



**AAI Opposes Nomination of Judge Kavanaugh to Supreme Court:
Analysis Shows Hostility to Antitrust Plaintiffs and Leniency to Big Business**

July 17, 2018

On July 9, 2018, President Trump nominated Brett M. Kavanaugh of the D.C. Circuit Court of Appeals to fill the vacancy on the U.S. Supreme Court created by the retirement of Justice Anthony Kennedy. Based on Judge Kavanaugh's sparse but conspicuous record in antitrust cases, the American Antitrust Institute (AAI) believes his nomination represents a serious setback for antitrust enforcement.

Judge Kavanaugh's opinions and decisions on the D.C. Circuit demonstrate hostility to antitrust plaintiffs, including the expert federal antitrust agencies. In particular, his dissents in two prominent merger cases signal a doctrinaire skepticism of threatened anticompetitive harm, leniency toward efficiencies claims that presumptively illegal mergers are procompetitive, and a willingness to disregard plaintiff-friendly precedent. His two other antitrust decisions also supported defendants. Judge Kavanaugh's confirmation would almost certainly weaken the antitrust laws and the ability of the government and private plaintiffs to enforce them. For these reasons, which we elaborate below, AAI opposes Judge Kavanaugh's nomination to the Supreme Court.

I. Background

Judge Kavanaugh was nominated to the D.C. Circuit in July 2003 and confirmed by the Senate in May 2006 after a prolonged political battle over his fitness for the bench. He did not serve as a district judge prior to his appointment. Although he has since sat by designation as a district judge in four reported cases in the U.S. District Court for the District of Columbia, he has never presided over an antitrust trial.

During his twelve years on the D.C. Circuit, Judge Kavanaugh sat on four appellate panels in antitrust cases. Two were merger cases, and two were generic drug exclusion cases. In the dissenting opinions he authored in the two merger cases, *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008), and *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017), Judge Kavanaugh went very far in unambiguously setting forth his personal antitrust philosophy.

AAI finds the views expressed in Judge Kavanaugh's opinions to be outside the mainstream, bipartisan consensus supporting antitrust enforcement for the benefit of consumers, workers, suppliers, and other beneficiaries of competition in the U.S. economy.

II. *Whole Foods*: Judge Kavanaugh Would Impose Erroneous and Unreasonably High Standard on Antitrust Plaintiffs

The *Whole Foods* case involved Whole Foods Market's proposed acquisition of Wild Oats, which a Republican-led FTC voted unanimously to challenge. The primary issue on appeal was whether there was a relevant market for premium natural and organic supermarkets. If such a market existed, as alleged by the FTC, then the post-merger firm would have a very high market share. But if there was only a broader relevant market for all supermarkets carrying differentiated natural and organic products, then the merger did not threaten a significant impact on competition.

Judge Kavanaugh's dissent stood out less for its conclusion that the narrower relevant market did not exist than for the stringent legal standard he would have applied to any party who has the burden of defining a relevant market in an antitrust merger challenge. To prove that firms' products compete in a narrower relevant product market, Judge Kavanaugh would have required "evidence in the record that Whole Foods was able to (or did) set higher prices when Wild Oats exited or was absent" from the market. Moreover, the evidence would have to show that Whole Foods "could impose a five percent or more price increase" as a result of the merger.

For Judge Kavanaugh it was not sufficient that the presence of Wild Oats stores depressed Whole Foods' profit margins significantly, that entry of Whole Foods stores led to price decreases at Wild Oats stores, and that entry of another natural food chain decreased prices at Whole Foods stores. Nor did it matter to Judge Kavanaugh that the economic evidence was bolstered by other evidence, including internal emails from the Whole Foods CEO that the acquisition would avoid "nasty price wars" with Wild Oats and the threat that Wild Oats could be a meaningful springboard "for another player to get into this space." Judge Kavanaugh characterized the emails, which constitute valuable anecdotal evidence in antitrust investigations, as merely a "CEO's bravado," which "cannot alter the laws of economics."

Judge Kavanaugh's novel standard in *Whole Foods* was based on his view that the government should have to set forth evidence on par with the evidence used in *FTC v. Staples*, in which uniquely high-quality price data associated with rivals' participation in various markets was available. But the government's expert in *Whole Foods* relied on profit data as a proxy for prices because the pricing data *supplied by the merging parties* was inadequate, having "very large discrepancies, both over time and cross-sectionally."

Moreover, Judge Kavanaugh's five percent threshold is unsupported by law, and is particularly inappropriate for a low-margin business like supermarkets. And his stringent approach conflicts with Section 7's incipiency standard, which condemns mergers that "may" substantially lessen competition or "tend to" create a monopoly. Under the standard, courts are to resolve doubts *against* the transaction.

More troubling is the dissent's attack on the use of *Brown Shoe's* "practical indicia" of a relevant (sub)market, i.e. qualitative factors such as industry recognition of the market as a separate economic entity, and its characterization of the FTC's case as "turn[ing] back the clock" to the "bad old days." The FTC's case was supported by expert testimony by a leading conservative economist from the University of Chicago, who conducted econometric analysis concluding that the "diversion ratio" was at least four times higher than necessary to make even a five percent price increase profitable.

Moreover, *Brown Shoe's* “practical indicia” have been widely employed by judges from Bork (*Rothery Storage*) to Hogan (*Staples*), both of whom Judge Kavanaugh cited approvingly.

In sum, while Judge Kavanaugh chided the FTC for “completely fail[ing] to make the economic showing that is Antitrust 101,” it was Kavanaugh who failed to appreciate the basic economics of unilateral effects, whereby a merger between particularly close competitors in a differentiated products market can raise prices even if the firms also compete significantly with other firms in the market.

III. *Anthem*: Judge Kavanaugh Would Apply Excessively Lenient Standards on Defendants’ Efficiencies Claims

Judge Kavanaugh’s dissent in *Anthem* is also disturbing. Besides largely ignoring the facts found by the district court, the opinion displays an overly lenient and misguided approach to the efficiencies defense in merger law. Judge Kavanaugh would have approved the merger of Anthem and Cigna, two major health insurers, notwithstanding that it would have resulted in a highly concentrated market for insurance sold to large national companies.

Anthem argued that its efficiencies defense rebutted the government’s prima facie case, claiming that its acquisition of Cigna would lead to lower prices for its large-employer customers. Specifically, Anthem argued that the merged firm would be able to lower the prices it paid to hospitals, doctors, and other providers primarily by switching Cigna customers to Anthem’s lower negotiated rates or by exploiting the merged firm’s increased bargaining power with providers. Putting aside the amount of pass through, which was contested, the majority rejected the efficiencies defense largely because the merging parties failed to establish that Anthem’s claimed “efficiencies” were cognizable, merger-specific, or verifiable.

Judge Kavanaugh argued for a lenient standard for efficiencies, contending that “[t]hey merely must be probable,” rather than, as the D.C. Circuit previously held, subject to a “rigorous analysis.” And he viewed merger specificity as being satisfied even though it was obvious, as the majority pointed out, that switching Cigna customers to Anthem’s product at lower rates (“rebranding”) was not a merger-specific efficiency; that option was available to Cigna customers without the merger.

Most problematic, however, is Judge Kavanaugh’s “mistaken belief that any exercise of increased bargaining power short of monopsony is procompetitive,” as Judge Millett noted in her concurring opinion. Absent a showing that the exercise of increased bargaining leverage creates some resource savings, which Anthem never showed, the increased ability to exercise buyer market power does not qualify as a cognizable efficiency. And that was particularly true in light of the district court’s finding that the lower input prices threatened to reduce the quality of the Cigna product.

Moreover, while Judge Kavanaugh accepted that the merger would be anticompetitive if it allowed Anthem to exercise monopsony power, his characterization of monopsony power as anticompetitive *because* it may result in higher prices for downstream consumers is troubling. The anticompetitive effects of monopsony power are artificially *lower* prices in input markets and it is well settled that a merger of buyers that enables them to exercise monopsony power is unlawful independently of any possible impact on customers downstream.

As in *Whole Foods*, Judge Kavanaugh chided the majority for being “stuck in” the 1960s and for espousing the proposition that efficiencies might be reason to condemn a merger, where the majority merely suggested that the viability of an efficiencies defense under Supreme Court precedent was not clear. Moreover, Judge Kavanaugh seemed to take the position that *General Dynamics* overruled prior merger cases like *Brown Shoe* and *Philadelphia National Bank*, which are important precedents for modern merger law and widely recognized as controlling authority by courts and mainstream antitrust practitioners.

IV. Judge Kavanaugh’s Generic Drug Exclusion Rulings Also Raise Concerns

Judge Kavanaugh also participated in two generic drug exclusion cases. He authored the opinion for the court in *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 892 F.3d 1264 (D.C. Cir. 2018), but the issue on appeal involved only a dispute about attorney-client privilege. In that case, the court held that the FTC could not obtain documents prepared by non-attorney employees at the request of a company’s general counsel. A concurring judge wrote separately out of concern that Judge Kavanaugh’s opinion threatened to expand the reach of attorney-client privilege beyond what existing precedent allows.

In the other case, *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857 (D.C. Cir. 2008), Judge Kavanaugh joined an opinion authored by Judge Douglas Ginsburg that upheld summary judgment against wholesale purchasers of the patented drug Tiazac. The wholesalers had accused a branded pharmaceutical manufacturer of monopolizing the market by manipulating the Food & Drug Administration (FDA) process to exclude rival generic drugs. The court upheld the district court’s ruling that plaintiffs had failed to show that the FDA would have approved the generic entrant and hence plaintiffs failed to show that they were injured by defendant’s anticompetitive conduct. The opinion’s approach to disputed issues of fact is generally hospitable to the defendants.

It is questionable whether any significant insight into Judge Kavanaugh’s views on antitrust can be gleaned from his generic exclusion cases, but regardless, they do not offer solace for proponents of vigorous antitrust enforcement. Moreover, a Justice Kavanaugh may put the Court in a position to overrule its landmark pay-for-delay ruling, as discussed next.

V. Solidification of a Conservative Majority on the Supreme Court Would Damage Public and Private Enforcement

As AAI noted when Justice Neil Gorsuch was nominated to replace the late Justice Antonin Scalia last year, very few Supreme Court antitrust decisions on the merits have been decided along strict ideological lines in recent years. 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 the *Leegin* case (2007), which eased the legal treatment of resale price maintenance. While Justice Kennedy was in the conservative majority in both of those cases, his *Leegin* opinion was relatively tempered.

More significantly, Justice Kennedy provided the fifth vote for the “liberal” majority in the *Actavis* (2013) case, which held that pay-for-delay agreements are not immune from antitrust scrutiny, as the dissent would have held. Justice Alito did not participate in the case, but presumably he would have voted with the conservative minority had he done so. Accordingly, Judge Kavanaugh may provide a fifth vote for overturning *Actavis*.

A 5-4 conservative majority also has been hostile to private enforcement of antitrust rules. During the last conservative era, which was interrupted only by a brief period with a 4-4 split after Justice Scalia's passing, the Court made class actions more difficult to bring by raising the burdens on class certification and strictly enforcing arbitration clauses. With Judge Kavanaugh on the bench, antitrust class actions very likely would be further eroded.

VI. Conclusion

Based on his opinions and decisions as an appellate judge, AAI believes Judge Kavanaugh holds crabbed, anti-enforcement views of the antitrust laws. He appears to embrace conservative judge and legal scholar Robert Bork's decades-old critique of antitrust enforcement as though nothing has changed in the intervening years. AAI is concerned that Senate confirmation of Judge Kavanaugh, and the solidification of a conservative Supreme Court majority that is inhospitable to antitrust claims, would be damaging to public and private enforcement of the antitrust laws and to competition in the U.S. economy. Accordingly, AAI opposes Judge Kavanaugh's nomination to the Supreme Court.