BakerHostetler

The Antitrust Points of View of Supreme Court Nominee Neil Gorsuch

By Carl W. Hittinger and Tyson Y. Herrold, The Legal Intelligencer

February 6, 2017

Introduction

Last March, we wrote a series of articles discussing Supreme Court Justice Antonin Scalia's antitrust legacy on the Supreme Court.We noted Scalia's admitted discomfort with the Sherman Act, specifically with holding corporate defendants, even monopolists, liable absent strong evidence of anti-competitive conduct. His likely successor appears to possibly hold similar views of the antitrust laws, ostensibly applying the Sherman Act to avoid replacing procompetitive, free-market behavior with judicially imposed, anti-competitive fiat, based on the record presented.

On Jan. 31, President Donald J. Trump nominated Neil M. Gorsuch, a judge on the U.S. Court of Appeals for the Tenth Circuit since 2006 , to fill Scalia's seat on the Supreme Court. Gorsuch has a long and storied background in antitrust work. Indeed, perhaps as much as former Justice John Paul Stevens.After graduating from Harvard Law School and eventually clerking for Supreme Court Justices Byron White and Anthony Kennedy (the most senior justice now on the Supreme Court), Gorsuch entered private practice where he brought and defended several major antitrust actions.

Thereafter, upon his appointment to the Tenth Circuit, Gorsuch issued three high-profile antitrust opinions that shed light on his substantial expertise in the area. This article will focus on Gorsuch's antitrust opinions. Future articles will focus on his antitrust experiences in the private sector and at the Department of Justice, where he briefly served.

'Novell v. Microsoft'

Perhaps Gorsuch's most significant antitrust decision was Novell v. Microsoft, 731 F.3d 1064 (10th Cir. 2013). In that case, Novell, developer of WordPerfect, sued Microsoft, developer of Windows 95 as well as a number of Microsoft applications, arguing the software developer violated Section 2 of the Sherman Antitrust Act by refusing to share its intellectual property with rival software developers.

The dispute arose out of Microsoft's position as the developer of the popular Microsoft Windows operating system. In addition, Microsoft developed applications to run on its own system, including Microsoft Office Suite. Other companies, known as independent software vendors, competed with Microsoft's applications, which, according to Gorsuch's opinion, benefitted Microsoft because it provided consumers with more functionality on the Microsoft OS. As Microsoft was rolling out its Windows 95 OS, it decided not to share its intellectual property with competing vendors, causing those vendors to reverse engineer Microsoft's code and ultimately write their own. Novell claimed this gave Microsoft Office a significant head start over Novell's competing suite, known as PerfectOffice, and permanently harmed the ultimate success of its software.

Novell sued Microsoft in the U.S. District Court for the District of Utah for antitrust violations in the market for computer operating systems. As Gorsuch put it, "one might be excused for thinking Novell's lawsuit charged Microsoft with ... seeking or maintaining a monopoly in some sort of market for applications generally or office

Reprinted with permission from the February 6, 2017 edition of the Legal Intelligencer© 2017 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or reprints@alm.com.

suite applications particularly." In a twist of litigation acrobatics necessitated by a long-expired statute of limitations, however, Novell brought a claim for unlawful monopolization of the computer operating systems market, claiming Microsoft's refusal to provide its intellectual property to competing vendors threatened to monopolize the market for operating systems. The court entered a post-trial judgment as a matter of law in Microsoft's favor, which Novell appealed.

Gorsuch's opinion, affirming the entry of post-trial judgment, offers an incisive critique of the over application of antitrust law. He rejected the argument that Microsoft had to provide Novell with its intellectual property in order to avoid harming Novell's marketing position. Such a judicially created edict, he explained, would "paradoxically risk encouraging collusion between rivals and dampen price competition-themselves paradigmatic antitrust wrongs." Moreover, "forcing monopolists to hold an umbrella over inefficient competitors might make rivals happy but it usually leaves consumers paying more for less" as companies are forced, he said, to prop up inefficient competitors. He also expressed anxiety over the courts assuming the legislative-esque responsibility of choosing which competitors should be required to deal with rivals, explaining it would "only risk judicial complicity in collusion ... dampen price competition ... and would also require judges to become central planners ... a role for which ...judges lack many comparative advantages and a role in which Uudges] haven't always excelled in the past." Therefore, Gorsuch concluded, Microsoft's purely unilateral decision not to deal with its rival vendors by sharing its intellectual property did not violate the Sherman Act.

'Four Corners Nephrology v. Mercy Medical Center of Durango'

In a similar case, Four Comers Nephrology v. Mercy Medical Center of Durango, 582 F.3d 1216 (10th Cir. 2009), Gorsuch authored an opinion ruling that a hospital's refusal to allow a physician to use its inpatient nephrology facilities did not violate the Sherman Act. In an attempt to build a nephrology practice in Durango, Colorado, Mercy Medical offered a physician an exclusive practice, thereby refusing to allow other local physicians to use Mercy Medical's nephrology facilities. In response, a doctor who requested and was denied access to Mercy's nephrology unit filed suit under Section 2 of the Sherman Act, alleging Mercy's refusal to deal with him constituted the unlawful monopolization of the market for nephrology services.

Gorsuch disagreed and affirmed the grant of summary judgment. Invoking the same point of view as in the Novell v. Microsoft case, he explained that a business has no obligation to share its facilities with a competitor. "This presumption should hardly surprise. Allowing a business to reap the fruits of its investments is an important element of the free-market system: it is what induces risk taking that produces innovation and economic growth." He rejected the plaintiff-physician's argument that Mercy Medical's refusal to deal entrenched its monopoly over the local nephrology services market. To the contrary, refusing to deal with competing physicians actually benefitted consumers, Gorsuch explained. Based on the record developed in discovery, Gorsuch found that before the medical provider granted the exclusive practice "there were no full-time nephrologists in Durango"; now there were two. "As a result, the consumers-the people of Durango and members of the Southern Ute tribe-have greater access to nephrology services."

'Kay Electric Cooperative v. Newkirk'

Finally, in Kay Electric Cooperative v. Newkirk, 647 F.3d 1039 (10th Cir. 2011), Gorsuch explored the application of the antitrust rules to a municipality acting as a market participant. In that case, Newkirk, Oklahoma provided electricity to citizens in the Newkirk city limits while its main competitor Kay Electric Cooperative provided electricity to nearby customers outside of town. When a new jail was built outside the city limits, the city and Kay Electric submitted bids to provide electricity to the facility. Kay Electric submitted a much lower bid, but the jailelected to buy the city's service. "Why? Because Newkirk is the only provider of sewage services in the area and it refused to provide any sewage services to the jail-that is, unless the jail also bought the city's electricity," said Gorsuch.

Kay Electric sued the city under the Sherman Act, alleging it had engaged in unlawful tying and attempted monopolization. The district court dismissed the case under Rule 12(b)(6), relying on the Parker state action immunity doctrine, which developed out of the U.S. Supreme Court case Parker v. Brown. In that case, the Supreme Court rejected the notion that states play by the same antitrust rules as private companies and concluded Congress intended to permit states to enact anti-competitive policies when they saw fit. The Supreme Court soon extended its holding in Parker to municipal subdivisions of state governments, as Gorsuch put it in Kay Electric, "answering the question conclusively by holding a municipality is immune from antitrust liability

Reprinted with permission from the February 6, 2017 edition of the Legal Intelligencer© 2017 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or reprints@alm.com.

when there is a clear articulation of a state policy to authorize anti-competitive conduct."

Applying the case law to the city of Newkirk, Gorsuch looked to the Oklahoma Rural Electric Cooperative Act, which preserved the right of rural electric cooperatives to continue operating even if their service area was annexed by local government, and the Electric Restructuring Act, which indicated a policy of encouraging competition in the electricity generation market. Gorsuch concluded there was no express state authorization for Newkirk to act anti-competitively.Moreover, the Cooperative Act and the Restructuring Act foreclosed any contention that the reasonably foreseeable result of Newkirk's municipal powers was the creation of a municipal electricity monopoly.Therefore, he reversed the district court's ruling that Newkirk's conduct was immune under the state action immunity doctrine as a matter of law.

In his nearly 11-year career on the bench of the Tenth Circuit, Gorsuch has been no stranger to the antitrust laws, writing three significant opinions. Even before he reached the bench, however, he had made a name for himself under the Sherman Act, winning what is widely regarded as the largest antitrust verdict in history.Next month we will discuss his antitrust experiences in private practice.

Stay tuned.

Carl W. Hittinger is a senior partner in Baker & Hostetler's antitrust group and the litigation group coordinator for the firm's Philadelphia office. He concentrates his practice on complex commercial and civil rights trial and appellate litigation, with a particular emphasis on antitrust and unfair competition matters. He can be reached at 215-564-2898 or chittinger@bakerlaw.com. Tyson Y. Herrold is an associate in the firm's Philadelphia office in its litigation group. His practice focuses on complex commercial and antitrust litigation matters. His experience also includes judicial clerkships for U.S. District Judge Ma/achy E. Mannion of the Middle District of Pennsylvania, Judge C. Dame/I Jones II of the Eastern District of Pennsylvania and Judges Dolores K. Sloviter of the U.S. Court of Appeals for the Third Circuit. He can be reached at 215-568-3439 or therrold@bakerlaw.com.

bakerlaw.com

Recognized as one of the top firms for client service, BakerHostetler is a leading national law firm that helps clients around the world to address their most complex and critical business and regulatory issues. With five core national practice groups – Business, Employment, Intellectual Property, Litigation and Tax – the firm has more than 940 lawyers located in 14 offices coast to coast. For more information, visit bakerlaw.com.

Baker & Hostetler LLP publications inform our clients and friends of the firm about recent legal developments. This publication is for informational purposes only and does not constitute an opinion of Baker & Hostetler LLP. Do not rely on this publication without seeking legal counsel.

© 2017 BakerHostetler®

Reprinted with permission from the February 6, 2017 edition of the Legal Intelligencer© 2017 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or reprints@alm.com.