

🖨️ Click to print or Select 'Print' in your browser menu to print this document.

Page printed from: <https://www.law.com/newyorklawjournal/2021/01/27/at-nysba-panel-amy-klobuchar-says-pandemic-hurt-competition-but-sees-moment-of-hope-for-antitrust-legislation/>

At NYSBA Panel, Amy Klobuchar Says Pandemic Hurt Competition, But Sees 'Moment of Hope' for Antitrust Legislation

"We all know there's a risk that we are going to emerge from the pandemic with an even more consolidated economy, more concentrated, less competitive. That's because 100,000 American small businesses have already closed for good, with thousands more at risk, increasing market concentration," the Minnesota Democrat said. Klobuchar is expected to become the new chairwoman of the Senate's antitrust law subcommittee.

By Jason Grant | January 27, 2021



Senator Amy Klobuchar (D-MN). Photo: Diego M. Radzinski/ALM

As she prepares to lead the U.S. Senate's subcommittee on antitrust law and reportedly introduce an expanded version of her past bill targeting corporate monopolies, Sen. Amy Klobuchar, D-Minnesota, told New York antitrust lawyers this week that the nation's business economy "may emerge with even less competition" and "more of a problem" due to the coronavirus pandemic forcing more than 100,000 smaller businesses to close.

"We all know there's a risk that we are going to emerge from the pandemic with an even more consolidated economy, more concentrated, less competitive. That's because 100,000 American small businesses have already closed for good, with thousands more at risk, increasing market concentration in many industries," Klobuchar told dozens of antitrust attorneys gathered virtually for her keynote address to the New York State Bar Association's Antitrust Law Section. Klobuchar's almost 20-minute, prerecorded talk on Monday evening was part of the antitrust group's "Virtual Reception" closing out its portion of this year's two-week NYSBA annual meeting.

Throughout much of her address, Klobuchar focused on the recent decades' increasing monopolization of key industries such as Big Tech, pharmaceuticals, health care, agriculture and media. She also talked about how that concentration of market share, as she put it, creates "the lack of competition that leaves consumers and small business with rising costs and fewer options."

"There's research showing that reduced competition actually increases income inequality," Klobuchar noted at one point.

She also talked with optimism, though, about the chance to rein in or break apart some of the growing monopolization, now that newly installed President Joseph Biden is appointing new Department of Justice and Federal Trade Commission agency heads who are expected to focus more on combating anti-competitive behavior, and now that the Senate is controlled by the Democrats. That post-election change means Klobuchar, who in recent years has been the Democrat's ranking member on the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, is expected to be named chairwoman of the important subcommittee.

"We are living through one of the most challenging periods in our nation's history," Klobuchar told the lawyers watching her address, mostly from their homes, over a Zoom video feed. "Millions [of people] are suffering from the economic destruction during this pandemic" and "our political divisions are there in full force, and continue to test the strength of our democracy. This is a moment that calls for serious reflection, and national resolve."

"But I also see it as a moment of hope," she said. "Yes, maybe I'm an optimist. ... You have to be when you're trying to pass antitrust legislation in the U.S. Capitol."

Klobuchar has been a leader among federal legislators in recent years in proposing new antitrust legislation. Last year, for example, she introduced the Anticompetitive Exclusionary Conduct Prevention Act (https://www.klobuchar.senate.gov/public/_cache/files/f/8/f81f969e-1c81-4d10-90aa-178a6cb4f159/3A75B8609ADDE8D20C57297DA5B687D7.aecpa.pdf), though it died in the subcommittee. According to a March 2020 Winston & Strawn blog post about the bill, it "aim[ed] to amend the over-century-old Clayton Antitrust Act in order to 'reinvigorate' antitrust enforcement across the economy" and it appeared to be "specifically intended to target industries like pharmaceuticals and telecommunications that—according to Klobuchar—are riddled with players that have grown too 'big.'"

“Klobuchar’s bill ... seeks—as one of its principal goals—to ‘Shift[] the Burden of Proof so that powerful companies that have a market share of greater than 50% or that otherwise have substantial market power would have to prove’ that their alleged ‘exclusionary conduct’ does not present an ‘appreciable risk of harming competition,’” the Winston blog post noted while quoting from parts of the proposed bill.

Now, Klobuchar is expected to reintroduce the legislation, though in somewhat expanded form, in the Democrat-controlled Senate, according to a Bloomberg report (<https://www.bloomberg.com/news/articles/2021-01-26/klobuchar-to-propose-anti-monopoly-bill-to-tame-tech-giants>) published Tuesday.

The longtime senator, who attended the University of Chicago Law School and worked both at law firms and as a prosecutor when practicing law, made clear during her address that legislation would be central in trying to limit and control monopoly power, in part, she said, because using the courts in the near term won’t work.

She noted that the federal judiciary has been well-stocked with conservative-leaning judges in recent years who have largely shot down one antitrust action after another.

“It’s clear that courts are not going to be the solution here in the, we’ll say, near term,” said Klobuchar.

But “maybe some of it will work, or [the government] wouldn’t bring these cases,” she continued, pointing to an ongoing Justice Department case against Google and a pending FTC case against Facebook.

But, she said, to win important antitrust cases, in general, “we have to get resources into the [FTC and DOJ agencies],” and she indicated that she hoped more resources will be put into antitrust enforcement under a Biden administration.

She noted that in 1980, at the time of AT&T’s historic, forced corporate breakup, the DOJ’s antitrust division had 453 lawyers, where as in 2017 it had just 330 lawyers. And the FTC in 1980, she said, had 1,719 employees. But in 2018 it had only 1,102 employees, she said.

“You can’t go after the most sophisticated companies in the country unless you have the resources,” Klobuchar told the antitrust bar group, which is chaired by Benjamin Sirota, a Kobre & Kim partner in Manhattan. “We need to be as sophisticated as they are,” said the senator.