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Inside Kavanaugh's Merger Challenge Dissents

By **Timothy Gray and Melissa Ginsberg** (July 13, 2018, 1:57 PM EDT)

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President Donald Trump has announced Brett Kavanaugh, a judge on the United States Court of Appeals for the District of Columbia, as his nominee to replace U.S. Supreme Court Justice Anthony Kennedy. Judge Kavanaugh's most notable antitrust-related decisions in his 12 years on the federal bench include the dissents he issued in United States v. Anthem Inc. and Federal Trade Commission v. Whole Foods Market Inc. In both cases, Judge Kavanaugh disagreed with his colleagues' decisions to block the contemplated mergers, suggesting an antitrust jurisprudence leery of excessive enforcement activity.

United States v. Anthem

In July 2016, the U.S. Department of Justice and attorneys general from multiple states sued to halt the merger of two of the nation's largest health insurance providers, Anthem Inc. and Cigna Corp., alleging that the contemplated merger would substantially lessen competition in the market for employers purchasing insurance for more than 5,000 employees ("national accounts") in multiple states and employers purchasing insurance for more than 50 employees ("large group employers") in Richmond, Virginia. After a six-week bench trial, the district court permanently enjoined the merger on the basis of its likely anti-competitive effects in both markets. In April 2017, a three-judge panel of the D.C. Circuit affirmed that decision 2-1, with Judge Kavanaugh dissenting.

The appeal presented two issues: (1) whether courts can consider the efficiencies realized as a result of a merger as a defense to illegality under Section 7 of the Clayton Act and (2) if so, whether the district court clearly erred in holding that the efficiencies Anthem identified were insufficient to overcome the merger's likely anti-competitive effects.

As to the first issue, the majority opinion considered it an open question whether courts could consider the efficiencies realized as a result of a merger as a defense to illegality under Section 7. The majority discussed the Supreme Court's decision in Federal Trade Commission v. Procter & Gamble Co. (1967), where the court held that "[p]ossible economies cannot be used as a defense to illegality" because "Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition." Nonetheless, and despite its description of Procter

& Gamble as “on-point precedent,” the majority acknowledged that other circuit courts have “recognized the use of efficiencies evidence in rebutting a prima facie case.” It explained that the Eleventh Circuit, for example, had “concluded that whether an acquisition would yield significant efficiencies in the relevant market is an important consideration in predicting whether the acquisition would substantially lessen competition.” Ultimately, the majority sidestepped the question by “simply assum[ing]” — without actually finding — “the availability of an efficiencies defense to Section 7 illegality.”

On this point Judge Kavanaugh’s dissent was more definitive. Chiding the majority for its “ahistorical drive-by” that “reli[ed] on 1960s Supreme Court cases and suggest[ed] that antitrust law may not allow consideration of the efficiencies and consumer benefits in the first place,” Judge Kavanaugh countered that the “modern approach” reflected in precedents postdating the Supreme Court’s decision in Procter & Gamble unambiguously mandate that lower courts “take account of the efficiencies and consumer benefits that would result from [a] merger.” In Judge Kavanaugh’s view, “the fact that a merger such as this one would produce heightened market concentration and increased market shares" was "not the end of the antitrust analysis.”

Judge Kavanaugh’s disagreement with the majority was even more pointed regarding the efficiencies Anthem contended would result from the merger: (1) “rebranding” Cigna customers as Anthem customers to allow them to pay Anthem’s lower rates, (2) exercising affiliate clauses in its agreements with health care providers to allow Cigna customers access to the lower rates, and (3) the increased negotiating power of the larger merged company. The majority concluded that the district court did not clearly err when rejecting these efficiencies as defenses, and found no error in the district court’s determination that none of the argued efficiencies was sufficiently verifiable given evidence of countervailing business pressures that would either render the savings impossible to achieve, or possible only with a concomitant reduction in quality of services. The majority also expressed doubt as to whether any cost savings would be passed on to customers, rather than simply captured by Anthem.

Judge Kavanaugh disputed the majority’s reading of the record. In his view, the efficiencies were “undeniable,” and the record “decisively demonstrate[d] that this merger would be beneficial to the employer-customers who obtain insurance services from Anthem and Cigna.” He explained that “[t]he key difference between this horizontal merger and some horizontal mergers” was that “the increased savings obtained by the merged company in the upstream supply market in this case would be passed through directly to consumers.” Judge Kavanaugh found that the record evidence suggested that although employers would pay the merged Anthem-Cigna additional fees of between $48 million to $930 million per year, those large employers would also save an amount ranging from $1.7 to $3.3 billion annually due to reduced rates charged by health care providers. Thus, in his view, the record established “that the merger would generate significant medical cost savings for employers” and that the “District Court clearly erred.”

On the basis of these efficiencies, Judge Kavanaugh would have held that the merger “would not substantially lessen competition in the market for the sale of insurance services to large employers.” He would, however, have remanded the case to the district court to assess whether the proposed merger would result in “Anthem-Cigna obtain[ing] lower provider rates from hospitals and doctors because of its exercise of unlawful monopsony power in the upstream market where it negotiates rates with healthcare providers.”

Anthem promptly filed a petition for certiorari to the Supreme Court, but the appeal was soon mooted after Cigna withdrew from the proposed merger.

FTC v. Whole Foods

In 2007, the FTC sought a preliminary injunction under 15 U.S.C. § 53(b) to halt the proposed merger of two prominent grocery chains, Whole Foods Market and Wild Oats Markets, alleging that in 18 cities the merger would create monopolies in the distinct market for "premium, natural, and organic supermarkets." The district court declined to enjoin the merger, concluding that the FTC's market definition was unsupported by the evidence and that Whole Foods and Wild Oats in fact competed in the broader market of "grocery stores and supermarkets." After a D.C. Circuit panel unanimously denied the FTC's request for an injunction pending appeal, the merger closed. Nonetheless, a year later, in a 2-1 decision, the D.C. Circuit reversed the denial of a preliminary injunction. Judge Kavanaugh dissented.

In separate opinions, Judges Janice Rogers Brown and David Tatel explained that to obtain a preliminary injunction under § 53(b), the FTC "need only show a likelihood of success sufficient, using [a] sliding scale, to balance any equities that might weigh against the injunction." A showing of likelihood of success, in turn, requires that the "FTC ha[ve] raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."

Judges Brown and Tatel agreed that the district court correctly treated market definition as a threshold issue. But they held that district court erred in its market definition analysis, with Judge Brown faulting it for addressing only "marginal consumers" and failing to account for "core consumers ... demanding exclusively a particular product or package of products," and Judge Tatel citing, inter alia, internal corporate documents and evidence of "industry or public recognition" as conclusive evidence supporting the FTC's proposed identification of a separate submarket for "premium, natural, and organic supermarkets." Both judges ultimately concluded that the FTC "showed the requisite likelihood of success by raising serious and substantial questions about the merger's legality," and therefore remanded for the district court to "weigh the equities in order to decide whether enjoining the merger would be in the public interest."

In dissent, Judge Kavanaugh disagreed with the majority's reasoning. He lamented that the majority's "decision resuscitates the loose antitrust standards of Brown Shoe Co. v. United States, 370 U.S. 294 (1962)," whose "practical indicia" test for market definition was a "1960s-era relic" and a "brand of free-wheeling antitrust analysis [that] has not stood the test of time" because it fails to "sufficiently account for the basic economic principles that, according to the Supreme Court, must be considered under modern antitrust doctrine." More pointedly, Judge Kavanaugh disagreed with his colleagues regarding "whether the FTC demonstrated the necessary 'likelihood of success' on its § 7 case." He criticized his colleagues' decisions for "dilut[ing] the standard for preliminary injunction relief in antitrust merger cases," a result "call[ing] to mind the bad old days when mergers were viewed with suspicion regardless of their economic benefits." In Judge Kavanaugh's view, "the FTC may obtain a preliminary injunction only by establishing ... a likelihood that, among other things, the merged entity would possess market power and could profitably impose a significant and nontransitory price increase."

Judge Kavanaugh further argued that the approach adopted by the majority would "authorize the FTC to obtain preliminary injunctions and block mergers based on a watered-down preliminary injunction standard and without sufficient regard for the economic principles that have undergirded modern antitrust law." Judge Kavanaugh concluded that the FTC fell well short of the "modern" standard, characterizing its case as "weak," based on "marginally relevant evidence," and a "scattershot of flawed arguments" that seemed "a relic of a bygone era when antitrust law was divorced from basic economic principles."

"The bottom line," Judge Kavanaugh explained, is that "there is no evidence in the record suggesting that Whole Foods priced differently based on the presence or absence of a Wild Oats store in the area. That is a conspicuous — and all but dispositive — omission." He further expressed concern that his colleagues' opinions would "give the FTC far greater power to block mergers than the statutory text or Supreme Court precedents permit."

Following the decision, the FTC resumed its adjudication of the already consummated merger, and in March 2009 the parties reached a settlement that permitted the merger to stand but required Whole Foods to divest stores in highly concentrated markets.

Conclusion

If confirmed, Judge Kavanaugh will be joining a Supreme Court that has recently split on significant questions of antitrust doctrine (such as in its recent 5-4 decision in Ohio v. American Express Co.) and will face important antitrust questions in the next term. Judge Kavanaugh's dissents in Anthem and Whole Foods Markets suggest a skepticism of FTC regulation and intrusion into corporate transactions absent a significantly compelling economic justification. We'll be following Judge Kavanaugh's confirmation hearings to see if they provide any further insights regarding his views on antitrust issues.

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