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

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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.

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.
Interestingly, by taking the helm using the newly minted Sherman Act with a trust-busting vice president, Theodore Roosevelt, took over the reins of the business titans who promoted McKinley thinking that thinking McKinley would be a malleable “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 their teeth, 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 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.

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