

## Antitrust Record Review: Obama's Judges

Law360, New York (March 24, 2011) -- The antitrust philosophy of President Barack Obama was a unique campaign topic for the former law professor, and has been scrutinized since he took office. Although the president's initial rhetoric — and that of his Federal Trade Commission appointments — expressed interest in aggressive enforcement, his administration has been both chided and praised for not actively prosecuting businesses and preventing mergers.[1]

But even if the administration went on the antitrust offensive, it would still have to convince courts to provide the relief it sought. To that end, the administration can also influence antitrust policy through its judicial appointments. A review of early Obama appointees reveals several judges with extensive antitrust experience who may leave a lasting impression on antitrust policy.

### The Supreme Court

It would be difficult for the president to make any serious impressions on antitrust doctrine with just two Supreme Court appointments so far. The lack of public pronouncements on antitrust from Justice Elena Kagan make it difficult to predict her antitrust leanings. But, in Justice Sonia Sotomayor, Obama selected a justice who developed expertise and respect in antitrust through her lower-court decisions.

#### *Justice Sonia Sotomayor*

In her first antitrust case on the high court, Justice Sotomayor signed on to the opinion in *American Needle v. NFL*,<sup>[2]</sup> which cited her Second Circuit concurrence in *MLB v. Salvino*.<sup>[3]</sup> In *Salvino*, professional baseball teams collectively sued a licensee for selling products with MLB logos outside its licensing agreement. The licensee counterclaimed that the teams' joint licensing was a per se violation of Section 1 of the Sherman Act.

Though Sotomayor supported the affirmance of the district court's dismissal of the plaintiff's counterclaim, she sharply disagreed with the majority's view that there was no price-fixing agreement. Judge Sotomayor was clear that the clubs' decision to not compete was "the essence of price-fixing."

She then analyzed the clubs' joint venture under the "doctrine of ancillary restraints" and found the venture promoted efficiency. In ratifying the clubs' agreement, she cited case law that relied on the writings of Judge Robert Bork.

Justice Sotomayor has established antitrust bona fides in other labor and professional sports contexts. In *Clarett v. NFL*, she held that the "nonstatutory" exemption of labor activities from the antitrust laws removed NFL age-eligibility rules from antitrust scrutiny.[4] This intersection of labor and antitrust law also arose in Judge Sotomayor's famous district court ruling that led to the end of the 1995 baseball players' strike.

In *Silverman v. Major League Player Relations Committee*,[5] Sotomayor found that owners engaged in unfair labor practice by unilaterally deviating from a competitive free-agent system, which she held was a mandatory subject of collective bargaining. In so ruling she rejected the owners' argument that they, as employers, have a reciprocal statutory right to collectively bargain with players.

And in *Todd v. Exxon Corp.*, she reversed the dismissal of employees' claims that oil companies depressed wages by exchanging information on employee compensation, finding the district court erred by not considering several market factors in deciding that the collusion concerned a plausible product market.

Another important decision came in *In re Visa Check/Mastermoney Antitrust Litigation*. [6] In that case, Judge Sotomayor reviewed economic evidence of harm to tying victims to uphold the certification of a nationwide class of merchants. The case was later settled for what was then the largest monetary settlement in the history of the Sherman Act.

These rulings reveal Sotomayor as confident in applying legal doctrines, deferential to federal polices and conversant in economic theory. They do not reveal her as especially sympathetic to antitrust plaintiffs or defendants.

## **Circuit Courts**

As of March 1, the Senate had confirmed 17 of Obama's appointees to the federal circuit courts. The list of confirmed appointees with antitrust experience includes Gerard Lynch, Second Circuit; [7] Denny Chin, Second Circuit; [8] Joseph Greenaway, Third Circuit; [9] Thomas Venaskie, Third Circuit; [10] James Wynn, Fourth Circuit; [11] and Kathleen O'Malley, Federal Circuit. [12]

As with Justice Sotomayor, these nominees have sided with both plaintiffs and defendants and demonstrated a nuanced familiarity with legal doctrine and economic theory. Three judges — Gerard Lynch, Joseph Greenaway and Thomas Venaskie — have the most notable antitrust records.

*Hon. Gerard Lynch*

Judge Lynch may be best known for authoring the district court opinion in *Bell Atlantic v. Twombly*. In *Twombly*, Judge Lynch dismissed consumers' claims that regional telecom companies (known as incumbent local exchange carriers or ILECs) violated Section 1 of the Sherman Act by not competing and prohibiting new companies (known as competing local exchange carriers or CLECs) from entering the ILECs respective service areas. Judge Lynch first stated that an antitrust complaint cannot make "bare bones" statements of conspiracy or injury, but rather must allege specific facts to support the inference of a conspiracy.

Judge Lynch's analysis closely aligned with the Supreme Court's "plausibility" standard announced in overturning the Second Circuit's reversal of Judge Lynch's decision. Judge Lynch went on to analyze the history of and incentives in the telecom market to conclude there were not sufficient facts to support an inference that the ILECs engaged in a conspiracy. This reasoning, too, was followed in Justice David Souter's majority opinion.

After the Supreme Court's opinion in *Twombly*, Judge Lynch dismissed other antitrust actions at the Rule 12 stage. In *Arista v. Lime Group LLC*, major record labels sued a file-sharing service for copyright infringement. The service countersued, claiming the labels conspired to monopolize the market for copyrighted sound recordings purchased over the Internet through enforcement of a mandatory licensing scheme.

Judge Lynch, however, dismissed the counterclaim. He compared the case to *Twombly*, finding the conspiracy allegations to be mere "conclusory statements of concerted action, or at best, on mere parallel conduct."

But Judge Lynch has not uniformly dismissed antitrust claims at the pleading stage. Prior to *Twombly*, in *Linens of Europe v. Best Manufacturing*, he denied a motion to dismiss a conspiracy complaint under Rule 12, noting that "where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly."

That case, however, involved allegations that the defendants used intimidation to exclude potential competitors, which was supported in admissions made by members of the alleged cartel.

*Hon. Joseph Greenaway*

On Feb. 9, 2010, the Senate confirmed Joseph Greenaway to replace Justice Samuel Alito on the Third Circuit. On the federal district court bench in New Jersey, Judge Greenaway wrote several antitrust opinions, with varying results for plaintiffs and defendants.

But his involvement in the *K-Dur* litigation provides his most extensive antitrust analysis. In that case, private purchasers and the commonwealth of Pennsylvania alleged that branded and generic pharmaceutical manufacturers violated the Sherman Act by contracting to exclude or delay generic entry into the market.

Judge Greenaway denied a motion to dismiss on each antitrust claim, finding sufficiently pled facts to show that settlement agreements between generic and branded manufacturers resulted in delayed generic entry and anti-competitive effects.

Judge Greenaway concluded that the plaintiffs adequately pled a conspiracy among the three defendants, noting that each could be found in collusion if each knew of the common plan, “from which knowledge of other co-conspirators’ roles in the conspiracy can be inferred.”

Judge Greenaway lastly found that indirect purchasers were, at the pleading stage, valid plaintiffs because they asserted assigned claims and the pleadings did not facially show those claim assignments as defective.

#### *Hon. Thomas Venaskie*

Judge Venaskie was confirmed to the U.S. Court of Appeals for the Third Circuit in April 2010. In his time in the Middle District of Pennsylvania, Judge Venaskie addressed antitrust issues most thoroughly in the Labelstock litigation.

In that class action, purchasers of pressure-sensitive labelstock sued label manufacturers for conspiring to fix prices in their industry. In a motion to dismiss, Judge Venaskie rejected the defendants’ request for a heightened pleading standard in antitrust cases, and found adequate allegations of conspiracy based on circumstantial evidence of conspiracy and the “conscious parallelism” theory.

At certification, the defendants argued that pressure-sensitive labelstock was a differentiated product and so classwide impact could not be presumed. Judge Venaskie first observed that liability — i.e., whether there was an unlawful conspiracy — would focus on the defendants’ conduct and was a common and predominant question.

Addressing the defendants’ claim regarding antitrust impact, Judge Venaskie avoided a presumption of classwide impact (the so-called “Bogorian shortcut”) but nonetheless scrutinized and found plausible expert analysis showing that pressure-sensitive labelstock was “commodity-like,” that purchases were “guided primarily by price,” and that class members could not avoid the artificially inflated prices alleged. This sufficiently showed classwide impact and maintained Rule 23(b)(3) predominance.

After certification, the defendants again moved to dismiss in light of Twombly. Judge Venaskie rejected this second Rule 12 challenge for one defendant but granted it for its parent company. In refusing to dismiss the first, Judge Venaskie emphasized that Twombly is qualified by Rule 8, that a complaint’s plausibility must be considered in its entirety, and that Twombly did not create a heightened pleading standard.

Judge Venaskie found plausibility by way of the complaint’s explanation for the defendants’ conspiratorial motive and conduct, as well as specific circumstances evidencing an understanding to fix prices.

Judge Venaskie found no plausible inference of the parent's actual involvement in the alleged conspiracy under their facts, concluding that mere knowledge of others' agreement to restrain competition was insufficient to show involvement.

In making his split dismissal, Judge Venaskie thoroughly analyzed the Twombly standard, the relevant market and business history, and economic incentives at play. This nuanced analysis both demonstrates a conscientious approach to market factors in antitrust cases, as well as the difficult lines drawn by Twombly.

## **Conclusion**

While it is too early to draw any definitive conclusions on the antitrust jurisprudence of Obama appointees, they have extensive experience in antitrust. These judges have mixed records, however, sometimes sympathizing with the difficulties of pleading conspiracy, while other times reinforcing pleading or standing requirements, and after analyzing complex economic theories to analyze inferences and incentives.

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[1] Neal R. Stoll and Shephard Goldfein, President Obama's Centrist Antitrust Enforcement, N.Y.L.J., Nov. 19, 2008; Jia Lynn Yang, Obama Antitrust Enforcement Looking Like More of the Same, Wash. Post, Sept. 8, 2010.

[2] 130 S. Ct. 2201 (2010).

[3] 542 F.3d 290 (2d Cir. 2008).

[4] 369 F.3d 124 (2004).

[5] 880 F. Supp. 246 (S.D.N.Y. 1995).

[6] 280 F.3d 124 (2d Cir. 2001).

[7] See *Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236 (S.D.N.Y. 2008) (finding insufficient allegations of causation in dismissing Sherman and Clayton Act claims); *S.W.B. New Eng. Inc. v. R.A.B. Food Group LLC*, 2008 U.S. Dist. LEXIS 14892 (S.D.N.Y. Feb. 27, 2008); *Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556 (S.D.N.Y. 2007) (discussed herein); *Linens of Eur. Inc. v. Best Mfg. Inc.*, 2004 U.S. Dist. LEXIS 18575 (S.D.N.Y. Sept. 16, 2004) (discussed herein); *Reading Int'l Inc. v. Oaktree Cap. Mgmt. LLC*, 317 F. Supp. 2d 302 (S.D.N.Y. 2003) (granting in part and denying in part motion to dismiss Sherman and Clayton Act claims based on plaintiff's lack of standing).

[8] *N.Y. Mescan LLC v. N.Y. Univ. Sch. of Medicine*, 430 F. Supp. 2d 140 (S.D.N.Y. 2006); *Goldberg v. Bell Atl.*, 2000 U.S. Dist. LEXIS 14250 (S.D.N.Y. 2000) (granting motion to dismiss claim under Section 2 of Sherman Act); *Sage Realty Corp. v. ISS Cleaning Servs. Group Inc.*, 936 F. Supp. 130 (S.D.N.Y. 1996) (granting motion to dismiss because plaintiff did not plead antitrust injury and labor laws exempt application of antitrust statutes).

[9] See *Medical Alert Ambulance Inc. v. Atl. Health Sys. Inc.*, 2007 U.S. Dist. LEXIS 57083 (D. N.J. 2007) (denying summary judgment where plaintiff ambulance servicer showed sufficient facts that hospital's tying arrangement with ambulance servicer was anti-competitive); *IDT Corp. v. Bldg. Owners & Managers Ass'n Int'l*, 2005 U.S. Dist. LEXIS 33208 (D. N.J. Dec. 14, 2005) (granting motion to dismiss antitrust suit because defendant did not compete in alleged market); *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517 (D.N.J. 2004) (denying motion to dismiss Sherman Act claims); *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 256 F. Supp. 2d 249 (D.N.J. Feb. 28, 2003) (granting in part motions for summary judgment on Sherman Act claims); *Cheminor Drugs Ltd. V. Ethyl Corp.*, 993 F. Supp. 271 (D.N.J. Feb. 5, 1998) (granting summary judgment of federal antitrust claim under Noerr-Pennington doctrine).

[10] See *In re Pressure Sensitive Labelstock Antitrust Litig.*, 2007 U.S. Dist. LEXIS 85466 (M.D. Penn. Nov. 19, 2007) (granting motion for class certification of antitrust claims), 566 F. Supp. 2d 363 (M.D. Penn. 2008) (approving attorney fees and class settlement); see also *Santana Prods. Inc. v. Bobrick Washroom Equip. Inc.*, 249 F. Supp. 2d 463 (M.D. Penn. 2003) (granting summary judgment on Sherman Act claims on lack of evidence of conspiracy), *aff'd in part, vacated in part and remanded*, 401 F.3d 123 (3d Cir. 2005).

[11] *DKH Corp. v. Rankin-Patterson Oil Co. Inc.*, 506 S.E.2d 256 (N.C. Ct. App. 1998) (vacating and remanding summary judgment dismissal of state antitrust claims); *Hyde v. Abbott Labs. Inc.*, 473 S.E.2d 680 (N.C. Ct. App. 1996) (reversing dismissal and holding that indirect purchases have standing under state antitrust laws); *N.C. Steel Inc. v. Nat'l Council on Compensation Ins.*, 472 S.E.2d 578 (N.C. Ct. App. 1996) (reversing in part and affirming in part dismissal of state antitrust claims).

[12] *Cavaliers Operating Co. LLC v. Ticketmaster*, 2008 U.S. Dist. LEXIS 93112 (N.D. Ohio Sept. 30, 2008) (delaying motion to dismiss antitrust claims for further discovery); *In re Scalp Metal Antitrust Litig.*, 2006 U.S. Dist. LEXIS 75873 (N.D. Ohio Sept. 30, 2006) (denying motion for judgment as a matter of law following jury findings of illegal conspiracy).