THE EFFICIENCIES DEFENSE AFTER *ANTHEM*: ASYMMETRIC BURDENS AND STRICT SCRUTINY OF MERGER EFFICIENCIES

Tyler J. Kubik[*]

INTRODUCTION

The Supreme Court has never validated an efficiencies defense in a merger analysis under section 7 of the Clayton Act.[1] Yet it is hornbook antitrust law that efficiencies can rebut a prima facie showing of anticompetitive effects.[2] Indeed, parties more often than not advance merger efficiencies as a benefit of their merger, and the U.S. Department of Justice ("DOJ") and Federal Trade Commission's ("FTC") joint Horizontal Merger Guidelines ("Guidelines") examine efficiencies in merger analysis, as does other FTC guidance.[3] This tension is caused by the Supreme Court's antagonistic but unclear statements on the status of the efficiencies defense in cases brought

---

* Antonin Scalia Law School at George Mason University, J.D. Candidate, May 2019; Member, George Mason Law Review, 2017–2019; Georgia State University, M.A., History, August 2016; Georgia State University, B.A., History, August 2014; University at Buffalo, B.S. Business Administration, June 2011. I would like to thank John Moore, Wayne Dale Collins, and Bryson Bachman for their helpful comments, and especially Joshua Wright for his guidance throughout.

1 FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001).

2 *E.g.*, United States v. Baker Hughes Inc., 908 F.2d 981, 984–85 (D.C. Cir. 1990) ("[T]hat a variety of factors other than ease of entry can rebut a prima facie case has become hornbook law. . . . [O]ther factors include industry structure, weakness of data underlying prima facie case, elasticity of industry demand, inter-industry cross-elasticities of demand and supply, product differentiation, and efficiency." (citing LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 204, at 622–25 (1977))); 1 JULIAN O. VON KALINOWSKI, PETER SULLIVAN & MAUREEN MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION § 30.04[1] (2d ed. 2019) ("Once a *prima facie* case has been made, a defendant can rebut it by introducing other evidence to show that the acquisition is not likely to have an anticompetitive effect. The merging parties may attempt to show that the merger . . . will result in efficiencies."); *see also* 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 970c (4th ed. 2016) ("Neither the language nor the legislative history of Clayton Act §7 forecloses an economies defense. Limited case law suggestions to the contrary are dicta, internally contradictory, unsupported, or otherwise unpersuasive.").

3 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES]; *see also, e.g.*, MALCOLM B. COATE & ANDREW J. HEIMERT, FED. TRADE COMM'N, MERGER EFFICIENCIES AT THE FEDERAL TRADE COMMISSION 1997–2007, at 6–7 (2009), https://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997%E2%80%932007/0902mergerefficiencies.pdf (noting efficiencies claims in 147 of 186 mergers at the FTC from 1997 to 2007).

under section 7 of the Clayton Act,[4] combined with a growing body of economic literature suggesting that mergers can benefit consumers, which lower courts have acknowledged.[5]

The Affordable Care Act initiated a wave of healthcare mergers that were defended based on efficiencies.[6] One of these slated mergers was the merger of Anthem, Inc. and Cigna Corp., the largest prospective health insurance merger ever.[7] The DOJ challenged the merger, arguing that it violated section 7 of the Clayton Act because it would substantially lessen competition in a fourteen-state national accounts market and Richmond, Virginia.[8] Anthem defended the merger primarily by claiming that the post-merger firm would achieve billions of dollars in efficiencies that would be passed through to benefit consumers.[9] The district court, in *United States v. Anthem, Inc.*,[10] found that the merger would substantially lessen competition in the fourteen-state national accounts market and Richmond and enjoined the merger, rejecting Anthem's defense that the merger would result in

---

4 *Compare* FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality."), United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963) (arguing that anticompetitive mergers are not saved due to benefits derived from "some ultimate reckoning of social or economic debits and credits"), *and* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision."), *with* United States v. Gen. Dynamics Corp., 415 U.S. 486, 497–99, 501 (1974) (finding that market concentration statistics were not conclusive of anticompetitive effects and that defendants could rebut the presumption of anticompetitive effects by demonstrating that market concentration statistics in the acquisition of one coal mining company by another were misleading).

5 *E.g.*, *Heinz*, 246 F.3d at 720 ("It is true that a merger's primary benefit to the economy is its potential to generate efficiencies."); *see also* HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10 ("[E]fficiencies . . . enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.").

6 Bernard W. Archbold, *Analyzing Qualitative Efficiencies in the Ninth Circuit's* St. Luke's *Decision: A Defense of Non-Price, Qualitative Efficiencies*, 27 GEO. MASON U. CIV. RTS. L.J. 343, 346–47 (2017) ("[T]he ACA creates incentives for health care providers to reduce costs through collaboration and improvements in operating efficiency. . . . The ACA's cost containment and quality goals have catalyzed more mergers and consolidation in the national health care provider market." (footnote omitted)).

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

8 *Id.* The fourteen-state market included thirty-five local markets, and the markets allegedly harmed included, separately, the sale of insurance to national accounts, to large group employers, and the market to buy healthcare services. *See* United States v. Anthem, Inc. (*Anthem I*), 236 F. Supp. 3d 171, 187 (D.D.C. 2017).

9 *Anthem I*, 236 F. Supp. 3d at 182.

10 236 F. Supp. 3d 171 (D.D.C. 2017).

procompetitive benefits that outweighed the anticompetitive harms.[11] Anthem appealed the district court's rejection of its efficiencies defense, but the D.C. Circuit affirmed.[12]

The case was noteworthy for a variety of reasons. Most notably, the courts analyzed the defense's evidence of alleged efficiencies in greater detail than any prior courts. The courts did so even though the availability of an efficiencies defense in section 7 merger cases was unsettled, as courts had acknowledged.[13] Significantly, neither the district court nor the D.C. Circuit accepted *any* of the alleged $2.4 billion in cost savings as efficiencies.[14] These cases indicate that the D.C. Circuit, if not lower courts generally, imposes an asymmetric burden on defendants to prove efficiencies claims (compared to plaintiff's prima facie burden), as well as heightened scrutiny of efficiencies evidence. The *Anthem* decisions will likely affect how other circuits analyze efficiencies evidence, for good or ill, for many years.

This Comment analyzes the state of the efficiencies defense after the D.C. Circuit's decision in *United States v. Anthem, Inc.*[15] Part I analyzes conflicting Supreme Court and lower court treatment of efficiencies, concluding that the Supreme Court has never foreclosed an efficiencies defense. Part II details the rationale for the efficiencies defense and considers various forms and features of the defense. Part III examines the *Anthem* district and circuit court opinions. Part IV considers the questions answered and left open by *Anthem* and what the decision means for future transactions, especially given the D.C. Circuit's important role in developing antitrust law.

I. BACKGROUND: CONFLICTING SUPREME COURT AND LOWER COURT TREATMENT OF EFFICIENCIES

Section 7 of the Clayton Act, as amended by the Celler–Kefauver Act in 1950, prohibits mergers or acquisitions "in any line of commerce" whose effect "may be substantially to lessen competition."[16] The FTC and DOJ, in their joint Guidelines, have interpreted their obligation to prevent mergers that substantially lessen competition to mean that "mergers should not be permitted to create, enhance, or entrench market power or to facilitate its

---

11 *Id.* at 251, 259. The court assumed that an efficiencies defense was available but found that Anthem failed to prove the merger would result in creditable efficiencies on the facts of the case. *See id.* at 253, 258–59.

12 *Anthem II*, 855 F.3d at 349.

13 *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066, 1088 (D.D.C. 1997).

14 *See Anthem II*, 855 F.3d at 356–67; *Anthem I*, 236 F. Supp. 3d at 236–53.

15 855 F.3d 345 (D.C. Cir. 2017).

16 Celler–Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. § 18 (2012)).

exercise,"[17] since this may permit firms to unlawfully "restrict output and achieve profits above competitive levels."[18] Courts generally apply a burden-shifting approach when they consider the merger's competitive effects.[19]

Under the burden-shifting approach, a plaintiff must demonstrate as part of its prima facie case that the "transaction will lead to undue concentration in the market for a particular product in a particular geographic area."[20] This is often indirectly demonstrated through "the Herfindahl-Hirschman Index ('HHI'), which compares a market's concentration before and after the proposed merger,"[21] to show that the merger will facilitate coordination among firms that together possess monopoly power and could cause an anticompetitive increase in price or decrease in output (coordinated effects).[22] Alternatively, plaintiffs can demonstrate that the post-merger firm itself will have the incentive and ability to profitably cause an anticompetitive increase in price or decrease in output or quality after the merger (unilateral effects).[23] Demonstrating a prima facie case depends on properly defining the relevant product market: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[24] Therefore "a product market includes all goods that are reasonable substitutes, even where the products

---

17 HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 1. Indeed, courts rely on this framing when they use concentration statistics. *See, e.g.*, FTC v. H.J. Heinz Co., 246 F.3d 708, 716 (D.C. Cir. 2001) (noting that, with respect to the Herfindahl-Hirschman Index ("HHI"), when there is an "HHI increase of more than 100 points, where post-merger HHI exceeds 1800," because such an increase is "presumed . . . likely to create or enhance market power or facilitate its exercise." (citing U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.51 (rev. 1997))).

18 FTC v. PPG Indus., Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986).

19 *See* United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990).

20 *Id.* While many courts and economists assumed a strong relationship between industry concentration and diminished competition, in the 1970s "economists realized that efficiency *explained* concentration in many industries," but this structural presumption still remains entrenched in antitrust law, though not nearly as strongly. *See* Timothy J. Muris, *The Government and Merger Efficiencies: Still Hostile After All These Years*, 7 GEO. MASON L. REV. 729, 736 (1999) (emphasis added).

21 *Anthem II*, 855 F.3d 345, 349 (D.C. Cir. 2017); *see also H.J. Heinz Co.*, 246 F.3d at 716 n.9; HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 5.3 ("The HHI is calculated by summing the squares of the individual firms' market shares."); Jamie Henikoff Moffitt, *Merging in the Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis*, 63 VAND. L. REV. 1697, 1707–08 (2010). Under the Guidelines, HHIs above 2500 are "highly concentrated," which only require 200-point increases to be presumed anticompetitive. *Anthem II*, 855 F.3d at 349; HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 5.3.

22 FTC v. Univ. Health, Inc., 938 F.2d 1206, 1218 n.24 (11th Cir. 1991) ("Significant market concentration makes it 'easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.'" (quoting United States v. Rockford Mem'l Corp., 898 F.2d 1278, 1282–83 (7th Cir. 1990))); HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 7; Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 353 (2011).

23 *See* United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 81 (D.D.C. 2011); HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 6.

24 Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

are not entirely the same."[25] Mergers of close substitutes, in particular, present greater competitive threats.[26] Ultimately, "[b]y showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition," which shifts the burden of production to defendant.[27]

Defendants may rebut the prima facie case in a variety of ways. Defendants can discredit plaintiff's concentration statistics by demonstrating that they "inaccurately predict[] the relevant transaction's probable effect on future competition."[28] They can also establish that entry of new firms into the market, or expansion of existing firms, is "'timely, likely, and sufficient in its magnitude, character, and scope' to counteract a merger's anticompetitive effects."[29] The purpose is to provide evidence that undermines the inference of anticompetitive effects, which are *presumed* from the evidence of undue concentration.[30] By rebutting plaintiff's prima facie case, defendant shifts the burden of production back to the plaintiff, which merges with plaintiff's burden of persuasion.[31]

---

25 FTC v. Staples, Inc., 190 F. Supp. 3d 100, 117 (D.D.C. 2016).

26 Crane, *supra* note 22, at 354 ("The key factor in such an analysis is whether consumers consider the products sold by the merging parties to be each other's best substitutes—meaning that customers tend to substitute preferentially between the goods or services of the merging parties. Critical to these types of analyses are the diversion ratios between the two firms' products."). Diversion ratios are "the fraction of unit sales lost by the first product due to an increase in its price that would be diverted to the second product." HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 6.1.

27 United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990) (footnote omitted).

28 *Id.* at 991; *see also* United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1974) (explaining that *Brown Shoe* "cautioned that statistics concerning market share and concentration, while of great significance, were not conclusive indicators of anticompetitive effects"). The *General Dynamics* Court also found that the district court had not been in error when it "assessed the evidence of the 'structure, history and probable future' of the coal industry, and on the basis of this assessment found no substantial probability of anticompetitive effects from the merger." *Gen. Dynamics*, 415 U.S. at 498.

29 *Anthem I*, 236 F. Supp. 3d 171, 222 (D.D.C. 2017) (quoting United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 73 (D.D.C. 2011)); *see e.g.*, United States v. Aetna Inc., 240 F. Supp. 3d 1, 52 (D.D.C. 2017); *H & R Block*, 833 F. Supp. 2d at 73–74; *see also* Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410, 429–30 (5th Cir. 2008) ("Other courts have generally concluded that for entry to constrain supracompetitive prices, the entry has to be of a 'sufficient scale' adequate to constrain prices and break entry barriers. . . . We read the Commission's opinion to suggest that entry would not be at a sufficient scale capable of competing with CB&I and piercing the barriers to entry. . . . Therefore, the Commission applied the correct legal standard and rightfully concluded that potential entrants would not be of a sufficient scale to compete on the same playing field as CB&I and thus would be unable to constrain the likely anti-competitive effects." (quoting United States v. Visa USA, Inc., 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001) (other citations omitted))); *Baker Hughes*, 908 F.2d at 987 (rejecting a requirement of "quick and effective" entry as a "novel and unduly onerous standard"); *id.* ("The district court's factual findings amply support its determination that future entry into the United States HHUDR market is likely. This determination, in turn, supports the court's conclusion that the defendants successfully rebutted the government's prima facie case.").

30 Other factors can also rebut a prima facie case. *See supra* note 2.

31 *See Baker Hughes*, 908 F.2d at 983.

One of the greatest unanswered questions in merger analysis involves the role of efficiencies in rebutting a prima facie case.[32] By "efficiencies defense," courts, agencies, and commentators mean only that efficiencies can rebut a prima facie case (i.e., negate the presumption of anticompetitive effect); they do not mean that reaching a certain level of efficiencies can justify a merger that on net is anticompetitive, which would be an absolute (affirmative) defense.[33] With the focus on competition, the antitrust laws assume that "[w]hen the competitive process is allowed to run its course . . . the incentive of firms to lure away rivals' customers by offering them lower prices, superior quality, or new product features will necessarily lead these firms to seek more efficient ways to do business."[34] Thus, it is generally understood that efficiencies are at the very least "built in" to the substantially-lessen-competition standard of section 7.[35]

Despite judicial uncertainty about the permissibility of the efficiencies defense, the FTC and DOJ have accepted that procompetitive efficiencies can rebut a presumptively unlawful merger from very early on.[36] As a practical matter, "most of the thousands of mergers that occur each year are unchallenged by the enforcement agencies,"[37] which indicates an implicit recognition that some mergers enhance competition. Today, the DOJ and FTC's Guidelines explicitly recognize that mergers can generate procompetitive efficiencies, namely that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."[38] However,

---

32 *See* Moffitt, *supra* note 21, at 1701.

33 Saint Alphonsus Med. Ctr.–Nampa Inc. v. Saint Luke's Health Sys., 778 F.3d 775, 790 (9th Cir. 2015) ("[A] defendant can rebut a prima facie case with evidence that the proposed merger will create a more efficient combined entity and thus increase competition."); *see also* William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 216–17 (2003) (citing Phillip A. Areeda & Donald F. Turner, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 146–99 (1980)).

34 Kolasky & Dick, *supra* note 33, at 207–08.

35 Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 706 (2017) ("[T]he very concept of substantially lessening competition refers to competitive harm that outweighs any likely efficiencies.").

36 *See* U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (1968) ¶ 10 (permitting efficiencies as a justification in extraordinary cases), https://www.justice.gov/archives/atr/1968-merger-guidelines. At times, agencies have contended that antitrust law does not permit an efficiencies defense. *See* Muris, *supra* note 20, at 731.

37 Craig W. Conrath & Nicholas A. Widnell, *Efficiencies Claims in Merger Analysis: Hostility or Humility?*, 7 GEO. MASON L. REV. 685, 692 (1999); *see* FED. TRADE COMM'N & DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2017, at 1–2 (2018) (noting 21 FTC enforcement challenges and 18 DOJ challenges (with only 11 filed complaints) out of 2,052 reported transactions).

38 HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10. The recognition that mergers could result in efficiencies may go back even to the common-law era. *See* Sheldon Kimmel, *The Supreme Court's Efficiency Defense*, 12 SUP. CT. ECON. REV. 209, 210 n.3 (2004) ("The common law allows 'co-operation

efficiencies must be (1) merger-specific; (2) verifiable; (3) passed through to consumers; (4) not based on "anticompetitive reduction[s] in output or service"; and (5) sufficient to overcome the merger's anticompetitive effects.[39]

In the absence of guidance from the Supreme Court, lower courts have generally relied on the Guidelines' framing of the efficiencies defense.[40] In the first place, efficiencies must occur in the same market as the alleged harm.[41] Efficiencies must be verifiable; defendants must provide credible evidence substantiating the size and scope of the claimed efficiencies to

between two or more persons to accomplish an object which neither could gain . . . alone . . . although, in a certain sense and to a limited degree, such co-operation might have a tendency to lessen competition.'" (quoting Hoffman v. McMullen, 83 F. 372, 376–77 (9th Cir. 1897))).

39 *See* FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 348–49, 351 (3d Cir. 2016); HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10; Philip Nelson & David Smith, *Efficiencies in Antitrust Analysis: A View from the Middle of the Road*, 60 ANTITRUST BULL. 128, 144 (2015). The third requirement, however, is disputed in academic literature; indeed, the Guidelines no longer explicitly mention passthrough as a requirement and only briefly mention passthrough in the context of discussing the sliding scale approach to efficiencies. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10 ("The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers . . . .").

40 *See, e.g.*, United States v. Aetna Inc., 240 F. Supp. 3d 1, 94 (D.D.C. 2017) (adopting merger-specific, verifiable, passthrough, and not based on anticompetitive reduction in output or service requirements); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 82, 86 (D.D.C. 2015) (adopting merger-specific, verifiable, passthrough, and net outweighing anticompetitive effects requirements).

41 *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963) ("[A]nticompetitive effects in one market" cannot be justified by "procompetitive consequences in another."); *see also* Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., 778 F.3d 775, 789 (9th Cir. 2015) (rejecting the "argument that the merger would allow the defendant to compete more efficiently *outside* the relevant market"); FTC v. Tenet Health Care Corp., 17 F. Supp. 2d 937, 948 (E.D. Mo. 1998) (rejecting alleged efficiencies in tertiary care services because the relevant market was acute care services); *cf.* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285–86 (2018) (holding that the proper antitrust analysis of the two-sided platform credit card market under the Sherman Act must include both sides of the market, meaning that benefits to cardholders are not outside the relevant market, but within the market). *But see* HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10 n.14 ("In some cases, . . . the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market . . . ."); Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market*, *in* 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE LIBER AMICORUM (2014). Although some maintain that out-of-market efficiencies should be considered, section 7 of the Clayton Act may impose an insuperable textual barrier to doing so. The Clayton Act prohibits mergers that substantially lessen competition "in any line of commerce," not in any line of commerce so long as not outweighed by competitive benefits in another line of commerce. 15 U.S.C. § 18 (2012). Nevertheless, arguments scoffing at "deny[ing] to one group the guarantees of a competitive market in order to provide the benefits of efficiency to a separate group" miss the mark because efficiencies enhance competition; and read as "denying the guarantees of a competitive market in order to provide the benefits of competition to a separate group," the rhetorical force falls away since such a balancing is an integral part of modern economic antitrust analysis. *See* Robert Pitofsky, Former Chairman, Fed. Trade Comm'n, Efficiencies in Defense of Mergers: 18 Months After, Address at the George Mason Law Review Antitrust Symposium (Oct. 16, 1998), http://www.ftc.gov/public-statements/1998/10/efficiencies-defense-mergers-18-months-after (criticizing the consideration of out-of-market efficiencies in merger analysis).

demonstrate that the effects are likely to follow from the merger.[42] Efficiencies must also be "merger-specific"; namely, the efficiencies likely to be achieved from the merger cannot be established in the absence of the merger through another, more competitive means.[43] Efficiencies are only procompetitive effects of a merger if they are passed through to the benefit of consumers, generally through lower prices.[44] Greater post-merger innovation (or incentives to innovate) can be a procompetitive effect, while reduced post-merger innovation is an anticompetitive effect.[45]

Both the Guidelines and some courts adopt a sliding scale approach to efficiencies, wherein plaintiff's stronger prima facie case imparts on the defendant a larger standard of proof to rebut the presumption of anticompetitive effects.[46] Even if efficiencies are verifiable, merger-specific, and likely to be passed-through to consumers, "[e]fficiencies almost never justify a merger to monopoly or near-monopoly."[47] The plaintiff, however, has the ultimate burden of persuasion.[48]

---

42 FTC v. H.J. Heinz Co., 246 F.3d 708, 721–22 & n.20 (D.C. Cir. 2001) ("The Horizontal Merger Guidelines explain that 'merging firms must substantiate efficiency claims so that the Agency 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.'" (quoting HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10)); *see Anthem II*, 855 F.3d 345, 359–63 (D.C. Cir. 2017).

43 *Sysco Corp.*, 113 F. Supp. 3d at 82 (citing United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 89 (D.D.C. 2011)); HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10. Some scholars have criticized the requirement that efficiencies be merger-specific when the evidence shows prices will not increase post-merger. *E.g.*, Hovenkamp, *supra* note 35, at 736–37 (arguing that the language of section 7 and the consumer welfare standard does not require merger specificity).

44 *Penn State Hershey Med. Ctr.*, 838 F.3d at 349; FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991) ("[A] defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers."); Moffitt, *supra* note 21, at 1722. The Guidelines, however, do not mention any *definite* requirement of consumer passthrough. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10. *But see* Hovenkamp, *supra* note 35, at 735 (stating that the Guidelines implicitly require pass through such that "post-merger prices [are] no higher than pre-merger prices" (citing HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 2.1)).

45 *See H & R Block, Inc.*, 833 F. Supp. at 79; FTC v. Staples, Inc., 970 F. Supp. 1066, 1083 (D.D.C. 1997).

46 *Saint Alphonsus Med. Ctr.*, 778 F.3d at 789–90; HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10 ("The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers . . . .").

47 HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10; *see Saint Alphonsus Med. Ctr.*, 778 F.3d at 790 ("Because § 7 seeks to avert monopolies, proof of 'extraordinary efficiencies' is required to offset the anticompetitive concerns in highly concentrated markets."); *H.J. Heinz Co.*, 246 F.3d at 720 ("Nevertheless, the high market concentration levels present in this case require, in rebuttal, proof of extraordinary efficiencies, which the appellees failed to supply.").

48 *See* United States v. Baker Hughes Inc., 908 F.2d 981, 983, 991 (D.C. Cir. 1990). *But see* Crane, *supra* note 22, at 356 ("[T]he Supreme Court's repeated invocation of 'probability' as the relevant threshold of proof for merger harms suggests that the government's burden in seeking to enjoin a merger is less

While many courts look to the Guidelines, they are not legally binding on the courts.[49] Nevertheless, there is a gap between the recognition and treatment of efficiencies in agencies and the courts.[50] This Section examines the vertical divergence between Supreme Court and lower court precedent, as well as the horizontal divergence among lower courts in examining merger efficiencies.

A. *Supreme Court Precedent*

The Supreme Court has not categorically ruled out considering efficiencies in merger analysis.[51] The Court's merger jurisprudence of the 1960s and 1970s was dominated by the now-outmoded structuralist paradigm in which muddled rulings with broadly stated dicta left antitrust practitioners and courts without a clear understanding of the Court's view of the role of efficiencies in merger analysis.[52]

---

than a preponderance of the evidence. . . . In typical preliminary injunction proceedings, ... the government's effective burden is merely to prove a 'substantial likelihood' that it will eventually be able to show probable cause to block the merger—a combination that seems to make the government's burden shrink exponentially.").

49 Conrath & Widnell, *supra* note 37, at 690; Moffitt, *supra* note 21, at 1706.

50 *See* Moffitt, *supra* note 21, at 1705, 1708.

51 At most, *Procter & Gamble* only said that "*possible* economies" will not be considered. FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) (emphasis added); *see* Moffitt, *supra* note 21, at 1704 ("[T]he Supreme Court never directly addressed the issue of an 'efficiency defense'; therefore, no specific precedent exists stating whether potential pro-competitive efficiencies should be included in the Section 7 competitive impact analysis."); Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381, 412–13 (1980) (noting that legislative history suggests that efficiency should count toward a merger's legality, and that the Supreme Court cases, particularly *Procter & Gamble*, have not foreclosed an efficiencies defense); *cf.* Kimmel, *supra* note 38, at 210 (arguing that the failing-firm defense in only understandable as an efficiencies defense). *But see* Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1595 (1983) ("[T]he Supreme Court resolved the legal status of a case-by-case efficiencies defense under section 7 of the Clayton Act, holding that it is not available . . . . Several major commentators interpret the Court's reference to 'possible economies' as evidence that the Court would not ignore relatively certain economies from mergers. This narrow reading of the language ignores the Court's stated rationale for rejecting an efficiencies defense. The Court based its holding on the balance that Congress struck 'in favor of protecting competition,' believing that Congress valued competition more highly than efficiency gains." (quoting *Procter & Gamble Co.*, 386 U.S. at 580) (footnotes omitted)). *See generally* Mark N. Berry, *Efficiencies and Horizontal Mergers: In Search of a Defense*, 33 SAN DIEGO L. REV. 515, 553 (1996).

52 *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 208 (2005) ("[M]erger law is the largest area of public antitrust enforcement activity, and an area where the law as the Supreme Court last left it is indefensible."); Fisher & Lande, *supra* note 51, at 1584 ("In 1968, the consensus analysis had long been that increased concentration typically led to (or increased) market power, with accompanying higher prices and lower output. Theoretical and empirical work since then, however, supports the increasingly accepted view that increased concentration often leads to (or indicates) greater efficiency, lower costs, greater output, and lower prices." (footnote omitted)); Joseph Kattan, *Efficiencies and Merger Analysis*, 62 ANTITRUST L.J. 513, 516–17 (1994) ("[T]hese cases . . . clearly reflect

In the seminal case of *Brown Shoe Co. v. United States*,[53] the Supreme Court upheld the lower court's judgment that a contemplated vertical and horizontal merger between two rival integrated shoe manufacturers and retailers violated section 7 of the Clayton Act.[54] The Court avowed that the merger would substantially lessen competition by permitting foreclosure of retail stores to rival manufacturers and resulting in a *potential trend* toward unlawful concentration in shoe retailing.[55] Addressing the potential consumer benefits of vertical integration, the Court said that vertical integration

> is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.[56]

Besides being internally inconsistent, as commentators have pointed out, the opinion's dismissiveness toward merger benefits ignores that the Clayton Act's disposition toward decentralization is not an absolute disposition and, as the statement itself recognizes, efficiencies from integration can *benefit* consumers.[57] If consumer welfare is what matters in antitrust,[58] adhering too rigidly to a desire to encourage small businesses would undermine consumer welfare and protect competitors, rather than competition, because this would undercut larger, more efficient firms that could drive prices down.

Subsequent Supreme Court cases also expressed hostility to merger efficiencies. In *United States v. Philadelphia National Bank*,[59] involving a merger between two large Philadelphia commercial banks, the banks defended that the merger would stimulate economic development to benefit both the

---

the philosophy of another antitrust era."); Moffitt, *supra* note 21, at 1703; *see also* John Kwoka, *The Changing Nature of Efficiencies in Mergers and Merger Analysis*, 60 ANTITRUST BULL. 231, 231 (2015) (explaining that the 2010 Guidelines "emphasized competitive effects over the calculation of market shares and concentration, although they reinstated the presumption that high shares and concentration signaled competitive concerns").

53 370 U.S. 294 (1962).

54 *Id.* at 346.

55 *Id.* at 328–34, 344–46.

56 *Id.* at 344.

57 Berry, *supra* note 51, at 522 (noting that *Brown Shoe* is "internally inconsistent"); *see also* Muris, *supra* note 51, at 406–07 ("[T]he Court, in the space of but a few pages, argued that the merger was harmful both because it led or might lead to higher prices and then because it led to lower prices."); *cf.* Rapanos v. United States, 547 U.S. 715, 752 (2006) ("[N]o law pursues its purpose at all costs . . . .").

58 Commentators generally agree that consumer welfare is the standard of competition under the Clayton Act, if not antitrust law generally. *See* Gregory T. Gundlach & Diana Moss, *The Role of Efficiencies in Antitrust Law: Introduction and Overview*, 60 ANTITRUST BULL. 91, 91 (2015) (noting that "consensus exists that the goal of antitrust law is maximizing 'consumer welfare'" (citing DEBORAH A. GARZA ET AL., ANTITRUST MODERNIZATION COMMISSION: REPORT AND RECOMMENDATION 35 (2007))).

59 374 U.S. 321 (1963).

company and the region.[60] Having concluded that the merger would result in undue concentration at a thirty percent market share in the Philadelphia commercial banking industry, the Court professed that anticompetitive mergers are not saved by the benefits derived from "some ultimate reckoning of social or economic debits and credits."[61] However, this language suggests that the Court precluded a consideration of *out-of-market* efficiencies—benefits to the community—not intramarket efficiencies.[62] Not only that, the Court admitted that when a court enjoins a merger, it is because the plaintiff demonstrated that the merger will significantly increase the market concentration, "in the *absence* of evidence clearly showing that the merger is *not likely* to have . . . anticompetitive effects."[63] Thus, *Philadelphia National Bank* can plausibly be read to endorse the proposition that plaintiffs may rebut the presumption established by market shares and concentration statistics.

The strongest hostility to efficiencies came in *FTC v. Procter & Gamble Co.*[64] There, in the context of Procter & Gamble's acquisition of bleach manufacturer Clorox, the Court asserted that "[p]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."[65] Many scholars thought this definitively ruled out merger efficiencies.[66] This is probably wrong. First, the Supreme Court consistently applies the consumer welfare standard, so it would be contradictory to only count consumer harm while ignoring consumer benefits.[67] Second, the Court only said that *possible* (i.e., *speculative*) merger efficiencies should not be credited, which should not rule out certain or probable efficiencies.[68] Nor was the issue of a general efficiencies defense before the Court.[69] Therefore, the Court did not settle the role of efficiencies in merger analysis.

---

60 *Id.* at 371.

61 *Id.* at 364–65, 371.

62 *See id.* at 363; Berry, *supra* note 51, at 524; Muris, *supra* note 51, at 409. Despite this holding, some scholars have nonetheless advocated that agencies seriously consider out-of-market efficiencies in merger analysis because out-of-market efficiencies improve consumer welfare. *See generally* Rybnicek & Wright, supra note 41.

63 *Phila. Nat'l Bank*, 374 U.S. at 363 (emphasis added); *see also* Muris, *supra* note 51, at 410.

64 386 U.S. 568 (1967).

65 *Id.* at 580.

66 *E.g.*, Fisher & Lande, *supra* note 51, at 1595 ("[T]he Supreme Court resolved the legal status of a case-by-case efficiencies defense under section 7 of the Clayton Act, holding that it is not available . . . .").

67 *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979))); Berry, *supra* note 51, at 546 ("There is, simply put, a logical inconsistency between recognizing distributional standards in the case of consumers' surplus, and then rejecting such standards in the case of cost savings.").

68 *See* FTC v. H.J. Heinz Co., 246 F.3d 708, 720 n.18 (D.C. Cir. 2001) (discussing *Procter & Gamble Co.*); Muris, *supra* note 51, at 412–13.

69 Berry, *supra* note 51, at 525; Muris, *supra* note 51, at 413.

The last word on merger analysis from the Supreme Court came in *United States v. General Dynamics Corp.*[70] *General Dynamics* expressly affirmed that market concentration statistics were not conclusive of anticompetitive effects and that defendants could rebut the presumption of anticompetitive effects, in that case, by demonstrating that market concentration statistics in the acquisition of one coal mining company by another were misleading.[71] Many have argued that this signaled a transition in the Supreme Court's jurisprudence toward accepting a more holistic approach in which the government no longer "always wins."[72] After *General Dynamics*, the Supreme Court in *Continental T. V., Inc. v. GTE Sylvania Inc.*,[73] *State Oil Co. v. Khan*,[74] and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[75] indicated the Court's embrace of the modern economic, consumer-welfare approach to antitrust by applying the rule of reason to potentially procompetitive restraints.[76] The Court has not turned back since.

B. *Lower Court Precedent*

Given the Supreme Court's silence on merger analysis, district and circuit courts have been the standard setters. Circuit courts vary widely on recognizing efficiencies but acknowledge that the case law is unsettled.[77] Despite many commentators' arguments that courts have been favorably disposed toward considering efficiencies, circuit courts are notably more hostile.[78] Indeed, one scholar has suggested that

---

70 415 U.S. 486 (1974); Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank*: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377, 379 (2015) ("In the last 40 years the Court has not again passed upon the substantive aspect of merger analysis."). This is partly due to the Hart-Scott-Rodino Act, passed in 1976, which established a premerger notification system. Moffitt, *supra* note 21, at 1703.

71 *See Gen. Dynamics Corp.*, 415 U.S. at 501–03.

72 United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) ("The sole consistency that I can find is that . . . under § 7, the Government always wins."); *see also* United States v. Baker Hughes Inc., 908 F.2d 981, 990–91 (D.C. Cir. 1990). *See generally* Stephen Calkins, *Developments in Merger Litigation: The Government Doesn't Always Win*, 56 ANTITRUST L.J. 855 (1988).

73 433 U.S. 36, 59 (1977) (holding that nonprice, vertical restrictions are analyzed under the rule of reason).

74 522 U.S. 3, 22 (1997) (holding that maximum resale price maintenance agreements are analyzed under the rule of reason).

75 551 U.S. 877, 907 (2007) (holding that minimum resale price maintenance agreements are analyzed under the rule of reason).

76 Under the rule of reason, restraints of trade are unlawful only if they pose an "unreasonable restraint on competition." *See Cont'l T. V.*, 433 U.S. at 49.

77 *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066, 1088–89 (D.D.C. 1997).

78 *Cf.* COATE & HEIMERT, *supra* note 3, at 16 (noting that the FTC's Bureau of Competition rejects efficiencies claims more often than not).

> [a]lthough courts claim to be balancing merger-generated efficiencies with other negative factors affecting market competition, they are not in fact doing so. Rather, courts appear to be making an assessment of the relevant concentration in the applicable market and then allowing that initial assessment to color their recognition of claimed efficiencies.[79]

In other words, many courts treat anticompetitive and procompetitive effects asymmetrically, rather than balancing potential efficiencies against potential anticompetitive effects, which may be determinative when applied in agency adjudication.[80]

The D.C. Circuit has played an important role in developing antitrust doctrine, and the efficiencies defense in particular. First, in *United States v. Baker Hughes Inc.*,[81] the D.C. Circuit affirmed the lower court's holding that defendants—a foreign acquirer of a domestic company's subsidiary, both of which manufactured hard rock hydraulic underground drilling rigs—had rebutted the government's prima facie case and that therefore the merger would not substantially lessen competition.[82] The court rejected the government's proffered "clear showing" rebuttal standard because a clear-and-convincing-evidence standard "in effect shifts the government's ultimate burden of persuasion to the defendant," erasing "the distinction between [defendants' rebuttal] burden and the ultimate burden of persuasion."[83] Although the court did not directly address efficiencies, the court recognized that "evidence on a variety of factors can rebut a prima facie case. . . . [N]on entry factors [can] provide compelling support" that a merger is unlikely to substantially lessen competition.[84] Referring to *Brown Shoe*, the court explained that "[s]ection 7 involves *probabilities*, not certainties or possibilities. The Supreme Court has adopted a totality-of-the-circumstances approach to the statute," so it is "imperative" to consider nonentry factors in merger analysis.[85] The court took its cue from *General Dynamics*, in which "the Court carefully analyzed defendants' rebuttal evidence."[86]

---

79 Moffitt, *supra* note 21, at 1698.

80 *Id.* at 1709; *see* Ardagh Group S.A., File No. 131-0087 (F.T.C. Apr. 11, 2014) (Wright, Comm'r, dissenting), https://www.ftc.gov/system/files/documents/public_statements/568821/140411ardaghstmt.pdf (arguing that the FTC must be applying asymmetric burdens, otherwise they could not condemn the merger and find zero efficiencies). *See generally* Crane, *supra* note 22 (describing how courts apply an asymmetrically higher standard of proof for efficiencies than anticompetitive effects).

81 908 F.2d 981 (D.C. Cir. 1990).

82 *Id.* at 992.

83 *Id.* at 983, 991. *But see* United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963) ("[W]e think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.").

84 *Baker Hughes Inc.*, 908 F.2d at 984.

85 *Id.* at 984, 986 (footnote omitted).

86 *Id.* at 990.

Just one year later, the Eleventh Circuit provided the clearest recognition of the efficiencies defense to date. In *FTC v. University Health, Inc.*,[87] involving an acquisition by multiple health care providers, the court held both that "a defendant may rebut the government's prima facie case with evidence showing that the intended merger would create significant efficiencies in the relevant market," and that efficiencies are relevant to the overall competitive effects analysis.[88] Like *Baker Hughes*, the court recognized that many different types of evidence can rebut a prima facie case.[89] Because of the significant difficulties in demonstrating efficiencies accurately, the court adopted a sliding scale approach; the court required defendants to prove "significant economies" to overcome the presumption that the merger was anticompetitive.[90] Defendants, however, failed to demonstrate efficiencies, finding that simply estimating the savings from eliminating duplication, without explaining "how these efficiencies would be created and maintained," yields only speculative, unverified efficiencies.[91] The court vacated the district court decision denying FTC's motion for a preliminary injunction because the district court relied on defendant's speculative efficiencies claims.[92]

The District Court for the District of Columbia first addressed efficiencies directly in *FTC v. Staples, Inc.*,[93] a merger between the two largest office superstores.[94] The court determined that office supply superstores were a relevant product market, with the merging parties having high market shares.[95] Acknowledging the disagreement about the permissibility of an efficiencies defense and rejecting the argument that a clear and convincing evidence standard should apply, the court considered the merger's efficiencies, but found them overstated.[96] The court found that much of the defendants' alleged \$4.9 to \$6.5 billion of efficiencies—achieving lower prices due to higher purchasing power post-merger—were unverified, owing largely to the defense witness's inability to explain how they were calculated, and the massive and inexplicable 500% increase in alleged savings from when they were first presented to the two companies' Boards to when the figures were submitted to the court.[97] The court also criticized the defendants' failure to distinguish between merger-specific and non-merger-specific savings and their

---

87 938 F.2d 1206 (11th Cir. 1991).

88 *Id.* at 1222; *see also* FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 348–49 (3d Cir. 2016) (requiring defendants to demonstrate "significant economies"); FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054 (8th Cir. 1999) (indicating that efficiencies must be part of the overall competitive effects analysis).

89 *Univ. Health*, 938 F.2d at 1221.

90 *Id.* at 1223.

91 *Id.*

92 *Id.* at 1225–26.

93 970 F. Supp. 1066 (D.D.C. 1997).

94 *Id.* at 1088.

95 *Id.* at 1081.

96 *Id.* at 1089–90.

97 *Id.* at 1089.

inflated passthrough estimate of two-thirds, even though historic passthrough had been fifteen to seventeen percent.[98]

Although the D.C. District Court had multiple opportunities to address efficiencies after *Staples*,[99] the defense's availability in the D.C. Circuit was solidified in *FTC v. H.J. Heinz Co.*,[100] where the appellate court found that "the trend among lower courts is to recognize the [efficiencies] defense" and proceeded to examine the alleged merger efficiencies.[101] Citing the 1997 Guidelines, the court adopted a sliding scale approach, requiring defendants—two baby food companies—to show extraordinary efficiencies to rebut a prima facie case with high HHI concentration statistics, a burden the defendants did not satisfy.[102] Thus, the court reversed the district court, which had denied the FTC's motion for a preliminary injunction and credited defendants' claims that the merger would result in cost savings from distribution and production consolidation that would allow the post-merger firm "to provide the best of the two companies' recipes . . . and to apply its value pricing strategy to the entire combined production volume."[103] The court found that the district court failed to calculate total variable cost savings across the combined company, which would significantly reduce the scale of the alleged cost savings.[104] The court also found that the district court failed to establish that the efficiencies were merger-specific, since there was no effort made to determine the likelihood of Heinz creating better recipes, like Beech-Nut, on its own through "product development and promotion."[105]

After *Heinz*, the District Court for the District of Columbia continued examining efficiencies evidence but consistently failed to find merger-specific efficiencies. In *FTC v. Arch Coal*,[106] for instance, the post-merger ability

---

98 *Id.* at 1090; *see also* FTC v. Cardinal Health, 12 F. Supp. 2d. 34, 62–63 (D.D.C. 1998) (finding that greater benefits would occur through competition that through merger, in part because evidence showed that passthrough of savings in the industry approached eighty percent, yet the parties alleged pass through of at least fifty percent, which appeared to be a reduction in consumer welfare resulting from the transactions).

99 *E.g.*, FTC v. Swedish Match, 131 F. Supp. 2d 151, 171–72 (D.D.C. 2000); *Cardinal Health*, 12 F. Supp. 2d at 61–63.

100 246 F.3d 708 (D.C. Cir. 2001).

101 *Id.* at 720–21.

102 *Id.*

103 *Id.* at 711. The *Heinz* district court was the first district court to hold that proffered efficiencies actually rebutted plaintiff's prima facie case. FTC v. H.J. Heinz Co, 116 F. Supp. 2d 190, 199 (D.D.C. 2000). Earlier cases that credited efficiencies held that the government failed to establish its prima facie case. *See, e.g.*, United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 137, 145 (E.D.N.Y. 1997).

104 *H.J. Heinz*, 246 F.3d at 721.

105 *Id.* at 722. The district court in *Heinz* had erroneously considered a high percentage variable cost reduction to Beech-Nut as evidence of a substantial efficiency, rather than recognizing that (1) a high percentage variable cost reduction can be insignificant when compared with the resulting percentage reduction in the overall product price, and (2) the relevant variable cost reduction was the post-merger firm's variable cost reduction compared to the aggregate of the two pre-merger firms. *Id.* at 721.

106 329 F. Supp. 2d 109 (D.D.C. 2004).

to cover the acquired company under the acquiring company's cheaper insurance policy was not a merger-specific efficiency, since such a policy could be independently negotiated and achieved.[107]

Other courts soon joined the burgeoning list of circuits recognizing that efficiencies are crucial to a competitive effects analysis or defendant's rebuttal burden.[108] In *Saint Alphonsus Medical Center–Nampa Inc. v. St. Luke's Health System, Ltd.*,[109] the Ninth Circuit adopted a sliding scale approach to the efficiencies defense, assuming the availability of the efficiencies defense while remaining skeptical of its existence.[110] Its recognition of the defense was limited, since it required clear and convincing evidence of "extraordinary efficiencies."[111] The court held that it was not clearly erroneous for the district court to find that adoption of a shared record system was not merger-specific, since "data analytics tools are available to independent physicians."[112] The court also seemed to argue that quality improvements were not efficiencies, since they did not reflect "increase[d] competition or decrease[d] prices," only an operational improvement; however, the court was unclear on this point since it subsequently noted the mere "*desire* of St. Luke's" to improve health care quality, which seemed to invoke verifiability.[113] Still, denying that nonprice efficiencies like quality improvements can offset a price increase is contrary to antitrust's consumer welfare goal

---

107 *Id.* at 152. In *United States v. H & R Block*, adopting better cost-cutting and IT procedures were not merger-specific post-merger efficiencies because each could independently implement these practices. United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 90–91 (D.D.C. 2011). In *FTC v. Sysco*, the merging firms' efforts to generate merchandising savings were not merger-specific efficiencies since the efforts were begun and could be implemented independently. FTC v. Sysco Corp., 113 F. Supp. 3d 1, 84–85 (D.D.C. 2015).

108 First, the Sixth Circuit implied the availability of efficiencies to rebut a merger in *ProMedica Health System, Inc. v. FTC*—involving a merger between a dominant community hospital and an independent rival—noting "ProMedica's failure to cite any efficiencies that would result from [the] merger." 749 F.3d 559, 572 (6th Cir. 2014). Therefore, the defense failed to rebut the government's concentration statistics that were well above HHI thresholds. *Id.* at 568, 572.

109 778 F.3d 775 (9th Cir. 2015).

110 *Id.* at 788–91. After *Saint Alphonsus*, the Third Circuit recognized an efficiencies rebuttal in *FTC v. Penn State Hershey Medical Center*. *See generally* FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347–51 (3d Cir. 2016).

111 *Saint Alphonsus*, 778 F.3d at 790; *see* HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10. Relatedly, the Third Circuit in *Penn State Hershey* adopted an elevated clear evidence standard for demonstrating consumer passthrough; this is far stricter than the Guidelines, which failed to explicitly adopt a consumer passthrough requirement. *Penn State Hershey*, 838 F.3d at 350; *see also Antitrust Law — Hospital Mergers — Third Circuit Clarifies Geographic Market Definition and Raises Bar for Efficiencies Defense* — FTC v. Penn State Hershey Medical Center, *838 F.3d 327 (3d Cir. 2016)*, 130 HARV. L. REV. 1736, 1742 (2017). Originally, the 1982 Guidelines adopted a clear and convincing evidence standard for efficiencies, although this standard was absent from the 1992 Guidelines. *Compare* U.S. DEP'T OF JUSTICE, MERGER GUIDELINES § 4 (1992), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf, *with* U.S. DEP'T OF JUSTICE, MERGER GUIDELINES § 5.A n.53 (1982), http://www.justice.gov/atr/hmerger/11248.pdf.

112 *Saint Alphonsus*, 778 F.3d at 791.

113 *Id.* (emphasis added).

because, *ceteris paribus*, consumers benefit from quality improvements.[114] To the extent that the courts recognize decline in quality as an anticompetitive effect, the court creates an asymmetry by failing to recognize quality improvements as a procompetitive effect. This holding is particularly problematic in today's economy, in which parties are much more likely to claim quality-enhancing efficiencies as a motivation for their merger.[115]

No appellate court has held that a defendant successfully rebutted a prima facie case with efficiencies.[116] Despite a willingness to seriously consider merger efficiencies in practice (if not the legal question whether an efficiencies defense is permissible), courts have allowed very few efficiencies to get through its merger-specific, verifiable, and passthrough screens. Courts also appear to apply a basic credibility screen to the evidence overall, refusing to engage in a dollar-for-dollar comparison of anticompetitive harm against procompetitive benefit when enough holes can be poked in the efficiencies evidence or estimations.[117] Thus, despite the apparent friendliness of courts to consider efficiencies, courts have been more hostile than not to claims of efficiencies.

II. THE EFFICIENCIES DEFENSE: JUSTIFICATION AND FORMS

The text and legislative history of the Clayton Act do not forbid an efficiencies defense.[118] However, the contradictory nature of the Clayton Act's legislative history—Congress's concern with both populist protections of small businesses and consumer-welfare-enhancing competition[119]—and the brevity of the Clayton Act's text resulted in a policy at war with itself because the goals of small-business protectionism and consumer welfare are incommensurable.[120] With many scholars recognizing that *consumer* welfare is the goal of antitrust laws, most now also recognize that mergers can produce

---

114 HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10.

115 *See* Kwoka, *supra* note 52, at 238.

116 *Saint Alphonsus*, 778 F.3d at 789 ("[N]one of the reported appellate decisions have actually held that a § 7 defendant has rebutted a prima facie case with an efficiencies defense . . . .").

117 *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066, 1090 (D.D.C. 1997) (finding at least 15–17% passthrough but failing to calculate what efficiencies remained after critiquing some efficiencies as unverified or not merger-specific).

118 Berry, *supra* note 51, at 521 ("The predominant view is that neither the language nor the legislative history of section 7 precludes the application of an efficiencies defense."); *see also* 4A AREEDA & HOVENKAMP, *supra* note 2, ¶ 970cl. Although a "defense" to a statutory violation ordinarily should be expressly provided to be lawful, the text of the Clayton Act is sparse, and the focus on competition—an economic concept undefined in the statute—in section 7 implies that efficiencies should be considered, since modern economic analysis underscores that competition is furthered by efficiencies.

119 *See* 4A AREEDA & HOVENKAMP, *supra* note 2, ¶ 970c2; *cf.* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 87–89 (1982) (noting Congress's "praise [of] corporate productive efficiency," and condemnation of monopolistic pricing in the legislative history of the Sherman Act).

120 ROBERT H. BORK, THE ANTITRUST PARADOX 204 (1993).

consumer-benefiting efficiencies.[121] Furthermore, the "consensus" is that the legislative history of the antitrust laws "indicate[s] some Congressional concern about preserving efficiencies," even among critics of an efficiencies defense.[122] Even if an efficiencies defense is not precluded by law or courts, there still must be a sound theoretical basis for an efficiencies defense that remains faithful to consumer welfare goals.

The main reason to accept an efficiencies defense in mergers—vertical, horizontal, and conglomerate alike—is that efficiencies can benefit consumers: "Society benefits from lower costs, innovation, and higher quality."[123] Oliver Williamson began this revolution in 1968, pointing out that basic economic theory demonstrates that merging firms can improve their productive efficiency by achieving economies of scale, with decreasing average total cost as output increases; it is widely accepted that this improves competition.[124] Even if a merger decreases output and puts upward pressure on price, reducing the cost of inputs can put an even greater downward pressure on price, as Oliver Williamson explained:

> [T]he deadweight loss from decreased production arises from marginal output no longer sold; cost savings, however, extend to all products actually manufactured. Since output still produced typically far exceeds the amount reduced by increased monopoly power, relatively small increases in efficiency can—and usually will—dominate much larger increases in monopoly power.[125]

The post-merger firm can realize these efficiencies by adopting one of the pre-merger firm's superiorities firmwide or by combining complementarities

---

[121] HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10; DEBORAH A. GARZA ET AL., ANTITRUST MODERNIZATION COMMISSION: REPORT AND RECOMMENDATIONS 35 (2007), http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf; Gundlach & Moss, *supra* note 58, at 91; *see also* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979))).

[122] Nelson & Smith, *supra* note 39, at 130–31; *see also, e.g.*, Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1191–92 (1977); Lande, *supra* note 119, at 89.

[123] Muris, *supra* note 51, at 381. *But see* Fisher & Lande, *supra* note 51, at 1599–1600 (arguing that while management efficiencies can result from conglomerate mergers, operating efficiencies are unlikely to result from conglomerate mergers).

[124] HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10; Conrath & Widnell, *supra* note 37, at 692; Nelson & Smith, *supra* note 39, at 134. *But see* Fisher & Lande, *supra* note 51, at 1600 ("Since one would not normally expect firms to survive long under reasonably competitive conditions unless they achieved something close to minimum efficient scale, horizontal mergers citing scale economies [that allow the post-merger firm to achieve minimum efficient scale] as the primary motive are suspect.").

[125] Fisher & Lande, *supra* note 51, at 1626 (discussing Williamson's findings); *see also* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 21–23, 34 (1968).

to yield synergies.[126] Mergers can also result in allocative efficiencies, which arise "when economic resources are allocated to the most valued uses."[127]

Besides productive and allocative efficiency, mergers can cause dynamic efficiency, or the "economic advancement and growth of a system and . . . the improvement of productive efficiency in a firm, over time," usually from "product and process improvements" through changes in the underlying technology.[128] Dynamic efficiencies may be the most important kind of efficiencies for antitrust policy because of their systemic impact.[129] Even "low, sustained dynamic efficiency advantages can offset sizeable transitory static efficiency losses."[130] Indeed, Joseph Schumpeter argued that larger firms are better innovators than smaller ones, which suggests that mergers tend to result in innovative markets.[131] Dynamic innovation efficiencies can occur from both traditional operational cost efficiencies, due to production process improvements that lower cost while achieving the same innovation levels, or from post-merger innovation synergies that result in "more innovation output per dollar of input."[132] Research and development economies can occur when merging firms have complimentary innovation assets.[133] Innovation efficiencies can result in the production of higher-quality products over time.[134] Hence, some commentators have argued that dynamic merger efficiencies should be more strongly recognized in merger analysis, going beyond considering short-run variable cost reductions.[135]

Firms can achieve efficiencies in ways other than economies of scale. There are also economies of scope, in which "costs are reduced by jointly producing two or more products, rather than producing the products separately."[136] Merging firms can eliminate or avoid redundancies, which can lower a firm's cost of operation as well as improve its degree of technological innovation.[137] The merging firm can replace one merging party's less

---

126 Fisher & Lande, *supra* note 51, at 1600.

127 Nelson & Smith, *supra* note 39, at 132; *see also* Berry, *supra* note 51, at 533 ("[Allocative efficiency] refers to the welfare of society as a whole in the sense of the placement of resources in the economy where consumers will most value their output. . . . Allocative efficiency is achieved when output is priced at marginal cost.").

128 Gundlach & Moss, *supra* note 58, at 93–94 (footnote omitted); Kwoka, *supra* note 52, at 236.

129 *See* Gundlach & Moss, *supra* note 58, at 94; *see also* Berry, *supra* note 51, at 533–34 ("[I]nnovative and productive efficiencies provide 'a more powerful contribution to social wealth because they comprise the growth factors by which social wealth increases over time.'" (quoting Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1027 (1987))).

130 Nelson & Smith, *supra* note 39, at 139.

131 *Id.* (citing JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 106 (1975)).

132 Kwoka, *supra* note 52, at 236.

133 *Id.* at 237.

134 Nelson & Smith, *supra* note 39, at 132.

135 *Id.* at 149.

136 *Id.* at 135.

137 Kwoka, *supra* note 52, at 236.

efficient management team with the other party's more efficient management.[138] Mergers can result in a post-merger firm with better ability to raise capital because of its size, allowing it to expand output.[139] For industries like consumer goods, promotional economies can provide procompetitive, cost-lowering benefits "as important as economies of large scale production."[140] Mergers can result in the adoption of the best practices between the two firms, resulting in quality improvements which undoubtedly benefit consumers.[141] Merging firms can also improve facilities utilization, sometimes permitting selling off the resulting redundant facilities, lowering costs, incentivizing output expansion, and lowering price, passing through benefits to consumers.[142]

Vertical mergers can reduce transaction costs when it is cheaper to produce inside the firm than to contract for products in the market,[143] as well as eliminate double marginalization, assure supply, and better coordinate production.[144] Some mergers that result in reduced transaction costs can "enable the creation of new markets as the reorganization generated by the merger allows the post-merger firm to serve a consumer need previously precluded by high transactions costs."[145] Some scholars have even suggested that

---

138 Muris, *supra* note 20, at 734–35; Muris, *supra* note 51, at 419.

139 Muris, *supra* note 20, at 734; Muris, *supra* note 51, at 418.

140 Muris, *supra* note 20, at 734.

141 Kwoka, *supra* note 52, at 238–39. Improvements in product or service quality are cognizable efficiencies under the same logic that reductions in product quality demonstrate anticompetitive effects: quality improvements imply a lower *quality-adjusted* price, and diminished quality implies a higher quality-adjusted price. United States v. Aetna Inc., 240 F. Supp. 3d 1, 94 (D.D.C. 2017) ("Efficiencies may benefit the economy insofar as they 'enhance the merged firm's ability and incentive to compete, which may result in lower prices, *improved quality*, *enhanced service*, or new products.'" (emphasis added) (quoting HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10)). *But see* St. Alphonsus Med. Ctr.–Nampa, Inc. v. St. Luke's Health Sys., 778 F.3d 775, 792 (9th Cir. 2015) ("At most, the district court concluded that St. Luke's might provide better service to patients after the merger. That is a laudable goal, but the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations." (citing FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967))). *See generally* Jamie L. Bjorklund, St. Alphonsus Medical Center v. St. Luke's Health System*: The Uncertain Application of the Efficiencies Defense Is Leading to Unpredictable Outcomes in Healthcare Mergers*, 53 IDAHO L. REV. 577, 581 (2017) (criticizing the *St. Luke's* decision).

142 Muris, *supra* note 20, at 729.

143 Muris, *supra* note 51, at 418.

144 Kwoka, *supra* note 52, at 242; Nelson & Smith, *supra* note 39, at 137; *see also* United States v. AT&T Inc., 310 F. Supp. 3d 161, 197 (D.D.C. 2018) ("Vertical mergers often generate efficiencies and other procompetitive effects. The proposed merger is no exception. Indeed, the Government concedes that this case implicates one 'standard benefit' associated with vertical mergers: the elimination of double marginalization ('EDM').").

145 Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutionalist View*, 13 SUP. CT. ECON. REV. 189, 226–27 (2005).

efficiencies explain most vertical mergers, leading to the argument that vertical mergers should rarely be challenged.[146]

Thus, mergers can improve a firm's efficiency in a variety of ways. However, some of these efficiencies may not be cognizable under existing formulations of the efficiencies defense because they are unverifiable, not merger-specific, would not be passed-through to consumers, or otherwise should not be recognized as efficiencies.

Regarding consumer passthrough, the basic understanding is that variable costs are likely to be passed onto consumers, while fixed costs are less likely to be passed on to consumers.[147] Although the formal requirement that efficiencies be passed through to consumers has varied over time,[148] and scholars have debated the wisdom and necessity of requiring passthrough,[149] courts have largely assimilated this requirement.[150] Courts want to be certain that efficiencies actually benefit consumers, not just producers, to maintain fidelity to antitrust law's core concern with consumer welfare.[151] Still,

---

146 *See, e.g.*, Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513, 519 (1995) ("[M]any vertical mergers create vertical integration efficiencies between purchasers and sellers . . . .").

147 Crane, *supra* note 22, at 372; Jerry A. Hausman & Gregory K. Leonard, *Efficiencies from the Consumer Viewpoint*, 7 GEO. MASON L. REV. 707, 727 (1999) (estimating a minimum passthrough rate of fifty percent for variable cost savings). *But see* Coate, *supra* note 145, at 219–20 ("An institutionally-based market model generates implications suggesting fixed cost efficiencies may have a relatively quick impact on the market. . . . To increase the likelihood of customer acquisition and retention, the firm encourages the customer to invest in firm-specific capital through the client's customization of their processes to the firm's products and services. In effect, the firm wants its customers to commit to a long term business relationship. . . . Thus, pricing policy must be seen as part of the firm's entire strategic plan and therefore such a firm would prefer a long run equilibrium pricing policy to one that changes in response to short run cost drivers. This implies that reductions in fixed and marginal cost would be treated in a comparable manner by the firm."); *but cf.* Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 REV. INDUS. ORG. 145, 156 (2011) (arguing that the 2010 Guidelines discounting of fixed-cost efficiencies contradicted "current economic thinking" and extant agency practice by ignoring the "long-term competitive benefits from reductions in fixed-cost savings").

148 *See* Muris, *supra* note 20, at 733 ("Another beneficial change in the 1997 Revised Merger Guidelines is the rejection of a rigid requirement that cost savings must be 'passed on' to consumers.").

149 *E.g.*, Moffitt, *supra* note 21, at 1745 ("Firms are actually *most* likely to pass through efficiency benefits in concentrated markets due to the downward-facing demand curve that firms with large market share face."); *see also* Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The* True *Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 336–37 (2010) ("Efficiency benefits count under the true consumer welfare standard, but only if there is evidence that enough of the efficiency benefits pass through to consumers so that consumers . . . would directly benefit on balance from the conduct."); Paul L. Yde & Michael G. Vita, *Merger Efficiencies: Reconsidering the "Passing-On" Requirement*, 64 ANTITRUST L.J. 735 (1996).

150 *See, e.g.*, FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 349 (3d Cir. 2016); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991); United States v. Aetna Inc., 240 F. Supp. 3d 1, 94 (D.D.C. 2017); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 82 (D.D.C. 2015).

151 Crane, *supra* note 22, at 371 ("Since Oliver Williamson's seminal article in 1968, it has been well understood that mergers can simultaneously generate efficiencies and consumer harm if the merging firms appropriate the efficiencies solely for themselves as cost savings and fail to pass them on to consumers.").

commitment to consumer welfare only justifies hostility to efficiencies that are not passed on to consumers, not efficiencies generally.[152] Many antitrust scholars regard the passthrough requirement as problematic.[153] There are often substantial measurement problems in calculating passthrough, despite recent research suggesting how to approximate it.[154] Also, permitting efficiencies that do not pass through to the consumer can still benefit the competitive process insofar as "competitors attempt to 'imitate' and 'emulate' the advantages achieved by such efficiencies," so it would be competitively undesirable to diminish incentives to achieve efficiencies simply because they do not immediately benefit consumers.[155]

To show that the efficiencies are verifiable, merging parties must also provide credible evidence that the efficiencies are likely to result from the merger. The burden of proof for efficiencies is naturally on the merging firms, since they can provide such evidence at a lower cost than the plaintiff can.[156] There must be specific proof of efficiencies from the merger at hand, not speculation, general economic platitudes, or the premerger firm's low profits or declining market share (as evidence of a size *dis*-economy).[157] Despite the apparent opportunity to prove alleged efficiencies, defendants generally fail to demonstrate verifiable efficiencies.[158]

Courts, like the Guidelines, usually require that efficiencies be merger-specific, which requires that efficiencies cannot be realistically achieved short of merger.[159] *Ceteris paribus*, requiring merger specificity means that mergers are less preferable ways of achieving efficiencies than other alternatives.[160] Joint ventures as an alternative to merger, however, can introduce the potential for collusion, "the supreme evil of antitrust," as well as coordination

---

152 *Id.* at 372.

153 *See, e.g.*, Joseph F. Brodley, *Proof of Efficiencies in Mergers and Joint Ventures*, 64 ANTITRUST L.J. 575, 584 (1996) (criticizing passthrough requirement as too difficult to prove); Muris, *supra* note 20, at 733 (rejecting the "rigid" passthrough requirement); Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 207–08 (1992); *see also* David Balto, *The Efficiency Defense in Merger Review: Progress or Stagnation?*, 16 ANTITRUST 74, 78 (2001); Berry, *supra* note 51, at 546 (arguing against requiring consumer passthrough even when consumer surplus is the standard of competition).

154 4A AREEDA & HOVENKAMP, *supra* note 2, ¶ 971d; Joseph Farrell & Carl Shapiro, *Recapture, Pass-Through, and Market Definition*, 76 ANTITRUST L.J. 585, 595 (2010).

155 Berry, *supra* note 51, at 546.

156 *See* 4A AREEDA & HOVENKAMP, *supra* note 2, ¶ 974b.

157 *Id.* ¶ 974a–b.

158 *See, e.g.*, FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991); FTC v. Staples, Inc., 970 F. Supp. 1066, 1089–90 (D.D.C. 1997).

159 FTC v. H.J. Heinz Co., 246 F.3d 708, 721–22 (D.C. Cir. 2001); HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10.

160 *See* Berry, *supra* note 51, at 547 ("It has been suggested that there is a 'bias ingrained in section 7 favoring internal expansion.'" (quoting C. Paul Rogers, *The Limited Case for an Efficiency Defense in Horizontal Mergers*, 58 TUL. L. REV. 503, 525 (1983))).

problems.[161] Also, while many efficiencies can be theoretically realized short of a merger, "mergers may be the cheapest and swiftest way to realize efficiencies."[162] As the Guidelines state, merger specificity involves an inquiry into the "practical" alternatives facing the merging parties, not "theoretical" alternatives that are infeasible.[163] This is because without "impos[ing] a relatively weak standard of proof . . . , [merger specificity] would have the potential to make the defense generally unavailable."[164] Still, many efficiencies fail on this requirement too.[165]

More broadly, the two basic ways of framing the efficiencies defense are a net efficiencies defense and an absolute efficiencies defense. Which legal rule is best depends on the sum of the costs, including error costs, litigation costs, compliance costs, and administrative costs.[166]

The net efficiencies defense allows defendants to rebut a prima facie case in which concentration levels exceed presumptive illegality when efficiencies outweigh the harm caused by increased concentration.[167] This approach is more flexible and context-specific, but creates greater uncertainty in application since it is more difficult to predict how courts will view a merger under more malleable standards, rather than bright line rules.[168] This is the approach courts and the Guidelines have taken when permitting or assuming the availability of an efficiencies defense.[169]

The absolute efficiencies defense can be formulated in a variety of ways, but basically it defines circumstances under which a merging firm can defend the merger by proving that the merger will create efficiencies such that the defense is irrebuttable by the plaintiff.[170] In other words, an absolute efficiencies defense is an affirmative defense: rather than negating an element of plaintiff's claim, if a court accepts an efficiencies defense, the defendant wins regardless of the strength of plaintiff's case.[171] This type of defense allows measurement ambiguities to play a lesser role while promoting greater

---

161 Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004); Berry, *supra* note 51, at 549.

162 Conrath & Widnell, *supra* note 37, at 686.

163 Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 791 (9th Cir. 2015); HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10 ("Only alternatives that are practical in the business situation faced by the merging firms are considered in making this determination. The Agencies do not insist upon a less restrictive alternative that is merely theoretical.").

164 Berry, *supra* note 51, at 549.

165 *See, e.g.*, *Saint Alphonsus Med. Ctr.*, 778 F.3d at 791–92 & n.15; FTC v. H.J. Heinz Co., 246 F.3d 708, 722 (D.C. Cir. 2001); *see also* Hovenkamp, *supra* note 35, at 736–37 (questioning the merger-specificity requirement).

166 *See* Muris, *supra* note 51, at 425 n.187.

167 Berry, *supra* note 51, at 539–40.

168 *Id.* at 540.

169 *Id.* at 551–52.

170 *See id.* at 541–42.

171 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1270 (3d ed. 2002) ("An affirmative defense will defeat the plaintiff's claim if it is accepted by the district court or the jury.").

certainty because it operates as a brightline rule.[172] One formulation of the absolute defense would limit merger specificity to showing only that the firm could not expand internally, given the problems with encouraging joint ventures.[173] Under this version, firms do not need to demonstrate consumer passthrough, one of the difficulties of the net efficiencies defense.[174]

Critics of the efficiencies defense have advocated a variety of limitations on its use. First, it is usually noted that prima facie burdens establishing thresholds of anticompetitive effects implicitly account for ordinary economies, and therefore "only substantial economies should be considered" once the burden has shifted.[175] Some commentators have advocated limiting the defense to mergers involving two small firms whose combined size would permit more effective competition within a concentrated market.[176] Others advocate for agency consideration of efficiencies as part of their prosecutorial discretion, which could avoid litigation altogether.[177] Still others would bar the defense entirely, but increase the burden on plaintiffs to establish a prima facie case, often due to concerns with administrative burdens on the courts.[178] Relatedly, scholars argue that neither courts nor agencies are institutionally competent to probe merging firms' cost-cutting plans and determine whether they will more likely than not be realized.[179]

Rather than being philosophically hostile to efficiencies, courts may just be exercising judicial humility; courts are often "wary of entrusting the government and the courts with the responsibility of predicting whether specific mergers are likely to be beneficial."[180] Courts have good reason to be skeptical about merger efficiencies evidence. Because all the efficiencies evidence

---

172 Berry, *supra* note 51, at 541, 554.

173 *Id.* at 554.

174 *Id.* at 547, 554.

175 AREEDA & HOVENKAMP, *supra* note 2, ¶ 974a.

176 *E.g.*, Rogers, *supra* note 160, at 521–25, 528.

177 *E.g.*, Oliver E. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699, 729–31 (1977).

178 *E.g.*, BORK, *supra* note 120, at 129; RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 112–13 (1976) ("I would not allow a generalized defense of efficiency. . . . [I]f the less encompassing prohibition of horizontal mergers that I have proposed were adopted, there would be less need to worry about the adverse consequences of ignoring most of the efficiency justifications of challenged mergers, for most mergers would not be subject to challenge."); *see also* Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 HARV. L. REV. 226, 318–21 (1960); Fisher & Lande, *supra* note 51, at 1669 ("By raising the market-share thresholds of presumptive illegality to account for potential efficiency gains, [an implicit] approach would permit the realization of some, but not all, of the efficiencies likely to result from mergers.").

179 *See, e.g.*, Conrath & Widnell, *supra* note 37, at 703.

180 *Id.* at 687; *see also id.* at 696 ("The information relevant to evaluating claims of efficiencies from specific mergers is entirely within the control of the merging firms. They have an incentive to overstate or fabricate information to obtain a benefit—market power."); Fisher & Lande, *supra* note 51, at 1596 ("To implement the spirit of the Clayton Act more fully, the Court chose . . . [to] ignore[e] efficiencies altogether. It did so not because it believed that Congress rejected the value of efficiencies, but rather because it recognized its own limited ability to balance market-power and efficiency effects.").

is in the merging parties' possession, parties might "selectively disclose information to support their efficiency claims, while ignoring data that might dampen their assertions."[181] Under this view, judicial humility may justify imposing a high, or even asymmetric burden on defendants to prove efficiencies.[182] Of course, skepticism about the ability of judges to confidently predict the effects of mergers should apply to both anticompetitive effects and procompetitive efficiencies, yet courts frequently use market share presumptions to simply and indirectly demonstrate anticompetitive effects, without any correspondingly simple heuristics that would allow efficiencies to presume procompetitive effects. Also, "[r]ebalancing the weighting of efficiencies and anticompetitive effects could have a significant effect on the overall mix and distribution of merger challenges" for the worse.[183] Although, as in *Staples*, courts have discounted efficiencies claims that are inflated on the eve of trial, this worry is offset by the fact that the parties' abilities to substantiate efficiencies claims grows over time, as each party gains greater access to due-diligence documents.[184]

While courts have applied the net efficiencies defense and gravitated toward the Guidelines' requirements of merger specificity, verifiability, and passthrough, few circuit courts have definitively held that there is an efficiencies defense. Thus, the scope and depth of the efficiencies defense largely remains to be determined.

III. *UNITED STATES V. ANTHEM, INC.*

The circuit court's decision in *United States v. Anthem, Inc.* symbolizes the hostile treatment of efficiencies in merger analysis by courts despite their superficial willingness to consider efficiencies. The failure of many circuits to credit merger efficiencies runs contrary to (1) the growing consideration of efficiencies in antitrust law generally; and (2) the recognition in economics that firms can achieve efficiencies that outweigh competitive losses, as measured by consumer welfare.

The *Anthem* decision increases uncertainty for merging parties by further solidifying the circuit split—making the forum decisive in many cases and making the prospect of litigation more ominous. Although the state of the efficiencies defense is still in flux, *Anthem*'s approach to efficiencies is consistent with the sliding scale approach to efficiencies, which often means a seemingly asymmetric and insurmountable burden on defendants.

---

181 Moffitt, *supra* note 21, at 1718–19; *see also* Berry, *supra* note 41, at 542.

182 *See* Conrath & Widnell, *supra* note 37, at 687.

183 Crane, *supra* note 22, at 349 ("[T]he differential treatment of costs and benefits . . . is unjustified and counterproductive."); Moffitt, *supra* note 21, at 1699 (arguing that courts should balance procompetitive efficiencies against anticompetitive effects, not treat efficiencies asymmetrically).

184 Moffitt, *supra* note 21, at 1719 ("[T]he fact that a merging entity can better identify an increasing number of potential efficiencies with greater accuracy over time actually makes sense given the increased access to competitive information that is allowed the closer one gets to the close of a transaction.").

A. Anthem *in the District Court*

In July 2015, Anthem agreed to merge with Cigna.[185] Anthem, the second-largest health insurance provider for large companies, exclusively licensed the Blue Cross Blue Shield brand in fourteen states, within which Anthem competed with Cigna, the third-largest provider.[186] Anthem was a major licensee of the Blue Cross Blue Shield brand; and under a best-efforts clause in its licensing agreement, "at least 80% of Anthem's revenue within the Anthem states must come from Blue-branded products, as must at least 66.67% of its revenue nationwide."[187] Anthem provided two types of insurance options: Administrative Services Only ("ASO") plans, where the employer self-insured, and fully insured plans for which Anthem itself provided insurance coverage.[188] The merger would have "create[d] the single largest seller of medical healthcare coverage to large commercial accounts."[189]

The DOJ, eleven states, and the District of Columbia sued to permanently enjoin the merger, arguing that the merger would substantially lessen competition in violation of section 7 of the Clayton Act.[190] The district court enjoined the merger after a bench trial, finding that the government established the merger was likely to be anticompetitive after rejecting Anthem's rebuttal evidence.[191]

The court defined the relevant product market as the market for the sale of health insurance to national account customers (employers having more than 5000 employees).[192] National account customers, the court reasoned, were recognized as a distinct market in the industry—including both Anthem and Cigna, who have teams dedicated to this distinct business segment—because of their special characteristics and distinct purchasing needs: "broad medical provider networks and account management capabilities."[193] The relevant geographic market comprised the fourteen states in which Anthem licensed the Blue Cross Blue Shield label and competed with Cigna.[194] This market was proper because "Blue Cross Blue Shield Association rules have a significant impact on the commercial conditions governing the sale of medical coverage to national accounts."[195]

---

185 *Anthem II*, 855 F.3d 345, 348 (D.C. Cir. 2017).

186 *Id.* at 348, 350. The Blue Cross Blue Shield brand is licensed to insurance companies by the Blue Cross Blue Shield Association, an association of thirty-six insurance companies. *Id.* at 350.

187 *Id.* at 350.

188 *Id.* at 351. The plans also each provide claims adjudication and access to the insurer's provider network. *Id.*

189 *Anthem I*, 236 F. Supp. 3d 171, 178 (D.D.C. 2017).

190 *Id.*

191 *Id.* at 179–80, 215.

192 *Id.* at 179.

193 *Id.*

194 *Id.*

195 *Anthem I*, 236 F. Supp. 3d at 179.

The government's experts established that the combined firm's concentration in the national accounts market was likely to be anticompetitive; the government established market shares and HHI well above presumptive anticompetitive levels, with a merger simulation predicting harm of over $900 million.[196] Thus, according to the court, the government satisfied its prima facie burden.[197] The government also established that there would be unilateral anticompetitive effects because of the elimination of "the two firms' vigorous competition against each other" in the relevant geographic market as well as diminished innovation.[198] This competition occurred even though Anthem's business model was more discount-focused.[199] The government further established, under the same line of reasoning, that the merger would harm the market for sale of health insurance coverage to large group employers in the Richmond, Virginia market.[200]

On rebuttal, Anthem alleged that "customers face[d] an array of alternatives, and that there [were] many new entrants poised to shake up the market."[201] The court rejected this argument because it found there were high barriers to entry in the commercial insurance market and because separate contracts with many localized carriers could not adequately serve the needs of national accounts.[202] Not only that, switching to those carriers would have been costly for customers.[203] The supposed "array of alternatives" were found to be largely dependent on the "big four national carriers," so they were not really alternatives at all.[204] The court also rejected Anthem's efficiencies defense because many of the savings were not merger-specific or verifiable (and perhaps not even cognizable).[205]

The district court considered two sources of alleged efficiencies: medical cost savings and general and administrative ("G&A") savings.[206] Anthem "project[ed] that the newly merged company [would have been] able to realize more than two billion dollars' worth of medical cost savings that . . . [would] be entirely passed through to consumers."[207] Anthem and Cigna's combined leadership team also projected $2.36 billion G&A savings on top of the medical cost savings, with a $1.7 billion to $2.3 billion range.[208]

The medical cost savings would largely result from Cigna customers receiving Anthem's lower prices where it had them, and Anthem customers

196 *Id.* at 179–80, 187, 193, 209, 212.
197 *Id.* at 179, 193.
198 *Id.* at 180.
199 *Id.*
200 *Id.* at 179.
201 *Anthem I*, 236 F. Supp. 3d at 180.
202 *Id.*
203 *Id.*
204 *Id.* at 180–81.
205 *Id.* at 181, 253.
206 *See id.* at 231–35.
207 *Anthem I*, 236 F. Supp. 3d at 231.
208 *Id.* at 235.

enjoying Cigna's prices where it had lower rates.[209] The parties and their expert economist, Dr. Mark Israel, argued that the combined firm could achieve at least the best prices negotiated by each firm independently, without considering the means available to the post-merger firm to achieve the rates.[210] Cigna customers would have medical costs reduced by $1.5 billion, while medical costs for Anthem customers would be reduced by $874 million.[211] Anthem also argued that the government's theory of competitive harm "depend[ed] upon the factual premise that the merger [would] result in the reduction of provider prices" to support its conclusions regarding cost efficiencies.[212] As the parties branded it generally, the customer would receive "the Cigna product at a lower Anthem price."[213]

The G&A savings would result from eliminating duplication and synergies from adopting each firm's best practices and cost structures.[214] Five hundred and fifteen million dollars would be annual variable cost savings from adopting best practices and cost structures.[215]

1. Merger Specificity

The D.C. Circuit ruled that efficiencies must be merger-specific, meaning that merging companies cannot independently achieve the efficiencies without the merger, and the court provided *Arch Coal*, *United States v. H & R Block, Inc.*,[216] and *FTC v. Sysco Corp.*[217] as examples of failures to demonstrate merger specificity.[218] The court explained that lower provider rates, like the cheaper insurance policy in *Arch Coal*, could be achieved independently since each company could independently obtain lower rates, and "any national account customer that values the superior discounts that Anthem receives from providers is free to purchase health insurance from Anthem today."[219] Thus, it was not as though the combined firm would achieve lower rates through additional patient volume, better rate structure, or other improvements from the firm's merger, which could be merger-specific efficiencies.[220]

---

209 *Id.* at 232–33.

210 *See id.* 233–34; *see also Anthem II*, 855 F.3d 345, 353 (D.C. Cir. 2017) (noting that ASO customers were expected to see $1.8 billion of the $2.4 billion in savings, while fully insured customers would realize $619 million).

211 *See Anthem I*, 236 F. Supp. 3d at 233–34.

212 *See id.* at 234.

213 *See id.* at 242.

214 *Id.* at 235.

215 *Id.*

216 833 F. Supp. 2d 36 (D.D.C. 2011).

217 113 F. Supp. 3d 1 (D.D.C. 2015).

218 *Anthem I*, 236 F. Supp. 3d at 237–38.

219 *Id.* at 238–39.

220 *Id.*

The court denied that a rebranding alternative to invoking the affiliate clause with providers was merger-specific, since Anthem's product could be rebranded and sold to Cigna customers today.[221] Since Blue Cross's affiliate language likely would have required a transfer of Cigna customers to Anthem's Blue brand to meet the best-efforts clause, a substantial portion of the $1.5 billion in efficiencies from applying Anthem's lower rates would not be merger-specific.[222] The court also rejected comparing these discounts to bulk buying because "invoking a contractual provision that requires providers to settle for a lower fee no matter how much Cigna volume is added can hardly be characterized as bulk purchasing."[223]

The court determined that Anthem could not achieve further economies of scale and that a bulk discount theory depended on the products being the same; in fact, Cigna's collaborative, low-utilization model differed greatly from Anthem's discounted provider approach.[224]

2. Verifiability

The biggest problem for the court was the verifiability of the claimed efficiencies.[225] The court saw the cost efficiencies as a house of cards in which provider rebellion would cause the entire house to collapse.[226] To the judge, it was unlikely that providers would "accept the obligation to extend lower Anthem fee schedules to Cigna patients without a fight."[227] Doctors could terminate contracts with ninety days' notice, making the prospect of rebellion ominous.[228] Anthem executives also testified that the benefits "[would] take years to come to fruition,"[229] which under the Guidelines made them more speculative.[230] Not only that, but Anthem would be hard pressed to comply with Blue's best-efforts rules, which would not be satisfied by invoking an affiliate clause or renegotiating provider contracts.[231]

The court found that any efficiencies resulting from Anthem customers gaining access to Cigna rates were unverified, particularly because Cigna achieved lower rates from providers to make Cigna's collaborative model

---

221 *See id.* at 239.

222 *See id.* at 240–41.

223 *See id.* at 241.

224 *Anthem I*, 236 F. Supp. 3d at 241–43.

225 *See id.* at 243.

226 *See id.*

227 *Id.*

228 *Id.* Cigna's CEO David Cordani even appeared to find Anthem's claimed efficiencies unverifiable, "testif[ying] that Anthem's predicted cost savings are unreliable in part because they are based on an unproven assumption that providers will not react and renegotiate their fee schedules upwards." *Id.*

229 *Id.* at 244.

230 HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10 n.15.

231 *Anthem I*, 236 F. Supp. 3d at 244.

competitive against Anthem.[232] The court cited defendants' failure to indicate any reliable plan for achieving Anthem's low rates for Cigna customers, and discounted each of defendants' potential strategies for achieving Anthem's rates, namely rebranding, renegotiating, or invoking the affiliate clause.[233] Even Cigna's CEO "advanced his opinion that both rebranding Cigna customers and imposing lower fee structures would unravel the collaborative relationships with providers that are essential to accountable care and better clinical outcomes;"[234] and as the court noted, "a Cigna product with a Blue label on it is not the Cigna product anymore."[235]

Looming in the background for the court was also the "compelling evidence of the deterioration of the merging parties' relationship," which made it "extremely difficult" for integration "to get back on track," as Anthem's leadership effectively admitted.[236] Furthermore, the court characterized the integration that had been done as largely high-level and preliminary: "[T]he two firms . . . ha[d] not yet agreed on the identity of a single member of the new company's management structure beyond naming the 'NewCo' President (Anthem's Swedish) and CEO (Cigna's Cordani)."[237] Given the extensive work still to be done to develop the bottom-up approaches to achieving cost efficiencies and integrating the firm, the court found the efficiencies unverified.

The same problems plagued Anthem's G&A efficiencies. The court saw G&A planning especially unfinished, noting that even assuming their verifiability, G&A efficiencies still "would not be sufficient to offset the [merger's] anticompetitive effects."[238] Therefore, the court only cursorily considered G&A efficiencies while ultimately dismissing them.[239]

3. Cognizability

The court also questioned whether Anthem's cost efficiencies were even cognizable since, in ASOs provided by Anthem, the customer pays the providers directly.[240] Even if the insured ultimately pays less in healthcare costs overall, the price of ASO itself—Anthem's product—was only a small sliver of the overall healthcare expenditures.[241] The merger may result in lower provider costs, said the court, but this is not Anthem's product because the customer directly pays the provider costs; it would be odd to credit it as an

232 *See id.* at 244–45.
233 *Id.* at 246–47.
234 *Id.* at 247.
235 *Id.* at 249.
236 *Id.* at 245–46.
237 *Anthem I*, 236 F. Supp. 3d at 246.
238 *Id.*
239 *Id.* at 237, 243–46.
240 *See id.* at 249–50.
241 *Id.* at 250.

efficiency of Anthem's product.[242] Essentially, the court saw the indirect nature of the consumer benefits as problematic, which caused the court to treat it similar to an out-of-market efficiency. Unlike the Staples-Office Depot merger of 1997, in which the defendants alleged that their suppliers would become more efficient, Anthem only alleged that providers would be paid less, not that they would become more efficient.[243] In fact, the court believed that the provider response would not be greater efficiency, but reduced quality.[244] Therefore, the court's doubts about whether the efficiencies were cognizable at all provided another reason to reject Anthem's efficiencies defense altogether.[245]

4. Overall Competitive Effects

Even considering evidence of cost efficiencies as part of the competitive effects analysis, the court still found the merger anticompetitive.[246] The court questioned the ninety-eight percent passthrough rate offered by the defense's economic expert, Dr. Israel, because Anthem considered multiple scenarios in which it would seek to capture the cost savings for itself.[247] Since the cost efficiencies would not enhance national account insurance market competition, defendants were effectively alleging out-of-market efficiencies and arguing that they were part of the overall competitive-effects analysis.[248] If anything, the alleged cost efficiencies were based "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, [for which] the scenario seems better characterized as an application of market power rather than a cognizable beneficial effect of the merger."[249]

The court, in its most problematic passage, even disputed that the test of an efficiency is whether it increases consumer welfare, arguing that efficiencies must enhance competition, not consumer welfare:

> Counsel for Anthem argued at the closing of Phase II that the defining characteristic of an efficiency is "consumer welfare," pointing to that portion of the *Heinz* opinion that cites *F.T.C. v. University Health*. He stated that the D.C. Circuit's citation of *University Health* "is interesting because *University Health* says when we're analyzing efficiencies, the touchstone is consumer welfare," and he characterized the citation in *Heinz* as an "endorsement"

242 *See id.*

243 *See Anthem I*, 236 F. Supp. 3d at 250.

244 *See id.* at 251 ("There is also reason to question . . . whether the quality of the Cigna offering will in fact degrade."); *see also id.* at 253 ("[I]f consumer benefit is indeed the touchstone, there is ample evidence in the record that the merger would harm consumers by reducing or weakening the Cigna value based offerings.").

245 *Id.* at 251.

246 *See id.* at 251–53.

247 *Id.* at 251.

248 *See id.* at 252.

249 *Anthem I*, 236 F. Supp. 3d at 253.

> of the consumer welfare test for efficiency. But the *University Health* opinion did not say that; the court held that a defendant seeking to overcome the presumption "must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit *competition*, and, hence, consumers." And *Heinz* quoted that sentence as support for its admonition that "high market concentration levels . . . require, in rebuttal, proof of extraordinary efficiencies"; it did not mention consumer welfare at all.
>
> There has been no showing made here that the claimed medical cost economies would enhance competition, so *University Health* is inapposite. Moreover, no court has held that a potential general benefit to consumers at the end of the day can negate competitive harm; what precedent there is states precisely the opposite. As the Supreme Court stated in *Philadelphia National Bank*, a merger that may substantially lessen competition is not saved because "on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." Nor may one justify the loss of competition in one market with an argument that it would countervail market power in another.[250]

Besides being inconsistent with the Supreme Court's modern recognition that the purpose of antitrust law is to enhance consumer welfare,[251] the court's dicta introduces an untenable distinction between competition that enhances consumer welfare and efficiencies (or other mechanisms) that increase consumer welfare—as if efficiencies and competition are unrelated. The central point of the modern economic analysis of merger efficiencies is that efficiencies can enhance *competition*, since product improvements, price reductions, and supply increases can result from efficiencies and all can benefit consumers.

In sum, the court held that Anthem's alleged efficiencies could not overcome the presumption that the merger would substantially harm competition and enjoined the merger.[252]

B. Anthem *in the D.C. Circuit*

Anthem appealed the district court's decision, arguing that the district court failed to properly weigh the benefits of the merger against its harms by rejecting the consumer welfare standard.[253] The government argued, as the district court held, that the efficiencies were neither merger-specific, nor verified, nor cognizable efficiencies.[254] The D.C. Circuit upheld the district court's holding, finding that it did not abuse its discretion in ruling that

250 *See id.* at 251–52 (footnote omitted) (citations omitted) (first quoting FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991); then quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001); and then quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963)).

251 NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979))).

252 *Anthem I*, 236 F. Supp. 3d at 259.

253 *Anthem II*, 855 F.3d 345, 348 (D.C. Cir. 2017).

254 *Id.* at 349.

Anthem failed to demonstrate extraordinary efficiencies that would offset the merger's anticompetitive effects.[255]

Like the district court, the D.C. Circuit held that the government satisfied its prima facie burden by establishing a highly concentrated post-merger market in national accounts.[256] This meant that the defense had to produce evidence rebutting the government's prima facie case. The court considered efficiencies as part of the defendant's rebuttal burden and also as part of the totality of the circumstances.[257] The court declined to consider whether Anthem's purported efficiencies were cognizable; since the amount of verified and merger-specific cost savings was insufficient, it did not need to reach the issue.[258]

Like many courts before it, the D.C. Circuit recognized a divergence between Supreme Court holdings in the 1960s and subsequent circuit court practice from the 1990s to the present. The circuit court endorsed the view that *Procter & Gamble* held that efficiencies cannot defend a merger, calling it a "clear holding," and that *General Dynamics* did not implicitly overrule *Procter & Gamble*'s efficiencies holding.[259] *Procter and Gamble*, therefore, was the Supreme Court's last word on the efficiencies defense, according to the majority in *Anthem*.

Because the court felt obligated to apply *Procter & Gamble*, it saw contrary circuit practice as problematic. The court noted that one circuit accepted efficiencies as a rebuttal defense (*University Health*), another accepted efficiencies as part of a competitive effects analysis (*FTC v. Tenet Health Care Corp.*[260]), and others assumed that efficiencies can rebut the prima facie case, while ultimately finding that the defense failed to meet its assumed burden (*FTC v. Penn State Hershey Medical Center*;[261] *St. Luke's*).[262]

As to its own circuit, the court properly read its precedents as endorsing verified efficiencies as part of a defendant's rebuttal burden. The court argued that *Baker Hughes* had not "blessed an efficiencies defense," although it did not go so far as to endorse the older view that efficiencies could be

255 *Id.*

256 *Id.* at 353.

257 *Id.* at 355.

258 *Id.* at 356.

259 *See Anthem II*, 855 F.3d at 353–54 ("In *FTC v. Procter & Gamble Co.*, the Supreme Court . . . . held that '[p]ossible economies cannot be used as a defense to illegality.' . . . In his concurrence, Justice Harlan . . . 'accept[ed] the idea that economies could be used to defend a merger.' No matter that Justice Harlan's view may be the more accepted today, *the Supreme Court held otherwise*, and no party points to any subsequent step back by the Court." (citations omitted) (emphasis added) (first quoting FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967); and then quoting *Proctor & Gamble*, 386 U.S. at 597 (Harlan, J., concurring))).

260 186 F.3d 1045 (8th Cir. 1999).

261 838 F.3d 327 (3d Cir. 2016).

262 *See Anthem II*, 855 F.3d at 354–55.

grounds to condemn a merger—it explicitly rejected this view.[263] The court properly recognized that *Heinz* permitted verified efficiencies to be credited to rebut the prima facie case, since the Supreme Court in *Procter & Gamble* only rejected "possible" efficiencies.[264] The court thus assumed that efficiencies could rebut a prima facie case.[265]

Although the court took a strong stand against efficiencies as a defense to merger under Supreme Court precedent, this stand was tempered by the court's distinction between an absolute defense to section 7 illegality and a rebuttal to the government's prima facie case.[266] The latter accords with the consumer welfare understanding of antitrust law, for which all legitimate mergers should have procompetitive consumer welfare benefits, like passed-through efficiencies, that outweigh any anticompetitive consumer welfare harms. To permit large efficiencies to outweigh consumer harms even though the consumer harms are greater, as the former does, would undermine the consistent recognition that consumer welfare is the guiding principle of antitrust law. Therefore, the court did not contradict itself by permitting efficiencies as part of a defendant's rebuttal burden while denying an efficiencies defense.

1. Merger Specificity

Like the district court, the D.C. Circuit started its analysis by looking at merger specificity, in which "[t]he real question is whether the alternatives to merger are practical and more than merely theoretical."[267] Here, Anthem failed to demonstrate merger-specific efficiencies.[268]

The court noted that the post-merger firm would have three methods of obtaining cost efficiencies: (1) rebranding, (2) renegotiation, and (3) exercising the affiliate clause.[269] As to rebranding Cigna's product to achieve Anthem discounts, the court argued that rebranding's immediate effects were to substitute Anthem's product for Cigna's, which was not merger-specific, and that any long-term ability to provide the Cigna product with an Anthem price was wishful.[270] The court failed to credit testimony that Anthem had twice

---

263 *Id.* at 354–55 (citing United States v. Baker Hughes Inc., 908 F.2d 981, 986 (D.C. Cir. 1990)); *e.g.*, *Procter & Gamble*, 386 U.S. 568, 579 (1967) (citing advertising economies as an indication of lessened competition); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (citing economies of vertically integrated chains as an indication that the merger was anticompetitive because it harmed small businesses).

264 *Anthem II*, 855 F.3d at 355 (quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 720 n.18 (D.C. Cir. 2001)).

265 *Id.*

266 *See id.*

267 *Id.* at 357.

268 *Id.* at 356–57.

269 *Id.* at 352.

270 *Anthem II*, 855 F.3d at 357.

failed to develop a Cigna-like product, because the district court reasonably saw the failure resulting "from Anthem's own no-frills culture or flawed marketing strategies."[271] Simply put, the evidence suggested Anthem devoted little effort to marketing its own Cigna-like products; thus, the benefit was not merger-specific since Anthem could have independently been successful had it really tried.[272] The court also noted that rebranding had to be a significant part of Anthem's post-merger capture strategy because it was the only one of its capture mechanisms that would comply with the Best Efforts clause.[273] Thus, any efficiencies dependent on rebranding would not be merger-specific.

Outside of rebranding, the court found that the district court erred in not finding merger-specific efficiencies for other strategies—renegotiation or invoking the affiliate clause—because of the substantial evidence at trial that Cigna had been unable to achieve Anthem rates on its own.[274]

2. Verifiability

Efficiencies are not verifiable "if they are vague, speculative, or otherwise cannot be verified by reasonable means."[275] The court was skeptical about the practical prospects for successfully invoking the affiliate clause to achieve provider discounts. Whatever the practical difficulty of exercising the affiliate clause—namely, provider push-back—the court found it unlikely that Anthem would invoke the affiliate clause because it would undermine Anthem's obligations under the Blue Cross Blue Shield Best Efforts clause: "The merger would immediately throw Anthem out of compliance . . . , [and] widespread exercise of the affiliate clause would remove any incentive for Cigna customers to convert to Anthem because those customers would then be receiving the Cigna product at Anthem prices."[276] This makes it more likely that Anthem would rely on rebranding, which would not result in merger-specific efficiencies, as the court established.[277]

The court also thought provider push-back from non-rebranding strategies was likely. In particular, the court imagined it unlikely that all customers would accept lower rates during renegotiation, especially for those providers who "ha[d] just terminated a contract because Anthem mandated, through an affiliate clause, the acceptance of *those very rates*."[278] Even if they were achieved, the court had the same concerns as the district court, namely that

---

271 *Id.* at 358.

272 *Id.* (noting also that Anthem failed to show that the merger would permit Anthem to have a Cigna-like product faster than it could develop one on its own, which would have been a merger-specific benefit).

273 *Id.*

274 *Id.* at 358–59.

275 *Id.* at 359 (quoting HORIZONTAL MERGER GUIDELINES, *supra* note 3, § 10).

276 *Anthem II*, 855 F.3d at 359.

277 *Id.* at 360.

278 *Id.*

the savings would accrue only in the long term, making them more speculative.[279] It was also reasonable for the district court to find it unlikely that providers, faced with lower fees, would not reduce their service, which undermines the delicate collaborative approach Cigna pioneered.[280] This could further lead to less innovation.[281]

In terms of the $874 million in savings to Anthem customers, if they could access Cigna rates, Anthem had failed to provide evidence or testimony substantiating the use of an affiliate clause or rebranding.[282] Anthem did not demonstrate that Cigna contracts had an affiliate clause that would allow Anthem customers to achieve Cigna rates at all, and "Blue Cross Association rules would prohibit Anthem from exercising it."[283] Not only that, but it would make it even harder for the post-merger firm to comply with the best-efforts clause.[284] This would make renegotiation the only plausible way of achieving the discounts.[285] Furthermore, the court agreed with the district court that Cigna's lower prices, where they existed, were "a result of factors other than volume" and thus the ability to obtain these discounts post-merger was questionable.[286] Therefore, the court found that Anthem's alleged cost savings were unverified.[287]

3. Passthrough

Cognizable efficiencies must be "passed through to consumers, rather than simply bolster[] Anthem's profit margin."[288] The court agreed with the district court that the ninety-eight percent passthrough rate of cost savings estimated by defendants' expert was too optimistic: it was "unsupported by the evidence and treated self-insured and fully insured customers identically."[289]

For self-insured customers, the court relied on Anthem's internal documents (like the district court) to infer that Anthem's consideration of seven alternatives, only one of which was 100% passthrough, meant that Anthem did not consider 100% passthrough as profit-maximizing.[290] The court also

279 *Id.* ("The longer it takes for an efficiency to materialize, the more speculative it can be.").
280 *Id.* at 361.
281 *Id.*
282 *See Anthem II*, 855 F.3d at 361.
283 *Id.*
284 *Id.*
285 *Id.*
286 *Id.* at 362.
287 *Id.*
288 *Anthem II*, 855 F.3d at 362 (citing FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991)).
289 *Id.*
290 *Id.*

argued that concentrated markets permit companies to raise prices to capture cost savings more effectively, which fit the circumstances of the merger.[291]

For fully insured customers, the court found that the passthrough rate would be even lower because only a corresponding price decrease would allow consumers to capture cost savings, which would otherwise go to Anthem's pocketbook.[292] Thus, treating ASO and fully insured customers the same, as the court alleged Dr. Israel's model did, was problematic.[293] Since the insurer would be paid directly by the provider under fully insured plans, consumers would also be less likely to be aware of cost savings than under ASO plans.[294]

The court agreed with the district court's criticism of Anthem's failure to account for lower utilization, which is a large purported benefit of Cigna's product.[295] That is, Dr. Israel's model failed to balance the cost saving benefits of discounts against the cost saving benefits of lower utilization, which might be lost in the merger.[296] Even if properly accounting for utilization would not result in lower cost savings, it naturally meant the figures offered by Anthem seemed less reliable.[297] Not only that, Dr. Israel's projected cost savings were "unmoored from the actual market at issue," since the savings were based on a market broader than national accounts.[298]

Thus, Anthem failed to demonstrate the "extraordinary efficiencies" necessary to rebut a strong prima facie case of a highly concentrated market with a "threatened loss of innovation."[299] Ultimately, the unreliability of the statistics meant that the defendants—who had the burden of proof—failed to demonstrate any of their cost savings, and the court was not obligated to attempt its own recalculation to determine whether "at least one-third of the $2.4 billion of savings are likely to be achieved," which Anthem argued was all that was needed for the merger to be procompetitive.[300]

4. Addressing the Dissent

The majority then addressed Judge Kavanaugh's dissenting opinion, expressing concern that "our dissenting colleague applies the law as he wishes it were, not as it currently is."[301] The court argued that the dissent "fail[ed] to engage with the facts shown in the record . . . . [and instead] offer[ed] a series

291 *Id.* at 362–63.
292 *Id.* at 363.
293 *Id.*
294 *Anthem II*, 855 F.3d at 363.
295 *Id.*
296 *Id.*
297 *See id.*
298 *Id.* at 364.
299 *Id.*
300 *Anthem II*, 855 F.3d at 364.
301 *Id.* at 354.

of bald conclusions and mischaracterize[ed] the court's opinion."[302] The majority alleged that the dissent reviewed the lower court's factual findings *de novo*, in many cases finding the lower court's factual findings as unpersuasive, which misapplies the standard of review.[303] The majority also criticized the dissent's singular focus on price, saying "lower prices" in concentrated markets, "if they occur at all, may be transitory," advocating instead for a more holistic analysis.[304] "[T]he dissent fails to recognize that lower prices may arise due to, or ultimately lead to, a decrease in product quality."[305] Because "every dollar of medical cost savings . . . will come at the expense of providers," providers could reasonably respond by lowering the quality of services.[306]

5. Judge Millett's Concurrence

Judge Millett wrote separately to criticize both the majority and the dissent's view "that any reduction in provider rates, standing alone, excuses an anticompetitive merger."[307] Judge Millett agreed with the government "that any decrease in provider rates would come about through an exercise of unlawful market power," which cannot be an efficiency.[308] She also pointed to internal documents saying that full passthrough was not profit maximizing, so the dissent could not be correct that the ninety-eight percent passthrough is "undeniable."[309] Finally, Judge Millett agreed that product quality would likely decrease in the event of cost savings, and chastised the majority and dissent for too much of a "monocular" focus on price.[310]

6. Judge Kavanaugh's Dissent

The crux of then-Judge Kavanaugh's dissent was that the merger was best viewed as a merger of *purchasing agents* who will be able to negotiate larger provider discounts for their customers post-merger.[311] These savings would largely be passed on, vastly outstripping any potential increased fees charged by the post-merger company to negotiate provider fees.[312] The dissent urged that the estimates of $1.7 billion to $3.3 billion cost savings far

302 *Id.* at 364–65.
303 *Id.* at 366.
304 *Id.*
305 *Id.*
306 *Anthem II*, 855 F.3d at 367.
307 *Id.* at 369 (Millett, J., concurring).
308 *Id.*
309 *Id.* at 369–70.
310 *Id.*
311 *See id.* at 372 (Kavanaugh, J., dissenting).
312 *See Anthem II*, 855 F.3d at 372–73 (Kavanaugh, J., dissenting).

exceeded the increased fee estimates of $48 million, $220 million, and $930 million, making the merger procompetitive.[313]

Judge Kavanaugh pointed out that "[t]he Government concedes that Anthem-Cigna would be able to negotiate lower provider rates that employers would be able to pay for their employees' health care," and that invoking the affiliate clause would permit some current Cigna customers to benefit from Anthem negotiated prices.[314] The dissent also argued that most, if not all, of the savings would be passed on directly to self-insured consumers, and that even excluding fully insured customers for whom there might not be automatic passthrough, savings would still be at least $1.7 billion.[315] Judge Kavanaugh further criticized the government's merger simulation that assumed "*zero* medical cost savings," making the government's evidence irrelevant for the calculation of efficiencies.[316]

The dissent argued that "[t]he efficiencies and consumer benefits in this case are merger-specific by definition" since enhanced bargaining power is a necessarily merger-specific consequence from which cost savings could be achieved, citing the absence of evidence that lower provider rates could be achieved absent the merger.[317]

Assessing verifiability, Judge Kavanaugh emphasized that merger efficiencies must only be probable, and need not be certain, arguing that testimony from Dr. Israel, McKinsey & Company, and the healthcare provider was sufficient to demonstrate that the efficiencies were probable, and "more than mere speculation."[318] Given the merger-specific, verifiable, passed-through cost savings in the fourteen-state market, as well as the Richmond, Virginia market, "[t]he District Court clearly erred, therefore, in concluding that the merger would substantially lessen competition."[319]

Looking at precedent, the dissent criticized the majority's reliance on Supreme Court precedent form the 1960's, pointing out that later decisions like *General Dynamics* and *GTE Sylvania* "indicated that modern antitrust analysis focuses on the effects on the consumers of the product or service, not the effects on competitors."[320] *General Dynamics* "endors[ed] an inquiry into . . . the 'structure, history and probable future' of the relevant market" enunciated in *Brown Shoe*,[321] and inaugurated "careful[] analy[sis of] defendants' rebuttal evidence."[322] Therefore, to rely on the conclusory statement

313 *Id.* at 373.

314 *Id.* at 373–74.

315 *Id.* at 374.

316 *Id.* at 372.

317 *Id.* at 374–75.

318 *Anthem II*, 855 F.3d at 375 (Kavanaugh, J., dissenting) (quoting FTC v. H.J. Heinz Co., 246 F.3d 708, 721 (D.C. Cir. 2001)).

319 *Id.*

320 *Id.* at 376.

321 *Id.* (quoting Note, *Horizontal Mergers After* United States v. General Dynamics Corp., 92 HARV. L. REV. 491, 499, 502 (1978)).

322 *Id.* (citing United States v. Baker Hughes Inc., 908 F.2d 981, 990 (D.C. Cir. 1990)).

given in *Procter & Gamble* rather than the standard announced in later cases was erroneous. Under standards of judicial precedent, the dissent argued, the Court inaugurated a new, comprehensive standard of antitrust analysis with *General Dynamics*, and lower courts were then bound to apply that standard, even if it reaches results that upset prior holdings made under an older standard and that had not been explicitly overruled.[323]

The dissent would have remanded to the district court to determine whether Anthem-Cigna's power to negotiate lower rates with providers was procompetitive bargaining power that would benefit consumers long-term, or anticompetitive monopsony power.[324] Although Anthem petitioned for certiorari, it withdrew its petition and the case was dismissed, halting the merger of Cigna and Anthem for good.[325]

IV. LESSONS

Anthem foreclosed efficiencies as an absolute defense (that proving a certain amount of efficiencies can justify a merger, no matter the strength of plaintiff's case) to section 7 mergers in the D.C. Circuit. This definitive rejection is a positive development because (1) no circuit has actually allowed efficiencies as an absolute defense to mergers; (2) the Supreme Court has definitively spoken against it in *Philadelphia National Bank* (unlike the Supreme Court's pronouncement on *possible* efficiencies in *Procter & Gamble*);[326] and (3) allowing efficiencies as an absolute defense would contradict the consumer welfare standard. Fairly construed, *Anthem*'s charge that Supreme Court precedent forecloses an efficiencies defense only means that efficiencies are not an ultimate defense to a section 7 case, not that it forecloses considering efficiencies in section 7 cases at all. Therefore, Anthem's Petition for Certiorari to the Supreme Court painted with too broad a brush when it stated that the D.C. Circuit legally concluded that the efficiencies defense is "foreclosed" by Supreme Court precedent, including efficiencies as part of defendant's rebuttal burden.[327]

While the *Anthem* court seriously considered the parties' efficiencies evidence, suggesting that efficiencies are relevant to the rebuttal burden and the competitive effects analysis, the *Anthem* decision increases uncertainty for merging parties by further solidifying the Circuit split—making the forum decisive in many cases, and making the prospect of litigation more ominous.

---

323 *See Anthem II*, 855 F.3d at 376–77 (Kavanaugh, J., dissenting) ("'[W]hen the Supreme Court overturns the standard that it had previously used to resolve a particular class of cases,' federal courts 'must apply the new standard and reach the result dictated under that new standard.' The 'results reached under the old standard' are no longer 'binding precedent.'" (quoting BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 31 (2016))).

324 *Id.* at 377–78.

325 *See* Anthem, Inc. v. United States, 137 S. Ct. 2250 (2017) (mem.).

326 *See supra* note 68.

327 Petition for Writ of Certiorari at 5, Anthem, Inc. v. United States, No. 16-1342 (2017).

Anthem left open the question whether efficiencies can rebut a prima facie case, since the court assumed so in the case, rather than holding so. If a court faced with verified, merger-specific efficiencies that would pass through to consumers is ultimately going to reject the efficiencies defense, parties undoubtedly would benefit from knowing this ahead of time, rather than squandering valuable litigation resources on a meritless defense.

Anthem proves that in mergers, the parties' risk aversion can be both friend and foe. The court in *Anthem* stressed that the defendants failed to demonstrate verifiable efficiencies because of the preliminary nature of much of the integration planning and efficiencies process, and the dependence on various factors for the efficiencies to occur.[328] While it is true that planning was unfinished due to a deterioration in the firms' relationship, firms deciding to merge must be willing to commit themselves to integration planning and all its costs when merging in a concentrated market for which efficiencies will be necessary to overcome legal challenges. *Anthem* demonstrates that courts view incomplete or preliminary integration and efficiencies planning as a superficial commitment to *achieving* the efficiencies post-merger. Some efficiencies require more planning than others. Elimination of duplication, the achievement of which does not depend on many contingencies, likely needs less planning than cost efficiencies that do depend on many contingencies.[329] That Anthem's efficiencies depended on a combination of invoking affiliate clauses, renegotiating contracts, and compliance with best efforts clauses provides a good example of the problem posed by friction-laden efficiencies that depend on various contingencies to achieve. Therefore, parties must understand that courts will closely scrutinize allegations that efficiencies are likely to occur when the likelihood depends on the actions of third parties not before the court.[330]

Anthem shows that merging parties need to not only assert the theoretical ability for the post-merger firm to achieve cost reductions, but also substantiate that there are no practical barriers to achieving the alleged cost reductions. It was significant for the D.C. Circuit that the defense's model did not account for practical barriers, including the Blue "Best Efforts" clause that made it unlikely that the post-merger firm could obtain Cigna's discounts for Anthem customers without increasing its compliance problems from integration. It was also significant that Cigna's product delicately balanced

328 *Anthem II*, 855 F.3d at 359–64.

329 Even elimination of duplication requires some planning. *See* FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991) (explaining that the defendant's proffered efficiencies from elimination of duplication were unverified because defendant failed to substantiate "how the[] efficiencies would be created and maintained").

330 Similar issues arise in standing cases, wherein plaintiffs must demonstrate an injury fairly traceable to the defendant's conduct and establish that the court's remedy is likely to redress the plaintiff's injury. This means that when the chain of causation or redressability of an injury depend on the actions of third parties not before the court, plaintiffs fail to demonstrate standing because it is speculative whether the remedy will rectify the harm and whether the harm was caused by defendant's conduct. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984).

provider fees and increased preventive care, and that this balance could be upset by forcing providers to accept lower fees by invoking the affiliate clause or by demanding renegotiation. The court was correct to consider the various means of achieving the savings to determine their verifiability; there may be barriers to achieving in practice what is possible in theory. But as Anthem noted in its Petition for Certiorari, "[t]he majority never acknowledged that the Government's own complaint alleges . . . the merger is likely to lead to lower reimbursement rates for Cigna customers."[331] While the court adequately demonstrated that there were frictions to achieving the efficiencies post-merger, this only demonstrated that the efficiencies were not guaranteed. The court failed to demonstrate that the efficiencies were less likely than not, let alone improbable.

Although the state of the efficiencies defense is still in flux, *Anthem*'s approach is consistent with the sliding scale approach to efficiencies, which appears to place an asymmetric burden on defendants. While plaintiffs can rely on the *Philadelphia National Bank* presumption—a heuristic that holds a merger is presumptively anticompetitive when the post-merger firm will have an "undue concentration" of greater than thirty percent market share and the merger significantly increases market concentration[332]—defendants must prove a litany of features about their efficiencies before merely shifting the burden back to plaintiffs (i.e., that they are merger-specific, verified, passed-through, and *significant* when plaintiffs have a stronger prima facie case). Therefore, it seems correct to say that "both the district court and the majority imposed unreasonably high and asymmetric burdens upon Anthem, effectively nullifying the defense" and imposing the kind of "clear" showing requirement rejected in *Baker Hughes*, as well as the burden-shifting regime it had affirmed.[333]

Should a court be able to reject wholesale proffered efficiencies because of imprecision—whether based on merger specificity, verifiability, or consumer passthrough—even though some efficiencies are admittedly going to occur? Or does the court have to at least attempt, even roughly, to calculate what efficiencies are going to occur, since it knows some will? *Anthem* demonstrates that if the efficiency statistics aren't sufficiently credible, the court may refuse to recalculate the statistics according to its own view of the probability that the efficiencies would be achieved. That is, a dollar-for-dollar comparison will not be made if none of the efficiencies are sufficiently verified. To this extent it differs from the Eleventh Circuit in *University Health*, which mandated a "dollar-for-dollar comparison" of efficiencies.[334] At the same time, the District Court for the District of Columbia in *United*

[331] Petition for Writ of Certiorari, *supra* note 327, at 13.

[332] Ginsburg & Wright, *supra* note 70, at 377–78.

[333] Petition for Writ of Certiorari, *supra* note 327, at 4; United States v. Baker Hughes Inc., 908 F.2d 981, 983 (D.C. Cir. 1990) (arguing clear showing shifts burden of persuasion to defendant).

[334] Petition for Writ of Certiorari, *supra* note 327, at 4.

States v. AT&T Inc.[335] favorably cited defendant's history of successfully achieving efficiencies in vertical mergers to suggest that the actual efficiencies from the vertical merger between AT&T and Time Warner would likely be *greater* than the $352 million in efficiencies conceded by the government's expert.[336] Time will tell how much evidence is needed to "verify" efficiencies, but the court in *AT&T* consistently distinguished between how courts treat vertical mergers compared to horizontal mergers, with the former having no *Philadelphia National Bank* presumption of anticompetitive effects available to plaintiffs.[337] Thus, it is reasonable to conclude that *AT&T*'s receptiveness to efficiencies, as to the merger more generally, was premised on the fact that it was a *vertical* merger being challenged, which to the court was the difference between night and day.

After *Anthem*, parties may also have a high hurdle to demonstrate merger specificity. The court determined that Anthem failed to demonstrate that it could not develop a Cigna-like collaborative insurance product. If merger efficiencies depend on adopting the acquired party's superior product, the court reasoned, merging parties must show that they could not have developed a comparable product on their own.[338] Similarly, in *Heinz*, Heinz made no effort to determine whether it could create a better product like Beech-Nut, so Heinz failed to demonstrate that better post-merger baby-food recipes were merger specific.[339] Although the *Anthem* court stayed true to circuit precedent, this case tends to indicate that merger specificity may also be a high barrier, especially in light of the *Anthem* court's assertion than Anthem's failed program to develop a Cigna-like product was due to inadequate marketing efforts (i.e., that Anthem just did not want the product to succeed badly enough).[340]

Anthem reaffirmed that passthrough rates are relevant to merger analysis because "savings only improve consumer welfare to the extent that they are actually passed through to consumers, rather than simply bolstering [a company's] profit margin."[341] Just as defendants must take care not to rely solely on theory to show that efficiencies are likely to occur, after *Anthem* strictly theoretical assertions of high passthrough rates will be less persuasive than documentary evidence that the defendant considered lower passthrough

335 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd*, United States v. AT&T Inc., 916 F.3d 1029 (D.C. Cir. 2019).

336 *Id.* at 192–93 & n.17. Although the D.C. Circuit subsequently pointed out that the $352 million in cost savings identified by the government's expert and accepted by the district court as efficiencies would not all be passed through to consumers, and thus were not all efficiencies, the D.C. Circuit did not suggest that the cost savings were unverified. *See AT&T Inc.*, 916 F.3d at 1046.

337 *E.g.*, *AT&T*, 310 F. Supp. 3d at 192–94.

338 *Anthem II*, 855 F.3d 345, 357–58 (D.C. Cir. 2017).

339 FTC v. H.J. Heinz Co., 246 F.3d 708, 722 (D.C. Cir. 2001).

340 *Anthem II*, 855 F.3d at 358 ("To the extent Anthem has failed to devote the resources needed to improve its product, it is in no position to claim that consumers will benefit from it swallowing up Cigna's superior product.").

341 *Id.* at 362.

rates. Going forward, parties should proffer lower bound estimates of passthrough and explain why it cannot be lower, rather than relying on a single estimate of passthrough. Additionally, when discussing post-merger efficiency passthrough scenarios internally, parties ought to spell out that these estimates are analytical, not a buffet platter of the company's post-merger "choices," especially when profit-maximization necessarily entails rejecting low passthrough rates.

Given the ease with which parties can, and here did, establish a prima facie case, *Anthem* seemed to have an asymmetric burden and higher standard of proof that amounted to a clear showing requirement or strict scrutiny. If this is the standard, merging parties will be better off concentrating on other forms of rebuttal evidence, like entry, or evidence that undermines the reliability of the concentration statistics as a predictor of post-merger competitiveness, like the defendant in *General Dynamics*. Here, then, Anthem may have erred by not offering, or being unable to offer, evidence to rebut the concentration statistics in the relevant market. Whereas DOJ offered a prima facie case and evidence to undermine Anthem's efficiencies defense, Anthem focused on its efficiencies defense without evidence to undermine DOJ's prima facie case.

It is difficult to ignore the dissent's criticism that the majority accepted "the worst-case possibility rather than determining what is likely" when it rejected all of Anthem's alleged billions of dollars in efficiencies due to real problems of provider abrasion—problems whose probability is just as speculative, if not more so.[342] The potential for provider revolt could reasonably be seen as rebutted by provider witnesses who testified that they expected lower rates but would not cancel their contracts.[343] It was the district court's skepticism that was imprecise, not Anthem's calculations. Defendants may now be effectively required to undertake the heavy burden of calculating savings at many different levels of passthrough and probabilistically calculating efficiencies based on the defendant's foresight of a court's verifiability skepticism.[344] Moreover, it seems unlikely that the post-merger firm could increase fees substantially enough to offset the firm's cost reductions, since less than ten percent of total medical costs are fees.[345] While there is some wiggle room to credit government evidence over Anthem evidence, universally doing so despite substantial testimony on both sides is problematic.

Finally, the district court decisively erred when it rejected consumer welfare as the defining standard for competition under antitrust laws.[346] What else is competition—guaranteed by the Sherman and Clayton Acts—meant to ensure but *consumer* welfare? The effect on businesses only matters as far as it reflects consumer welfare; we don't care about competitors for their own

342 *Id.* at 380 (Kavanaugh, J., dissenting).

343 Petition for Writ of Certiorari, *supra* note 327, at 23.

344 *See id.* at 26.

345 *See id.* at 14.

346 *Anthem I*, 236 F. Supp. 3d 171, 251–52 (D.D.C. 2017).

sake, but for competition. And competition is good because it serves consumers. If not consumers, then whom? Antitrust laws are not laws that insulate weaker competitors from stronger ones. The Supreme Court has, in fact, said that the antitrust laws were meant to protect consumer welfare through competition.[347] Therefore, the *Anthem* court erred by rejecting the consumer welfare standard.

CONCLUSION

The Supreme Court has not categorically ruled out incorporating efficiencies into merger analysis. Despite many commentators' arguments that circuits have been relatively favorable toward considering efficiencies, circuit courts are more hostile than not. As some courts have described it, the case law is unsettled. Nevertheless, many circuit courts have fortunately responded to the economic reality that mergers efficiencies can improve competition by assuming the existence of an efficiencies defense.

Unfortunately, the defense exists only in theory. Courts rarely credit any efficiencies in a merger, let alone determine that defendants have successfully rebutted the plaintiff's prima facie case with efficiencies evidence. In *Anthem*, the court discounted every penny of the defense's alleged efficiencies, even though the evidence failed to demonstrate that efficiencies were unlikely or were unlikely to be sufficient to outweigh the merger's anticompetitive effects. Thus, the current jurisprudence unwisely reflects an asymmetric burden and heightened standard of proof for efficiencies evidence that favors plaintiffs, even though in general we presume that mergers are more likely to be procompetitive than anticompetitive. This predictably will result in overdeterrence. If consumer welfare is the goal of antitrust, overdeterrence will result in too many welfare-enhancing mergers being blocked, thus undermining the goal of antitrust.

---

347 *See supra* note 67.