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Expert Analysis

# A Focus on Price: Antitrust In the Kavanaugh Era

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With confirmation hearings looming for DC Circuit Judge Brett Kavanaugh, President Trump's Supreme Court nominee to replace retiring Justice Anthony Kennedy, senators will prepare to probe Judge Kavanaugh's judicial record on various matters—including antitrust law. But unlike Justice Gorsuch—who was confirmed to the Court in Spring 2017—Judge Kavanaugh was neither an antitrust professor nor an antitrust practitioner, and has heard few antitrust cases while on the bench.

Although Judge Kavanaugh's antitrust experience is relatively sparse, his doctrinal preferences seem anything but. Dissenting in two merger reviews, *FTC v. Whole Foods Market* and *United States v. Anthem*, Judge Kavanaugh expressed support for both mergers and indicated his desire to shift antitrust law towards a "modern" doctrine that stresses pricing and economic data. *F.T.C. v. Whole Foods Mkt.*, 548 F.3d 1028 (D.C. Cir. 2008) (Skadden Arps represented Wild Oats at the trial level in the matter); *U.S. v. Anthem*, 855 F.3d 345 (D.C. Cir. 2017).

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If confirmed, Judge Kavanaugh may have the chance to leave his mark on antitrust law, and his *Whole Foods* and *Anthem* dissents may provide clues as to how.

### 'FTC v. Whole Foods Market'

In *Whole Foods*, a divided DC Circuit reversed the district court's denial of a preliminary injunction to block a merger between Whole Foods and Wild Oats, supermarkets that the FTC alleged focused on "high-quality perishables" and "specialty and natural" products. The panel divided on a standard antitrust issue: what is the product market? Judge Brown and Judge Tatel (concurring) both voted to reverse the district court, concluding that the FTC showed a likelihood of success on the merits that the merger may lessen competition in the discrete submarket for "premium natural and organic supermarkets." Judge Kavanaugh, by contrast, would have affirmed the district court's decision denying the preliminary injunction because the FTC failed to show a likelihood of success on the merits that the merger may lessen competition in the broader market for *all* supermarkets.

In reaching this conclusion, Judge Kavanaugh's reasoning—and his rebuke of his colleagues'—highlights the antitrust significance he places on pricing data. Unlike Judge Kavanaugh, Judges Brown and Tatel based their conclusions, in part, on evidence relating to the "practical indicia" that the Supreme Court explained in

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*Brown Shoe* could help determine the existence of a discrete market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.").

For example, in addition to pricing data, Judge Brown highlighted that Whole Foods and Wild Oats catered to a core group of consumers by providing "higher levels of customer service than conventional supermarkets, a 'unique environment,' and a particular focus on the 'core values' these customers espoused." Also citing *Brown Shoe*, Judge Tatel supported his conclusion that Whole Foods and Wild Oats operated in the discrete premium natural and organic market because "'industry or public recognition'" regarded it "'as a separate economic entity,'" and because both companies had "peculiar characteristics" that distinguished them from traditional supermarkets. Moreover, Whole Foods and Wild Oats executives made statements explaining the ways in which the retailers considered themselves competitors.

Dissenting, Judge Kavanaugh stated that his colleagues' reliance on *Brown Shoe* was out of step with what he called "modern antitrust doctrine." Indeed, he attacked his colleagues' reliance on *Brown Shoe*'s "practical indicia" as a "brand of free-wheeling antitrust analysis [that] has not stood the test of time" and that "does not sufficiently account for the basic economic principles that … must be considered under modern antitrust doctrine."

Judge Kavanaugh's dissent revealed what could become key to defining markets in a Justice Kavanaugh era: evidence of pricing practices. In addition to suggesting that practical indicia evidence should not "'trump objective evidence about how customers would react in the event of a price increase,'" Judge Kavanaugh stated that in the merger context, the product market inquiry comes down to whether "the merged entity could profitably impose at least a five percent price increase (because the price increase would not cause a sufficient number of consumers to switch to substitutes outside the alleged product market.)" Yet, he said, the FTC failed to make this "economic showing that is Antitrust 101." To be sure, Judge Tatel argued that Judge Kavanaugh's price-driven analysis was "not the *only* way to prove a separate market" given *Brown Shoe*. But to Judge Kavanaugh, the record's "all-but-dispositive price evidence" paved a clear path to affirm the district court.

### 'United States v. Anthem'

In *Anthem*, Judge Kavanaugh again dissented, this time from a majority that affirmed the district court's decision to permanently enjoin a merger between insurers Anthem and Cigna. Like his *Whole Foods* dissent, Judge Kavanaugh's *Anthem* opinion underscored the importance of "modern antitrust" law and pricing practices.

In *Anthem*, the DOJ and several state governments sued to enjoin a merger between Anthem and Cigna on the ground that it may substantially lessen competition in the market for the sale of health insurance to national accounts in several states, as well as in the market for the sale of health insurance to large group employers. After the district court permanently enjoined the merger, the DC Circuit was asked on appeal whether a merger's efficiencies could be a defense to illegality under Section 7 of the Clayton Act, and if so, whether the efficiencies proposed in *Anthem*—billions of dollars in medical cost savings—satisfied that defense. Assuming without deciding that efficiencies could be a defense, the panel affirmed the district court's permanent injunction because Anthem failed to show the district court erred "in rejecting Anthem's purported medical cost savings as an offsetting efficiency."

Similar to *Whole Foods*, Judge Kavanaugh's dissent suggested his colleagues failed to perform a "modern merger analysis." According to Judge Kavanaugh, the court wrongly relied on old, "anti-merger" precedent from which the Supreme Court has "shifted away." More pointedly, he claimed the court was "stuck in 1967." In his view, "modern merger analysis must consider the efficiencies and consumer benefits of the merger," like the prices paid by the consumer. Judge Kavanaugh explained that "[t]he only real factual question concerning the effects of the merger on large employers should be whether the savings to employers from lower provider rates would exceed the increased fees employers would pay to Anthem-Cigna for the insurance services." Looking to the economics, Judge Kavanaugh found that it would, as the record showed the merger "would significantly reduce healthcare costs for the large employers that purchase insurance services from Anthem and Cigna" and, therefore, would not substantially lessen competition in the relevant markets. In fact, he called these cost savings the "critical feature of this case." (Nevertheless, Judge Kavanaugh would have remanded the case for the district court to consider a separate issue: whether the government could prevail on its alternative theory that the merger would allow Anthem-Cigna to obtain lower provider rates from hospitals and doctors because the merger would give Anthem-Cigna monopsony power in the upstream market where Anthem-Cigna negotiates rates with healthcare providers.)

The panel's other judges, however, balked at Judge Kavanaugh's reliance on pricing data. Judge Millett's concurrence argued that prices paid by consumers are not "the sole focus of antitrust law" and that "product variety, quality, innovation, and efficient market allocation … are equally protected forms of consumer welfare." Judge Rogers similarly argued that Judge Kavanaugh's "single-minded focus on price" was "flawed." She also accused Judge Kavanaugh of "appl[ying] the law as he wishes it were, not as it currently is" in ignoring 1960s Supreme Court precedent. Still, Judge Kavanaugh's view was clear: the record's pricing data "decisively demonstrate[d] that this merger would be *beneficial* to the employer-customers who obtain insurance services from Anthem and Cigna."

## Implications

If confirmed to the Supreme Court, Judge Kavanaugh will no longer be constrained by Supreme Court precedent. Instead, he will have opportunities to, as Judge Rogers put it in *Anthem*, push the law to where he wishes it were. If Judge Kavanaugh's *Whole Foods* and *Anthem* dissents shed any light on how he may seek to shape antitrust law, he may find pricing and economic data most significant in defining relevant markets—at least in merger cases—and in evaluating efficiencies of proposed mergers. It remains to be seen, however, whether Judge Kavanaugh would give such evidence greater weight in other areas of antitrust law, especially at the expense of "practical indicia" evidence; if so, antitrust cases may, more than ever, turn on expert economists and their pricing models. As Judge Kavanaugh launches his bid to join Justice Gorsuch and a conservative majority on the Supreme Court, which has been willing to review antitrust matters, we may soon find ourselves in Judge Kavanaugh's "modern" antitrust era.