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ANTITRUST LAW SOURCE PODCAST

WITH JAY LEVINE

Episode 51: The Antitrust Revolution: The Antitrust Revolution: New Brandeisians Keep Their Promise | Aug. 3, 2021

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Welcome to Porter Wright's Antitrust Law Source.

Jay: Okay. Good morning. This is Jay Levine, the editor of antitrust law source and the firm's podcasts. And I am once again thrilled to be joined by my colleague Carrie Garrison. Morning, Carrie.

Carrie: Morning, Jay.

Jay: So, you know, in our ongoing series about the antitrust revolution, our third article deals with Senator Klobuchar antitrust competition legislation, aptly named Competition and Antitrust Law Enforcement Reform Act. And I think the reform is the key there. And Carrie, why don't you kick us off by giving us sort of a an overview of sort of what this legislation is about?

Carrie: Definitely Jay. So Klobuchar introduced this legislation, kind of as a kickoff from the 2020 democratic platform. I mean, we knew some major antitrust legislation was coming. And it seems like she really planned this to be brought in with the democratic controlled Congress. So it's really a good time to bring this radical and progressive legislation. And she's really taken advantage of that. Klobuchar has introduced legislation in the past, but this is really the pinnacle and probably the most progressive antitrust legislation we've seen in in recent years. This bill is really has broad and far reaching implications, we can tell that it's going to affect really every major market, or at least many markets in the United States. It really embraces the new Brandeisians' concerns about growing market concentration and power. And it really redefines what anti-competitive conduct and really competition what it means. The new Brandeisians really abandon this consumer welfare standard. And we really see that embraced in this bill, especially in the findings, Jay, why don't you tell us a bit about those findings?

Jay: Yeah, so you know, every legislation comes with "findings." But this bill has some 25 findings, and several of them are, are really noteworthy. One of them says that competition fosters small business growth, reduces economic inequality and spurs innovation and job creation. And interestingly, again, this focus on small business growth and economic inequality, these are terms that have not really been present as part of a focus for antitrust, certainly in the last several, several decades. Another is that there's the presence and exercise of market power is substantial and growing, which, again, sort of feeds into the new Brandeisians, you know, worry about that. But then there's another one that says that the market power has particularly damaging effects on historically disadvantaged communities, again, not normally concerns for antitrust laws. Yet they are here, you know, in front and center in the findings for this legislation. Similarly, they talked about market power and markets of concentration,

contributing to the consolidation of political power, something that really does smack of both President Roosevelt's in, as you may remember, from our previous articles and podcasts, of course, he talked about the acquisition of nascent or potential rivals by dominant firms, which we know, is a big concern, actually across both aisles. And then, you know, to your to your point about the consumer welfare, they basically say that courts and enforcement policies have limited the vitality of the antitrust laws by, quote focusing inordinately on the effect of an acquisition on price in the short term, to the exclusion of other potential anti-competitive effects. And that's is certainly a dig at this notion of consumer welfare being the primary focus of antitrust. And then it goes on to basically say that exclusionary conduct and the like, has not really been enforced too much because of courts relying on inaccurate economic assumptions that are inconsistent with contemporary economic learning, such as presuming the market power is not durable and can be expected to self-correct, that monopolies can drive as much more innovation than a competitive market. And that above cost pricing cannot harm competition and other flawed assumptions. Again, sort of direct attacks on the Chicago School and its foundations. With that as sort of a backdrop and a foundation, we can better appreciate what this legislation is hoping to achieve in its details. And I guess, devils in its details, so let's get right to it. Carrie, you want to tell us a little bit about some of the merger provisions?

Carrie: Definitely Jay. You're right. I mean, the devil is really in the details here. There's some broad and far reaching implications of this legislation. And it starts with this amending of the Clayton Act. Klobuchar aims to lower the threshold for what mergers and acquisitions violate antitrust laws. And in certain cases, she even creates a presumption of illegality for certain transactions. And she does this by creating this new standard. It's a new threshold, that's it's a lower threshold to meet, and it prohibits mergers and acquisitions that create an appreciable risk of materially lessening competition. And we know what materially means from the bill, it defines materially to mean more than a de minimis amount. But it does remain to be seen how courts will interpret the phrase materially lessening competition. And I think it's, it's going to remain to be seen how this is really going to be interpreted. But I think that we can see that if, depending on how courts are going to interpret it, this really could have a really, really broad effect on mergers and acquisitions. And I mean, what is this de minimis amount? I mean, is that just any moving of the needle? Is that a really big change in competition? I mean, I think based on de minimis, we can define that to be a really small amount, but just how small is going to be up to the court. So I mean, this this legislation is really going to have a significant effect in the antitrust world.

Jay: So, Carrie, what is she trying to change the standard from and means, what is the Clayton Act say now?

Carrie: What the Clayton Act says now is substantially less than competition. So Klobuchar is moving from substantially to materially..

Jay: So I guess it does remain to be seen. But clearly, they think that's a fairly tough standard for merging parties to meet. As you said, there's also certain presumptions built into the bill. Interestingly, the courts are to presume that certain mergers already have an appreciable risk of material you lessen competition, including those that would lead to a more than 50% market share any deal worth more than $5 billion, involving a company worth more than 100 billion, and any acquisitions that would lead to a significant increase in market concentration. Again, those terms are not defined either. But in all of those cases, the burden of the proof shifts to the mark to the merging parties to prove that their merger or acquisition will not in fact, create an appreciable risk of materially lessening competition. And it's wholly unclear how they can do

that. So that's pretty much of a fairly radical change from what's there. Now. The bill also sort of goes beyond mergers and deals with exclusionary conduct, right Carrie?

Carrie: Definitely Yeah, the bill does address exclusionary conduct and it really seeks to strengthen current law by expanding the definition of exclusionary conduct clothes which are makes unlawful, acting alone or in concert with others to engage in exclusionary conduct that presents an appreciable risk of harming competition. So again, we're seeing this really broad language substantially, materially and this appreciable risk. So much like the rest of the bill, we're not super sure what this means yet. But we will see that once if the bill is passed. And then it when courts interpret it. The exclusionary conduct that Klobuchar is protecting against is conduct that either materially disadvantages one or more actual or potential competitors, or tends to foreclose or limit the ability or incentive of one or more actual, or potential competitors to compete. So we really see the broad implications in that language, the actual or potential competitors. So think it's going be pretty hard to apply this, don't you think, Jay?

Jay: Yeah. There is a presumption or there is a view of perspective, that the antitrust laws have just gotten too hard for plaintiffs or enforcers to prove that there's harm and this essentially lowers that bar and says that an appreciable risk doesn't have to be definite, it doesn't have to be a lot. It's just, there has to be some there has to be a measurable risk. And that's pretty much it. And that can really affect a lot of conduct. And especially in our very fast paced world. This is going to be sort of hard for enforcers and courts to figure out this is kind of turning things on a dime. But she also here also includes certain presumptions, right.

Carrie: Right Jay. So the presumptions here state that exclusionary conduct is presumed if it is engaged in by one or more entities that have a market share of 50%, or otherwise has significant power in the relevant market. So again, this really broad and ambiguous language, the significant power in a market, what does that mean? I mean, are entities going to fall into this exclusionary conduct? If we don't have a clear line of court interpretation of what exactly this these words mean, I think that really remains to be seen.

Jay: Right. I think you're absolutely right in and in our next article and podcast, we're going get into sort of the implications and consequences of this bill. But I mean, one can sit back and sort of see a world where if this, if this bill passes, we as antitrust lawyers, a client comes to us and says, Can I do this? You know, we're now going to have for as a counseling matter, is this going to otherwise increase your significant power in the relevant market. Again, these are words and standards that have not yet been developed. And it's a, it's going to be hard to rely on past case law, given the fact that there is a paradigm shift here. But

Carrie: Definitely, I think, though, I think, though, that I mean, part of the counseling, may be relying on this language in the bill, that this presumption can be defeated by a showing of distinct pro-competitive benefits. So perhaps the counseling will move toward developing some kind of evidence or showing documents that would show that there is not going to be these distinct pro-competitive benefits in order in order to defeat this presumption. So I guess we do have that out there that the bill provides.

Jay: Well, you're absolutely right. And that's actually a very, very prescient point. Because, you know, as we know, whether you're dealing with section one or section two, there is this inherent sort of framework, which was actually just sort of laid out in the NCAA case that came out last week where you need to first Identify the anti-competitive effects, you then identify whether there are any pro-competitive benefits that sort of outweigh, and then you identify whether you could achieve those benefits by a substantially less restrictive means. And this may have effect

of sort of presuming the anti-competitive effect, and really spending a lot of your time on the pro-competitive benefit, which, of course, is very hard to determine whether that pro-competitive benefit outweighs the anti-competitive effects. We do it and we have to, but as a counseling matter, I can see where that's going to drive some people a little bit, to taking Tums and other acid medication, because it's certainly uncertain, but, the bill, in some respects. So, we've laid out some of the some of the highlights, but the bill also includes very, very interesting things that really go to rounding out how the democrats want to reshape, antitrust enforcement, it calls for much tougher civil fines. You know, it's the fines for violations of section one, section two or the like, are going to be the greater of 15% of a company's total US revenue. And again, for some, that's, that's pretty, pretty hefty, or 30%, of the company's US revenue that's related to the illegal conduct. And again, depending on how you apply that that can that can be pretty, pretty tough. Senator Klobuchar, in this bill also increases dramatically the budgets for the FTC and DOJ, more people, more studies, that's going to translate to more enforcement actions. And then it also sets up within the FTC, an entirely new division that's designed to study markets to study mergers after they've been completed, to see how they've gone a lot of the empirical work that we have talked about that they are empowering the FTC to do now, in conjunction with already these, these measures. And again, that's very forward thinking, and will help him to create a database of this information. This is in many respects, a holistic approach to changing and I trust. You know, Carrie, what other provisions kind of struck you from this bill?

Carrie: Yeah, there's another provision that I found really interesting. Klobuchar aims to strengthen Whistleblower Protection. So this goes hand in hand with the strengthening of enforcement, and providing a bigger budget to strengthen enforcement. But I think this Whistleblower Protection really adds to that foundation for aggressive antitrust enforcement. And that's really the theme of this bill. I mean, we're seeing throughout the findings and all these provisions, really just aggressive, and progressive, antitrust enforcement.

Jay: Yeah, absolutely. I couldn't agree more. As I said, there's a lot of consequences implications for businesses, for antitrust lawyers for almost everybody from this bill, and we really sort of, you know, deserves its own article and podcasts. And that's what we'll devote the next time to, as well as a couple of the other measures that the Democrats have brought. And then down the line, we're also going to detail what the Republicans have brought because they've also brought some fairly game changing legislation that deserves its own sort of examination, and that has its own implications. But, I think we've given you enough to chew on for now. So as always, we if you have any comments or thoughts, please let us know. You can reach me on Twitter as @JayLLevine. I am also on LinkedIn. My email is letter jlevine@porterwright.com. I am the host of the podcast and the editor of antitrust laws source. And once again, I'm joined by my wonderful colleague Carrie Garrison. Carrie, how can people get in touch with you?

Carrie: Yes, please reach out to us for questions or comments. You can reach me on twitter at @CGarrisonESQ. My email is cgarrison@porterwright.com. And I'm also on LinkedIn. So please reach out to us. Let us know what you think about this new legislation.

Jay: Have a wonderful day. We hope you all stay safe and stay tuned.