

Is Judge Kavanaugh a Fan of Antitrust Laws? Let's Take a Look

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We know Judge Brett Kavanaugh is a fan of the Washington Nationals. But is he also a fan of the antitrust laws? On July 9, 2018, President Donald Trump nominated Kavanaugh, who currently sits on the U.S. Court of Appeals for the District of Columbia Circuit, to replace retiring justice and long-time swing voter Anthony Kennedy. Judge Kavanaugh is sure to be the subject of exacting congressional scrutiny on any number of topics. But the Senate Judiciary Committee should not overlook Kavanaugh's antitrust jurisprudence. As of this writing, Kavanaugh's Senate Judiciary Committee hearing is scheduled to begin on Sept. 4.

Unlike [Justice Neil Gorsuch, who practiced antitrust law in the private sector](#) and authored three unanimous antitrust opinions while on the U.S. Court of Appeals for the Tenth Circuit, Judge Kavanaugh has no private antitrust experience. Kavanaugh has authored two antitrust dissents while on the D.C. Circuit, both of which drew sharp criticism from fellow judicial panel members. Despite his limited antitrust experience, these dissents shed some light on Kavanaugh's antitrust and economic persuasion and provide fertile ground for congressional examination.

'FTC v. Whole Foods Market'

In the 2008 case of *FTC v. Whole Foods*, the FTC filed a motion for preliminary injunction challenging Whole Foods' merger with Wild Oats, which the district court denied. The ensuing appeal to the D.C. Circuit turned on the appropriate definition of the relevant product market. The FTC defined the market as "premium, natural, and organic supermarkets," called "PNOS" for short. According to the FTC, these stores "focus on high-quality perishables," "generally have high levels of customer services," "target affluent and well educated customers," and "emphasi[ze] ... social and environmental responsibility."

D.C. Circuit Judge Janice Brown, with Judge David Tatel concurring in the judgement, agreed with the FTC's narrow PNOS market definition and rejected Whole Foods' proposed alternative market, which included so-called "conventional" supermarkets. In support, Judge Brown pointed to evidence of lower profits on "high-quality perishables" where Whole Foods and Wild Oats competed, compared to where they did not. Further economic data from the FTC showed that, although PNOSs competed with conventional supermarkets for "dry grocery" goods, conventional supermarkets had little to no effect on margins for the "high-quality perishables" sold by PNOSs. Judge Brown also relied on Whole Foods' proprietary "internal projections" that a majority of Wild Oats' consumers would switch to Whole Foods if the former chain closed, as well as "pseudonymous blog postings" by Whole Foods' CEO that conventional supermarkets were "unable to compete" with PNOSs.

Dissenting, Kavanaugh branded the FTC's case "weak" and, by extension, the court's decision to preliminarily enjoin the merger (according to him), "a relic of a bygone era when antitrust law was divorced from basic economic principles."

First, Kavanaugh criticized the court for "diluting the standard for preliminary injunction relief." He argued that its purportedly lenient application of that standard allowed the "FTC to just snap its fingers and temporarily block a merger." Citing Robert Bork's famous (or infamous) book "The Antitrust Paradox," Kavanaugh explained, "the FTC's position ... calls to mind the bad old days when mergers were viewed with suspicion regardless of their economic benefits."

In turn, in his concurrence, Judge Tatel called Kavanaugh's criticism "baffling" and noted that the court "scrupulously followed ... the likelihood of success standard." He rebuked Kavanaugh for his "zeal to reach the merits and preempt the FTC" and

reminded him that the preliminary injunction standard was designed by Congress to maintain the status quo pending the FTC's administrative review of mergers within its jurisdiction.

Second, throwing binding case authority to the winds (not to mention *stare decisis*), Kavanaugh criticized the court for relying too heavily on the Supreme Court's *Brown Shoe v. United States* decision, which framed "practical indicia," or factors, used to identify discrete product submarkets in merger cases. He called that binding decision "free-wheeling," and commented that it "has not stood the test of time." Kavanaugh again approvingly quoted a passage from Bork's "Antitrust Paradox," contending that, while it would be "overhasty to say that the *Brown Shoe* opinion is the worst antitrust essay ever written, ... [it] has considerable claim to the title."

Third, Kavanaugh rejected the court's PNOS product market, citing Whole Foods' economic expert. Kavanaugh applauded that expert for relying on "all-but-dispositive price evidence" that prices were uniform across Whole Foods' stores, regardless of whether there was a competing PNOS like Wild Oats in the area. This observation drew further sharp criticism from Judge Tatel who, calling Kavanaugh's "all-but-dispositive" price evidence "all-but-meaningless," pointed out that Whole Foods' expert testimony only showed pricing on a single day and only after "Whole Foods announced its intent to acquire Wild Oats." This made the data susceptible, according to Judge Tatel, to "manipulation" and "gave Whole Foods every incentive to eliminate any price differences that may have previously existed between its stores ... not only to avoid antitrust liability, but also because the company was no longer competing with Wild Oats."

'United States v. Anthem'

Nine years later, in the 2017 case of *United States v. Anthem*, the United States sued to permanently enjoin Anthem's \$54 million merger with Cigna, both "sellers of medical health insurance to large companies." The district court granted the DOJ's request for injunctive relief, concluding that the merger would, on balance, substantially lessen competition. The ensuing appeal to the D.C. Circuit hinged mostly on the viability of Anthem's "efficiencies defense," a method of rebutting the government's *prima facie* case where there are

merger-specific efficiencies that would inure to the benefit of consumers.

Though never directly recognized by the Supreme Court, a number of courts have assumed that efficiencies could play a role in reviewing mergers. At the same time, however, many courts have expressed skepticism concerning the existence of such a defense. For example, in the hospital merger case *FTC v. Penn State Hershey Medical Center*, Third Circuit Judge D. Michael Fisher, writing for the majority, commented: "Based on the language [of Supreme Court merger cases] and on the Clayton Act's silence on the issue, we are skeptical that such an efficiencies defense even exists."

In *Anthem*, the majority, like many courts before it, "assumed the availability of an efficiencies defense" but ultimately rejected Anthem's argument that the merger would enable the combined company to provide Anthem's low rates with Cigna's "innovative value proposition." The court concluded that the parties failed to substantiate the purported efficiencies and failed to demonstrate that they were merger-specific.

In his dissent, Judge Kavanaugh embraced Anthem's efficiencies argument, proclaiming, without citation to any Supreme Court decision on the efficiencies defense (and despite the combined skepticism of other circuit courts): "The case law of the Supreme Court and this court, as well as the government's own merger guidelines, establish that we must consider the efficiencies and consumer benefits of a merger together with its anti-competitive effects." In so stating, Kavanaugh again cited Bork's *Antitrust Paradox* and criticized the Supreme Court's *Brown Shoe* decision.

Like in *Whole Foods*, Kavanaugh's comments drew uncharacteristic, harsh criticism from his panel colleagues. In her opinion, Judge Judith Rogers pointed out that Kavanaugh failed to engage the Supreme Court's last word on the efficiencies defense in *FTC v. Proctor & Gamble* (instead criticizing the majority for being "stuck in 1967") and reminded Kavanaugh that that decision did not provide the resounding support he appeared to believe it did. Instead, she pointed out, the Supreme Court in the *Proctor & Gamble* case noted in passing: "possible economies cannot be used as a defense to illegality." Judge Rogers continued: "Even stranger is the dissent's suggestion that [prior D.C. Circuit case law] blessed an efficiencies defense

because ... [an intermediate court] could not overrule Supreme Court precedent.” Therefore, the majority flatly dismissed Kavanaugh’s dissent as “wishful” thinking and admonished, “our dissenting colleague applies the law as he wishes it were, not as it currently is.”

Having concluded that efficiencies could offset an otherwise anticompetitive merger, Kavanaugh credited Anthem’s economic evidence that a combined Anthem/Cigna would be able to negotiate lower health insurance rates for employers: “The merged Anthem-Cigna would be a more powerful purchasing agent than Anthem and Cigna operating independently.” And, Kavanaugh continued, “[t]he record evidence overwhelmingly demonstrates that the medical cost savings from the lower provider rates negotiated by [a combined] Anthem-Cigna would be largely if not entirely passed through to ... large employers.”

Kavanaugh was criticized for these statements as well. Judge Rogers claimed Kavanaugh’s “fundamental flaw is the failure to engage with the facts shown in the record as they pertain to merger-specificity and verifiability.” She also accused Kavanaugh of naively letting Anthem off too easily by “uncritically accepting” the defense’s “rosy testimony”: “Ultimately, the dissent concludes that on this record, there is little basis to doubt that the cost savings for employers as a result of the merger would be large, without evidencing any real awareness of the record beyond the testimony of Anthem’s expert and consultant.”

Predicting Kavanaugh’s Effect on Antitrust

While Kavanaugh does not have an extensive antitrust background, his dissents in *Whole Foods* and *Anthem* do provide congressional food for thought.

First, Kavanaugh has shown a considerable lack of regard for *stare decisis* that does not, according to him, find support in his view of empirical economics, what he called a “modern approach,” thereby seemingly contradicting any claim of his unbending adherence to the rule of law. In *Anthem*, Judge Rogers bluntly criticized Kavanaugh’s indifference for “applying the law as he wished it were, not as it currently is.” In *Whole Foods*, Judge Tatel charged Kavanaugh with “ignoring both circuit precedent and Section 13(b) [of

the Clayton Act].” Given his willingness to narrowly read (or perhaps ignore) inconvenient but binding Supreme Court case law while serving on an intermediate court, it is fair to ask if Kavanaugh, if confirmed, would take issue with Supreme Court precedent that did not fit within his modern approach to antitrust enforcement. In this regard, one could argue that Kavanaugh follows in Justice Kennedy’s footsteps, revolutionizing antitrust law as his predecessor and former boss Justice Kennedy did in his 2007 opinion *Leegin Creative Leather Products v. PSKS*. That seminal decision overturned 100 years of vertical price restraint jurisprudence.

Second, Kavanaugh’s dissents appear to portend a deference to private enterprise over government antitrust regulators and enforcers. This deference may stem from his Borkian views of the antitrust laws—that the antitrust laws are designed to promote consumer welfare and business efficiency at the expense of competition when those two goals butt heads. In both his *Whole Foods* and *Anthem* dissents, Kavanaugh relied upon Robert Bork’s “Antitrust Paradox” while explaining that he would vote in favor of allowing the merger to proceed. Kavanaugh’s Borkian views also manifest themselves in his skepticism of economic data presented by government experts and his willingness (or naiveté, as his D.C. Circuit colleagues believed) to blindly accept economic data presented by merging entities’ hired economists. In *Anthem* in particular, Kavanaugh appears to have espoused the view that bigger can be better, or more accurately, more efficient, insisting that the merger would be procompetitive on balance, even where competitors in the relevant “national accounts market” were reduced from four to three. Supreme Court scholars may recall that Supreme Court candidate Robert Bork (also formerly of the D.C. Circuit) was strongly criticized in his 1987 Supreme Court confirmation hearing by Sen. Howard Metzenbaum for espousing the view that two or three competitors were sufficient to maximize consumer welfare.

In sum, there are plenty of topics to raise at Kavanaugh’s upcoming confirmation hearing. However, the Senate Judiciary Committee would be wise, in fulfilling its advice and consent responsibility, to inquire about Kavanaugh’s antitrust views— his confirmation may shape the antitrust laws for decades to come. Stay tuned.

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