BakerHostetler

Attorney General Nominee Merrick Garland's Antitrust Experience

In early January 2021, President Joe Biden announced his intent to nominate U.S. Court of Appeals for the D.C. Circuit judge, and former Supreme Court nominee, Merrick Garland to lead the Department of Justice.

By Carl Hittinger and Tyson Herrold

In early January 2021, President Joe Biden announced his intent to nominate U.S. Court of Appeals for the D.C. Circuit judge, and former Supreme Court nominee, Merrick Garland to lead the Department of Justice. If confirmed as Attorney General, the department's antitrust division would report to him. Since his moribund nomination to the Supreme Court in 2016, Garland has been heralded by some commentators as an antitrust expert. Garland certainly has experience with antitrust matters, not particularly common with prior attorneys general.

As an adjunct professor at Harvard Law School from 1985-86, Garland briefly taught antitrust law, focusing on immunities and exemptions. The following year, he wrote an antitrust article for the Yale Law Journal on the state antitrust immunity where he called for deference to state regulation. As a partner at Arnold & Porter, he litigated one published antitrust case involving a tying claim. On the D.C. Circuit, Garland joined the majority in several antitrust cases, authored a partial concurrence and dissent in an open-records case implicating alleged harm to competition, and recently wrote an opinion dismissing antitrust claims against big tech under the Communications Decency Act's immunity provision. He will be the first federal judge in recent memory to serve as the Attorney General.

Garland's initial antitrust case on the D.C. Circuit was *Thomas v. Network Solutions*, a 1999 case in which domain name registrants sued the National Science Foundation, a federal agency, and Network Solutions, a private contractor, for alleged monopolization violations of the Sherman Act Section 2. The registrants alleged that Network Solutions, which was essentially responsible for maintaining the internet and assigning domain names, abused its monopoly power by refusing to allow potential competitors to introduce new top-level domains, e.g., .com, .gov or .org. The district court dismissed the claim, finding that the "federal instrumentality doctrine" immunized Network Solutions from antitrust liability due to its contract with the National Science Foundation.

A three-judge panel of the D.C. Circuit, including Garland, affirmed the dismissal, but on grounds raised for the first time on appeal – that the plaintiffs lacked standing to assert an "essential facilities" claim because they were not direct competitors of Network Solutions.

In 2000-01, Garland was a member of two three-judge panels in *FTC v. H.J. Heinz* that considered the Federal Trade Commission's bid to enjoin a merger between the second- and third-largest manufacturers of jarred baby food, Heinz and Milnot Holding Corp., the parent of Beech-Nut. In 2000, Garland joined in a per curiam opinion granting an emergency injunction of the merger, pending the appeal. The opinion credited the FTC's economic analysis showing the jarred baby food market was highly concentrated, being dominated by "three principal manufacturers," and concluded that the FTC demonstrated a substantial probability of success in showing under Section 7 of the Clayton Antitrust Act that the merger would substantially lessen competition. The court rejected Heinz and Milnot's "novel defense" that increased efficiency would bolster competition against the dominant player in the industry, Gerber, deeming the agreement a "merger to duopoly." The D.C. Circuit deferred to FTC expertise and found the proposed efficiencies too "uncertain" to overcome the FTC's "strong evidence" that the merger would lead to anticompetitive concentration. It opted to maintain the status quo: "The public interest in enforcement of the antitrust laws is strong; any injury to competition from going forward with the merger would plainly be irreversible, while the same cannot be said for any loss to competition from its delay." One year later, as a member of a different three-judge panel, Garland enjoined the merger on similar grounds, pending administrative review of the deal by the FTC.

That same year, in *Andrx Pharmaceuticals v. Biovail International*, Garland again joined a three-judge panel in reversing the district court's dismissal of antitrust counterclaims brought by Biovail against Andrx.

This article is reprinted with permission from the Jan. 22, 2021, edition of *The Legal Intelligencer*.

The case involved a dispute over Andrx's rights as the first filer of an abbreviate new drug application, known as an ANDA filing, which, if approved, would have given Andrx 180-day generic drug exclusivity. The district court dismissed Biovail's antitrust counterclaims *with prejudice*, concluding there was no "injury-in-fact" because Biovail had yet to win FDA approval of its own generic. The D.C. Circuit held the district court erred in granting the motion to dismiss with prejudice because Biovail could have repled its claim with allegations of its "intent and preparedness to enter the market."

In *McDonnell Douglas v. Air Force*, a 2004 case, Garland authored a partial concurrence and dissent. A so-called "reverse" Freedom of Information Act case, McDonnell Douglas challenged as arbitrary and capricious the decision of the Air Force to disclose to competitor Lockheed Martin portions of McDonnell Douglas's contract with the Air Force for maintenance of KC-10 and KDC-10 aircraft. Though not strictly an antitrust case, McDonnell Douglas argued that parts of the contract were trade secrets exempt from disclosure, and, if released, would give Lockheed Martin a competitive advantage in future bidding for government contracts. The district court found for the Air Force, but the D.C. Circuit reversed in part, finding that disclosure of some information in the contract "would likely cause McDonnell Douglas substantial competitive harm by informing the bids of its rivals in the event the contract is rebid." Garland concurred in part and dissented in part, writing that the information was not shielded from disclosure and that the majority failed to give the Air Force deference in finding no competitive harm.

In 2008, Garland heard another case about public access to government records. In *Stolt-Nielsen Transportation Group v. United States*, Stolt-Nielsen, a shipping company, allegedly joined an international cartel and colluded with other shipping companies to not compete on deep-sea trade routes. Fearing prosecution, Stolt-Nielsen in 2000 entered into an amnesty agreement with the antitrust division of the U.S. Department of Justice under the division's corporate leniency program. Thereafter, the department revoked the amnesty agreement for purported noncompliance and sued Stolt-Nielsen. In a series of FOIA requests, Stolt-Nielsen sought "all amnesty agreements entered into by the antitrust division from August 1993 to the present." For confidentiality reasons, Stolt-Nielsen agreed that names and identities could be redacted. The Department of Justice refused. In subsequent FOIA litigation, the district court granted summary judgment in favor of the government.

The D.C. Circuit reversed and remanded, holding that the antitrust division had improperly relied on a paralegal's conclusion that limited redactions were not possible.

In 2013, Garland joined in a unanimous panel that reversed a district court's approval of class certification in a railroad freight price-fixing case called In re *Rail Freight Fuel-Surcharge Antitrust Litigation*. There, the D.C. Circuit found that the plaintiffs' damages model was over-inclusive and may have inappropriately included parties that did not suffer any antitrust injury. The case again found its way to the D.C. Circuit in 2019 when Garland joined a panel in affirming the district court's denial of class certification because the damages model did not prove class-wide injury, thereby precluding a finding that issues common to the class would predominate.

Finally, in June 2019, Garland in *Marshall's Locksmith Service v. Google* authored an opinion affirming the dismissal of Sherman Act Section 1 and Section 2 claims against Google, Microsoft and Yahoo! by applying the Communications Decency Act's Section 230 immunity provisions. The complaint alleged that the search engine operators conspired to "flood the market of online search results with information about so-called 'scam' locksmiths, in order to extract additional advertising revenue." As Garland explained, "Section 230 immunizes internet services for third-party content that they publish, including false statements, against causes of action of all kinds." Garland's opinion chiefly addressed whether the defendants' geographic mapping of purportedly sham locksmith businesses, based on information provided by the sham locksmith businesses themselves, constituted "information provided by another information content provider." Finding that it did, Garland affirmed the district court's dismissal.

In conclusion, as a federal judge Garland has addressed antitrust issues in a measured, thorough, and circumspect manner. He has shown deference to government agencies, including the FTC, and the states, while remaining a strong advocate of the public's right of access to government documents. He also seemed to apply the Communication Decency Act's immunity provision strictly, a timely issue as the Department of Justice pursues antitrust cases against big tech companies and calls from Congress mount to revisit that immunity provision. Garland, if confirmed, will no doubt bring to the Department of Justice a wealth of antitrust experience. He also brings a judge's eye for getting it right and, in turn, will hopefully pursue only winnable antitrust cases based on sound legal and policy principles. Stay tuned.

This article is reprinted with permission from the Jan. 22, 2021, edition of *The Legal Intelligencer*.

BakerHostetler

***Julian Perlman**, Philadelphia-based counsel at BakerHostetler, contributed to the preparation of this article.*

***Carl W. Hittinger** is a senior partner at BakerHostetler and serves as the firm's antitrust and competition practice national team leader and also litigation group coordinator for the Philadelphia office. He concentrates his practice on complex antitrust and unfair competition matters, including class actions. His experience also includes a judicial clerkship with Chief Judge Emeritus Louis C. Bechtle of the U.S. District Court for the Eastern District of Pennsylvania. He was appointed a special master in several complex matters by Bechtle. 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 litigation, particularly antitrust and unfair competition matters, as well as civil rights litigation. Immediately before joining the firm, he clerked for Judge Dolores K. Sloviter of the U.S. Court of Appeals for the Third Circuit, serving during her last year on the bench.*

This article is reprinted with permission from the Jan. 22, 2021, edition of *The Legal Intelligencer*.