CHRISTINE A. VARNEY*

Antitrust Immunities

I am pleased to be here today to speak about an important issue in American antitrust law: immunities and exemptions that limit or preclude the application of antitrust laws to certain conduct or industries.[1] The core message of my remarks today is that the changing dynamics of many industries coupled with the increasing analytical rigor that courts and antitrust enforcement agencies apply should alleviate the concerns that have been cited by advocates of exemptions. Free market competition is a fundamental and core principle of this country. As the bipartisan Antitrust Modernization Commission recognized, just as private constraints on competition can be harmful to consumer welfare, so can government restraints.[2] Thus, the use of such restraints should be minimized.

What our dynamic and rapidly changing economic era demands is an antitrust regime that is responsive to market realities. As Bob Pitofsky recognized a few months ago when he accepted the John

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1 Presently, there are about thirty federal statutes that exempt some conduct from antitrust entirely, that limit the applicability of antitrust law to it, or that limit the penalties that can be assessed against it. *See* AM. BAR ASS'N, SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 1–4, 31–52 (2007).

2 ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 333 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

Sherman Award, the movement toward a more responsive set of substantive antitrust rules over the past few decades has been a salutary development whether one is an ardent Chicago School adherent or one believes, in the words of his most recent book, that portions of conservative economic analysis have "overshot the mark."[3] As a result of this movement toward greater analytical rigor, the analysis that underlies today's antitrust enforcement is sufficiently clear and flexible to permit new innovative arrangements that enhance efficiency, obviating the need for widespread exemptions. As I have stated on another occasion:

> Allegations that particular procompetitive behavior would violate the antitrust laws and thus should be exempted from their application can fail to take account of the economically sound competitive analysis that is used today to carefully circumscribe *per se* rules and fully analyze other conduct under the rule of reason. . . . [T]he flexibility of the antitrust laws and their crucial importance to the economy argue strongly against antitrust exemptions that are not clearly and convincingly justified.[4]

Unless there is some compelling reason otherwise, I strongly believe that vigorous competition, protected by the antitrust laws, will do the best job of promoting consumer welfare and the U.S. economy. Departures from this competitive model should be rare.

I
THE EVOLUTION OF MODERN ANTITRUST ANALYSIS

It will surprise no one when I say that antitrust law and policy, and the markets in which they operate, have transformed dramatically over the past several decades. The 1950s and 1960s saw a period of growing industrialization and concentration in the American economy, a tide that was met with vigorous enforcement of the antitrust laws. To be sure, this was a period of some excessive intervention, in which big was sometimes condemned as bad without a consistent grounding in economic analysis, proof of anticompetitive market effects, or consideration of efficiencies. Those days are in the past, however, as both antitrust law and more general economic

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[3] HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008).

[4] Christine A. Varney, Statement Before the Senate Judiciary Committee Hearing on "Prohibiting Price Fixing and Other Anticompetitive Conduct in the Health Insurance Industry" 4 (Oct. 14, 2009) [hereinafter Varney Testimony], *available at* http://www.justice.gov/atr/public /testimony/250917.pdf.

policy have moved well beyond them. Though opponents of enforcement will frequently raise this period as a specter for the harms of over-enforcement, including chilling procompetitive behavior, this is a straw man. No amount of costuming should allow it to be confused with vigorous antitrust enforcement in its contemporary form.

In fact, since this period, antitrust doctrine continued to evolve. Competitive analysis shifted to the fore, and both the courts and the enforcement community began to focus on the procompetitive aspects of a variety of economic arrangements and conduct. It was here that the Chicago School made a real and lasting contribution to the well being of the American consumer. Through its insights, antitrust analysis became more oriented to consumer welfare, more grounded in the economics that tended to produce it, and more responsive to market realities as a result. Today, antitrust applies an increasingly nuanced approach and the growing awareness of efficiency gains from conduct that in past years was treated as always or almost always illegal. The Supreme Court's recent rejection of the per se approach in a number of cases underscores this fact.[5]

This modern, market-oriented antitrust analysis is a powerful tool for the promotion of consumer welfare because it is attuned to market realities and sensitive to the possibility of efficiencies. When calibrated in this way, antitrust enforcement preserves the kind of competitive environment that requires firms to innovate in both product offerings and business models in order to prosper. Competition is the bedrock of our economy, and we should be dubious of attempts to avoid it.

I have said before that antitrust enforcement has been in need of some rejuvenation and that, in the course of the modernization of antitrust law, the pendulum swung too far in the direction of skepticism about enforcement and sanguinity about markets and their ability to self-correct.[6] Yet, returning the pendulum to the center entails no return to the bad old days—real or imagined—when enforcement was divorced from the assessment of competitive harm or the recognition of predictable efficiencies. To the contrary, it is precisely because I have faith in the flexibility and economic foundations of modern antitrust that I believe with such conviction

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[5] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[6] Christine A. Varney, Vigorous Antitrust Enforcement in This Challenging Era (May 12, 2009), *available at* http://www.justice.gov/atr/public/speeches/245777.htm.

that vigorous enforcement will lead only to a healthier and more efficient American marketplace. This is why I have a general skepticism for antitrust exemptions and the justifications that accompany them.

II

RUMORS OF TYPE I ERRORS HAVE BEEN GREATLY EXAGGERATED

One justification given for exemptions is that, without them, there will be a chilling of procompetitive activity due to the potential for antitrust liability.[7] As I have said before in the context of dominant firm conduct, I do not find arguments about Type I errors, or false positives, particularly convincing. I have seen how firms conduct business, and I would be hard-pressed to find a single example where a firm refrained from clearly procompetitive unilateral or joint conduct because the antitrust laws apply. Antitrust simply is not an obstacle to efficiency-enhancing conduct.

The ways in which antitrust law and policy have changed over the past decades should dispel concerns about false positives. For example, consider legal developments regarding cooperative efforts by competitors, the conduct most often protected by exemptions. Both the courts and the Division have acknowledged that cooperation among competitors can produce substantial efficiencies, including product and service offerings that would be completely unavailable without coordination among otherwise competitive firms. That means that many collaborations—horizontal and vertical—merit flexible treatment under the rule of reason. This outlook is evident in landmark cases such as *BMI*,[8] *Northwest Wholesale Stationers*,[9] and *NCAA*.[10] It also suffuses the Division's guidelines on competitor collaborations.[11] In business review letters,[12] speeches,[13] and amicus

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[7] *See, e.g.*, ANTITRUST MODERNIZATION COMM'N, *supra* note 2, at 351. Other justifications for exemptions include market failures, natural monopolies, and the overall state of the economy. I find these equally uncompelling in most instances.

[8] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979) (applying the rule of reason to a blanket licensing scheme).

[9] Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985) (applying the rule of reason to a cooperative buying association).

[10] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984) (applying the rule of reason to restrictions on televising college football games).

[11] FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 1 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf. "[C]ollaborations often are not only benign but procompetitive. Indeed, in the last two decades, the federal antitrust agencies have

filings,[14] the Division has stood behind its commitment to approach collaborations with the care and analytical elasticity necessary to accommodate the many innovative arrangements that are bringing greater efficiency and untold possibilities to our dynamic economy. Firms are left with quite broad latitude to devise collaborations that are shown to benefit (or at least not to harm) consumers. I see no reason for carte blanche immunity for these activities and no reason why procompetitive activities would be deterred by a rigorous and well-grounded antitrust enforcement policy.

The point needn't be belabored: antitrust law has moved well beyond the era of blindly condemning collaborative practices that may be efficient, and it is well equipped to evaluate a wide array of business arrangements. We remain vigilant in condemning as per se illegal arrangements that are nothing more than naked price fixing. Yet, in the modern era of antitrust, almost all collaborations are subject to a more sophisticated analysis that acknowledges that—in the words of our guidelines—it is "[c]ompetitive forces [that] are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs."[15] No exemptions are needed to see that "[s]uch collaborations often are not only benign but procompetitive."[16]

III

CURRENT ENFORCEMENT TRANSPARENCY FURTHER MINIMIZES THE RISK OF FALSE POSITIVES

The above-discussed advances in legal and economic analysis make modern antitrust well equipped to distinguish procompetitive

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brought relatively few civil cases against competitor collaborations. Nevertheless, a perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of precompetitive collaborations." *Id.*

12 *See, e.g.*, Letter from Christine A. Varney, Assistant Att'y Gen., to William J. Baer (Mar. 31, 2010), *available at* http://www.justice.gov/atr/public/busreview/257318.pdf.

13 *See, e.g.*, Christine A. Varney, Antitrust and Healthcare: Remarks as Prepared for the American Bar Association/American Health Lawyers Association Antitrust in Healthcare Conference 11–16 (May 24, 2010), *available at* http://www.justice.gov/atr/public/speeches/258898.pdf.

14 Brief for the United States as Amicus Curiae Supporting Petitioners, Texaco Inc. v. Dagher, 547 U.S. 1 (2006) (Nos. 04-805 & 04-814), *available at* http://www.justice.gov/atr/cases/f211000/211046.htm.

15 FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, *supra* note 11.

16 *Id.*

conduct from anticompetitive conduct. In addition, the Antitrust Division and the Federal Trade Commission employ various methods to ensure that antitrust enforcement is both predictable and transparent. Let me point out three ways in particular that this goal is achieved.

First, of course, are the various guidelines, reports, and policy statements that the agencies have issued. The goal of these various efforts is to encourage efficient business behavior by clearly articulating an analytical framework. Suffice it to say that, given the various policy commitments and safe harbors in some of these documents—and the clear guidance they all contain—businesses need not live in fear of rigid or unpredictable antitrust enforcement that comes down hard on procompetitive behavior.

Second, there are the various ways in which businesses can test the acceptability of their arrangements or strategies without simply implementing them and risking litigation. Business review letters provide an opportunity for industry players to present models and ideas to the Division and to obtain an advance statement of the agency's enforcement intentions.[17] In fact, requests regarding the formation and operation of joint ventures are one of the most frequent types of requests the Department receives. The Federal Trade Commission has a similar procedure for advance review of contemplated business arrangements.[18] At the Division, we are willing to work with firms that have innovative ideas about their business models so that they can avoid antitrust concerns, and we frequently do so. This promotes our enforcement aims.

We are not only on the lookout for conduct that may be harming competition but also in the business of facilitating procompetitive conduct and supporting innovative business arrangements to the extent we can. For instance, the Division recently addressed the Associated Press's proposal to establish a voluntary news registry that would list content from various providers in a single forum. Those seeking to republish the content could turn to this registry as a central place for republication rights. Although this plan would bring together various competing news providers, the Division concluded that it was unlikely to harm competition and could simultaneously

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[17] *See* 28 C.F.R. § 50.6. For a description of the process through which a business review can be requested, see DEP'T OF JUSTICE, PILOT PROGRAM ANNOUNCED TO EXPEDITE BUSINESS REVIEW PROCESS (1992), *available at* http://www.justice.gov/atr/public/busreview/201659a.htm (Business Reviews section).

[18] *See* 16 C.F.R. §§ 1.1–1.4.

"provide a new, efficient mechanism through which content users can identify applicable terms of use and purchase licenses for news content they want to use."[19]

To put it plainly, the complaint that antitrust law is frequently too rigid to accommodate efficiency-enhancing business behavior has been overtaken by events. The reality is that, in the modern era of antitrust law and policy, the kind of efficient behavior that is ultimately beneficial for fair and free markets is rarely—if ever—subject to enforcement. To the contrary, modern antitrust law and enforcement policy have the ability to protect the economy from anticompetitive behavior without stifling the kinds of innovative, procompetitive business behavior that keeps our dynamic economy moving and growing.

IV
MCCARRAN-FERGUSON

One example of an exemption that I believe it is time to retire is the exemption for "the business of insurance" contained in the McCarran-Ferguson Act. As stated in my congressional statement on this topic:

> [T]he application of the antitrust laws to potentially procompetitive collective activity has become far more sophisticated during the 62 years since the McCarran-Ferguson Act was enacted. Some forms of joint activity that might have been prohibited under earlier, more restrictive doctrines are now clearly permissible, or at very least analyzed under a rule of reason that takes appropriate account of the circumstances and efficient operation of a particular industry. Thus, there is far less reason for concern that overly restrictive antitrust rulings would impair the insurance industry's efficiency."[20]

McCarran-Ferguson immunity historically relied upon two premises. The first was that pervasive state law regulation of insurance would be preempted by the Sherman Act in the absence of an antitrust exemption. That is why McCarran-Ferguson exempts "the business of insurance" only to the extent that it is "regulated by State law." McCarran-Ferguson immunity was in large part a response to *South-Eastern Underwriters*,[21] in which the Supreme Court held that the insurance business was within Congress's commerce power, and so raised the specter that antitrust would

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19 *See* Letter from Christine A. Varney, *supra* note 12, at 3.

20 Varney Testimony, *supra* note 4, at 5.

21 United States v. Se. Underwriters Ass'n, 322 U.S. 533 (1944).

preempt state regulation and taxation of insurance. Then, the "state action" doctrine first announced in *Parker v. Brown*[22] was only in its infancy. Today, however, that doctrine has been comprehensively developed, and it is now clear that—rather than being preempted by antitrust—state law can immunize restraints with a clearly articulated, affirmatively expressed intention to displace competition, coupled with active state oversight.[23] This overlap makes McCarran-Ferguson immunity for the purpose of allowing state regulation unnecessary at best.

The reality can be worse than mere overlap, however. Under McCarran-Ferguson, limited regulation providing for insufficient supervision can be enough to supplant antitrust. In the words of one leading treatise, "the presence of even minimal state regulation, even on an issue unrelated to the antitrust suit, is generally sufficient to preserve the immunity."[24] As Supreme Court cases make clear, however, *Parker* immunity would require more affirmative government action.

Second, McCarran-Ferguson was enacted because of the concern that the antitrust laws would condemn cooperative joint activities such as information sharing designed to improve the functioning of the insurance system. Yet, as I explained, the application of the antitrust laws to efficiency-enhancing joint activities has become much more flexible, favorable, and predictable. The result is that the vast majority of cooperative activities that might have once been of theoretical concern in the absence of McCarran-Ferguson immunity are now clearly permissible. The American Bar Association,[25] the Antitrust Modernization Commission,[26] and leading scholars[27] all agree—in the words of the leading treatise: "[m]any, perhaps most, of the challenged practices need no immunity because they do not violate the antitrust laws."[28] Those that would violate antitrust laws are ones we should be concerned about, not granting immunity to.

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22 317 U.S. 341 (1943).

23 *See, e.g.*, Sandy River Nursing Care v. Aetna Cas., 985 F.2d 1138 (1st Cir. 1993) (immunizing conduct under *Parker* that involved collective rate making).

24 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 219c, at 25 (3d ed. 2006).

25 AM. BAR ASS'N, SECTION OF ANTITRUST LAW, INSURANCE ANTITRUST HANDBOOK (2d ed. 2006).

26 ANTITRUST MODERNIZATION COMM'N, *supra* note 2, at 351.

27 *See, e.g.*, AREEDA & HOVENKAMP, *supra* note 24, ¶ 219d.

28 *Id.*

The better scheme would be to allow the insurance firms to rely on *Parker* immunity where appropriate and to otherwise justify their arrangements as good for competition—just as every other industry does. That is the approach we have advocated and continue to endorse today. In this way, we can see the returns of market-oriented antitrust law and policy in this important sector of our economy.

I am hopeful that congressional action on this front will continue to move forward. Bills to repeal McCarran-Ferguson are advancing, and they have the strong support of the administration and private groups like the American Antitrust Institute. A number of other exemptions are decades old and were implemented at a time when the U.S. economy was very different and antitrust analysis less nuanced. Reevaluating whether the justifications for certain exemptions still apply (if they ever did) may well be warranted. I urge you to keep up your efforts on this front so that—sooner rather than later—the benefits of full antitrust oversight will be restored more broadly.

CONCLUSION

Let me close with a few thoughts about where these observations leave us.

First, new legislative exemptions for specific industries should be avoided absent a clear and compelling reason why such an exemption is in the public interest despite an obvious loss in consumer welfare. With the economic downturn, some industries have argued that their continued strength or existence depends upon an exemption from the antitrust laws. Yet, in the age of market-oriented antitrust enforcement, the law is highly unlikely to condemn or deter any arrangement necessary to bring desirable products to consumers. Legislators should not support special interest efforts to avoid the rigors of competition to the detriment of consumers.

Second, I agree with the Antitrust Modernization Commission that, in the rare case that an exemption is found to be necessary, it should be crafted in the least restrictive way needed to achieve the desired public interest. A recently enacted example is the Standards Development Organization Advancement Act of 2004, which eliminates per se liability for a standards development organization while engaged in standards development activities and provides an opportunity to limit antitrust liability to actual, as opposed to treble

damages.[29] The statute protects the standard-setting body, not anticompetitive conduct by its individual members, and rather than eliminating antitrust oversight, it mandates only rule of reason review and limits successful claimants to single damages. In some important respects, this exemption may not be necessary; standard setting produces substantial efficiencies and would almost always be subject to rule of reason analysis anyway.[30] Still, such narrow and tailored exemptions that preserve but limit antitrust enforcement are a better model than sweeping and overbroad exemptions that authorize even hard-core price fixing and output restriction.

Finally, exemptions for regulated industries should be kept narrow, recognizing that antitrust and regulation are complements, *not* substitutes. The contemporary approach to these industries is built upon the power of competitive markets, and antitrust law and policy are capable of responding with flexibility to promote and protect that competition without standing in the way of the regulatory regime. Indeed, regulators and antitrust enforcers should be empowered—to the greatest extent possible—to work *together* in these industries to bring the benefits of competition to an ever growing set of markets and their consumers.

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[29] Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, § 213(a), 118 Stat. 661, 666 (2004).

[30] Christine A. Varney, Promoting Innovation Through Patent and Antitrust Law and Policy: Remarks as Prepared for the Joint Workshop of the U.S. Patent and Trademark Office, the Federal Trade Commission, and the Department of Justice on the Intersection of Patent Policy and Competition Policy: Implications for Promoting Innovation (May 26, 2010), *available at* http://www.justice.gov/atr/public/speeches/260101.pdf.