

WILMER, CUTLER & PICKERING

2445 M STREET, N.W.

WASHINGTON, D.C. 20037-1420

TELEPHONE (202) 663-6000

FACSIMILE (202) 663-6363

WASHINGTON  
BALTIMORE  
NEW YORK  
LONDON  
BRUSSELS  
BERLIN

February 23, 2001

*Antitrust Law Update*

***Potential Changes in Federal Antitrust Enforcement May  
Increase State Enforcement Efforts***

The Bush administration has moved quickly to name two veterans of previous Republican administrations to top antitrust enforcement positions. Charles James, who held positions at both the Federal Trade Commission and the Department of Justice, will run Justice's Antitrust Division. Timothy Muris is expected to succeed Robert Pitofsky as Chairman of the FTC. Like James, Muris has extensive former government experience, having previously served as Director of the FTC's Bureau of Competition. We wanted to share some brief thoughts about what these nominations may portend for the direction of federal antitrust enforcement and the potential for increased antitrust enforcement at the state level.

Both men have criticized some of the more high-profile antitrust cases brought by their predecessors. Muris has publicly disagreed with some of the vertical cases brought during the Clinton administration, including *Intel* and *Toys "R" Us*. Vertical cases involve relationships or arrangements between customers and suppliers within a chain of distribution, rather than companies that compete directly.

In the FTC's *Toys "R" Us* matter, Muris gave expert testimony on behalf of the defendant toy retailer. Toys "R" Us was accused of engineering a boycott of competing toy retailers by major toy manufacturers. Muris testified that the defendant's efforts to limit competition from discounters created efficiencies, because they discouraged free-riding on the services provided by Toys "R" Us and helped to ensure that Toys "R" Us would continue to carry lots of toys throughout the year. Muris testified that these efficiencies outweighed any potential competitive harm from Toys "R" Us' conduct. The *Intel* complaint alleged that Intel cut off technical assistance to some of its customers during litigation over patent rights. The FTC complaint charged that this conduct constituted an unlawful exercise of market power. In a recent article, Muris criticized the government's position in *Intel* as requiring insufficient proof of actual harm to consumers.

James has been critical of the *Microsoft* case he will soon control. He stated in an interview “One thing that is very very clear is that consumers have benefited by there being a common [software] platform. If Microsoft were to be broken up, you would see divergence of that common platform.” James also commented that remedies short of an actual break-up of the company should sufficiently address any concerns.

The nominees’ backgrounds and public comments support some general predictions about the likely direction for federal antitrust enforcement efforts in the new administration. Both men are likely to move their agencies’ enforcement efforts towards more limited interpretations of the antitrust laws. Horizontal restraints like bid-rigging, cartels, and other price-fixing arrangements between competitors should continue to be a priority at the federal level. Horizontal mergers between competitors, such as the currently pending airline transactions, are also likely to continue to receive significant attention. Vertical mergers, such as the recent AOL/Time-Warner transaction, are likely to receive somewhat less scrutiny at the federal level.

Another important change in merger enforcement will likely be a more sympathetic view of efficiency claims. Muris has criticized current efficiency analysis as overly rigid and hostile to efficiency claims. Arguments that mergers will create significant efficiencies are likely to receive greater attention at both agencies.

Although we expect some shift in emphasis and direction at both of the federal agencies, the degree to which state antitrust enforcers will follow the federal lead is unclear. During the Reagan administration, when federal antitrust enforcement was curtailed, state enforcement efforts increased.

Through the National Association of Attorneys General (“NAAG”), individual states have joined forces to share resources and costs. Using NAAG coalitions to bring antitrust cases addresses a historical impediment to state enforcement efforts: limited resources. Antitrust cases are often large, complex matters that are extremely expensive to litigate. By sharing the risks and costs of litigation, NAAG has achieved some recent success:

- A coalition of 21 states and the District of Columbia obtained a \$255 million dollar settlement from six vitamin manufacturers to settle allegations of price-fixing.

- A coalition of 32 states reached a \$5 million dollar settlement with makers of contact lenses. The case involved allegations of a conspiracy to keep consumers from purchasing these products from low-cost mail order or internet retailers.
- A coalition of 18 states and the District of Columbia played an active role in the recent *Microsoft* case. It is possible that the states will break with the federal government and continue the litigation if a settlement between Microsoft and the DOJ does not address their concerns.

While these cases were brought either after or in conjunction with federal cases involving the same conduct, NAAG may begin bringing more cases without any federal assistance if the NAAG members view federal enforcement efforts as insufficient.

Individual state attorney generals have also been active in cases where a particular merger is likely to have significant effects within that state. For example, two non-profit hospitals in Rhode Island recently abandoned plans to merge, after the Rhode Island Attorney General voiced serious concerns with the deal. The two entities controlled approximately 57% of that state's acute care hospital beds.

The New York Attorney General also brought suit last year against two hospitals in the Poughkeepsie, N.Y. area. The two hospitals had operated a joint venture together. Through the joint venture, the two hospitals negotiated prices with third party payers together and divided the market for particular service offerings between them. The New York Attorney General successfully sued the hospitals alleging *per se* violations of the antitrust laws for price-fixing and market division.

Individual states have also shown no reluctance to take on the kind of vertical cases where the federal government may reduce its role. For example, Minnesota Attorney General Michael Hatch recently settled a resale price maintenance case involving satellite television systems. The defendant distributor, Golden Sky, allegedly set the resale prices of its retail dealers and punished retailers who refused to follow its price list. The Attorney General's press release stated:

The bottom line is that we believe Golden Sky restricted independent pricing decisions by its dealers. Competition and the free market should determine prices, not Golden Sky's Dealer contracts .... Today's agreement sends a message that the state of Minnesota

doesn't take price-fixing lightly, and that's good news for Minnesota consumers and businesses.

While we will continue to monitor these issues closely, ultimately we expect that both joint state actions through NAAG and individual state enforcement efforts will increase in the years ahead. The magnitude of this state expansion will be heavily influenced by developments at the federal level. If federal enforcement drops dramatically in the new administration, state enforcement activity will likely increase substantially to compensate for the perceived gap in coverage. If the changes at the federal level are more modest, then the increases in state enforcement will also be more incremental.

The ultimate outcome of the *Microsoft* case may be a leading indicator of how significantly state enforcement will expand. If the states perceive that the Justice Department has entered into a settlement that is overly favorable to Microsoft, they will likely view that as a significant retreat in federal antitrust enforcement. In turn, that perception may trigger substantial increases in state activity.

Although the federal government's role in enforcing the antitrust laws may be more narrowly focused in the new administration, effective antitrust counseling may paradoxically become a more complex task in the coming years. Analysis of a proposed transaction's effects in particular jurisdictions may play an increasing role in merger counseling in the future. The states may not adopt a uniform approach to vertical issues like resale price maintenance in the absence of federal leadership, further complicating efforts to effectively predict risks associated with some business practices and vertical combinations.

All this amounts to increased uncertainty about where lines will be drawn and who will be doing the drawing. Corporations and their advisors must make their evaluations based on the new playing field, and experience will go a long way towards compensating for the unsettled climate. Early involvement by proactive antitrust counsel can minimize the antitrust risks presented by both federal and state enforcement, helping companies to achieve their business goals. If you have any further questions, please feel free to call us.

William Kolasky  
Wilmer, Cutler & Pickering  
2445 M Street, N.W.  
Washington, DC 20037  
202-663-6357  
(wkolasky@wilmer.com)

Veronica Kayne  
Wilmer, Cutler & Pickering  
2445 M Street, N.W.  
Washington, DC 20037  
202-663-6975  
(vkayne@wilmer.com)

James Frost  
Wilmer, Cutler & Pickering  
2445 M Street, N.W.  
Washington, DC 20037  
202-663-6434  
(jfrost@wilmer.com)