

Will President Trump Revive Section 2 of the Sherman Act?

AntitrustConnect Blog

November 15, 2016

Brad Geyer (GeyerGorey LLP)

Please refer to his post as: Brad Geyer, 'Will President Trump Revive Section 2 of the Sherman Act?', AntitrustConnect Blog, November 15 2016, <http://antitrustconnect.com/2016/11/15/will-president-trump-revive-section-2-of-the-sherman-act/>

When I concluded by summer of 2015 that our next President would be Donald Trump, my closest friends and associates were skeptical. Having grown up in the New York media market and reading the "Art of the Deal" after college, I studied Donald Trump because he was interesting. You are free to see it differently, but I see in President-Elect Trump as a strategic and tactical thinker who comes off as being spontaneous and off the cuff, but is actually in the third decade of his strategic plan. To read his books and to watch old videos shows a consistency in public policy views that is startling.

Few took President-Elect Trump seriously over the years in his statements about Antitrust, but like the protagonists in a movie, the best ones like to tell the antagonists that it's coming. Any mystery about President-Elect Trump's Antitrust enforcement priorities should have been eliminated when in his "Gettysburg address" outlining his plans for his first 100 days, he blasted the media and turned his ire toward the Comcast / NBC Universal merger stating that the merged company is "trying to poison the mind of the American voter," and said that the deal should never have been approved in the first place, and that it's bad for democracy ([here](#)). He took his complaints further, promising action to prevent AT&T from buying Time Warner, the parent company of CNN, which he argued would concentrate too much power in one company ([here](#)). "We'll look at breaking that deal up and other deals like it," he vowed. "They're trying to poison the mind of the American voter."

President-Elect Trump has already been equally clear in expressing his thoughts about Amazon^[1]:

Amazon has "a huge antitrust problem," and (Jeff) Bezos (owner of the Washington Post and founder of Amazon.com) "thinks I would go after him for antitrust."

- from the Twitter account of @realDonaldTrump (May 14, 2016)([here](#))

President-Elect Trump may have the most sophisticated view of Antitrust Law of any U.S. President in history. That experience was recently referenced by [Emre N. Ilter](#) in the National Law Review:

Mr. Trump was involved in three significant antitrust proceedings in the late 1980s and early 1990s. First, in 1988, Mr. Trump paid a \$750,000 civil penalty to settle charges brought by the US Department of Justice (DOJ) and Federal Trade Commission (FTC) that he had violated the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) by acquiring stock in two companies without making timely HSR filings. Around the same time, Mr.

Trump, as one of the owners of the New Jersey Generals US Football League team, was involved in a private antitrust suit against the National Football League (NFL)—a case that resulted in a jury verdict that the NFL had willfully acquired or maintained monopoly power in a market consisting of major league professional football in the United States, in violation of Section 2 of the Sherman Act. Damages of \$1, trebled to \$3, were awarded. *US Football League v. Nat'l Football League*, 842 F.2d 1335 (2d Cir. 1988). Finally, Mr. Trump, in connection with his Atlantic City casinos, was sued by Boardwalk Properties, Inc. on numerous grounds including allegations that he had attempted to monopolize casino gambling and had conspired to suppress competition. After a lengthy legal battle, Mr. Trump prevailed. ([here](#)).

Combine experience, competition sophistication and seething intensity^[2] and recognize that in the early 1980's there were 50 media companies in the United States. Now that number is 6^[3]. I suspect he believes there is a significant conscious parallelism among these six companies and there seems to be tight coordination and collaboration –a common gestalt — among these organizations on a host of issues. Call it a “thought cartel”. I would suggest that recent Wikileaks disclosures are likely to have reinforced this view among him and his team of advisors who may suspect that media companies are inducing lax regulation through maximizing the benefits of close relationships of its media figures with the political apparatus.^[4] Further, is President-Elect Trump viewing AT&T, Time Warner, Amazon, Comcast and even Google^[5] individually as “media and information trusts”, as he finalizes his enforcement initiatives? My hunch is that he is and that each of these companies is at risk of enhanced enforcement attention.

It is clear that President Elect-Trump understands the power of the bully pulpit and he knows that if he can get AT&T and Time Warner to abort merger discussions before “the sheriff even rides into town” that means: 1) less work for him; 2) emboldened career civil service enforcers who were gearing up to make the case for blocking it; and 3) an enhanced perception of the Antitrust Division's power. This, before he takes the oath of office in January, means enhanced leverage on day one.

I believe that it is possible he will pick a high visibility company, possibly on the crest of the wave of an aborted AT&T deal, to break up. So what potential “trust” will it be? Amazon has attracted criticism and controversy for years. Many of the criticisms are tied to allegations of anti-competitive or monopolistic behavior. Does President-Elect Trump agree with Paul Krugman who recently penned, “Amazon.com, the giant online retailer, has too much power, and it uses that power in ways that hurt America.”^[6] Could the Department of Justice under the leadership of an Attorney General appointed by President-Elect Trump quite credibly take the view that Amazon is the *Standard Oil Company* or the *AT&T* or the *Microsoft* of its day^[7] and bring an action to break it up?

I am certain that President-Elect Trump will announce that enforcement of the nation's Antitrust Laws needs to be reinvigorated and that allegations of predatory pricing and attempts to monopolize certain sectors of the economy will not be tolerated. Some might expect that a Republican administration would line up alongside lax Section 2 enforcement. It is clear, however, that whatever else might be expected in a Trump administration, based on his statements throughout the campaign, consistency with Republican orthodoxy is not that thing and affected companies would be well served to increase their outside counsel budget.

Mr. Geyer is a partner in the Washington and Philadelphia-based law firm of GeyerGorey LLP. Prior to entering private practice he was a prosecutor in the Antitrust Division of the Department of Justice for 21 years. From 2007 through 2012 he served as the Antitrust Division's Special Counsel to the Criminal Division involving “war zone” cases and investigations involving procurement fraud and grand fraud.

This post originally appeared on the [CartelCapers](#) blog.

1. President-Elect Trump on Hannity May 12, 2016 at 15:59 through 17:20. “[Jeff Bezos is] using the Washington Post . . . he’s using that for political purposes to save Amazon in terms of taxes and in terms of antitrust.
2. Any member of the Antitrust defense bar who would like to get a flavor of what I suspect will be reinvigorated Antitrust Enforcement under a Trump administration would be well served to [watch this video](#) which shows Seth Rogan and President Obama roasting President Elect Trump in 2011. If you are like me, when you watch this video you see a ferocious Kodiak bear in a cage that is being poked with sticks. The Bear is not reacting, but you can tell he is going to bust out of the cage and tear the pokers to shreds . . . after he constructs an ingenious plan. There is something about his reaction that makes you feel uncomfortable from the first Rogan joke. You want to plead with the men with the sticks to “please just stop.” You actually look in your hand to make sure you aren’t holding a stick and try to drop it anyway. That is called power and intensity and control. He has it and he knows how to use it.
3. See, *The Media Monopoly*, 6th Edition, March 24, 2000, by Ben H. Bagdikian.
4. For example, in an [April 15, 2014 email](#) released by WikiLeaks, Eric Schmidt, CEO of Google, proposed that a \$1.5 billion Clinton Campaign vehicle be formed that, among other things, to convert each voter to a single record that aggregates all that is known about them. Are enforcers entitled to wonder if voters across the country want to be converted into a record and whether this market share in this endeavor is aided by power in Google’s core businesses? Would Google’s relationship with the Clinton campaign team regenerate an interest in their potential antitrust issues as Europe has? (When enforcers read this email does it bring the movie, “the Clockwork Orange” to mind like it did for me?).
5. See, <http://www.nytimes.com/2016/10/31/technology/google-europe-antitrust.html>
6. See, http://www.nytimes.com/2014/10/20/opinion/paul-krugman-amazons-monopsony-is-not-ok.html?_r=0
7. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); *United States v. American Tel. and Tel. Co.* , 552 F.Supp. 131 (D.D.C. 1982); *United States v. Microsoft Corp.* , 56 F.3d 1448 (D.C.Cir . 1995).