

Supreme Court Nominee Amy Coney Barrett's Record on Antitrust

We have written about the antitrust views and backgrounds of other justices on the court, such as Justice John Paul Stevens, and more recently Justice Ginsburg, Justice Neil Gorsuch and Justice Brett Kavanaugh; however, Judge Barrett remains the wild card in this area of the law.

By Carl W. Hittinger and Jeanne-Michele Mariani

With the passing of Justice Ruth Bader Ginsburg, President Donald Trump has nominated her successor, Judge Amy Coney Barrett to fill the open seat on the U.S. Supreme Court. On Monday, Oct. 26, the full Senate is scheduled to vote on her confirmation.

We have written about the antitrust views and backgrounds of other justices on the court, such as Justice [John Paul Stevens](#), and more recently [Justice Ginsburg](#), [Justice Neil Gorsuch](#) and [Justice Brett Kavanaugh](#); however, Judge Barrett remains the wild card in this area of the law. She has only been on the U.S. Court of Appeals for the Seventh Circuit since 2017 and has spent most of that time on cases with little connection to the antitrust world. Despite the Seventh Circuit being well known for its antitrust jurisprudence, none of the opinions in which Barrett has participated in provide much insight into her approach to or views on the antitrust laws. Reviewing the panels on which she has sat, Barrett only participated in a total of seven antitrust cases, writing only one majority opinion and authoring no concurrences or dissents. As such, a review of any of those opinions provides limited information about what Barrett specifically thought of the arguments counsel made or the underlying legal issues.

Furthermore, these appeals were not particularly complex. In three cases, the court affirmed a district court dismissal of the antitrust claims. Another case saw the court summarily affirm the district court's dismissal of the case and sanction the plaintiff for bringing a frivolous appeal; and finally one other case, while involving an antitrust claim in the district court, on appeal dealt only with questions of patent law and contract law. Only one case, *Marion Healthcare v. Becton Dickinson & Co.*, decided earlier this year on March 5, dealt with a remand to the district

court. In that opinion, authored by the chief judge of the circuit, the court vacated and remanded the dismissal of an antitrust claim by health care providers that alleged that their suppliers formed a vertical conspiracy to raise prices. The case was remanded for what the court called an error of law on behalf of the district court, as it had failed to carry out properly its indirect purchaser analysis. Finally, the sole antitrust case that Barrett authored, *PMT Machinery Sales v. Yama Seiki*, revolved around a violation of the Wisconsin Fair Dealership Law. Appellant PMT Machinery Sales alleged it had an exclusive-dealership arrangement with Yama Seiki, which the latter breached by using other companies to promote the sale of its machines. The court, led by Barrett, held that PMT "failed to show that it had any dealership agreement with Yama Seiki, much less an exclusive one." Again, the antitrust issues in this case took a backseat to the more common issue of statutory interpretation and what was meant by an "exclusive dealership agreement." With this being the most substantive antitrust opinion she has participated in, the tea leaves are muddled as to where she stands on these issues.

During her confirmation hearing, however, Barrett offered a rare glimpse into her thinking on federal antitrust law. Her confirmation comes at a time when concerns by some over big technology companies have drawn the attention of the Department of Justice, which just last week sued Google over alleged monopoly improprieties. When asked her thoughts on the Sherman Antitrust Act by Sen. Amy Klobuchar, who chairs the subcommittee on antitrust, Barrett responded that "the text of the Sherman Act, as the court has determined over time, essentially permits the court to develop a common law," Barrett went on to

BakerHostetler

say, “So I think, you know, I haven’t really had occasion to decide very many antitrust cases on the Seventh Circuit, but it’s an area, because it’s largely been left to judicial development, that is controlled by precedent for the most part.” What Barrett meant by this exactly is unknown, but she is most likely referring to the simplicity with which the Sherman Act, the major law controlling antitrust activity, was written by Congress, with little guidance as to what constitutes anticompetitive activity. Congress purposefully left it to the courts to unravel and hone the Sherman Act, which they have done, albeit sometimes, to suit the times and the industry at issue. In that sense, she is correct that it has been left up to the courts to decide how to enforce the Sherman Act and to give color to what constitutes a violation of that statute.

With Barrett being a former law clerk of Justice Antonin Scalia, and her expressing admiration for his textualist approach, and perhaps his unique antitrust views, [which we have written about](#), her ascent to the Supreme Court could be good news for large corporations who may be wary of future antitrust investigations or lawsuits. Stayed tuned.

Carl W. Hittinger is a senior partner and serves as Baker & Hostetler’s antitrust and competition practice team leader and is 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, including class actions. He can be reached at 215.564.2898 or chittinger@bakerlaw.com.

Jeanne-Michele Mariani is an associate in the firm’s Philadelphia office in its litigation group. Her practice focuses on complex commercial and antitrust litigation matters. Her experience also includes a judicial clerkship with Judge Thomas I. Vanaskie of the U.S. Court of Appeals for the Third Circuit. She can be reached at 215.564.1509 or jmariani@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 address their most complex and critical business and regulatory issues. With six core national practice groups – Business, Digital Assets and Data Management, Intellectual Property, Labor and Employment, Litigation, and Tax – the firm has nearly 1,000 lawyers located 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.

© 2020 BakerHostetler®

26.10.20.16.35_p03

This article is reprinted with permission from the Oct. 23, 2020, edition of *The Legal Intelligencer*.