BakerHostetler

# Does Section 2 of the Sherman Antitrust Act Need More Bite?

*Last month, two members of Congress introduced the Monopolization Deterrence Act, which would allow the Justice Department and the Federal Trade Commission to seek civil penalties for monopolization offenses under U.S. antitrust law.*

By Carl W. Hittinger and Jeanne-Michele Mariani

After almost 120 years, does the Sherman Antitrust Act need statutory tweaking? Sens. Amy Klobuchar and Richard Blumenthal seem to think so. Last month, they introduced the Monopolization Deterrence Act, which would allow the Justice Department and the Federal Trade Commission to seek civil penalties for monopolization offenses under U.S. antitrust law. The bill would create two versions of a penalty for antitrust violations under Section 2, either 15% of a company's total U.S. revenue of the previous calendar year or 30% of the company's total U.S. revenue related to the unlawful conduct during the time it took place – whichever amount is greater. Section 2237 names no particular offenders or recent events as its impetus. Whether such massive civil fines would end up in the hands of the injured or just thrown into the public treasury remains unclear under the language of the bill.

The Sherman Antitrust Act already carries hefty civil penalties in terms of automatic treble damages, injunctive relief and related lengthy consent decrees, reasonable attorney fees and costs and possible disbarment from government contracts. Moreover, criminal penalties are also available for conspiratorial conduct under Section 1, but also arguably for predatory monopoly conduct under Section 2, with fines not to exceed $100 million for a corporation, or $1 million for an individual, and a prison term of up to 10 years.

When the act was first drafted in 1890, individuals found guilty of criminal antitrust conduct could be fined up to $5,000 and given a year in jail. As time went on, the penalties became harsher to keep up with inflation, and corporations and individuals could be fined separately. Up until the early 2000s, the act imposed fines of up to $10 million for corporations and $350,000 for an individual. Prison terms not exceeding three years could also be imposed for criminal conduct. In 2004, Congress amended the act to provide for even harsher penalties.

Now, the act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. The DOJ has been pressing the courts for 10-year sentences but so far no judge has imposed that amount of jail time. Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million. Despite all that daunting criminal and civil leverage, some still say that certain companies have grown so powerful that the fear of earning an injunction and related punishment for monopolization offenses no longer works as a successful deterrent, prompting the need for "more serious financial consequences," according to Klobuchar.

Historically, Sherman Act cases under Section 2 can be challenging to prove, based in large part on the fact that Sen. John Sherman (brother of General William Tecumseh) who introduced the bill, left the statute's centerpiece – what it means to "monopolize" – largely undefined, and the statutory language offers no further guidance in identifying prohibited conduct. There are many factors, situational and otherwise, that the courts have found since 1890 must be considered when bringing a Section 2 claim. The framers of the landmark legislation obviously recognized the need for a fact-based and expert inquiry and created the legislation with bare-boned provisions for that reason. After all, Section 2 is not necessarily aimed at smoking out ruthless cutthroat behavior operating within often dog-eat-dog competitive playing fields, which can often benefit consumers but waste other noncompetitive businesses in the process. The architects of the Sherman Act recognized the delicate balance between competition and competitors and had some foresight to limit its structured definitions so that the act would adapt with the passage of time, depending on the period in history and arguably the state of expert economic analysis.

This article is reprinted with permission from the Sept. 9, 2019, edition of *The Legal Intelligencer*.

Accordingly, with the dawn of both modern technology and the growth in expert science and analysis, consumer habits and competition processes have changed and advanced in ways that no one could have predicted when the Sherman Act was written in 1890. Some say mega companies have emerged over the past decades that can now barely feel the current statutory $100 million fine or even the millions or billions of treble damages and the rest at stake. And while no company wants the incumbent expensive and burdensome legal nightmare that staving off an antitrust case can often impose, both at the outset and in the outcome, there is growing concern, albeit unproven, that behemoth companies might be (foolishly) willing to (if not corporation crippling) take the legal hit than modify potential predatory behavior that has arguably benefited the corporation and its executives and shareholders. But the answer to fixing the alleged problem is not so simple.

"Do our antitrust laws need to be changed, or should we try to enforce the laws that we have more strongly? There's a lot of debate," says Carola Frydman, professor of finance at Northwestern University. "Getting new laws through Congress is not trivial. So let's think more carefully about enforcement, and how much discretion there is to achieve whatever we think might be the best outcomes."

Last month, Frydman wrote an article for the Kellogg School of Management at Northwestern University where she suggested that the answer may not be tougher laws. In coming to that conclusion, she used an interesting historical event to show how antitrust laws changed over time, without actually changing their text. She talks about the late William McKinley, described as having a "lax attitude" toward antitrust law. Historians say he was vaulted into the presidency by the business titans of the day perversely thinking McKinley would be a malleable head of state. Indeed, during his short tenure as president that thinking paid off as large corporations operated as seemingly unchecked de facto monopolists. When McKinley was killed by an assassin's bullet, however, his trust-busting vice president, Theodore Roosevelt, took over the helm using the newly minted Sherman Act with a renewed sense of vigor. This was much to the chagrin of the business titans who promoted McKinley thinking that Roosevelt would be effectively corralled if serving as vice president. They foolishly overplayed their hand even after Roosevelt became president.

While the laws themselves remained the same on paper, Roosevelt's desire to really enforce them gave the laws back their grit, an act which Frydman describes as political discretion, the real arbiter of change when it comes to the American legal system. Such executive discretion has been powerfully played out by some presidents thereafter. Other presidents have tried to quash such antitrust surges. Interestingly, by taking the laws and actually enforcing them, Frydman discovered the economic effects were immediate and clear: large companies that were particularly vulnerable to antitrust prosecution saw their stock prices lose nearly 30% more value after Roosevelt became president compared to companies without antitrust concerns.

It is crystal clear that the Sherman Antitrust Act as written can and certainly does have weighty consequences, particularly for individuals found criminally liable – years in prison can certainly tame one's predatory urges. But the debate about whether the Sherman Act has enough bite will continue, returning to the idea that the scale of companies of the day may not be effectively deterred by the potential remedies currently available on the books. Stay tuned.

---

***Carl W. Hittinger** is a senior partner and serves as BakerHostetler's antitrust and competition practice national team leader and is the litigation group coordinator for the firm's Philadelphia office. He concentrates his practice on complex commercial and civil rights trial and appellate litigation, with a particular emphasis on antitrust and unfair competition matters, including class actions. His experience also includes a judicial clerkship with Chief Judge Emeritus Louis C. Bechtle of the U.S. District Court for the Eastern District of Pennsylvania. He can be reached at 215.564.2898 or chittinger@bakerlaw.com.*

---

***Jeanne-Michele Mariani** is an associate in the firm's Philadelphia office in its litigation group. Her practice focuses on complex commercial and antitrust litigation matters. Her experience also includes a judicial clerkship with Judge Thomas I. Vanaskie of the U.S. Court of Appeals for the Third Circuit. She can be reached at 215.564.1509 or jmariani@bakerlaw.com.*



12.09.19.08.59_p01