



ANTITRUST ENFORCEMENT IN THE OBAMA ADMINISTRATION

While a candidate, President Obama committed that if elected, he would instruct his administration “to reinvigorate antitrust enforcement.” To lead this “reinvigoration” effort, he has chosen new enforcement officials—Christine Varney to be Assistant Attorney General (“AAG”) at the Department of Justice Antitrust Division (“DOJ”) and Jon Leibowitz as the new Chairman of the Federal Trade Commission (“FTC”). The Senate voted on April 20, 2009, to confirm Ms. Varney as AAG, and Mr. Leibowitz was elevated to Chairman at the end of February. (Because he was a sitting FTC commissioner, no confirmation hearing was necessary.) These selections, along with President Obama’s own statements regarding antitrust enforcement while still a candidate, offer insights as to what we might expect from federal antitrust enforcement over the course of this administration. We begin by providing general background regarding Ms. Varney, Chairman Leibowitz, and key personnel named to their respective senior leadership teams. We then focus on three

areas where more vigorous and aggressive antitrust enforcement seems particularly likely: mergers, single-firm conduct, and patent settlements.

THE ENFORCERS

Ms. Varney and Chairman Leibowitz both have track records as enforcement officials. Along with their public statements, this background suggests that their enforcement philosophies and priorities conform well to President Obama’s own expressed views about antitrust. Ms. Varney served as an FTC commissioner between 1994 and 1997 and has spent several years in private practice, with a focus on internet clients. Her votes as a commissioner and subsequent public statements reflect a liberal antitrust philosophy and particular interest in several areas, including the interplay between antitrust and innovation, single-firm conduct, and mergers that raise vertical antitrust issues.

Chairman Leibowitz began serving as an FTC commissioner in 2004. Prior to joining the FTC, he was vice president for congressional affairs for the Motion Picture Association of America. Before that, he served as chief counsel to Senator Herb Kohl and as Democratic chief counsel and staff director for the U.S. Senate antitrust subcommittee. During his tenure at the FTC, Chairman Leibowitz has consistently advocated for the agency to adopt an aggressive enforcement agenda. He has been especially vocal in two areas: so-called “pay-for-delay” settlement agreements involving branded and generic pharmaceutical manufacturers and alleged unlawful conduct by patent holders before standard-setting organizations.

The DOJ has announced the appointment of its senior leadership team. Carl Shapiro will be the new Deputy Assistant Attorney General (“DAAG”) for Economic Analysis, a position he occupied from 1995 to 1996. He is a former economic consultant and professor at the Haas School of Business and the University of California, Berkeley. Dr. Shapiro has been a vocal critic of the Bush administration’s antitrust record in general, and the DOJ’s in particular. In addition, the DOJ announced the Chief of Staff and Counsel (Sharis Arnold Pozen), Deputy Assistant Attorneys General for Civil Matters (Molly Boast and William Cavanaugh, Jr.), Deputy Assistant Attorney General for International, Policy and Appellate Matters (Philip Weiser), and Chief Counsel for Competition Policy and Intergovernmental Relations (Gene Kimmelman).¹ Scott Hammond will remain the Deputy Assistant Attorney General for Criminal Enforcement, having since 2005 served in that role, traditionally a slot for a career DOJ lawyer. This team, which brings together individuals with prior agency, litigation, and policy experience, is well positioned to pursue all areas of antitrust enforcement aggressively, including challenges in court.

The FTC has also named several senior staff members, including Director of the Bureau of Competition (Richard Feinstein) and Director of the Bureau of Economics (Joseph Farrell). Both appointees have prior agency experience. Mr. Feinstein served as an Assistant Director of the FTC’s health care shop from 1998 to 2001. Earlier in his career, Mr. Feinstein also worked as a trial attorney and supervisor at the DOJ. He joins the FTC after several years in private practice, where he focused on antitrust litigation and counseling. Mr. Feinstein’s appointment provides further evidence that the FTC will closely scrutinize the health care and

pharmaceutical industries for anticompetitive conduct, a top priority for Chairman Leibowitz.

Dr. Farrell occupied Dr. Shapiro’s current post at the DOJ from 2000 to 2001 and previously served as the Federal Communications Commission’s chief economist. Drs. Farrell and Shapiro have also worked together often over the years: They were colleagues at the University of California, Berkeley, were affiliated with the same consulting firm, and have coauthored numerous articles regarding antitrust issues, including merger analysis and standard setting. Indeed, four out of Dr. Farrell’s last five publications were written with Dr. Shapiro. Given this relationship, the appointments of Dr. Farrell and Dr. Shapiro to the agencies’ top economist positions is another reason to believe that the agencies will present a considerably more unified stance regarding the economic analysis of mergers and acquisitions, single-firm conduct, and collusive behavior.

ANTITRUST ENFORCEMENT UNDER PRESIDENT OBAMA

Merger Enforcement. During the campaign, Senator Obama told the American Antitrust Institute (“AAI”), a nonprofit organization committed to aggressive antitrust enforcement, that his administration would “step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not.”² We should expect this promise to be fulfilled, though we are likely to see more pronounced changes in merger enforcement at the DOJ, the recipient of the brunt of charges of underenforcement by critics of the Bush administration’s antitrust record.³ In particular, the DOJ under Ms. Varney will be less likely to approve mergers resulting in large market shares on the basis of entry, expansion, and efficiency justifications. Furthermore, the DOJ seems more likely to examine closely vertical theories of competitive harm and to focus more attention on an analysis of competitive issues involving “innovation markets.”

Entry, Expansion, and Efficiencies Arguments. Merging competitors often view the likelihood of “easy” entry or expansion or significant post-merger efficiencies as reasons why their combinations should not be expected to lessen competition. But a number of critics share the view expressed by

Dr. Shapiro and coauthor Jonathan Baker that Bush administration decision makers (specifically those at the DOJ) were “overly willing to accept defense arguments about entry, expansion, and efficiencies, while downplaying the loss of competition inherent in the proposed merger.”⁴ In an article for *Antitrust* magazine,⁵ Drs. Shapiro and Baker discussed two unchallenged mergers as illustrative: Whirlpool/Maytag and XM/Sirius. Dr. Shapiro’s criticism of the DOJ’s decision in Whirlpool/Maytag, in particular, is striking because he was retained by the DOJ as part of its investigation of the merger.

During her confirmation hearing, Ms. Varney also questioned the result in those two matters. While acknowledging that she was not privy to the specific facts relied upon during the DOJ’s investigations of those transactions, Ms. Varney commented that “clearly, from the outside, those looked like mergers in horizontal markets that one wonders why they were not challenged.”

In both matters, depending upon the relevant market definition, the combined entity was to have a large market share. In Whirlpool/Maytag, the DOJ stressed that imports from LG and Samsung, two recent entrants, could constrain any attempt by the combined entity to raise laundry prices. The DOJ also pointed to large merger-specific cost savings as further evidence that the transaction would not harm consumers. In XM/Sirius, the DOJ emphasized that any inference of competitive harm was limited by a number of technologies under development that would likely offer new or improved alternatives to satellite radio. The DOJ also found that any competitive harm was further reduced because the parties were likely to realize significant cost savings through the merger.

While surely they will carefully consider parties’ claims with respect to entry, expansion, and efficiencies, Ms. Varney and Dr. Shapiro are less likely than their predecessors to approve mergers resulting in large market shares on such grounds. During her confirmation hearing, Ms. Varney commented that economic theory had been used during the Bush administration “to inhibit prosecuting mergers” and expressed an interest in “bringing new rigor to the economic analysis that underpins any prosecution.” Dr. Shapiro is likely to provide such “rigor.” In a recent book chapter entitled “Reinvigorating Horizontal Merger Enforcement,”⁶ Drs. Shapiro and Baker urge caution when assessing defendants’ entry and

efficiency arguments. They maintain that merging parties will frequently be able to identify limited instances of past entry but caution that these examples “should not form a basis for embracing the view that entry will solve any competitive problems caused by the merger, especially when the shares of the merging firms are large and those of the entrants are small.” On efficiencies, the authors “caution that arguments by merging firms that efficiencies will enhance their ability and incentive to compete, resulting in lower prices, higher quality or new products, should not be accepted based solely on their plausibility, but only after careful analysis.”

Vertical Mergers. Ms. Varney’s tenure at the FTC in the 1990s coincided with a renewed emphasis on vertical merger theories and enforcement. She described such theories in a 1995 PLI speech, observing that “[w]hen there is a factual basis supporting a likely anticompetitive effect from a vertical acquisition, we should act.”⁷

Over the course of her FTC service, Ms. Varney voted to take enforcement action with respect to several vertical mergers. But perhaps one of her most significant and high-profile vertical merger investigations occurred in 1997, when she was part of a 3-2 majority that voted to issue a complaint and settle FTC concerns arising from Time Warner’s proposed acquisition of Turner Broadcasting. It was a close decision: A joint statement by the majority acknowledged that “the transaction posed complicated and close questions of anti-trust enforcement.”⁸ The majority ultimately concluded that the deal raised both horizontal (e.g., combining the first and third largest cable programmers) and vertical (e.g., foreclosure) concerns.

While this history suggests the DOJ under Ms. Varney is considerably more likely to be concerned about the competitive implications of vertical mergers, and to examine them closely, we should not necessarily expect an onslaught of vertical merger enforcement actions. As Ms. Varney herself noted in her 1995 speech, “most vertical arrangements raise few competitive concerns.” She also expressed at that time a pragmatic approach to vertical merger enforcement: “[T]he best way to develop a sensible vertical merger enforcement policy is to rely on the factual evidence presented and to act on a case-by-case basis when the facts support a plausible theory of anticompetitive harm.”⁹

Innovation. During her tenure as an FTC commissioner, Ms. Varney was a proponent of innovation market analysis. She was a commissioner in 1995 when the FTC and the DOJ jointly issued the *Antitrust Guidelines for the Licensing of Intellectual Property*, which formally recognized the concept of “innovation markets,” or markets based on the “research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development.” Ms. Varney published an article in *Antitrust* magazine around that same time in which she defended why innovation market analysis is a necessary and proper inquiry for evaluating a merger of two innovating companies. While recognizing the potential for procompetitive benefits, Ms. Varney also cautioned that such transactions could have anticompetitive effects (e.g., suppressing or leading to abandonment of alternative technologies).¹⁰

As FTC commissioner, Ms. Varney joined a number of decisions analyzing transactions in high-technology industries in which innovation market analysis played a significant role. For example, in the Ciba/Sandoz merger, Ms. Varney joined the majority in approving a consent order that sought to preserve innovation over the long-term by requiring the combined firm to license the specified gene therapy technology and patent rights to a third party.

Dr. Shapiro appears to share Ms. Varney’s interest in preserving innovation competition, as reflected by testimony he provided to the Antitrust Modernization Commission in 2005. Dr. Shapiro testified that innovation market analysis is both justified and useful “so long as the analysis is rooted in reasonably foreseeable impacts on future product-market competition.”¹¹

While agency challenges to transactions on the basis of innovation markets have diminished significantly since Ms. Varney was at the FTC,¹² under her leadership the DOJ may be more inclined to bring such cases. At the very least, the antitrust community can expect a greater focus on innovation in the context of merger analysis.

Merger Process. It remains to be seen what changes the Obama administration will make with respect to merger process, but there is some reason for cautious optimism that one vexing problem—“clearance” of mergers between the DOJ and FTC—will be assuaged, if not fixed altogether. In their 2008 Transition Report, the American Bar Association

Section of Antitrust Law characterized the current state of affairs this way:

In some cases where relevant agency experience is unclear, the agencies engage in a protracted negotiation...to determine which agency will conduct the merger investigation.... The status quo is not only embarrassing, but it also has strained relations between the agencies and impaired their ability to work together efficiently. It is imperative that the agencies resolve this needless inefficiency in the merger review process. Failure to do so is simply bad government.¹³

Ms. Varney seemed to echo these concerns in the prepared remarks she submitted at her confirmation hearing. She wrote that “[p]olicy disputes and jurisdictional squabbles between agencies with overlapping enforcement mandates lead to uncertainty for consumers, business, and for overseas’ antitrust enforcers who look to the US for consistent guidance.” At the hearing, she characterized such “squabbles” as “simply unacceptable” and added that “[m]y friend and colleague, the chairman of the Federal Trade Commission, John Liebowitz, is here, and I know he shares in my commitment to end that.” Of course, the clearance problem has proven to be a difficult one to solve over the years, despite well-intentioned prior agency leadership. So it remains to be seen whether Ms. Varney and Chairman Liebowitz will succeed on this front. Many in the antitrust bar and business community will be rooting for them.

Single-Firm Conduct. In his statement to the AAI, then-Senator Obama was critical of lax Section 2 enforcement during the Bush administration, noting that “in seven years, the Bush Justice Department has not brought a single monopolization case.” His critique did not extend to the FTC, which did bring monopolization enforcement actions during the prior administration, such as *Rambus* and *Unocal* in the standard-setting context.

The sense that the two agencies had different philosophies with respect to Section 2 enforcement during the Bush administration was reinforced when, after jointly holding hearings intended to determine effective standards for single-firm conduct analysis under Section 2, the agencies were unable to produce a unified report. Instead, in September 2008, the DOJ issued its report,¹⁴ which engendered a sharply worded

critique from a majority of FTC commissioners (Harbour, Leibowitz, and Rosch). In their statement, the commissioners wrote that the report's analysis, if adopted by the courts, "would be a blueprint for radically weakened enforcement under Section 2 of the Sherman Act." They wrote that the standards endorsed by the DOJ in the report are tougher than those in the existing case law and "would make it nearly impossible to prosecute a case under Section 2." The three commissioners pledged that "[t]his Commission stands ready to fill any Sherman Act enforcement void that might be created if the Department actually implements the policy decisions expressed in its Report."¹⁵

This dramatic disconnect between the two antitrust agencies with respect to Section 2 enforcement will not continue under the Obama administration. The FTC under Chairman Leibowitz's leadership is expected to remain committed to aggressive Section 2 enforcement, while the DOJ under Ms. Varney's guidance will shift course. During her hearing, Ms. Varney testified that she does not support the report's conclusions and, if confirmed, would work with colleagues at the DOJ and the FTC to determine "whether or not [the report] is amended, or withdrawn or reworked."

There are other indications that Ms. Varney will favor proactive and vigorous enforcement of Section 2. For example, while serving as a panelist at the June 2008 annual national conference sponsored by the AAI,¹⁶ Ms. Varney said that one of the lessons from the government's last high-profile case in this area is that it "went in too late—if the Microsoft case had been brought a year earlier there might have been a different commercial result." During that program, she also expressed skepticism concerning the risk to competition posed by "false positives":

I have counseled numerous incumbents who are dominant as well as numerous new entrants. I can tell you, at least in my own experience, there is not a dominant incumbent who hasn't done something that was lawful because they were afraid that it might be reviewed by the DOJ or a state attorney general or an FTC. I just don't see it.... I think that this ruse of... we have to be restrained in our enforcement because of false positives will chill innovation, take an economic toll on society and over all result in negative economic consequence, slowing output, increasing cost, I just think is false.¹⁷

Ms. Varney also remarked that the next administration needs to "find the right cases to begin to push back on some of the doctrine that may have gotten too extreme in the last decade." She cited as one such example *Verizon v. Trinko, LLP*,¹⁸ in which the Supreme Court held that Verizon's alleged refusal to share its telephone network under the Telecommunications Act of 1996 did not state a claim under Section 2. Although she did not detail her specific objections to the decision, Ms. Varney characterized the refusal-to-deal at issue as "absolutely too extreme." This comment suggests that Ms. Varney's Antitrust Division may continue the prior administration's active amicus program, but with a liberal focus.

Patent Settlements. During the Bush administration, the DOJ and the FTC openly disagreed about how to analyze patent settlements between manufacturers of branded and generic pharmaceuticals, with the FTC adopting the more aggressive enforcement position. In fact, the DOJ's Solicitor General successfully urged the Supreme Court to deny the FTC's petition that the Court review the *Schering-Plough* reverse payments case. The agencies likely will now hew closely to the approach articulated in the past by the FTC generally and Chairman Leibowitz in particular. During the campaign, in his statement to the AAI, then-Senator Obama communicated his concern about such agreements and interest in targeting them: "An Obama administration will ensure that the law effectively prevents anticompetitive agreements that artificially retard the entry of generic pharmaceuticals onto the market, while preserving the incentives to innovate that drive firms to invent life-saving medications."

During his tenure on the FTC, Chairman Leibowitz has called eliminating "pay-for-delay" agreements "[o]ne of the most important objectives for antitrust enforcement in America today,"¹⁹ and he has taken a leading role in trying to stop them. In light of recent setbacks in federal circuit courts (*Schering-Plough*, *Tamoxifen*, *Ciprofloxacin*), the FTC appears to have changed its litigation strategy. For example, then-Commissioner Leibowitz joined the FTC's decision to issue a complaint in February 2008 to block an agreement by Cephalon that would have delayed the marketing of generic Provigil before 2012.²⁰ Unlike prior cases, where the FTC charged the parties with an unlawful agreement under Section 1 of the Sherman Act, here the

FTC asserted that Cephalon's conduct in entering into the settlement agreements constitutes an abuse of monopoly power under Section 2 of the Sherman Act. Commissioner Leibowitz would have gone still further. He disagreed with the majority's decision not to name the generic companies that accepted payment to delay entry as additional defendants. Finally, the FTC elected not to pursue administrative litigation (its usual path), instead commencing the action in federal district court in Washington, D.C.²¹

Chairman Leibowitz's efforts in this area are not limited to challenging these agreements through administrative and judicial ends. Both Chairman Leibowitz and Ms. Varney appear to support a legislative end to "pay-for-delay" agreements. Then-Commissioner Leibowitz testified in 2007 in favor of such a bill, which did not become law. This year, however, Senator Kohl introduced legislation entitled the "Preserve Access to Affordable Generics Act." During her confirmation hearing, Ms. Varney confirmed her opposition to reverse payment patent settlements and committed to working with her colleagues at the DOJ and the FTC to align the two agencies' views on this subject. She also told Senator Kohl that, "if the courts continue to not reach the result that you and your committee thinks is appropriate, then legislation may be necessary."

CONCLUSION

"Change" is coming to antitrust enforcement under the Obama administration. The enforcement agenda at the DOJ is likely to be markedly more aggressive under Ms. Varney's leadership than during the prior administration.

We can expect greater skepticism toward merging parties' efficiencies and entry arguments: Counsel should be prepared to take the time and spend the money to carefully and thoroughly document their claims. Vertical mergers will get a closer look and will be subject to longer investigations. Indeed, at both agencies, there will probably be an uptick in merger investigations that reach the "Second Request" phase rather than close after the initial 30-day review. But perhaps counsel can use that first 30-day period effectively more often, given the potential for improvement, if not an outright solution, to the flawed process for determining which agency has jurisdiction over a given merger.

The substantive disconnect between the agencies with respect to single-firm conduct and patent settlements will narrow considerably, with the DOJ moving toward the FTC. The Section 2 Report released under the prior administration most likely will not survive in its current form. Dominant firms will be subject to greater scrutiny, and the DOJ, like the FTC, will probably investigate and challenge single-firm conduct within the next four years. It will be interesting to see whether the administration attempts to use the amicus program to influence the case law in a more liberal direction, and whether such an effort is successful given Bush administration era cases like *Trinko* and *Schering-Plough*. Ending pay-for-delay settlements—either through case-by-case challenges or a legislative ban—will be a major priority for the FTC under Chairman Leibowitz and may receive more traction now with anticipated support from the DOJ.

Despite an overall "reinvigoration" of antitrust enforcement at both agencies, the most dramatic impact of the changes under Ms. Varney's and Chairman Leibowitz's stewardship are likely to be seen in a relatively small number of "close" cases. These are matters where, on the one hand, the agency has serious anticompetitive concerns about a transaction or specific conduct, but on the other hand, those concerns are tempered by potentially significant (but not altogether verifiable) procompetitive offsetting factors. In such matters, we believe the current antitrust enforcers are more likely than their predecessors to challenge perceived anticompetitive conduct.

Jones Day lawyers look forward to closely following antitrust developments and vigorously representing our clients throughout this period of increased enforcement activity.

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ENDNOTES

- 1 Ms. Boast and Mr. Weiser each have prior agency experience, as Senior Deputy Director and Director of the FTC's Bureau of Competition (1999-2001) and Senior Counsel to Joel Klein, Assistant Attorney General of the Department's Antitrust Division (1996-1998), respectively. Mr. Weiser also clerked for Justices Byron White and Ruth Bader Ginsberg at the U.S. Supreme Court from 1995-1996. Mr. Cavanaugh is an experienced antitrust litigator, and joins the DOJ from private practice. Mr. Kimmelman was most recently Vice President for Federal and International Affairs at Consumer Union (publisher of Consumer Reports). He is a recognized expert on deregulation and consumer protection issues, and has represented consumers in various fora, including in connection with major media and telecommunication mergers.
- 2 Statement of Senator Barack Obama for the American Antitrust Institute, available at <http://www.antitrustinstitute.org/Archives/pres01.ashx>.
- 3 See, e.g., Antitrust Advice for the New Administration: Roundtable Discussion (Robert Pitofsky remarks), *Antitrust*, Summer 2008, at 9 (Summer 2008) ("I believe the antitrust laws for the last four or five years have been underenforced. Now, my criticism is primarily addressed to antitrust enforcement at the Department of Justice. I think the Federal Trade Commission is doing a reasonable job."). Indeed, as indicated in its Annual Report, despite a reduction in merger filings, the FTC "filed a record number of preliminary injunction and administrative complaints since March 2008." *The FTC in 2009: Federal Trade Commission Annual Report*, at 4 (Mar. 2009), available at <http://www.ftc.gov/os/2009/03/2009ftcrptsv.pdf>.
- 4 Jonathan B. Baker & Carl Shapiro, "Detecting and Reversing the Decline in Horizontal Merger Enforcement," *Antitrust*, Summer 2008, at 29.
- 5 *Id.*
- 6 The chapter is included in *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust 235* (Robert Pitofsky, ed. 2008).
- 7 Christine A. Varney, Vertical Merger Enforcement Challenges at the FTC, Remarks before the PLI 36th Annual Antitrust Institute, July 17, 1995, available at <http://www.ftc.gov/speeches/varney/varta.shtm>.
- 8 Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, In the Matter of Time Warner Inc., Docket No. C-3709 (Feb. 7, 1997), available at <http://ftc.gov/os/1997/02/c3709other.htm>.
- 9 Varney, *supra* note 7.
- 10 Christine A. Varney, "Innovation Markets in Merger Review Analysis," *Antitrust*, Summer 1995, at 16.
- 11 Carl Shapiro, Statement at AMC New Economy Hearing, at 10 (Nov. 8, 2005), available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Shapiro.pdf.
- 12 See J. Thomas Rosch, Commissioner Fed'l Trade Comm'n, Antitrust Regulation of Innovation Markets (Feb. 5, 2009), available at <http://www.ftc.gov/speeches/rosch/090205innovationspeech.pdf> ("[W]hile innovation cases involving mergers in the pharmaceutical industry permeated the FTC's case load during the 1990s, claims of innovation harm virtually evaporated from complaints filed by the FTC from 2004-2008.") (footnotes omitted).
- 13 ABA Section of Antitrust Law, 2008 Transition Report 6 (2008), available at <http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf>.
- 14 "U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008)," available at <http://www.usdoj.gov/atr/public/reports/236681.htm>.
- 15 Statement of Commissioners Harbour, Leibowitz and Rosch on DOJ Section 2 Report, at 1 (2008), available at <http://www.ftc.gov/opa/2008/09/section2.shtm>.
- 16 Christine A. Varney, Panelist on Re-energizing Sec. 2 of the Sherman Act at the AAI Annual National Conference and 10th Anniversary Celebration (June 19, 2008), audio available at <http://www.antitrustinstitute.org/Archives/Varney.ashx>.
- 17 *Id.*
- 18 540 U.S. 398 (2004).
- 19 Concurring Statement of Commissioner Leibowitz, *FTC v. Watson Pharmaceuticals et al.* (Feb. 2, 2009), available at <http://www.ftc.gov/opa/2009/02/androgel.shtm>.
- 20 Fed. Trade Comm'n v. Cephalon, Inc., No.08-cv-2141-RBS (E.D. Pa. filed Feb. 13, 2008) (removed from D.D.C.).
- 21 The court granted Cephalon's motion to transfer venue to the Eastern District of Pennsylvania, where private cases challenging the same settlement had been pending. Cephalon alleged that the FTC brought the action in D.C. to obtain a circuit split, in the hopes of setting the stage for Supreme Court review. While the FTC did not state that this was its purpose in filings before the court, obtaining a circuit split is on the FTC's agenda. In January 2007, Chairman Leibowitz remarked that it is "a matter of public knowledge that [the FTC is] looking to bring a case that will create a clearer split in the circuits and encourage the Supreme Court to resolve this issue." Oral Statement of Commissioner Jon Leibowitz, Hearing of the Senate Judiciary Committee (Jan. 17, 2007) at 3, available at <http://www.ftc.gov/speeches/leibowitz/071701oralstatement.pdf>.

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