

Blog Post

Will President Trump's Supreme Court Pick Have an Influence on The Healthcare Industry?

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On July 9, 2018, President Trump announced his intention to nominate D.C. Circuit Court Judge Brett Kavanaugh to replace retiring Justice Anthony Kennedy on the Supreme Court. Since the announcement, there has been considerable discussion about what Judge Kavanaugh's views are on several "hot button" issues, including free speech, religious-rights and abortion, and how Judge Kavanaugh might influence the law on those subjects if confirmed. Less attention has focused – at least so far – on Judge Kavanaugh's healthcare-related decisions, notwithstanding that he has authored several high-profile decisions in that area. If confirmed, these opinions may well provide a window into Judge Kavanaugh's thinking on several high-profile antitrust issues in healthcare, including the proposed mergers between CVS and Aetna and Express Scripts and Cigna.

First and foremost, Judge Kavanaugh authored a strong dissent in *US v. Anthem* (2016), indicating that he believed that the DOJ's successful merger challenge to the Anthem/Cigna combination should be reversed. Judge Kavanaugh criticized the majority for – in his view – failing to account for the potential benefits that the combination would have for consumers in their analysis, stating "The majority opinion sees this as a classic horizontal merger case where the high concentration of this

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market and the merged insurer's high market share would mean increased prices for employer-customers. But that understanding misses what I believe is the critical feature of this case." Judge Kavanaugh continued, "[T]he insurance companies act as purchasing agents of behalf of their employer-customers," and "when the insurers negotiate lower provider rates, those savings go directly to the employer-customers." Thus, "the record decisively demonstrates that this merger would be beneficial to the employer-customers who obtain insurance services from Anthem and Cigna."

To be clear, Judge Kavanaugh goes on to explain that he was not yet prepared to declare the Anthem/Cigna merger lawful (suggesting instead that the case should be sent back to the District Court for a determination as to whether the merger might have anticompetitive effects in the *provider* market – and issue the lower court had not addressed).

Nevertheless, Judge Kavanaugh's strong support in *US v. Anthem* for the view that efficiencies that translate into cost savings for consumers can counteract high market shares – particularly in the healthcare arena – could well prove significant in the coming months should the recently announced large healthcare mergers (CVS/Aetna, Express Scripts/Cigna, etc.) face legal challenge.

In addition, Judge Kavanaugh has also suggested that he views *vertical* relationships generally – which the CVS/Aetna and Express Scripts/Cigna mergers would be – as rarely being a cause for concern. In *Comcast Cable v. Federal Communications Commission* (2013), for example, Judge Kavanaugh wrote in a concurring opinion that "As Professors Areeda and Hovenkamp have explained, vertical integration 'is ubiquitous in our economy and virtually never poses a threat to competition,' particularly absent market power. Accordingly, this view, particularly coupled with the views Judge Kavanaugh expressed in *US v. Anthem*, provide some reason to believe that he might not view these pending mergers – which are

currently being investigated by the DOJ Antitrust Division – as being necessarily harmful to competition, despite the significant size of the deals.

Finally, Judge Kavanaugh’s non-healthcare opinions while on the D.C. Circuit have repeatedly suggested that he has a general concern about potential “overreaching” by regulatory agencies. In addition to his rejection of the DOJ Antitrust Division’s case in *US v. Anthem*, Judge Kavanaugh notably wrote in *Free Enterprise Fund v. PCAOB* (2008) – again in dissent – that the structure of the Public Company Accounting Oversight Board was unconstitutional. Similarly, Judge Kavanaugh concluded that the structure of the Consumer Financial Protection Bureau was unconstitutional in 2016, in *PHH Corp. v. CFPB*. Accordingly, while these decisions don’t necessarily predict how Judge Kavanaugh would view a merger challenge by the DOJ or FTC, they certainly suggest that he does not “rubber stamp” all agency actions. This view could certainly influence not only the pending vertical mergers, but any other actions brought by the DOJ or the FTC in the healthcare area that might be considered “cutting edge” or an expansion upon their more traditional enforcement theories and policies.

It has been widely reported that Senate Majority Leader McConnell hopes to have Judge Kavanaugh confirmed prior to the commencement of the Supreme Court’s term in October, and therefore that hearings on his nomination should commence fairly soon. Accordingly, while most of the attention at the hearings will likely focus on non-healthcare issues, it will be interesting to see whether Judge Kavanaugh’s views on healthcare – and particularly healthcare mergers – become an issue for discussion. Stay tuned.

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