). The Act would also revise provisions

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<sup>1</sup> On March 18, the Act was reported to the Senate Committee on the Judiciary without amendment by Senator Patrick Leahy (VT) and placed on the Senate Legislative Calendar under General Orders.

prohibiting anticompetitive transactions except for those approved by specified federal agencies acting under certain statutes to eliminate the exemption for certain STB approved transactions.

On February 3, Senator Kohl introduced the Preserve Access to Affordable Generics Act. The bill, which has four cosponsors, seeks to enhance competition in the pharmaceutical industry by banning brand name drug manufacturers from making “reverse payment” to generic drug companies to delay the market entry of a generic drug.

On February 25, 2009 Representative Anthony D. Weiner (NY) introduced H.R. 1204, The Community Pharmacy Fairness Act of 2009. The Act is entitled to “ensure and foster continued patient safety and quality of care by making the antitrust laws apply to negotiations between groups of independent pharmacies and health plans and health insurance issuers in the same manner such laws apply to protected activities under the National Labor Relations Act.” The bill has 65 cosponsors. It was referred to the House Judiciary Committee on February 25, 2009.

In response, on March 12, 2009, Representative Ron Paul introduced H.R. 1493, the Quality Health Care Coalition Act of 2009. The Act would exempt health care professionals from antitrust laws in connection with negotiations with a health care regarding contract terms under which the professionals provide health care items or services for which plan benefits are provided. The Act would only apply to health care professionals excluded from the National Labor Relations Act. The Act would not apply to negotiations relating to Medicare or Medicaid programs, the State Children’s Health Insurance Program, medical and dental care for members of the uniformed services, veterans medical care, the federal employees health benefits program, or the Indian Health Care Improvement Act. The bill has two cosponsors.

Rep. James Oberstar (MN) introduced House Resolution 831 on February 3, 2009 which would direct the Comptroller General to conduct a study of the legal requirements and policies followed by the Department of Transportation in deciding whether to approve international alliances under section 41309 of title 49, United States Code, between air carriers and foreign air carriers and grant exemptions from the antitrust laws under section 41308 of title 49 in connection with such international alliances, and for other purposes. The Resolution states that the OCC study should examine the affect on competition of exemptions from the antitrust laws enjoyed by some international alliances.

Senator Chuck Grassley (IA) introduced S.364, as the Agriculture Competition Enhancement Act of 2009, before the Senate Judiciary Committee on February 3, 2009. The bill would provide for the review of “agriculture mergers and acquisitions” by the Department of Justice. In order the effect such review, the bill establishes a Deputy Assistant Attorney General for Agricultural Antitrust Matters in the Department of Justice; an Agriculture Competition Task Force operating under the authority of the Attorney General; and the Office of Competition and Fair Practices within the Department of Agriculture. Senator Herb Kohl is cosponsoring the bill.

Finally, a long running controversy in college football is addresses in House Resolution 68 introduced on January 15, 2009 by Rep. Neil Abercrombie (HI) and five cosponsors.<sup>2</sup> The proposed legislation supports the establishment of an NCAA Football Bowl Subdivision Championship playoff system in the interests of fairness and to bring parity to all NCAA teams. It rejects the current NCAA Bowl Championship system as an illegal restraint of trade in violation of the Sherman Act. The resolution calls for the Department of Justice’s Antitrust

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<sup>2</sup> On March 6, the bill was referred to the House Subcommittee on Higher Education, Lifelong Learning, and Competitiveness.

Division to investigate and bring to appropriate action to have the BCS system declared illegal and to require a playoff to determine a nation champion.

Congress and the Obama administration seem poised for more vigorous antitrust legislation and enforcement than the Bush administration, which had a reputation of weak antitrust enforcement. Already, Obama has nominated administrators with reputations for strong antitrust enforcement to the government's principle antitrust enforcement agencies; the House Judiciary Committee has reorganized its antitrust responsibilities; and Congress has introduced a hearty menu of antitrust legislation. Additionally, governmental response to proposed mergers between LiveNation and Ticket Master, and Wyeth and Pfizer, should provide some early insights as to what's to come under the new administration.