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Judge Merrick Garland's Antitrust Past: A Brief Summary

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Since President Obama announced Judge Merrick Garland's nomination to the Supreme Court of the United States last Wednesday, March 16, 2016, many have opined on his qualifications as well as the political fight about his confirmation this election year. A few articles have noted Judge Garland's academic background—that he taught Advanced Antitrust at his alma mater, Harvard Law School, while working in private practice in the 1980s. During that time, Judge Garland also published articles in the *Yale Law Journal* and *Harvard Law Review* on antitrust issues.

Although his time as an antitrust academic ended nearly 30 years ago, Judge Garland's articles remain relevant and continue to be cited by the courts and legal academics. For example, his article, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486 (1986), was cited by Justice Kennedy in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015), in February 2015. In *Antitrust and State Action*, Judge Garland argued that courts and legal theorists should not rely on antitrust principles of economic efficiency to justify interference with state regulations and should not permit preemption of state regulations except where state governments delegate market regulation to private parties. 96 Yale L.J. at 487-88. The Supreme Court cited Judge Garland's article in recognizing this limited exception to state immunity. *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1111.

Since his appointment to the U.S. Court of Appeals for the District of Columbia

Circuit in 1997, Judge Garland has been on several panels deciding antitrust cases, but has not authored any opinions. The panel decisions, however, can give us some insight as to how he may decide antitrust issues if his nomination is successful:

- In *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), the court vacated class certification in a price-fixing case and remanded to the district court for consideration under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). In particular, the D.C. Circuit was concerned that Plaintiff's damages model yielded false positive results, which, "if accurate, [] would shred the plaintiffs' case for certification" because "[c]ommon questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact." *In re Rail Freight*, 725 F.3d at 252-53.

- The court held interlocutory review under Rule 23(f) was not appropriate where defendant's challenges to class certification—that plaintiffs lacked antitrust standing—was a merits question unrelated to the Rule 23 factors. *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 107-09 (D.C. Cir. 2002).

- In *Andrix Phamaceuticals, Inc. v. Biovail Corp. Int'l*, 256 F.3d 799 (D.C. Cir. 2001), the court held that the district court erred in dismissing with prejudice defendant's counterclaim based on lack of antitrust injury or standing where the defendant could have amended its counterclaim to allege a cause of action. In that case, plaintiff had an agreement with a third-party that contained "allegedly anticompetitive provisions, including [plaintiff's] pledge to continue to . . . forestall other applicants from receiving final FDA approval . . .[, which] could reasonably be viewed as an attempt to allocate market share and preserve monopolistic conditions." at 811. Thus, the agreement could have caused defendant's injury by delaying entry into the market.

Judge Garland's earlier antitrust cases included: (i) granting the FTC's emergency motion to enjoin the merger of baby food manufacturers H.J. Heinz Company and Milnot Holding Corporation; (ii) affirming dismissal of an "essential facilities" claim because plaintiffs were not competitors of defendant; and (iii) affirming dismissal of a group boycott claim brought by a doctor against seven defendants because the plaintiff failed to present evidence tending to exclude the possibility that the alleged conspirators acted based on legitimate rather than anticompetitive reasons. *FTC v. Heinz, H.J. Co.*, Case No. 00-5362, 2000 WL 1741320 (D.C. Cir. Nov. 8, 2000); *Thomas v. Network Sols., Inc.*, 176 F.3d 500 (D.C. Cir. 1999); *Ostrzenski v. Columbia Hosp. for Women Found, Inc.*, 158 F.3d 1289 (D.C. Cir. 1998).

In sum, these decisions reflect a measured application of the law that is neither pro-plaintiff nor pro-defendant. Judge Garland's understanding of economic theory underlying antitrust law can, as shown in *Rail Freight*, benefit antitrust defendants faced with class certification motions that hinge on plaintiffs' experts flawed analyses.