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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Judge Merrick Garland: Supreme Court Nominee and Antitrust Scholar

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Since March 16, 2016, when President Barack Obama nominated Chief Judge Merrick Garland to fill the vacant seat on the U.S. Supreme Court, much has been written about the political standstill surrounding his confirmation. While Senate Republicans refuse to grant Garland either a hearing or a vote, Democrats tout his reputation as a fair-minded and moderate jurist, known for being a consensus-builder on the U.S. Court of Appeals for the D.C. Circuit where he currently sits as chief judge.

Though his confirmation seems far from a sure thing, many have wondered what we could expect in the antitrust domain if Garland were to take Justice Antonin Scalia's now-empty seat on the high court. One distinct possibility is an increase in the number of antitrust cases heard by the Supreme Court. Though his experience with the subject matter does not rival that of Justice Stephen Breyer, who served as a special assistant to the U.S. Assistant Attorney General for Antitrust before his appointment to the U.S. Court of Appeals for the First Circuit, Garland has shown an affinity for the topic prior to his own appointment to the D.C. Circuit in 1997.

> Judge Garland's votes on a variety of antitrust issues bolster the view that he is a measured jurist, whose decisions are uninfluenced by ideology.

State Action Doctrine

While working in private practice at Arnold & Porter, Garland had a one-year stint as a professor of Advanced Antitrust at his alma mater, Harvard Law School, in 1985–86. The next year, he wrote a well-known antitrust article for the Yale Law Journal. At the time of his writing, other antitrust academics were calling for a revision of the state action doctrine, which immunizes state regulations from challenge under the Sherman Act. Those academics, concerned that special interest groups could lobby for anticompetitive state regulations, proposed to narrow the scope of state action immunity in order to preempt economically inefficient state regulations.

In the article, "Antitrust and State Action: Economic Efficiency and the Political Process," Garland argued that state regulation should not be preempted by the federal antitrust laws simply because it is inefficient or restrains competition because to do so would be a tremendous interference with the state political process. He said that such a proposal was "little more than a return to the era the Court left behind when it repudiated *Lochner v. New York*."[1] *Lochner* is the landmark Supreme Court decision from 1905 that struck down a New York law that limited the number of hours that a bakery

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employee could work each day and each week.[2]

The court held that "liberty of contract" was implicit in the Due Process Clause of the Fourteenth Amendment—a view from which the court has since distanced itself.[3] In his article, Garland wrote that "[t]he substitution of 'antitrust' for 'due process' and 'economic efficiency' for 'liberty of contract' does not make the assault on democratic politics any more palatable."[4] Garland recognized the value in maintaining economic competition (just as there is value in liberty of contract), but argued that the value is not sufficiently high to justify interfering with the political process. Thus, by citing the widely discredited Lochner opinion, Garland signaled his concern with judicial interference, under the guise of the antitrust laws, with a state's political decisions.

The article was not without its critics. John Shepard Wiley Jr., then a law professor at the University of California, Los Angeles, wrote a reply defending the proposal that federal courts invalidate state regulations that are inefficient and the result of businesses or special interest groups lobbying state governments as both consistent with Supreme Court precedent and economically desirable.[5] In a short response to Wiley's article, Garland cautioned that "a respect for the decisions of elected local governments…counsels hesitation in adopting such a dramatic restructuring of American federalism in the absence of any mention of the possibility in the legislative history of the antitrust laws."[6]

Garland advocated instead a limited exception to state immunity for laws "that do no more than delegate to business competitors the power to restrain competition" because such laws "offend the Sherman Act in the most direct possible way" and must be preempted in order to prevent the gutting of the federal antitrust laws.

Garland's view of the state action doctrine found recent support in *North Carolina State Board of Dental Examiners v. FTC*, which held that state professional boards controlled by market participants must be actively supervised by the state in order to be immune from federal antitrust laws.[7] Justice Anthony Kennedy's opinion even cited Garland's article.

If Garland's view of antitrust law has changed or developed over the course of his tenure on the bench, we would be hard-pressed to know. Though he has joined the majority in six cases involving a substantive analysis of antitrust law, he has not authored any opinions on the subject. The panel decisions, however, support the picture of Garland as a measured jurist without obvious ideological bent, finding for both plaintiffs and defendants depending on the facts and applicable precedent.

Earlier Cases

Garland was not on the bench long before his first encounter with an antitrust case in 1998. In *Ostrzenski v. Columbia Hospital for Women Foundation*, the plaintiff alleged that seven individual doctors and the six hospitals at which they practiced had engaged in an illegal group boycott in order to put him out of business, including by manipulating the peer review processes at the hospitals.[8] The three-judge panel, including Garland, issued a short per curiam opinion affirming the district court's grant of summary judgment for defendants, finding that "no reasonable jury could find plaintiff was denied hospital staff privileges as the result of an unlawful antitrust conspiracy, rather than because of concern about his medical competence."

A year later, in *Thomas v. Network Solutions*, Judge Garland joined a majority opinion affirming dismissal of an "essential facilities" claim, which is a claim that has developed through case law that finds that a firm has monopolized a market by controlling, and denying competitors access to, a facility (such as a utility or special technological resource) that is essential to entry into or competition within the relevant market. In *Thomas*, plaintiffs (individuals and entities who registered domain names) brought an essential facilities claim against defendant (the company through which plaintiffs registered those domain names) on the ground that defendant monopolized the domain name registration market by refusing to allow potential competitors to utilize its domain name database.[9]

The court dismissed the claim because plaintiffs were not competitors of defendant and thus failed to satisfy an element of the claim. In so holding, the court declined to affirm on the same grounds as the district court, which had held that defendant Network Solutions, Inc., was immune from antitrust liability because of its contractual relationship with the National Science Foundation, itself a federal agency and therefore immune from the antitrust laws.

On Network Solutions' potential immunity, the D.C. Circuit wrote, "[i]t is not obvious to us…that a private contractor automatically shares the federal agency's immunity simply because the contractor's allegedly anti-competitive conduct occurred…'pursuant' to a government contract." The opinion contrasted the immunity of federal contractors with that of entities under state regulation, noting that in the latter situation considerations of federalism counseled in favor of immunity—reasoning in line with Garland's earlier "Antitrust and State Action"article.

In 2000, a three-judge panel, including Garland, issued a per curiam opinion granting the FTC's emergency motion to enjoin the merger of H.J. Heinz Company and Milnot Holding Corporation, the nation's second- and third-largest manufacturers of baby food.[10] The merging parties claimed that their union would actually increase competition because the combined entity would be better able to compete with Gerber, the largest baby food manufacturer. In granting the emergency injunction, the court noted the FTC's "substantial probability of success" given that "no court has ever approved a merger to duopoly under similar circumstances."

Just five months later, another three-judge panel, again including Garland, granted the FTC a preliminary injunction of the merger.[11] The court stressed the importance of the structural presumption in cases under Section 7 of the Clayton Act—the idea that the structure of the market, including factors such as relative market shares and market concentration, can create a presumption of illegality. The court acknowledged that such a presumption could be overcome in principle, but only by "extraordinary" efficiencies, and found those efficiencies "sufficiently uncertain" in this case.

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Pharmaceuticals

Later in 2001, Judge Garland heard an antitrust case under the Hatch-Waxman Act, Pub. L. No. 98-417, 98 Stat. 1585 (1984) (codified in various sections of titles 21, 35 and 42 U.S.C.), the federal law that governs the manufacture of generic drugs by the pharmaceutical industry. In *Andrx Pharmaceuticals v. Biovail Corporation International*, Andrx, a generic drug manufacturer, was the first to file an abbreviated new drug application to manufacture a generic drug, triggering a 180-day marketing exclusivity period under the Hatch-Waxman Act.[12]

When Andrx was later sued by the drug's patent holder (HMRI) for infringement, those two parties reached an agreement whereby HMRI paid Andrx $40 million a year in exchange for refraining to market a generic version of the drug. Andrx filed suit against the FDA and other drug applicants to protect its marketing exclusivity and Biovail, a drug manufacturer and applicant, brought a counterclaim for illegal restraint of trade.

The D.C. Circuit reasoned that, while the Hatch-Waxman Act does provide marketing exclusivity, the "statutory scheme does not envision the first applicant's agreeing with the patent holder of the pioneer drug to delay the start of the 180-day exclusivity period." Thus, the court held that while the district court was correct to dismiss Biovail's antitrust counterclaim for failure to sufficiently allege injury, it should not have done so with prejudice, as it remained possible for Biovail to allege its intent and preparedness to enter the market and that the agreement between Andrx

and HMRI prevented it from doing so. The unanimous decision thus affirmed the dismissal of Biovail's antitrust claim, but reversed the district court's decision to dismiss the claim with prejudice.

Class Certification

Garland's next antitrust case did not actually involve any substantive antitrust analysis. In 2002, a panel, including Garland, held that interlocutory review under Federal Rule of Civil Procedure 23(f) was not appropriate where defendant challenged class certification on the basis that plaintiffs lacked antitrust standing, a requirement different than constitutional standing, which is an appropriate basis for review under Rule 23(f).[13] Antitrust standing requires that the plaintiff has suffered antitrust injury ("injury of the type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful"[14]) and is an efficient enforcer of the antitrust laws.

The *In re Lorazepam & Clorazepate Antitrust Litigation* court conceded that "whether a class of direct purchasers has antitrust standing under the particular circumstances at issue is a novel question of law," but reasoned that "the question is unrelated to class certification under Rule 23."[15]

It was not until 2013 that Garland encountered another substantive antitrust case, *In re Rail Freight Fuel Surcharge Antitrust Litigation*, in which the court vacated class certification in a price-fixing case.[16] There, the court determined that, unlike in *In re Lorazepam*, review under Rule 23(f) was appropriate, in part because of an intervening Supreme Court decision, *Comcast Corp. v. Behrend*,[17] that had bearing on the district court's decision. The dispute involved freight customers alleging that the four major freight railroads conspired to impose rate-based fuel surcharges on shipments over their tracks.

Reaching the merits, the court then called into question the damages model that plaintiffs had relied on to show damages caused by the defendant rail companies' fuel surcharge programs. The district court had considered the damages model essential to its certification decision, but on appeal defendants demonstrated that the model produced false positive results. Remanding the case to the district court to reconsider the model, the court reasoned that after *Behrend* "[i]t is now indisputably the role of the district court to scrutinize the evidence before granting certification.…[The] models are essential to the plaintiffs' claim they can offer common evidence of classwide injury. No damages model, no predominance, no class certification."

Conclusion

Though Garland did not author any of these opinions, his votes on this variety of antitrust issues bolster the view that he is a measured jurist, whose decisions are uninfluenced by ideology. While *FTC v. H.J. Heinz* and *Andrx Pharmaceuticals* show a slight pro-enforcement tendency, decisions such as *Thomas* and *In re Rail Freight* take a more critical approach to plaintiffs' antitrust claims. His experiences with these cases, as well as his interest in antitrust law before taking the bench, suggest that he could provide another vote in favor of granting petitions for certiorari in antitrust cases should he ever be confirmed by the Senate.

1. 96 Yale L.J. 486, 488 (1987) (footnote omitted).
2. 198 U.S. 45 (1905).
3. Fifty years later, the court repudiated *Lochner*, declaring "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (1955).
4. 96 Yale L.J. at 488.
5. John Shepard Wiley Jr., "Revision and Apology in Antitrust Federalism," 96 Yale L.J. 1277 (1987).
6. Merrick B. Garland, "Antitrust and Federalism: A Response to Professor Wiley," 96 Yale L.J. 1291, 1294 (1987).
7. 135 S. Ct. 1101, 1111 (2015).
8. 158 F.3d 1289, 1290–91 (D.C. Cir. 1998).
9. 176 F.3d 500, 509 (D.C. Cir. 1999).
10. *FTC v. H.J. Heinz Co.*, No. 00-5362, 2000 WL 1741320, at *1–2 (D.C. Cir. Nov. 8, 2000).
11. *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).
12. 256 F.3d 799, 809 (D.C. Cir. 2001).
13. *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 107–09 (D.C. Cir. 2002).
14. 725 F.3d 244 (D.C. Cir. 2013).
15. 133 S. Ct. 1426 (2013).