TAKING STOCK OF THE EFFICIENCIES DEFENSE: LESSONS FROM RECENT HEALTH CARE MERGER REVIEWS AND CHALLENGES

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The U.S. health care industry continues to consolidate as health care providers and payors explore mergers and other contractual arrangements to address uncertainties created by changes in technology, regulations, and reimbursement methodologies. The federal antitrust enforcement agencies have been active in policing mergers in health care and have not shied away from challenging transactions they felt posed threats to competition. Many of these challenges have culminated in litigation, and the resulting opinions from trial and appellate courts have contributed to the debate over which analytical approaches should be used to determine relevant antitrust markets and to assess competitive effects. These opinions have also shed light on the standards that courts and antitrust agencies use to assess efficiency claims. While the antitrust agencies maintain that they give efficiency claims due consideration when evaluating proposed transactions, the courts have been somewhat more dismissive of these claims.

This article examines the current state of the efficiencies defense in health care mergers by reviewing the discussion of efficiency claims by agencies and courts in recent provider and insurer merger challenges.

I. INCORPORATING EFFICIENCIES INTO MERGER ANALYSIS AT THE AGENCIES: CONCEPTUAL UNDERPINNINGS

Economists have long recognized that mergers may lead to efficiency gains, which may negate or mitigate any anticompetitive effects to which the mergers might otherwise give rise. That is, efficiency gains might not only enhance a merged firm's ability to compete effectively, but also, to the extent

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they are passed on, benefit consumers in the form of lower prices or improved quality. Recognizing this dynamic, the Merger Guidelines[1] acknowledge the role that efficiencies play in the analysis of competitive effects, and describe the evidentiary standards that merging parties must satisfy for the agencies to credit their claimed efficiencies.[2]

In particular, the Guidelines emphasize that the agencies will credit efficiencies claimed by merging parties (i.e., deem them "cognizable") only if the parties are able to demonstrate their ability to realize those efficiencies (i.e., the claimed efficiencies are "verifiable") and, even if so, only if the efficiencies are unlikely to be realized absent the proposed merger (i.e., are "merger-specific"). The merging parties bear the burden of demonstrating that any claimed efficiencies satisfy these criteria. If the parties carry their burden, the Agency reviewing the merger will assess whether the likely magnitude of the claimed efficiencies is sufficient to offset any anticompetitive harm posed by the merger. As the Guidelines explain, the efficiency must be sufficient to result in no predictable post-merger price increase, thereby making "pass-through" effects the focus of the analysis.[3]

The Guidelines provide additional direction on when efficiency assessments are likely to move the needle in merger investigations. Notably, the Guidelines make it clear that where structural changes resulting from the merger are likely to lead to substantial harmful competitive effects, the magnitude of the cognizable efficiencies claimed by the parties must be "extraordinarily great" for the agencies not to deem the merger anticompetitive.[4] As a corollary, efficiencies are most likely to matter in merger review when the "likely adverse competitive effects, absent the efficiencies, are not great."[5]

The agencies apply the criteria of merger-specificity and verifiability when assessing efficiency claims in health care transactions. In hospital mergers, potential cognizable efficiencies may take the form of cost reductions or quality improvements. For example, a merger between two hospitals (or hospital

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[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) [hereinafter Guidelines], ftc.gov/os/2010/08/100819hmg.pdf.

[2] While economists have long recognized the trade-offs between anticompetitive harm resulting from a lessening of competition due to the merger and efficiency gains, earlier versions of the Guidelines limited consideration of efficiencies to "extraordinary cases." *See, e.g.*, U.S. Dep't of Justice, Merger Guidelines § 5.1(A) (1982). Starting with the 1984 revision, the Guidelines have included language indicating greater acknowledgment of the role played by efficiencies in possibly counteracting any anticompetitive effects arising from a merger. U.S. Dep't of Justice, Merger Guidelines § 3.5 (1984).

[3] "To make the requisite determination, the agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market." Guidelines, *supra* note 1, § 10.

[4] *Id.*

[5] *Id.*

systems) could lead to cost reductions by helping the merging parties to avoid capital expenditures or to consolidate service lines, thereby eliminating cost inefficiencies associated with underutilization.[6] In assessing such claims against the merger-specificity criterion, the agencies focus their inquiry not just on whether the hospitals could have realized these cost or quality benefits by continuing to operate as independent firms (e.g., by using consultants), but also on whether there are alternative transactions that could facilitate the realization of these efficiencies but that do not pose the same threat of competitive harm. These alternative transactions could include affiliations short of a merger (e.g., joint ventures), or to the extent there are viable candidates,[7] mergers with other hospitals or hospital systems with which the focal hospital has less competitive overlap. In addition to being merger-specific, efficiency claims must also be verifiable—that is, there should be sufficient grounds to believe that the merging parties will indeed realize the claimed efficiencies and that the parties have taken steps to identify the source of these efficiencies and have incorporated the claimed efficiencies into their assessments of the proposed merger.[8]

Efficiency claims pertaining to quality improvements are subject to the same level and type of scrutiny. For example, hospitals might claim that their merger will improve patient outcomes (in certain service lines or overall) by helping them consolidate patient volumes in procedures with an established volume-outcome relationship,[9] or by allowing them to share best practices. In

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[6] For example, the merging parties could consolidate the provision of certain types of care, such as cardiac surgery, at a single site. Consolidating service lines in this way could improve utilization and efficiency relative to operating two separate cardiac surgery programs, each of which might be underutilized.

[7] According to the Guidelines, the set of alternatives to be considered in making this determination ought to be restricted to those that are "practical in the business situation faced by the merging firms." Guidelines, *supra* note 1, § 10. For example, if several hospitals are interested in merging with a particular target, then the agencies will likely determine the magnitude of efficiencies specific to a particular merger by comparing the efficiencies achieved by that merger with those that could be achieved by other combinations involving the target hospital.

[8] *See id.*:

> Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.

[9] The volume-outcome effect refers to the positive relationship between the frequency with which a provider (hospital) performs a given surgical procedure and the rate at which the provider's patients undergoing that procedure achieve good health outcomes. Academic studies have posited that the volume-outcome effect stems from a combination of learning-by-doing and economies of scale. While studies have documented this effect for a wide variety of procedures, the effect is particularly meaningful for complex procedures, such as cardiac surgery. *See, e.g.*,

such cases, the merging parties would need to establish that the difference between the pre-merger and post-merger volumes is sufficiently high to generate material improvements in quality, and this projected quality improvement would then have to be compared with the improvement that could be achieved absent the merger.[10]

II. INCORPORATING EFFICIENCIES INTO MERGER ANALYSIS AT THE AGENCIES: PRACTICAL CONSIDERATIONS

Consistent with their traditional close adherence to the principles outlined in the Guidelines, the antitrust agencies have repeatedly affirmed their commitment to assessing efficiency evidence as part of their merger investigations. In various public statements, agency officials from both the FTC and the DOJ have affirmed each agency's commitment to appropriately accounting for any benefits that a merger might help realize. In a speech delivered when she was Director of the FTC Bureau of Competition, Deborah Feinstein noted that the FTC "routinely consider[s] efficiency arguments, especially with respect to quality improvement claims" and that "the FTC does decide *not* to pursue cases based on [its] assessment of these claims" during the investigation phase.[11] Senior leadership at the DOJ has expressed similar sentiments, recognizing that mergers can "lead to cost savings and improved quality of care" and that, in its review of transactions, the DOJ will "credit *legitimate* efficiencies that will benefit consumers of health care services."[12]

Of course, the agencies' commitment to incorporating efficiencies into their analyses does not guarantee their ready acceptance of any efficiencies claimed by merging parties. As the quotations cited above make clear, the agencies will only consider efficiencies that they deem legitimate under the rigorous standards that the Guidelines set forth. Given the confidential nature of agency investigations, and the lack of closing statements in cases where the

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John D. Birkmeyer et al., *Hospital Volume and Surgical Mortality in the United States*, 346 NEW ENG. J. MED. 1128 (2002).

[10] When evaluating claimed cost reductions or quality enhancements that depend on consolidation of services across the merging parties, the agencies might consider the impact that realizing these efficiencies would have on patients' access of services. The agencies might discount any efficiencies that the parties propose to achieve through a consolidation that has a material adverse impact on patient access.

[11] Deborah L. Feinstein, Dir., Bureau of Competition, Fed. Trade Comm'n, To Know Where You're Going, Look at Where You've Been, Address Before the AAI Healthcare Roundtable (Feb. 22, 2017), www.ftc.gov/system/files/documents/public_statements/1120623/feinstein_aai_speech_2-22-17.pdf.

[12] Bill Baer, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Role of Antitrust Enforcement in Health Care Markets, Remarks as Prepared for Delivery at the New Health Care Industry Conference: Integration, Consolidation, Competition in the Wake of the Affordable Care Act, Yale University (Nov. 13, 2015) (emphasis added), www.justice.gov/opa/file/794051/download.

agencies did not pursue a challenge, it is difficult to discern whether, and to what extent, efficiencies (let alone specific efficiency arguments) may have factored into an Agency's decision to close any given investigation.

Public statements made by Agency officials do provide a window into what types of evidence the agencies might find convincing in substantiating efficiency claims. For example, in assessing claims pertaining to quality improvements, the agencies look at the "comparative quality of the [merging] hospitals"[13] to determine whether there is a meaningful difference in quality between the merging parties that the merger would allow the parties to bridge. Any claims pertaining to transfer of best practices must "address the specifics of how those processes and practices will benefit patients through improved care."[14] Finally, evidence of quality improvements or cost reductions realized from past transactions can help make a credible case that a proposed transaction will generate similar efficiencies. However, when an Agency has made public statements regarding its evaluation of claimed efficiencies, it has typically done so in the context of a merger litigation, that is, a situation where the Agency has already determined the following: that a merger is likely to have an adverse impact on competition; that any claimed efficiencies are not cognizable; and that, even if they were, they would be insufficient to offset the harm. As a result, these public statements from the agencies almost always convey a strong sense of skepticism when it comes to evaluating efficiency claims.

III. INCORPORATING EFFICIENCIES INTO MERGER ANALYSIS IN FRONT OF THE COURTS

While the agencies acknowledge the validity of the efficiencies defense but seem to take a skeptical view toward efficiency claims, courts have taken this skepticism a step further, sometimes questioning the very existence of an efficiencies defense.[15] This is due in part to the lack of clear precedents from the Supreme Court, which has largely failed to address the efficiencies defense.

As early as 1963, the Supreme Court observed, in a case involving the merger of two Philadelphia banks, that "a merger the effect of which may be substantially to lessen competition is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed benefi-

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[13] Deborah L. Feinstein, Dir., Bureau of Competition, Fed. Trade Comm'n, Antitrust Enforcement in Health Care: Proscription, Not Prescription, Address Before the Fifth National Accountable Care Organization Summit (June 19, 2014), www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf.

[14] *Id.*

[15] FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 348 (3d Cir. 2016) ("Based on this language and on the Clayton Act's silence on the issue, we are skeptical that such an efficiencies defense even exists.").

cial."[16] Although the Court did not use the term "efficiency," it at least suggested without deciding the question that "enabl[ing] certain economies of scale" might militate in favor of a merger's legality.[17] Justice John Marshall Harlan II, joined by Justice Potter Stewart, filed a dissent; Justice Harlan asserted that, in heavily regulated industries like banking, "Congress rejected the notion that the general economic and business premises of the Clayton Act should be the only considerations applicable to [the] field."[18]

Four years later, in *Procter & Gamble*, the Court reviewed whether a proposed merger would lessen competition or create a monopoly in the production and sale of household liquid bleaches.[19] The Court distilled the "core question" to "a prediction of the merger's impact on competition, present and future."[20] In upholding the Commission's finding of illegality and order of divesture, the Court observed, without more, that "[p]ossible economies cannot be used as a defense to illegality," and that "Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."[21]

In a solo concurring opinion, Justice Harlan remarked that "economic efficiencies produced by the merger must be weighed against anticompetitive consequences in the final determination whether the net effect on competition is substantially adverse."[22] He further explained that "true efficiencies in the use of advertising must be considered in assessing economies in the marketing process, which as [sic] has been noted are factors in the sort of § 7 proceeding involved here."[23] Justice Harlan's concurring opinion was the first opinion by a member of the Court explicitly addressing how efficiencies should factor into merger analysis. A majority of the Court has yet to approve or otherwise opine on Justice Harlan's views.

Roughly 15 years later, in *Maricopa County*, the Court reviewed agreements among physicians that established maximum fees for health services provided to policyholders of certain insurance plans.[24] Writing for the majority, Justice John Paul Stevens concluded that the agreement amounted to unlawful price fixing.[25] Justice Lewis F. Powell Jr.'s dissent criticized the

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[16] United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963) (quotation marks omitted).
[17] *Id.* at 335 n.10.
[18] *Id.* at 380 (Harlan, J., dissenting).
[19] FTC v. Procter & Gamble Co., 386 U.S. 568, 569–70 (1967).
[20] *Id.* at 577.
[21] *Id.* at 580.
[22] *Id.* at 597 (Harlan, J., concurring in judgment).
[23] *Id.* at 604.
[24] Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 336 (1982).
[25] *Id.*

majority's analysis for failing to consider how the agreements made "possible a new product by reaping otherwise unattainable efficiencies."[26]

The Supreme Court has not directly addressed the issue of efficiencies in any rulings since, and the manner in which the Court would treat the efficiencies defense today remains unclear. Given this lack of clear direction, the lower courts have tended to default to the position taken by the agencies regarding merger efficiencies and their role in countering anticompetitive harm arising from the merger. In the following sections, we highlight the principal issues pertaining to the efficiencies defense that recent health care merger challenges have raised.

IV. EFFICIENCY CLAIMS ASSESSED IN RECENT HEALTH CARE MERGER CHALLENGES

Although the Supreme Court has never sanctioned the efficiency defense, various federal district and appellate courts have assessed efficiency claims in challenges brought by the FTC and DOJ against proposed health care-provider and health-insurer mergers.[27] In their opinions, these courts have analyzed how efficiencies might offset anticompetitive effects.

Between 2013 and 2015, the FTC challenged three health care provider transactions where efficiency claims were a key part of the merging parties' defense: (1) the FTC and the State of Idaho challenged the acquisition by St. Luke's Health System of the Saltzer Medical Group in March 2013;[28] (2) the FTC and the Commonwealth of Pennsylvania challenged the proposed merger of Penn State Hershey Medical Center and Pinnacle Health System in December 2015;[29] and (3) the FTC and the State of Illinois challenged the proposed merger of Advocate Health Care and NorthShore University Health system in December 2015.[30] In all three cases, a party appealed the district court's initial decision, forcing a court of appeals to weigh in.

In the St. Luke's-Saltzer case, the FTC argued that St. Luke's acquisition of Saltzer would create a single, dominant provider for primary-care services in

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[26] *Id.* at 365 (Powell, J., dissenting).

[27] *See, e.g.*, FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347 (3d Cir. 2016) ("We note at the outset that we have never formally adopted the efficiencies defense. Neither has the Supreme Court. Contrary to endorsing such a defense, the Supreme Court has instead, on three occasions, cast doubt on its availability."); FTC v. Advocate Health Care, No. 15 C 11473, 2017 WL 1022015, at *12 (N.D. Ill. Mar. 16, 2017) (explaining that lower courts recognize the efficiency defense in a horizontal merger to rebut the government's prima facie case).

[28] St. Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys., Ltd., No. 1:12-CV-00560-BLW, 2013 WL 5488904, at *1 (D. Idaho Sept. 30, 2013).

[29] *See Hershey*, 838 F.3d at 348.

[30] FTC v. Advocate Health Care Network, 841 F.3d 460, 464 (7th Cir. 2016).

the Nampa, Idaho area.[31] St. Luke's asserted an efficiency defense, contending that the merger would enhance coordinated and value-based care efforts.[32] Although the district court believed the merger would eventually improve the delivery of health care, the court ultimately found in favor of the FTC: the court did not think the merger would increase competition or decrease prices.[33] The Ninth Circuit agreed, finding that St. Luke's failed to demonstrate that efficiencies resulting from the merger would have a positive effect on competition.[34]

In the Hershey-Pinnacle and Advocate-NorthShore cases, the district courts found in favor of the merging parties, primarily on the basis that the FTC had not defined a proper relevant geographic market. The FTC appealed both decisions. The Third Circuit remanded the case and directed the district court to enter the preliminary injunction in Hershey-Pinnacle while the Seventh Circuit reversed and remanded to the district court for further proceedings in Advocate-NorthShore. In each case, the appellate court held that the district court had misapplied the hypothetical monopolist test in analyzing the relevant geographic markets. The Third Circuit opinion also addressed the Parties' arguments regarding efficiencies, finding that the merging parties' efficiencies claims were insufficient to overcome the likely competitive harm from the merger, and expressing some doubt as to whether an efficiencies defense even exists.

Recent DOJ challenges to proposed health care-provider and health-insurer mergers have also seen merging parties raise efficiency arguments. These include the proposed merger of Aetna Inc. and Humana Inc., which the DOJ, eight states, and the District of Columbia challenged in July 2016;[35] and the proposed merger of Anthem, Inc. and Cigna, Inc., which the DOJ, together with 11 states and the District of Columbia, sued to enjoin in July 2016.[36]

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[31] St. Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys., Ltd., No. 1:12-CV-00560-BLW, 2014 WL 407446, at *10 (D. Idaho Jan. 24, 2014) (*St. Alphonsus I*), *aff'd*, 778 F.3d 775 (9th Cir. 2015) (*St. Alphonsus II*).

[32] *St. Alphonsus I*, 2014 WL 407446, at *15–19.

[33] *Id.* at *23–24.

[34] *St. Alphonsus II*, 778 F.3d at 792. The Ninth Circuit also voiced its skepticism of the "efficiencies defense in general and about its scope in particular." *Id.* at 790.

[35] United States v. Aetna Inc., 240 F. Supp. 3d 1, 9 (D.D.C. 2017). The states that joined the DOJ and the District of Columbia in bringing the suit were Delaware, Florida, Georgia, Illinois, Iowa, Ohio, Pennsylvania, and Virginia. *Id.* at 17.

[36] United States v. Anthem, Inc., 236 F. Supp. 3d 171, 181 (D.D.C. 2017) ("Anthem has taken the lead in defending the transaction, and it contends that any anticompetitive effects will be outweighed by the efficiencies it will generate."). The states that joined the DOJ and the District of Columbia in bringing the suit were California, Colorado, Connecticut, Georgia, Iowa, Maine, Maryland, New Hampshire, New York, Tennessee, and Virginia. *Id.* at 186.

Efficiency arguments were central to Anthem's defense of its merger with Cigna. Anthem claimed that its merger would generate efficiencies in three ways. First, Anthem argued that an increase in scale resulting from the merger would allow it to negotiate reimbursement rates with providers for the combined entity that were at least as low as the rates paid by Anthem pre-merger.[37] Second, because Anthem had lower rates than Cigna to begin with (Cigna was known to have a "high-touch" service), it could realize savings as long as some Cigna customers switched to Anthem products.[38] Finally, Anthem argued that it could exercise an "affiliate clause" in some of its provider contracts that would allow Cigna customers to access Anthem's lower rates.[39] Anthem argued that, through these mechanisms, the proposed merger would result in savings of over $2 billion annually, which the merged entity would pass through to self-insured customers.[40]

Anthem was ultimately unsuccessful in its attempt to use the efficiency defense to rebut the DOJ's prima facie case, and could not persuade the court that its claimed efficiencies were cognizable.[41] After the district court enjoined the merger, Anthem appealed the decision on the basis that the district court had improperly failed to account for efficiencies generated by the merger and that these efficiencies were sufficient to offset any anticompetitive effect of the merger.[42] The D.C. Circuit upheld the findings of the district court in a 2–1 decision.[43] The D.C. Circuit concluded that Anthem had failed to demonstrate that the merger would generate efficiencies sufficient to counteract its predicted competitive harm.[44]

The court opinions discussed above shed light on the standards that courts currently employ in assessing efficiency claims in health care mergers and the types of evidence that courts find compelling when assessing such claims. Below, we highlight some of the general themes in the courts' analyses. Unless stated otherwise, the discussion here draws from the appellate, or circuit court, opinion in each case.

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[37] *Id.* at 232.

[38] *Id.* at 233–34.

[39] *Id.* at 233.

[40] *Id.* at 231.

[41] *Id.* at 238 ("[T]he Court finds that the projected medical cost savings are not merger-specific and therefore, are not cognizable efficiencies.").

[42] United States v. Anthem, Inc., 855 F.3d 345, 348 (D.C. Cir. 2017), *cert. dismissed*, 137 S. Ct. 2250 (2017).

[43] *Id.* at 364.

[44] *Id.* While Anthem filed a petition for certiorari to the U.S. Supreme Court after the appellate court decision, the parties abandoned the merger shortly thereafter.

A. Efficiencies Cannot Result from Reductions in Output or Quality

According to the Guidelines, cognizable efficiencies "do not arise from anticompetitive reductions in output or service."[45] Output reductions are particularly salient in health care given that reductions in patients' access to health services could adversely affect quality of care. Therefore, one would expect the agencies and the courts to gauge with extra care any efficiency claims driven by service consolidation or avoidance of capital expenditures.

In the Hershey-Pinnacle case, one of the key efficiency claims made by the merging parties was that the transaction would enable Hershey to avoid constructing a new 100-bed tower and thereby save $277 million in capital expenditures.[46] The parties argued that the merger would make use of capacity at Pinnacle hospitals and facilitate transfers of patients to those hospitals.[47] The merging parties argued that these avoided capital costs ought to be counted as a merger-specific efficiency.[48]

While the Third Circuit acknowledged that avoided capital costs could be a potential source of merger efficiencies, it affirmed the Guidelines' reasoning in this case.[49] The court pointed out that the capital avoidance plan advanced by the parties amounted to an anticompetitive reduction in output and was therefore not a cognizable efficiency.[50] The court also expressed skepticism toward the parties' claim that Hershey, absent the proposed merger, would need to build a new 100-bed tower to alleviate capacity constraints.[51] The court noted that the merging parties' own efficiency analysis showed that Hershey only needed 13 beds to operate at optimal capacity.[52]

In addition to output reductions, the Guidelines emphasize that the agencies will discount any efficiency claims predicated on decreases in product or service quality.[53] For example, in the Anthem-Cigna merger, the D.C. Circuit opined that even if the merger did lead to lower pricing per Anthem's claims,

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[45] Guidelines, *supra* note 1, at § 10.

[46] FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 331, 347 (3d Cir. 2016). The merging parties also argued that the cost savings could be passed on to patients. *Id.* at 351.

[47] *Id.* at 349–50.

[48] *Id.* at 350.

[49] *Id.* ("The *Merger Guidelines* expressly indicate that the FTC will not consider efficiencies that 'arise from anticompetitive reductions in output or service.'") (citation omitted).

[50] *Id.* ("Our recognition that capital savings are cognizable efficiencies does not decide this issue, however, because even if capital savings are efficiencies, they must nonetheless be verifiable and must not result in any anticompetitive reduction in output.").

[51] *Id.*

[52] *Id.*

[53] *Id.* at 349.

because these pricing reductions arose from reducing payments to providers, they could be associated with a decline in quality.[54]

B. MERGING PARTIES NEED TO DEMONSTRATE MERGER-SPECIFICITY OF BENEFITS AND PASS-THROUGH TO CONSUMERS

The Guidelines explain that an efficiency is merger-specific if it is "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects."[55] For example, in the Anthem-Cigna matter, the court dismissed efficiency claims made by the merging parties because the claimed efficiencies were not merger-specific.[56] Specifically, the court found that the savings posited by Anthem were based on Anthem selling its product to Cigna customers, which Anthem could do even absent the merger.[57]

In the Hershey-Pinnacle matter, the merging parties argued that the transaction would enable the merged entity to engage in risk-based contracting (i.e., enable the entity to take on more of the financial risk involved in treating patients).[58] The Third Circuit dismissed these efficiency claims on the basis that they were not merger-specific, given that both Hershey and Pinnacle had already engaged in risk-based contracting before the merger.[59] Moreover, the

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[54] United States v. Anthem, Inc., 855 F.3d 345, 361 (D.C. Cir. 2017), *cert. dismissed*, 137 S. Ct. 2250 (2017). In his dissenting opinion, Judge Kavanaugh argued that the Government's arguments about declines in quality were speculative and that there was insufficient evidence in the record or analysis undertaken to establish that Anthem's post-merger plans as implemented would adversely affect quality. *Id.* at 380 (Kavanaugh, J., dissenting).

[55] Guidelines, *supra* note 1, at § 10.

[56] *Anthem*, 855 F.3d at 346.

[57] *Id.* at 361.

[58] *Hershey*, 838 F.3d at 350–51. The parties claimed this efficiency in addition to those based on avoidance of capital costs. *Id.* at 350.

[59] The court stated:

> It is similarly unclear how this ability to engage in risk-based contracting will counteract any of the anticompetitive effects of the merger. Finally, the District Court's finding that both Pinnacle and Hershey are capable of independently engaging in risk-based contracting contravenes its conclusion that this is a cognizable efficiency because the benefit is not merger specific.

Id. at 351.

Interestingly, in its ruling denying the preliminary injunction, the district court also acknowledged the fact that "Hershey and Pinnacle independently are capable of continuing to operate under the risk-based model." FTC v. Penn State Hershey Med. Ctr., 185 F. Supp. 3d 552, 563 (M.D. Pa. 2016), *rev'd and remanded*, 838 F.3d 327 (3d Cir. 2016). Ultimately, however, the district court appears to have treated the increased ability of the merged entity to engage in risk-based contracting as a merger-specific benefit based on the parties' arguments that the transaction would allow the merged entity to operate at a larger scale and thereby enable a greater degree of participation in risk-based contracts. *Id.* at 563 ("This adaptation to risk-based contracting will have a beneficial impact. One persuasive benefit involves Hershey's ability to continue to use its revenue to operate its College of Medicine and draw high-quality medical students and professors into the region.").

court explained that even if the ability to engage in risk-based contracting were a merger-specific benefit, such a benefit would accrue to the merging parties.[60] To count as an efficiency brought about by the merger, the merging parties would need to show that "such a benefit would ultimately be passed on to consumers."[61] The court clarified that passing benefits of any projected cost savings to consumers (pass-through) is an important component of the efficiencies analysis; further, any arguments about pass-through would need robust evidentiary support.[62]

Similar sentiments regarding pass-through were expressed by the district court in its opinion enjoining the Aetna-Humana merger.[63] The court took note of the fact that Aetna had projected a pass-through rate of less than 50 percent for any reductions in marginal costs arising from the proposed merger.[64] Moreover, Aetna had not estimated what proportion of any such savings would flow to the relevant product and geographic markets at issue.[65]

C. Merger-Specific Efficiencies Still Need to Be Verifiable to Be Cognizable

Efficiency arguments in recent health care challenges have also fallen short of the verifiability standard outlined in the Guidelines.[66] In the FTC's challenge to the proposed Advocate-NorthShore merger, the merging parties argued that the transaction would enable them to develop a High-Performance Network (HPN), a limited provider network that could be sold to employers and consumers at discounted rates.[67] The district court dismissed the arguments put forth by the merging parties supporting the magnitude of savings that could be realized by development of the HPN, noting that defendants "must provide firmer, more rigorous proof than they have offered," and that the estimates put forth by defense experts did not "withstand the 'rigorous analysis' that the Clayton Act requires."[68]

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[60] *Hershey*, 838 F.3d at 351.

[61] *Id.*

[62] *Id.* ("An efficiencies analysis requires more than speculative assurances that a benefit enjoyed by the Hospitals will also be enjoyed by the public.").

[63] United States v. Aetna Inc., 240 F. Supp. 3d 1, 9 (D.D.C. 2017).

[64] *Id.* at 95.

[65] *Id.* at 96.

[66] *See, e.g.*, *Hershey*, 838 F.3d at 350 ("Our recognition that capital savings are cognizable efficiencies does not decide this issue, however, because even if capital savings are efficiencies, they must nonetheless be verifiable and must not result in any anticompetitive reduction in output.").

[67] FTC v. Advocate Health Care, No. 15 C 11473, 2017 WL 1022015, at *12–13 (N.D. Ill. Mar. 16, 2017).

[68] *Id.* at *15 (citation omitted).

The district court reviewing the Anthem-Cigna merger expressed similar skepticism about the verifiability of the cost savings projected by the merging parties.[69] In particular, given that the purported savings were predicated in part on moving providers currently affiliated with Cigna to contracts with Anthem, the court found that these savings were too speculative and did not take into account the practical difficulties of renegotiating provider contracts and the timeframe within which such actions would be feasible.[70]

In her decision, Judge Amy Berman Jackson also expressed reservations over whether the projected cost savings were in fact true economic efficiencies:

> But since the efficiencies defense is based not on any economies of scale, reduced transaction costs, or production efficiencies that will be achieved by either the carriers or the providers due to the combination of the two enterprises, but rather on Anthem's ability to exercise the muscle it has already obtained by virtue of its size, with no corresponding increase in value or output, the scenario seems better characterized as an application of market power rather than a cognizable beneficial effect of the merger.[71]

V. WHAT LIES AHEAD FOR THE EFFICIENCIES DEFENSE

As the preceding discussion makes clear, merging parties have a steep hill to climb in convincing courts of the viability of the efficiencies defense once a merger proceeds to litigation. While the courts have expressed some reservations about whether an efficiencies defense truly exists, particularly in light of less than clear precedents from the Supreme Court, they have tended to default to the framework outlined in the Guidelines on what constitutes a cognizable efficiency and when such efficiencies might counteract a merger's potential anticompetitive effects. These principles apply equally to mergers in the health care sector. The distinctive characteristics of health care markets, however, mean that additional considerations, such as the impact of the merger on access to care, and the interaction between proposed cost savings and quality of care, will also play key roles in courts' assessments of the efficiencies defense.

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[69] United States v. Anthem, 236 F. Supp. 3d 171, 243 (D.D.C. 2017) ("The evidence gives rise to a number of concerns about whether the projected medical cost savings . . . can actually be achieved . . . . [T]here is much in the record to indicate that obtaining the proclaimed medical cost savings may be easier said than done.").

[70] *Id.* at 253.

[71] *Id.*