The Antitrust Implications of Ketanji Brown Jackson's Supreme Court Appointment

On April 7, 2022, the Senate voted 53-47 to confirm D.C. Circuit Judge Ketanji Brown Jackson as Justice Stephen Breyer's replacement on the U.S. Supreme Court. This commentary reviews relevant aspects of Justice Jackson's judicial record and explores how her ascension to the Supreme Court may affect key substantive and procedural issues that affect public and private enforcement of the U.S. antitrust laws.

Justice Jackson began her professional life working as a journalist for Time Magazine before attending Harvard Law School and clerking in the District of Massachusetts, the First Circuit, and for Justice Breyer at the Supreme Court. She later worked as an associate at several private law firms, an Assistant Special Counsel at the U.S. Sentencing Commission, a public defender in the Office of the Federal Public Defender in the District of Columbia, and an appellate litigator at Morrison & Foerster. In 2010, she returned to the U.S. Sentencing Commission, where she served as a Commissioner and later as Vice Chair from 2010-2014. During that time, in 2012, President Obama nominated her to become a judge on the D.C. District Court, and she was confirmed in the spring of 2013. Justice Jackson served for seven years as a district court judge before President Biden nominated her to the D.C. Circuit in 2021. She was confirmed to serve on that court the same year, by a vote of 53-44, and she has since issued two majority opinions and one concurrence as an appellate judge.

Like 50-year-old Justice Amy Coney Barrett, who was confirmed in a 52-48 vote after serving briefly on a federal appellate court, the 51-year-old Justice Jackson appears to be acquainted with antitrust law, but not deeply so. And like Justice Barrett, Justice Jackson's record affords little-to-no basis to speculate as to how she might rule in particular cases. Indeed, whereas President Trump purposely selected self-professed originalists and textualists who were vetted and supported by the leadership of the Federalist Society, President Biden did not telegraph the jurisprudential or ideological qualities he sought in a candidate. He famously said that "the person I nominate will be someone with extraordinary qualifications, character, experience and integrity—and that person will be the first Black woman ever nominated to the United States Supreme Court." At Justice Jackson's nomination ceremony, President Biden emphasized that, in making his selection, he "looked for someone who, like Justice Breyer, has a pragmatic understanding that the law must work for the American people," and someone with "an independent mind, uncompromising integrity, and with a strong moral compass and the courage to stand up for what she thinks is right."

We do not believe Justice Jackson's confirmation will have antitrust implications comparable to those of Justice Barrett's confirmation. Whereas Justice Barrett replaced the late liberal icon Ruth Bader Ginsburg and markedly shifted the Court's ideological balance, prompting President Biden to create a bipartisan commission to study Court reform, Justice Jackson's confirmation preserves the

existing 6-3 divide, under which the conservative justices maintain not only a lopsided voting majority but also control of the Court's docket, which is governed by cert. grants that require at least four votes.

In addition, our review of Justice Jackson's record in antitrust and other complex civil cases, her encounters with antitrust law prior to becoming a judge, and her statements during the Senate confirmation process, does not reveal an activist bent. Many of her decisions in complex civil cases, for example, have turned on technical jurisdictional or evidentiary considerations, and the outcomes do not appear to reliably favor either plaintiffs or defendants. Ultimately, Justice Jackson's record does not offer meaningful fodder for prediction or even speculation about her antitrust views. And regardless, it remains to be seen how her views may evolve during what should be, barring Court reform measures and assuming good health, a very long tenure as a Supreme Court justice.

I. Justice Jackson's Record in Antitrust and Other Complex Civil Cases

A. Antitrust Cases

According to our review, in her eight years as a federal judge, Justice Jackson has never decided an antitrust case. However, she has presided during numerous antitrust cases and been exposed to antitrust issues in a variety of different contexts, albeit often only in passing. In *Federal Trade Commission v. DraftKings, Inc.*, No. 1:17-cv-01195, (D.D.C. July 13, 2017), for example, she held hearings and heard motions concerning the FTC's challenge to the proposed merger of Draftkings and FanDuel under Section 7 of the Clayton Act. However, shortly after the complaint and answer were filed, the parties chose to abandon the merger, mooting the case.

In numerous other merger challenges brought under Section 7, Judge Jackson has reviewed and approved settlements and entered consent decrees. *See, e.g.*, *United States v. Centurylink, Inc.*, No. 1:17-cv-02028, 2020 U.S. Dist. LEXIS 183242 (D.D.C. Aug. 17, 2020) (approving merger of CenturyLink and Level 3 Communications subject to asset divestitures); *United States v. Zf Friedrichshafen AG & WABCO Holdings*, No. 1:20-cv-00182-KBJ, 2020 U.S. Dist. LEXIS 110803 (D.D.C. Apr. 27, 2020) (approving merger of ZF Friedrichshafen AG and WABCO Holdings, Inc. subject to divestiture of WABCO); *United States v. Danone S.A.*, No. 1:17-cv-0592 (KBJ), 2017 U.S. Dist. LEXIS 144667 (D.D.C. July 13, 2017) (approving merger of Danone S.A. and The WhiteWave Foods Company subject to Danone's divestiture of Stoneyfield); *United States v. Nexstar Broad. Grp., Inc.*, No. 14-cv-2007 (KBJ), 2015 U.S. Dist. LEXIS 45068 (D.D.C. Feb. 27, 2015) (approving merger of Nexstar Broadcasting and CCA subject to asset divestitures); *United States v. United Techs. Corp.*, 946 F. Supp. 2d 135 (D.D.C. 2013) (approving merger of United Technologies Corp. and Goodrich Corp. subject to asset divestitures and related relief). In each of these cases, the settlements were straightforward insofar as no public comments or objections were filed pursuant to the Antitrust Procedures and Penalties Act.

In *United States v. Conagra Foods, Inc.*, No. 1:14-cv-00823-KBJ, 2014 U.S. Dist. LEXIS 150460 (D.D.C. Oct. 2, 2014), Judge Jackson approved the DOJ's settlement with Conagra, Horizon, Cargill, and CHS to permit a joint venture in the flour milling industry subject to asset divestitures. In *United States v. MacAndrews & Forbes Holdings, Inc.*, Civil Action No. 13-CV-0926 (KBJ), 2013 U.S. Dist. LEXIS 116682 (D.D.C. July 1, 2013), she approved the FTC's settlement with MacAndrews & Forbes in which the latter agreed to pay a $720,000 civil penalty for violating the Hart Scott Rodino (HSR) Act by failing to notify the antitrust agencies of a proposed merger. In *United States v. Third*

Point Offshore Fund, Ltd., Civil Action No. 15-1366, 2015 U.S. Dist. LEXIS 175632 (D.D.C. Dec. 18, 2015), she approved a settlement with Third Point Offshore Fund and several related entities over a similar HSR violation after the latter agreed to cease and desist from future violations. The settlements were similarly straightforward.

In *In re Disposable Contact Lens Antitrust Litig*., 306 F. Supp. 3d 372, 374 (D.D.C. 2017), a complex private antitrust MDL consolidated in the Middle District of Florida, Judge Jackson was asked to resolve a dispute over a subpoena issued in Florida that had to be enforced in the District of Columbia, after the respondent refused to consent to jurisdiction in Florida. Judge Jackson held that the matter should be transferred back to the MDL-host court, which had issued the subpoena. She relied on the exceeding complexity of the underlying antitrust cases that had been consolidated, concluding that a single tribunal should adjudicate pretrial disputes for the sake consistency and efficiency.

B. Competition Policy Cases

Judge Jackson also has addressed competition issues in other kinds of complex civil cases. She has appeared to recognize and appreciate the competition implications in these cases, but she has resorted to jurisdictional or evidentiary considerations in resolving them. For example, in *Globe Metallurgical, Inc. v. Rima Indus. S.A.*, 177 F. Supp. 3d 317 (D.D.C. 2016), a RICO case in which the plaintiff alleged that a Brazilian importer fraudulently induced the Commerce Department to revoke an anti-dumping order by intentionally concealing its relationship with a U.S. distributor to manipulate the calculation of the dumping margin, Judge Jackson narrowly construed the fraud exception to the D.C. Circuit's rule barring personal jurisdiction based on governmental action alone.

The plaintiff in *Globe Metallurgical* alleged that it was injured in its business by the foreign competition the Brazilian importer had introduced under false pretenses, and it brought suit in the District of Columbia. The District's long-arm statute does not extend to injuries arising out of a defendant's contacts that are based solely on interactions with the federal government. However, the D.C. Circuit recognizes an exception to this general rule "where the plaintiff alleges that the defendant fraudulently petitioned the government and induced unwarranted government action against the plaintiff."

Judge Jackson held the plaintiff's claims did not fall within the exception and that the court, therefore, lacked personal jurisdiction over the defendant, without reaching the merits. She found that the government's revocation of the anti-dumping order was not an action "against the plaintiff." Although she recognized that the revocation had competitive "consequences" for the plaintiff, she held that it was inappropriate "to consider the *indirect* impact of an agency decision." Otherwise, she reasoned, "any plaintiff engaged in business anywhere in the world could find in D.C. a forum to file suit against its competitors, if those competitors have allegedly fraudulently induced a government agency into making a regulatory determination that is beneficial to them."

In *Am. Meat Inst. v. United States Dep't of Agric.*, 968 F. Supp. 2d 38 (D.D.C. 2013), Judge Jackson addressed the competitive effects of statutory country-of-origin-labeling ("COOL") requirements for food commodities, and she reached her decision using similar reasoning. The case involved a meat industry challenge to a regulation issued by the Agricultural Marketing Service Division (AMS) of the U.S. Department of Agriculture. A group of meat industry trade associations

sought to preliminarily enjoin the challenged regulation, which created four designations for providing COOL information for certain meat products according to whether the animal in question was born, raised and slaughtered in the United States, a foreign country, or in multiple countries through a "commingling" process.

The plaintiff meat-industry trade associations argued, among other things, that the AMS regulation's treatment of commingled products would cause them irreparable harm by forcing them to build out separate facilities for handling and storing segregated cattle, to incur significant administrative and recordkeeping costs, and in some cases to forgo buying foreign livestock entirely and thereby cede a competitive advantage to competitors who buy only domestic cattle. They argued that the segregated production processes would impose additional costs on meat packers, thereby harming the packers' "financial and competitive viability."

Judge Jackson was not persuaded. She held that the plaintiffs' "bare allegations and fears about what may happen in the future" were not sufficient to support a claim of irreparable injury. The plaintiffs' speculative declarations about the potential impact of the AMS regulation on their business operations and profits were unpersuasive because they were not substantiated by "any facts that would permit the Court to evaluate the context in which these claims are made." For example, she explained, "without any information about the overall size and scope of the business, the Court is left in the dark about the economic effect of the segregation rule."

Judge Jackson also held that the claimed harm could not support a preliminary injunction because it "does not flow directly from the requirements of the Final Rule but is instead based on independent market variables such as how the supplier's customers and/or retail consumers might react." She observed that the plaintiffs "appear most concerned that they will ultimately lose future business because others may respond to the new labeling rules and react in a manner that may ultimately affect their companies negatively." She held that such "indirect harm is neither certain nor immediate, and thus cannot be the basis for a finding of irreparable harm."

C. Class Actions

Judge Jackson also has some experience with class actions, which, even when brought under unrelated federal statutes, can be relevant to private antitrust enforcement because of the primacy of the class device in obtaining private antitrust relief. She has presided over numerous fairness hearings and settlement approvals under Rule 23 in class actions brought under the FLSA, TCPA, FCRA, and other federal statutes, and she has resolved several class-certification disputes. Her decisions are similarly careful, attentive to jurisdictional, evidentiary and procedural considerations, and mixed in their outcomes.

In *Healthy Futures of Tex. v. HHS*, 326 F.R.D. 1, 10 (D.D.C. 2018), Judge Jackson certified a contested Rule 23(b)(2) class in an Administrative Procedures Act case. The defendant objected that the putative class plaintiffs improperly defined the class to exclude plaintiffs who had previously recovered from the same defendant in individual suits. The defendant characterized this exclusion as an unauthorized "opt-out mechanism" and argued that the class could not be properly defined without improperly interfering with the litigation of similar issues in other districts. Judge Jackson disagreed and ruled for the plaintiffs. As to the first contention, she held that it is "clear beyond cavil" that the "class definition" and "opt-out" mechanisms involve different inquiries, and the "threshold [class] membership decision" is not constrained by Rule 23(b)(2)'s requirements with

respect to the unavailability of opt outs. As to the second contention, she held that it was sufficient for certification purposes that the proposed class members have all suffered the same injury and the court would need to enter only a single injunction on behalf of the class if it agrees with the claims on the merits.

In *Parker v. Bank of Am., N.A.*, 99 F. Supp. 3d 69 (D.D.C. 2015), Judge Jackson ruled for the defendant, relying on *Walmart v. Dukes* in refusing to certify a proposed class of injured mortgage borrowers for lack of commonality under Rule 23(a). After Bank of America (BOA) promised the named plaintiff a loan modification in writing but waited two years to execute the modification, resulting in his default, the named plaintiff sought to certify a class based on allegations that BOA systematically determined which mortgage modification agreements were valid and binding, reviewed the binding agreements for errors, and then, if certain errors were found, refused to execute the terms, to the borrowers' detriment. Judge Jackson held that the plaintiff had failed to introduce "significant proof of the existence of a general policy or practice" on the part of BOA that resulted in the systematic breach of, or tortious interference with, the modification agreements of other borrowers.

In *Josey v. Lockheed Martin Corp.*, No. 16-cv-2508 (KBJ), 2020 U.S. Dist. LEXIS 127789 (D.D.C. July 21, 2020), Judge Jackson again applied *Walmart* to refuse class certification, as well as to deny pre-certification discovery, on commonality grounds. After the plaintiffs alleged that Lockheed Martin systematically discriminated based on race and breached its employment contracts through its performance evaluation process, in violation of Title VII of the Civil Rights Act, Judge Jackson held that it was "manifestly implausible that the 5,000 African-American Lockheed Martin employees who are members of the putative class have suffered a common injury that can either be redressed through a single remedy on a classwide basis or be proven through common questions of fact that predominate over individualized proof of injury." She held further that "the existence of a class action that is plausibly viable is a prerequisite to getting discovery in aid of a motion for class certification."

In April 2021, in *Osvatics v. Lyft, Inc.*, 535 F. Supp. 3d 1, 22 (D.D.C. 2021), Judge Jackson opined on the scope of the Federal Arbitration Act's residual clause, which provides a limited exemption for transportation workers otherwise subject to mandatory class action waivers that are inserted into forced-arbitration clauses in adhesion contracts. Judge Jackson closely followed then-Judge Amy Coney Barrett's opinion in a similar Seventh Circuit case, repeatedly citing, quoting, and adding emphasis to then-Judge Barrett's language. The Barrett/Jackson approach, which we discussed in our analysis of Justice Barrett's record, has prevailed in the majority of circuits. It construes the residual clause more narrowly than courts in other circuits, which, as a practical matter, serves to nullify a greater proportion of antitrust and consumer claims under the Supreme Court's controversial arbitration jurisprudence.

II. Beyond Judge Jackson's Opinions

A. U.S. Sentencing Commission Experience

After she was nominated by President Obama and confirmed as a district court judge, but before her service on the U.S. Sentencing Commission was complete, Justice Jackson also encountered antitrust law in her capacity as Vice Chair of the Commission. In the summer of 2014,

at AAI's urging, the Commission reviewed the U.S. Sentencing Guidelines' formula for calculating cartel fines.

In July 2013, AAI submitted a Comment to the Commission explaining why economic evidence warranted at least a doubling of the cartel overcharge presumption used to calculate cartel fines under the U.S. Sentencing Guidelines. In 2014—apparently in response to the 2013 AAI suggestion, and for the first time since 1991—the Commission published a Federal Register Notice of Proposed Priorities and Request for Public Comment in which it identified the re-examination of the level of cartel fines among its "tentative priorities." Later that year, in August 2014, AAI submitted a second Comment, asking the Commission to reconsider and double a key portion of the formula it uses to calculate fines for antitrust offenses. By raising the presumption of the amount of the illegal overcharge from 10 percent to 20 percent, AAI argued that the formula would lead to more nearly optimal deterrence of price fixing and other cartel behavior while considerably increasing the funds available to the fund for compensating crime victims. Judge Jackson left the commission in December 2014, and the presumption was never updated.

A. Clerking for Justice Breyer

Justice Jackson also had exposure to a judicial perspective on antitrust law and competition policy early in her career, when she served as a law clerk to Justice Breyer. During her clerkship, from 1999-2000, Justice Breyer dissented from the Court's denial of cert in Microsoft's direct appeal of its district court defeat in the infamous *United States v. Microsoft* case. The Court ruled that the appeal should be heard in the D.C. Circuit in the first instance, but Justice Breyer objected that "the case significantly affects an important sector of the economy—a sector characterized by rapid technological change," and that "[s]peed in reaching a final decision may help create legal certainty," which, "in turn, may further the economic development of that sector so important to our Nation's prosperity."

During Justice Jackson's clerkship term, the Court also heard argument and issued its decision in *California Dental v. Federal Trade Commission*, and Justice Breyer issued a partial dissent from Justice Souter's opinion for the Court. Justice Breyer agreed with the thrust of Justice Souter's opinion, including that "in a 'rule of reason' antitrust case 'the quality of proof required should vary with the circumstances,' that 'what is required . . . is an enquiry meet for the case,' and that the object is a 'confident conclusion about the principal tendency of a restriction.'" However, whereas the majority vacated and remanded for a "more extended examination of the possible factual underpinnings," Justice Breyer would have gone further and affirmed the FTC's administrative decision based on the FTC's fact findings.

Summarizing his long-standing view, which begat a mixed and controversial antitrust record, Justice Breyer explained:

> The form of analysis I have followed is not rigid; it admits of some variation according to the circumstances. The important point, however, is that its allocation of the burdens of persuasion reflects a gradual evolution within the courts over a period of many years. That evolution represents an effort carefully to blend the procompetitive objectives of the law of antitrust with administrative necessity. It represents a considerable advance, both from the days when the Commission had to present and/or refute every possible fact and theory, and from antitrust theories so abbreviated as to prevent proper analysis. The former prevented

> cases from ever reaching a conclusion, *cf.* Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 266 (1960), and the latter called forth the criticism that the 'Government always wins.' I hope that this case does not represent an abandonment of that basic, and important, form of analysis."

In his numerous opinions, Justice Breyer frequently found himself reasoning his way to prioritizing administrability considerations over the procompetitive objectives of antitrust law, which led him to side with conservative justices in cases like *Trinko*, *Credit Suisse*, and *Nynex*, among others. If Justice Jackson fits a similar mold, she should be expected to provide a pragmatic, moderate voice but not to serve as a forceful champion of progressive antitrust. However, if the lopsided conservative majority holds the line on substantive antitrust law, which remains to be seen, her influence on the Court's antitrust jurisprudence likely will be limited regardless.

American Antitrust Institute
April 12, 2022