
# Senate Confirmation of Justice Amy Coney Barrett Tightens Conservative Grip on Antitrust Law in the Courts

On October 26, 2020, the Senate voted 52-48 to confirm Seventh Circuit Judge Amy Coney Barrett as the late Justice Ruth Bader Ginsburg's replacement on the U.S. Supreme Court. This commentary reviews relevant aspects of Justice Barrett's judicial and scholarly record and explores how her ascension to the Court may affect key substantive and procedural issues that impact public and private enforcement of the U.S. antitrust laws.

Unlike President Trump's previous two nominees to the High Court, the 48-year-old Barrett appears to have had only a passing acquaintance with antitrust law during her three years on the federal bench and 15 years as a law professor at Notre Dame, where she taught federal courts, constitutional law, and statutory interpretation. Although her record affords little-to-no basis to speculate as to how she might rule in particular cases, Justice Barrett is a self-professed originalist and textualist who was vetted and supported by the Co-Chairman of the Federalist Society. She therefore can be expected to fit a familiar conservative mold, and a 6-3 conservative majority on the Court has important implications for antitrust law.

We suspect that Justice Barrett's confirmation could re-shape the kinds of antitrust cases that come before the Court and the nature of litigants' arguments. It may also call into question the force of Supreme Court precedent should the issues raised in certain decisions return to the Court in future cases. And it may further motivate calls for legislative reform of the antitrust laws if the Democratic Party assumes control of both Congress and the executive branch in the forthcoming election.

## I. Justice Barrett's Caselaw

Like Justice Kavanaugh, Justice Barrett never served as a district court judge prior to her appointment to a federal circuit court. She served as an appellate judge for only three years, compared to Justice Kavanaugh's 12 years and Justice Gorsuch's 10. According to our review, she authored one antitrust opinion and sat on six other antitrust panels during her time on the Seventh Circuit. However, none of the cases were decided on the merits.

The opinion she authored, *PMT Mach. Sales, Inc. v. Yama Seiki USA, Inc.*, 941 F.3d 325 (7th Cir. 2019), involved a Wisconsin state statute that prohibits manufacturers from refusing to deal with certain qualifying dealerships without good cause. In ruling for the defendants, Justice Barrett held that the plaintiff failed to establish that it was a qualifying dealership protected under the statute, and she affirmed the district court's dismissal on that basis without reaching the plaintiff's refusal-to-deal argument.

In the six other antitrust cases she helped decide, Justice Barrett joined with the majority in all six, without authoring any concurrences. The most notable case, *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 952 F.3d 832 (7th Cir. 2020), was a unanimous opinion authored by Chief Judge Wood and joined by Judge Kanne in addition to Justice Barrett. The court overturned a district court's dismissal of private Sherman Act claims brought by medical providers alleging a hub-and-spoke conspiracy among manufacturers of medical syringes, group purchasing organizations, and distributors. After the district court had expansively interpreted *Illinois Brick* to bar the plaintiffs' claims, the panel vacated the district court's order, holding that *Illinois Brick* does not bar a suit on behalf of the first purchaser who dealt with a member of the conspiracy, including a vertical participant in the conspiracy. However, the court also held that the plaintiffs had failed to adequately plead a conspiracy, and it remanded the case with instructions to grant plaintiffs leave to amend their complaint.

Of Justice Barrett's remaining five antitrust cases, three also involved dismissals of antitrust claims at the pleading stage, where the court did not reach the merits. In *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc.*, 937 F.3d 1056 (7th Cir. 2019), the court affirmed a district court's dismissal of price-fixing claims for lack of antitrust standing, because the plaintiff's injuries were too remote. In *Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC*, 950 F.3d 911 (7th Cir. 2020), the court affirmed dismissal of exclusive dealing and refusal-to-deal claims on grounds that plaintiffs had pled implausibly narrow geographic and product markets. And in *Zummo v. City of Chicago*, 798 F. App'x 32 (7th Cir. 2020), the court affirmed dismissal of nonspecific Sherman Act claims on grounds that the plaintiff failed to allege an agreement under Section 1 or harm to competition under Section 2.

The other two cases were only tangentially connected to antitrust law. In *ABS Glob., Inc. v. Inguran, LLC*, 914 F.3d 1054 (7th Cir. 2019), after a patent owner successfully brought infringement counterclaims against antitrust plaintiffs who successfully proved a monopolization claim to a jury, the patent owner voluntarily dismissed its cross-appeal of the antitrust verdict, but it remained for the court to determine whether it was proper to take appellate jurisdiction of the patent counterclaim given that the Federal Circuit has exclusive jurisdiction over actions and compulsory counterclaims arising under the Patent Act. The court held that jurisdiction was proper because the patent infringement counterclaim did not arise out of the same transaction or occurrence as the federal antitrust claim, and thus, the counterclaim was permissive.[1] In the second case, *Momo Enterprises, LLC v. Popular Bank*, 738 F. App'x 886, 888 (7th Cir. 2018), the court affirmed a district court's issuance of sanctions and issued further sanctions against plaintiffs for frivolously litigating and appealing a 179-page, 34-count complaint that included Sherman and Clayton Act claims, and that was deficient "for multiple obvious reasons."

Justice Barrett's track record in deciding collective action cases is equally uninformative. She has authored one Rule 23 opinion and one collective arbitration opinion, both for unanimous panels. Neither opinion evidences a particular hostility or affection for collective actions. In *Weil v. Metal Technologies, Inc.*, 925 F.3d 352 (7th Cir. 2019), an FLSA wage-and-hour case, the court held that class certification can be reversed at any time without a need for new evidence and that time clock stamps are not conclusive evidence of hours worked. *Herrington v. Waterstone Mortgage Corp.*, 907 F.3d 502 (7th Cir. 2018), also an FLSA case, concerned whether the availability of class or collective

[1] In subsequent proceedings in the same case, 771 F. App'x 672 (7th Cir. 2019), the court also vacated as "premature" an award of attorneys' fees based on the successful antitrust claim, because the antitrust and patent aspects of the case were closely interlinked, and the latter remained pending.

arbitration is a threshold question of arbitrability to be decided by the court or whether it should be left to the arbitrator to determine. Following every other circuit to address the issue, the panel held that this is a threshold question that must be decided by the court. In both cases, Justice Barrett followed relatively clear and uncontroversial precedent, although in *Herrington* the precedent was from outside the circuit. In *Weil*, the decision favored the defendants and in *Herrington* the plaintiffs prevailed.

Justice Barrett did have occasion to interpret the scope of the Federal Arbitration Act (FAA) in a case with important implications for transportation gig workers who are required to do business with dominant platforms. The FAA, by its terms, excludes "contracts of employment" with transportation workers from its coverage. Last year, in an opinion by Justice Gorsuch, the Supreme Court in *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), unanimously held that the FAA does not compel courts to enforce private arbitration agreements involving workers covered by the exclusion. The Court also broadly interpreted the FAA's use of "contracts of employment" to include both employees and independent contractors, because, at the time of the FAA's adoption, "a 'contract of employment' usually meant nothing more than an agreement to perform work."

In *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020), Justice Barrett held that food delivery drivers operating on the Grubhub app were not covered by the exclusion, which she construed narrowly. Her holding rested on the exclusion's requirement that covered workers be part of "a class of workers actively engaged in the movement of goods across interstate lines," whereas here the drivers carried goods that had already moved across state lines. As a Congressional Research Service report shows, other courts have reached different conclusions. *See, e.g.*, *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 23 (1st Cir. 2020) (holding that delivery drivers who "haul goods on the final legs of interstate journeys" fall within the exclusion "regardless of whether the workers themselves physically cross state lines"). Justice Barrett's narrow reading of the exclusion likely would prevent many transportation gig workers bound by arbitration clauses from bringing class actions, notwithstanding the Supreme Court's holding in *New Prime* that independent contractors otherwise fall within the exclusion.

While the *Grubhub* case warrants some pause, Judge Barrett's record is far too sparse to support any meaningful conclusions or predictions about her attitudes toward the FAA or the Supreme Court's collective action cases generally, let alone how she is likely to greet novel substantive or procedural questions of antitrust law that come before the Court.

## II. Justice Barrett's Scholarship

In her scholarship, Justice Barrett also has written and said very little specifically about the Sherman Act or other antitrust statutes. Her writings on statutory interpretation generally, however, combined with what little she has said directly about how courts should treat the antitrust laws, may at least give some idea of how she would address questions before the Court that implicate antitrust precedents.

When she was questioned by Sen. Klobuchar about how, as a textualist, she would grapple with recent Supreme Court decisions that narrow the Sherman Act's broad text, Justice Barrett said only that she believes the Sherman Act consists of "broad language" that "essentially permits the

court to develop a common law."[2] Accordingly, in Justice Barrett's view, "it's an area, because it's largely been left to judicial development, that is controlled by precedent for the most part." This answer leaves open the question of how much deference Justice Barrett will give Sherman Act precedents in deciding antitrust cases that come before the Court.

However, Justice Barrett has written extensively on stare decisis and the role of precedent in judicial decision-making. Viewed through the lens of those writings, Justice Barrett's statement that the Sherman Act is an area where courts "develop common law" and is "controlled by precedent" is more illuminating than it appears. In Justice Barrett's view, not all precedents are created equal. Putting aside "super precedents," she maintains that there are three levels of deference due to a court's past decisions. First, precedents interpreting statutory language are due the highest level of deference and are "nearly sacrosanct." Second, precedents interpreting the Constitution are due weak deference. And third, interpretations of federal common law get "baseline" deference.[3]

This framework begs the question: Are precedents interpreting the Sherman Act "nearly sacrosanct" because they are interpreting a statute? Or are such precedents only "baseline" because the statute is so broad that courts are, effectively, developing common law?

*Statutory Stare Decisis in the Courts of Appeal*, Justice Barrett's only article to touch directly on the Sherman Act, provides some conflicting signals but ultimately suggests the latter. Published more than 15 years ago, the article makes two references to the Sherman Act. First, the article cites the judicially-crafted baseball exemption to the Sherman Act as a "classic illustration" of the heightened stare decisis applied to statutory interpretations. This suggests Justice Barrett regards the Sherman Act as a statute whose past interpretations are due strong deference. However, in a footnote to the same article, she cites the Sherman Act as a "blatant delegation" of legislative power from Congress to the courts and notes that the Supreme Court relaxes its stare decisis presumption in the context of such delegations "on the theory that the judiciary is freer to shift among interpretations in the case of a 'common-law statute.'"

Justice Barrett reconciles the seeming conflict in footnote 13 of her article. There she notes that "[r]ecently, the Court has begun to reason that since the Sherman Act authorizes the creation of federal common law, cases interpreting the Sherman Act ought to be treated like common law cases, rather than statutory cases." Put differently, antitrust precedents used to be nearly sacrosanct, but are no longer. Thus, Justice Barrett's assessment, at least as of 2005, is that the Supreme Court gives Sherman Act precedents only baseline deference. The burden still lies with the party seeking to overturn them, but such precedents can be overruled based on changed law or changed circumstances.

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[2] Nomination of the Honorable Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States, 116th Cong. (Oct. 14, 2020) (exchange between Sen. Klobuchar, Member, Senate Comm. on the Judiciary, and Hon. Amy Coney Barrett), unofficial transcript available at https://www.klobuchar.senate.gov/public/index.cfm/2020/10/klobuchar-questions-judge-barrett-on-the-affordable-care-act-elections-and-freedom-of-the-press, video available at https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-amy-coney-barrett-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-3.

[3] Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005).

Justice Barrett's article observes that this is how the Supreme Court operates, but it does not necessarily endorse that approach. Indeed, Justice Barrett notes that the Court's treatment of such common law statutes renders the statutory stare decisis doctrine "internally inconsistent" because, "[w]hile it treats *Chevron*-like delegations with suspicion, it views more blatant delegations like the Sherman Act as unproblematic[.]" Justice Barrett does not attempt to resolve this inconsistency, although she hints both that she questions whether the *Chevron* doctrine is constitutional and that one way to resolve the inconsistency is to afford strong stare decisis to all statutory interpretation cases, regardless of whether they interpret standard or "common law" statutes. But beyond noting the inconsistency, Justice Barrett does not criticize or disagree with what she perceives to be the Court's approach. Based on the currently available information, then, it appears Justice Barrett will follow what she perceives to be the Supreme Court's current practice: affording baseline deference to prior interpretations of the Sherman Act and overriding precedent where there has been a change of law or circumstances that merits revisiting antitrust doctrine.

Although we can surmise that Justice Barrett will not feel particularly constrained by precedent in deciding future antitrust cases, her scholarship, like her caselaw, ultimately provides no meaningful insight about her substantive views on antitrust doctrine. Suffice it to say that, in the domain of antitrust law, she is writing on a blank slate.

**III. The Antitrust Implications of a 6-3 Conservative Court**

As has been widely reported, conservative legal scholars have curated President Trump's short list for Supreme Court nominations. Naturally, Justice Barrett was chosen because her jurisprudential sensibilities are expected to hew closely to those of Justices Kavanaugh and Gorsuch, in all areas of the law. According to one empirical analysis of a subset of Justice Barrett's cases, 88.9% of the opinions she authored, 88.33% of the opinions she joined, and 91.67% of her unsigned orders, were "pro-business." Justice Barrett also self-identifies as an originalist in her constitutional interpretation and a textualist in her statutory interpretation, methodologies that are said to be engineered to "hobble legislation" and "tilt[] toward small government." Her appointment to the Supreme Court thus can be expected to have certain general consequences for antitrust law, even if her specific views are inscrutable (or still developing).

The Supreme Court has been comprised of a 5-4 conservative majority, excepting only brief interludes when individual justices have transitioned off the Court, for decades. Historically, very few antitrust decisions were decided along purely ideological lines during that time. Notably, however, the Court was ideologically split 5-4 in the *Amex* case (2018), which raised the bar for establishing a prima facie case under the rule of reason in two-sided transaction markets, and in the *Leegin* case (2007), which eased the legal treatment of resale price maintenance. The Court also was divided 5-4—albeit along non-ideological lines—in *Apple v. Pepper* (2019), which rejected expansive interpretations of *Illinois Brick* that would have barred more claims, and 5-3 (with Justice Alito recused) in the *Actavis* case (2013), which held that pay-for-delay agreements are not immune from antitrust scrutiny, as the dissent would have held.

Justice Kavanaugh and Justice Kennedy joined the liberal justices in *Pepper* and *Actavis*, respectively. Thus, under the Court's new makeup, there are now only four "liberal" votes on *Illinois Brick* and only three remaining justices who voted with the majority in *Actavis*. Moreover, Justice Kennedy and Justice Roberts were each in the conservative majority in *Amex* and *Leegin*. Justice Kennedy's opinion in *Leegin* was relatively tempered, and Justice Thomas's opinion in *Amex* was

limited to specific kinds of markets. If Justice Barrett lives up to her billing, subsequent cases can be expected to build out these decisions, perhaps rendering a plaintiff's chances of proving an anticompetitive vertical restraint or surviving the rule of reason to be nearly nonexistent, as even Justice Roberts's vote would be insufficient to overcome the will of Justices Thomas, Alito, Gorsuch, and Kavanaugh.

The shift from a 5-4 to 6-3 conservative majority also places other precedents at risk for the first time. For example, in *North Carolina State Board of Dental Examiners*, which raised the bar for state-licensing boards controlled by active market participants that seek antitrust immunity under the state-action doctrine, Justice Kennedy and Justice Roberts voted with the liberal justices to form a 6-3 coalition. Only four of those votes now remain.

The potential impact of a 6-3 conservative majority on the class-action device also raises questions. The prevailing 5-4 conservative majority was already exceedingly hostile to private antitrust class actions in recent years, and the Court's opinions have largely served as a one-way ratchet in raising the burdens on class certification and strictly enforcing arbitration clauses. With rare exceptions where a given conservative justice might be recused, however, a further shift rightward in the Court's makeup may be largely academic, as the Court arguably cannot become any more predisposed toward undermining class actions than it already is. Still, even if the tenor of the Court's class-action opinions is unlikely to change, the conservative justices now have unprecedented control of the Court's docket, because the liberal justices no longer have the four votes necessary to obtain a cert grant. It remains to be seen whether any four conservatives will exercise this new power to achieve more activist tort-reform goals, in a more condensed period of time, than the previous Court.

President Trump and Senate Majority Leader McConnell's aggressive approach to re-making the Court has raised concerns among Democrats and moderates about politicization, ideological capture, and undermining the Court's legitimacy as a democratic institution. If elected, Democratic presidential candidate Joe Biden has announced that he will convene a bipartisan commission to propose changes to the Court and to the federal judiciary more generally. But in the meantime, litigants will be grappling with a tectonic shift in the Court's dynamics, effective immediately.

We expect wise antitrust plaintiffs will try to avoid the reconstituted Court at all costs, unless their case presents sui generis issues that are susceptible of uniquely strong textualist arguments or otherwise stand a chance of winning over two reliably conservative votes. Antitrust defendants, on the other hand, likely will compete vigorously for the new Court's attention. Pro-consumer developments in antitrust law, at least in the near term, likely will have to come from administrative agencies or Congress, as the Court now appears very unlikely to sponsor anything of the sort.

American Antitrust Institute
October 28, 2020