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The Inefficient Treatment of the Efficiencies Defense

BY MICHAEL E. HAMBURGER AND DANIEL GROSSBAUM

THE PRIMARY REASON FOR PERMITTING competitors to merge is the potential to generate efficiencies. When two entities combine, they should be able to reduce redundancies in assets or staffing, and exploit each firm's superior internal processes, talent, products, and services. At the same time, the larger combined firm typically enjoys economies of scale that permit it to produce goods more cheaply and may be able to use its greater purchasing volume to obtain lower input costs. If executed properly, the merger should allow the new company to provide the same or a greater quantity of goods and services at lower prices, improved goods and services at no higher than existing prices, or an amalgamation of the two. At a minimum, the company should be able to increase profitability without negatively impacting the price, quantity, or quality of goods and services it sells.

Of course, the combined firm may instead use the loss of a competitor to raise prices unilaterally, or to coordinate with the remaining competitors to raise prices. In order to avoid these potential consequences, Section 7 of the Clayton Act prohibits mergers where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[1] Yet far too many courts—and the competition agencies—focus only on possible harms from a merger, either minimizing real consideration of the efficiencies a merger may create, or imposing an asymmetric and higher evidentiary burden to proof of efficiencies than to proof of potential harms.

This is a serious error that likely has deprived consumers of lower costs and improved products by preventing procompetitive mergers. Rather than casting a skeptical eye on potential benefits from an acquisition, the language of Section 7 and the burden-shifting framework that governs Section 7 litigation compels the judicial and executive branches to consider benefits and harms on a level playing field. Thus, the type and quantum of proof needed to establish efficiencies should be equivalent to the type and quantum of proof sufficient to establish anticompetitive effects from a merger, with both categories of proof subject to the same degree of scrutiny.

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The Legal Framework for Section 7 Actions

In *United States v. Baker Hughes Inc.* (D.C. Cir. 1990), then-Circuit Judge Clarence Thomas described the burden-shifting approach applied in Section 7 cases and how that approach has evolved. First, "[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." Second, if the government makes its prima facie case, "[t]he burden of producing evidence to rebut this presumption then shifts to the defendant."[2] The defendant can carry this burden of production "by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor."[3] Third, "[i]f the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times."[4]

Despite recognizing this framework for Section 7 litigation and the possibility that defendants could rebut a prima facie case, "[i]n the mid-1960s, the Supreme Court construed Section 7 to prohibit virtually any horizontal merger or acquisition."[5] That hostile approach softened in the 1970s, when the Supreme Court began taking a more holistic look at mergers to determine whether they may substantially lessen competition. The following subsections provide examples of the Court's hostile treatment of mergers during this period, as well as the Court's subsequent shift toward greater tolerance of proposed transactions in the 1970s.

The 1960s: The Supreme Court Increasingly Finds that High Market Shares, or Minor Increases in Concentration, Warrant Condemning Mergers. The 1963 decision in *United States v. Philadelphia National Bank* held that it was proper to "simplify the test of illegality" and "dispens[e], in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects" in favor of relying entirely on the merged firm's market share to establish the government's prima facie case. According to the Court, if a merger results in an entity that possesses "an undue percentage share of the relevant market" and significantly increases concentration in that market, it is "inherently likely to lessen competition substantially" and must be enjoined unless the defendant produces "evidence clearly showing that the merger is not likely to have such anticompetitive effects."[6] Although the Court did not establish a minimum threshold beyond which a merger would warrant

this simplified test of illegality, it held that the merged firm's share of at least 30% of the market and an increase in concentration of the top two firms by more than 33% would exceed any minimum threshold.[7]

Subsequent cases appeared to decouple the amount of concentration post-merger from an increase in concentration due to the merger, while simultaneously lowering the bar for the government to establish its prima facie case. In *United States v. Aluminum Co. of America* (1964), for example, the Supreme Court held unlawful the merger of two aluminum conductor producers—Alcoa and Rome—where Alcoa held the largest share of the market (27.8%) and Rome, as the ninth largest producer, had only 1.3% market share. Even though the merger did not appreciably increase concentration, the Court nevertheless ordered divestiture because "Rome seems to us the prototype of the small independent that Congress aimed to preserve by § 7." In particular, the Court worried that the aluminum conductor market had seen five acquisitions since 1957, and that permitting another acquisition would further shift the market away from a supposed ideal of many sellers with small market shares.[8]

Thus, *Philadelphia National Bank* and *Aluminum Co.* appeared to interpret Section 7 to prohibit (1) the merger of two of the largest firms in a market, and (2) the acquisition by the largest firm in a market of a far smaller firm, even where many competitors remain. In the 1966 *United States v. Von's Grocery Co.* decision, the Court took *Aluminum Co.* a step further, relying upon its belief that "Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency" to order divestiture following the merger of two grocery stores that collectively controlled just 7.5% of the Los Angeles retail grocery market.[9]

Judged by today's merger review standards, *Von's Grocery* would not present any antitrust concern: post-merger, there were still more than 3,800 single-owner grocery stores in Los Angeles, and 150 chain grocers of two or more stores, in comparison to just 61 stores operated by the merged Von's and Shopping Bag chains. While the two chains were third and sixth in total retail sales respectively pre-merger (behind the market leader, which held an 8% share), even post-merger they became just the second largest chain (at 7.5% share).[10] Moreover, pre-merger Von's and Shopping Bag represented 8.9% of total sales (at 4.7% and 4.2%, respectively),[11] indicating that the combined firm actually lost about 1.4% market share post-merger (one presumes due to competition by the remaining firms). Collectively, the top 12 grocery store chains held just 48.8% of the market pre-merger, and only 50% post-merger.[12] Under the widely-used Herfindahl-Hirschman Index ("HHI") measure of concentration,[13] this merger would not have exceeded any of the HHI thresholds first adopted by the U.S. Department of Justice ("DOJ") in its 1982 Merger Guidelines.[14] Indeed, by the late 1980s, Von's (then the second largest California grocer) and Safeway (the third largest) had merged.[15]

When the DOJ first promulgated its merger guidelines in 1968, *Von's Grocery* arguably fell within the class of mergers that the regulators would have challenged.[16] Although not competitors in a "Highly Concentrated" market (which the 1968 Merger Guidelines defined as having a 75% share among the four largest firms), the agencies might have challenged the merger because (1) Von's and Shopping Bag were close to 5% market share each, which was a threshold used in challenging mergers in "Less Highly Concentrated" markets, or (2) the share of the eight largest firms had increased by more than 7% in the preceding 10 years.[17]

Just a few weeks after *Von's Grocery*, the Court adopted an even more extreme position, reversing an order dismissing a challenge to the consummated merger between the nation's tenth largest brewer (Pabst) and its eighteenth largest (Blatz), which combined to hold merely 4.49% market share nationally.[18] Echoing its earlier concerns about arresting increases of concentration, the Court in *United States v. Pabst Brewing Co.* (1966) held that "a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be." Because there was such a "steady trend toward concentration in the beer industry," the Court held that even this meager post-merger market share was sufficient to establish a Section 7 violation.[19]

As these cases demonstrate, Justice Potter Stewart was right when he memorably quipped that the "sole consistency" of decisions from the 1960s was that "the government always wins."[20] In effect, the government and the courts could use a simple numerical shortcut to strike down almost any merger, which Justice Stewart found inappropriate in *Von's Grocery*:

> The Court makes no effort to appraise the competitive effects of this acquisition in terms of the contemporary economy of the retail food industry in the Los Angeles area. Instead, through a simple exercise in sums, it finds that the number of individual competitors in the market has decreased over the years, and, apparently on the theory that the degree of competition is invariably proportional to the number of competitors, it holds that this historic reduction in the number of competing units is enough under § 7 to invalidate a merger within the market, with no need to examine the economic concentration of the market, the level of competition in the market, or the potential adverse effects of the merger on that competition. This startling *per se* rule is contrary not only to our previous decisions, but contrary to the language of § 7, contrary to the legislative history of the 1950 amendment, and contrary to economic reality.[21]

1974 and Beyond: The Supreme Court Moves Away from Treating High Market Shares or Increases in Concentration as Determinative in Section 7 Cases. In 1974, the Supreme Court changed the trajectory of merger review cases in *General Dynamics*. There, the government presented proof that the coal industry was highly concentrated, with much of this concentration happening in the then-recent

past as the number of market participants dropped from 144 to 39 over a ten-year period. Despite recognizing that this proof permitted the government "to rest its [prima facie] case on a showing of even small increases of market share or market concentration" due to the proposed merger, the Court ultimately accepted the appellees' argument that other factors in the industry and in the businesses of the merging parties warranted finding that there was no likelihood of a substantial lessening of competition.[22]

In a sharp break from prior precedent, the Court reasoned that "statistics concerning market share and concentration, while of great significance, were not conclusive indicators of anticompetitive effects." In the coal industry, for example, past production did not speak to a company's future ability to produce because it did not reflect available reserves, and even current production was a poor indicator because much of it was committed for sale to specific companies at set prices under long-term supply contracts. When present and future reserves were considered, they showed that the target company "was a far less significant factor in the coal market than the Government contended or the production statistics seemed to indicate," which supported the district court's finding that the merger would not substantially lessen competition.[23]

The differences between *General Dynamics* and its predecessors are striking. In *United States v. Phillipsburg National Bank & Trust Co.* (1970), the Supreme Court faulted the district court for considering competition between commercial banks—the relevant product market there—and other institutions such as savings and loan associations, pensions, and mutual funds, in deciding whether the merger of two commercial banks was substantially likely to lessen competition.[24] In dissent, Justice Harlan rejected the majority's approach of simply calculating market share and finding that the merger violated Section 7 on that basis alone as too simplistic, ignoring that market share statistics at most "create a rebuttable presumption of illegality."[25] Moreover, Justice Harlan chastised the majority for "ignor[ing] completely the extent to which competition" from the other financial institutions "affects the market power of the appellee banks."[26] Just four years later in *General Dynamics*, the majority seemed to agree with Justice Harlan's approach and considered evidence that producers in the coal industry—the relevant product market—"had become increasingly less able to compete with other sources of energy in many segments of the energy market," i.e., sources of energy other than coal.[27]

General Dynamics thus began the shift away from wholesale reliance on the structural presumptions that courts used to reject so many mergers in the 1960s. And in the decades since, almost all stakeholders—including the enforcement agencies—have "progressively deemphasized structural factors, moved toward more sophisticated econometric tools, and increasingly emphasized unilateral effects theories of anticompetitive harms."[28]

For example, *Baker Hughes* (D.C. Cir. 1990) held that market shares are simply "a convenient starting point for a broader inquiry into future competitiveness," and argued that the "Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition."[29] And in *FTC v. Sysco Corp.* (D.D.C. 2015), the FTC itself presented a complex merger simulation model in order to estimate that the transaction likely would result in $900 million in increased prices, rather than resting on increased concentration alone.[30]

The shift away from focusing almost exclusively on market share presumptions has led to an expanded range of evidence that defendants may use to rebut a prima facie case. "In the wake of *General Dynamics*, the Supreme Court and lower courts have found Section 7 defendants to have rebutted the government's prima facie case by presenting evidence on a variety of factors," including the weak position of an acquiring company, deteriorating ability to compete by an acquired company, and a strong level of competition in the relevant market post-merger.[31] In addition, it is now regarded as "hornbook law" that many other factors can rebut a prima facie case, such as a low likelihood of express or tacit collusion (in cases presenting coordinated effects theories of harm), weak data underlying the market share calculations, product differentiation, elasticities of demand across industries, and, in some instances, efficiencies.[32]

Unfortunately, some courts have not applied the same standards in considering defendants' "rebuttal" evidence that they applied to plaintiffs' evidence of potential anticompetitive effects. This disparity is most apparent in how differently some courts have treated claimed efficiencies in Section 7 actions, which has led them to invalidate mergers that appeared likely to benefit, rather than harm, consumers.

While Some Courts Credit Proof of Efficiencies, Many Give Efficiencies Evidence Short Shrift

In the 1960s, as the Supreme Court struck down virtually every merger that came before it, the Court also cast doubt on whether firms could use a merger's efficiencies either to rebut the government's prima facie case or to win approval for a merger that the courts would otherwise block. In *Philadelphia National Bank* (1963), for instance, the Court rejected the argument that two large banks in the Philadelphia area should be allowed to merge because the merger would stimulate economic development. According to the Court, "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial."[33] In *FTC v. Procter & Gamble Co.* (1967), the Court held 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."[34] And in *Phillipsburg National Bank*

(1970), the Court held that even if the merger of two banks enhanced their competitive position, stimulated other local banks to be more aggressive, and enabled the merged bank to compete more effectively with larger banks, "such considerations . . . are not persuasive in the context of the Clayton Act."[35]

There was immediate backlash against this seeming rejection of efficiencies as a relevant consideration, with Justice Harlan's concurrence in *Procter & Gamble* forcefully contending that courts must consider efficiencies when evaluating mergers. Justice Harlan lamented the majority's "attempts to brush the question aside by asserting that Congress preferred competition to economies," because in his view "certain economies are inherent in the idea of competition." From this premise, it follows that if "Congress had reasons for favoring competition, then more efficient operation must have been among them." Furthermore, because a firm that realizes greater efficiencies improves its competitive position, any evaluation of a merger should "examine and weigh possible efficiencies arising from the merger in order to determine whether, on balance, competition has been substantially lessened."[36]

But not all efficiencies matter for this evaluation. Instead, courts and the enforcement agencies generally will not consider efficiencies unless they are (1) merger-specific, (2) verifiable, and (3) will be passed through to consumers. According to the 2010 Merger Guidelines, efficiencies are merger-specific only if they are "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects."[37] For efficiencies to be verifiable, they must not be vague, speculative, or incapable of verification "by reasonable means." When efficiencies are verifiable, merger-specific, and not due to anticompetitive reductions in output or services, they are said to be "cognizable" and should be considered in assessing the effects of a given merger.[38]

Since *General Dynamics*, some courts have held that cognizable efficiencies are relevant because they may enhance competition, while others continue to hold that courts should not consider efficiencies in Section 7 cases. And in many instances, even courts that consider efficiencies have imposed asymmetrically high burdens on the merging parties to prove verifiable, merger-specific efficiencies that will lower prices post-merger.

Some Courts Have Accepted that Efficiencies May Rebut a Prima Facie Case. As noted above, for nearly 30 years the D.C. Circuit has regarded it a matter of "hornbook law" that efficiencies may rebut a prima facie case.[39] In *Heinz* (2001), the court agreed with Professors Areeda and Turner that *Procter & Gamble* (1967) did not foreclose the use of the efficiencies defense, but instead rejected "'an economies defense based on mere possibilities'" alone.[40] It also noticed that, despite *Procter & Gamble*, "the trend among lower courts is to recognize the defense."[41]

In addition, shortly after *Baker Hughes* (D.C. Cir. 1990), the Eleventh Circuit recognized the defense in *FTC v. University Health, Inc.* (1991). Although it reversed the lower court's decision not to enjoin the merger, the court reasoned that evidence of "significant efficiencies benefiting consumers is useful in evaluating the ultimate issue–the acquisition's overall effect on competition." It instructed lower courts to compare a merger's predicted anticompetitive costs against efficiencies that would benefit competition and consumers, finding this comparison "necessary . . . to evaluate the acquisition's total competitive effect."[42] Similarly, the Sixth Circuit in *ProMedica Health Systems v. FTC* (2014) recognized that efficiencies benefiting consumers may rebut a prima facie case, but rejected the defense because the merging parties in that case only argued that the merger would benefit them, not consumers.[43]

Nevertheless, even the cases that considered efficiencies have not relied entirely on them to reject challenges to the proposed mergers. Most prominently, in *FTC v. Tenet Health Care Corp.* (1999), the Eighth Circuit held that while the trial court may have properly rejected the parties' efficiencies defense, the district court nevertheless erred in failing to consider evidence that a larger, more efficient merged entity would provide a better quality service (medical care) than if the merging parties remained separate.[44] Because the combined system could provide better services, the court held that the merger may enhance rather than substantially lessen competition.[45]

The district court in *FTC v. Arch Coal, Inc.* (2004), engaged in the same type of analysis of efficiencies evidence and refused to enjoin a merger of two coal companies. The court devoted several pages to assessing the defendants' claimed efficiencies and determined the efficiencies that the parties were likely to realize: about $35-$50 million of the claimed $130-$140 million over the first five years post-merger. While it found that these savings were not large enough to "provide a complete defense to plaintiffs' prima facie case," it recognized that such efficiencies remained relevant to assessing the competitive landscape post-merger. It then held that the likely efficiencies, combined with other evidence, successfully rebutted the FTC's prima facie case.[46]

Similarly, in *New York v. Deutsche Telekom AG* (2020), the district court held that the merger of Sprint and T-Mobile would result in verifiable, merger-specific efficiencies, including: (1) billions of dollars in cost savings from combining their cellular networks and closing redundant retail locations; (2) a faster transition to 5G data transfer capabilities across a broader network with more capacity than could be achieved if the companies built out their networks independently, in part due to carrier aggregation network effects; and (3) resultant cost savings that would flow to consumers given the incentive to use excess network capacity and reduced capital/operational costs to compete against larger wireless providers like AT&T and Verizon.[47] But despite recognizing that billions of dollars in efficiencies likely would

be achieved and passed on to consumers, the court declined to rest its decision on efficiencies evidence alone due to the uncertainty of whether efficiencies are a complete defense.[48] Instead, the court found that the predicted effects of the merger based on market share and upward pricing pressure analyses failed to match the reality that T-Mobile had aggressively competed against Verizon and AT&T in the past and, with a better network and lower costs post-merger, was unlikely to abandon this strategy.[49]

In short, since *General Dynamics*, many courts have credited evidence of cognizable efficiencies in Section 7 cases. As discussed below, others have doubted that efficiencies are relevant when assessing the likely effects of a merger. And still others have imposed such high burdens on proving the certitude and scale of post-merger efficiencies that they have effectively rendered it impossible for efficiencies to rebut a plaintiff's *prima facie* case or show that a merger will benefit consumers.

Many Courts Are Hostile to Efficiencies Evidence or Asymmetrically Require More Proof of Efficiencies than of Potential Anticompetitive Harm. Several courts of appeals have suggested that courts should not consider an efficiencies defense even though they themselves elected to do so. In *St. Alphonsus Medical Center-Nampa, Inc. v. St. Luke's Health System* (2015), the Ninth Circuit argued that the Supreme Court may not approve of such a defense and asserted that it "remain[s] skeptical about the efficiencies defense in general and about its scope in particular."[50] The Ninth Circuit nevertheless considered evidence of efficiencies, but held that the defendant was obligated to "clearly demonstrate" that the merger enhances competition because of merger-specific and verifiable efficiencies.[51] Because it found that the defendant had not clearly shown that there were sufficient cognizable efficiencies to make the merger procompetitive, the court affirmed the district court's rejection of the merger.[52]

The court made several relevant findings: (1) it accepted that, as defendants claimed, adding primary care physicians through the merger of two health systems likely would improve the quality of patient care; (2) but it believed that the reimbursement rates paid to the combined firm for primary care physician services would likely increase as well; and (3) it doubted the defendants' contention that the merger would necessarily lead to more integrated health care or a new reimbursement model for healthcare services that would replace the old system based on the payment of fees for each medical service. Moreover, the court did not find that the defendant needed to add primary care physicians to transition to integrated care, because independent physicians already were adopting risk-based reimbursement models and using data analytics tools to move toward integrated care. As a result, the court held that the claimed efficiencies were not merger specific. Finally, the court concluded that even though the merger may result in better patient care, the defendant had not shown that this outcome "would have a positive effect on competition."[53]

The following year, the Third Circuit in *FTC v. Penn State Hershey Medical Center* (2016) stated that it was "skeptical that such an efficiencies defense even exists," but did not decide that issue because it believed the defendants "cannot clearly show that their claimed efficiencies will offset any anticompetitive effects of the merger." The court first took issue with the district court crediting savings of $277 million from using the merged firm's existing capacity rather than building more, because it was unclear whether a new building was needed and because deciding not to build the facility constituted a reduction in output (i.e., there would be fewer facilities to provide services post-merger). The court further held that the efficiencies were not "extraordinarily great," which it felt was required given the high HHI numbers post-merger.[54]

Previously, the D.C. Circuit in *Heinz* (2001) suggested that efficiencies needed to be "extraordinary" where market concentration levels were high. In that case, however, the court never questioned whether efficiencies evidence should be considered, because "the trend among lower courts is to recognize the defense." Instead, it rejected the defendants' efficiencies evidence because it found that the purported benefit of the transaction—access to the acquired firm's better recipes, which would allow production of better-tasting baby food in Heinz's more efficient facilities at a lower cost—was not merger-specific, since neither the defendants nor the district court addressed whether Heinz could have improved its own products and thus obtained the benefits of the merger without eliminating a competitor.[55]

Even though two prior D.C. Circuit cases held that efficiencies may be used to rebut a prima facie case (*Baker Hughes* (1990) and *Heinz* (2001)), the D.C. Circuit shifted course in *United States v. Anthem, Inc.* (2017) ("*Anthem II*") and strongly suggested that *Procter & Gamble* banned consideration of efficiencies. After noting that Justice Harlan's concurrence in *Procter & Gamble* had accepted the use of efficiencies to defend a merger, the two-judge majority of the panel deciding *Anthem II* stated that while "Justice Harlan's view may be the more accepted today, the Supreme Court held otherwise." The majority then disclaimed that it was deciding whether efficiencies could be considered in a Section 7 case, because it believed that the district court's rejection of the defendants' efficiencies evidence was not clearly erroneous.[56]

In reaching this conclusion, the *Anthem II* majority went well beyond even the "clear showing" burden that some courts had placed on merging defendants to prove efficiencies in cases like *Penn State Hershey* and *St. Luke's*.[57] There, a health insurer, Anthem, contended that its acquisition of another insurer, Cigna, would allow it to obtain $2.4 billion in medical cost savings through lowering the rates it paid providers for medical services, and its expert calculated that 98% of these savings would be passed through to customers.[58] The majority concluded that in order for these savings to be creditable, Anthem first would need to obtain

lower provider rates, and then renegotiate some customers' contracts in order to pass through lower rates.[59] Rather than assessing whether this was likely, it held that Anthem would need to be "*certain* to take those actions" and face "no impediments to the savings' realization," finding that this "showing is still *necessary* for a court to conclude that the merger's direct effect (upward pricing pressure) is likely to be offset by an indirect effect (potential downward pricing pressure)."[60]

According to the majority, the merged firm's calculated medical cost savings were "speculative" because there *might* be "abrasion" with medical providers if the combined entity used pre-existing contractual terms (called affiliate clauses) to automatically lower provider rates. It also thought that some providers "could push back hard" on efforts to renegotiate lower rates, even though "very few" providers had tried to remove the affiliate clause from their contracts despite knowing that Anthem planned to use it to lower rates.[61] Moreover, the majority doubted that much of the savings would be passed on to customers. While it admitted that "renegotiation will lead to a decrease in [the acquired firm's] rates," it thought the merged firm might try to increase fees to self-insured customers in order to recoup some of these savings and would need to renegotiate contracts with fully-insured customers in order to deliver any savings to them.[62]

Then-Circuit Judge Brett Kavanaugh's dissent critiqued the majority for placing so much weight on 1960s Supreme Court jurisprudence and ignoring the shift away from those cases beginning with *General Dynamics*.[63] Rather than relying on market share alone as conclusive proof of a Section 7 violation, *General Dynamics* requires an analysis that "is 'comprehensive,' and focuses on a 'variety of factors,' including 'efficiencies.'"[64]

In addition, Justice Kavanaugh explained that the majority placed an insurmountable burden on the defendants and inexplicably disregarded the claimed efficiencies. Contrary to the majority's holding, he noted that the "evidence overwhelmingly demonstrates that the merged Anthem-Cigna, with its additional market strength and negotiating power in the upstream market, would be able to negotiate lower provider rates . . . *Indeed, the Government itself agrees that this merger would allow Anthem-Cigna to obtain lower provider rates.*"[65] Further, because most customers in the relevant market defined by the district court were ASO (self-insured) customers, annual savings of at least $1.7 billion would be passed through to them "automatically," even ignoring efficiencies that would flow to fully-insured customers.[66] This amount far exceeded the increased fees—without considering any efficiencies—that the government's expert believed would result from the merger ($48 million to $930 million).

In the dissent's view, the majority erred by ignoring that efficiencies "need not be certain. They merely must be probable."[67] In fact, the D.C. Circuit had recognized as far back as *Baker Hughes* that "Section 7 involves *probabilities*, not certainties or possibilities."[68] The majority, however, relied on a "smorgasbord" of "highly speculative" concerns about "lots of bad things [that] *could* happen after the merger. But the courts have to assess what is *likely*." According to Justice Kavanaugh, the majority disregarded the teachings of *Baker Hughes* and instead seemed "to be accepting the worst-case possibility rather than determining what is likely."[69]

Some district courts have rejected efficiencies defenses by relying on the same type of reasoning as the majority in *Anthem II*. In certain of these decisions, the courts refused to consider efficiencies because they did not believe the efficiencies were certain to occur.[70] In other cases, the courts also concluded that the efficiencies would not outweigh the likely harm resulting from the merger, despite never quantifying the amount of cognizable efficiencies or harm that the merger was likely to cause.[71]

The asymmetric treatment of efficiencies evidence provides private plaintiffs and government enforcers a significant advantage in merger cases. As then-FTC Commissioner Christine Wilson recognized in 2021, such asymmetric treatment of efficiencies evidence created a "vicious cycle": since some courts and the competition agencies "systematically discount efficiencies evidence, requiring certainty when none is possible," merging firms have "little incentive" to develop robust proof of efficiencies, and in turn courts and the agencies that encounter such less-than-robust proof become even more suspicious of all efficiencies evidence.[72]

There Is No Sound Basis for Imposing a Higher Burden on Merging Parties to Prove Efficiencies

That many courts have imposed a higher burden to prove efficiencies does not address a central question: is there a sound reason for requiring a higher burden? Professor Hovenkamp argues that courts should "require stricter proof of merger-generated efficiencies than of predicted anticompetitive effects" for two reasons. First, he suggests that proof of harmful effects is largely based on market predictions "supported by widely embraced economic tools and observable by many," in contrast to proof of efficiencies, which depend "on information that is often unobservable to outsiders." Second, he notes that parties to a merger are in the best position to identify what efficiencies they expect to achieve and how they expect to do so.[73] But neither rationale supports imposing a *greater* burden on the merging parties than their opponents bear in proving anticompetitive effects.

The first rationale does not account for the "widely embraced economic tools" available to determine how efficiencies impact a merger's competitive effects. In general, courts and enforcers should judge efficiencies based on whether they enhance consumer welfare (i.e., benefit consumers), rather than general welfare (i.e., create more gains than losses, even if those gains accrue to the merged entity rather than to consumers).[74] Thus, if a merger would likely generate efficiencies, then that merger would likely enhance consumer welfare if enough efficiencies are passed through

to avoid increased prices.[75] And while precise pass-through estimates may be difficult to calculate in some instances,[76] that does not undercut textbook economics theory, which finds that even monopolists pass through 50% of cost changes.[77] If it is fair to build a prima facie case based on economic predictions that increasing concentration is likely to result in supracompetitive prices, it is fair to presume that at least 50% of cost savings are likely to be passed through to customers. In each case, of course, both predictions can be rebutted with evidentiary proof. But in the absence of such rebuttal evidence, any difficulty in calculating more precise pass-through rates of efficiencies does not justify disregarding foundational economic principles and presuming that pass-through is zero.

The second rationale similarly appears to treat a reason for placing the burden of *production* on merging defendants—evidence of likely efficiencies would be in their possession—as a reason for imposing the burden of *persuasion* on them (and a high burden at that). But this rationale ignores that the burden of proving a merger is likely to result in a substantial lessening of competition always remains with the plaintiff.[78]

Although Professor Hovenkamp did not call for placing the burden of persuasion on defendants, other commentators have done so. For example, Professor Daniel Crane contends that merging parties should be forced to prove likely efficiencies by a preponderance of the evidence.[79] But that position conflicts with the well-recognized rule that, in Section 7 cases, plaintiffs always bear the ultimate burden of proving a merger is likely to substantially lessen competition. Consequently, defendants should not be obligated to prove that a merger likely is procompetitive due to its efficiencies.[80] Rather, if the defendants produce evidence that efficiencies outweigh the likely harm established by the government in its prima facie case, then the burden should shift to the government to prove that, on balance, the merger is likely to substantially lessen competition.

Furthermore, the defendants' burden of production cannot be too stringent or else it would turn merger cases on their heads. "A defendant required to produce evidence 'clearly' disproving future anticompetitive effects must essentially persuade the trier of fact on the ultimate issue in the case—whether a transaction is likely to lessen competition substantially. . . . [W]e are loath to depart from settled principles and impose such a heavy burden."[81]

Most importantly, imposing a higher burden of production on defendants or shifting the burden of persuasion to them would violate the language of Section 7, which prohibits only mergers that may *substantially* lessen competition. If Congress intended to outlaw all mergers unless they were proven to *enhance* competition, it could have said so—but it did not. Thus, the substance of Section 7 does not support requiring defendants to prove with certainty that there will be no harm. The statute contemplates symmetrical treatment of harms and benefits and requires the plaintiff to prove that the likely harms outweigh the likely benefits substantially enough to violate Section 7.

The next issue concerns how to apply symmetrical treatment to potential harms and efficiencies. Some commentators disfavor direct numerical comparisons. In Professor Crane's view, for example, data and methodological limitations make direct balancing of likely efficiencies against likely harms impossible (or at least impracticable) in most cases. He therefore proposes "symmetrical treatment as a policy mnemonic device, much as we already use mathematically indeterminate concepts like probable cause."[82]

But there is no reason to impose such evidentiary limitations, at least where the efficiencies claimed are directed at lowering costs or prices of goods and services.[83] In such instances, the only way to determine if competition may be substantially lessened is to compare directly the likely efficiencies and harms. Further, adopting such limitations on efficiencies evidence would allow courts to rule in merger cases without a thorough analysis of a mergers' likely competitive effects.[84]

Moreover, there are not systematic difficulties in using empirical evidence to make direct comparisons of a merger's procompetitive and anticompetitive effects. To the contrary, modern economic models and computing technology enable reliable predictions of a merger's effects on price and other key economic metrics. In most merger cases, the asserted harm is that lost competition will increase prices, and the government often presents economic evidence predicting the magnitude of such price increases.[85] Similarly, multiple courts have assessed the efficiencies claimed by merging parties and estimated, in dollars, those that were likely to be achieved.[86] Thus, the courts, plaintiffs, and merging defendants can evaluate what effects on price are likely due to increased concentration, a loss of direct rivalry between two competitors, and cost savings the merger will produce. They also can compare likely harms and benefits to determine whether a particular merger may lessen competition substantially.

Post-*General Dynamics*, the only rational way to resolve a Section 7 case is to require the government to prove that a substantial lessening of competition is likely despite defendants' evidence of cognizable efficiencies, if any. Unless the government can prove that prices will likely increase, even after accounting for downward pressure on prices from whatever efficiencies are likely to be achieved, then a merger should not be invalidated or enjoined. That is the only way that courts can assess an "acquisition's total competitive effect,"[87] meaning its net effect on competition under a "totality-of-the-circumstances approach."[88]

Unfortunately, as shown above, numerous courts have gotten the efficiencies standard wrong. Contrary to the language of Section 7, these courts in effect shifted the burden of persuasion to defendants, and then enhanced it by requiring "clear" or "certain" proof that the mergers would be procompetitive. Had these cases been decided under the actual

probability standard imposed by Section 7, and without shifting the burden of persuasion to the defendants, many of them may well have come out differently.

Conclusion

Although quantifying likely harm and efficiencies may not be possible in all instances, in many instances the parties and the courts can quantify and compare a merger's potential procompetitive and anticompetitive effects. Because the goal of Section 7 is to prevent only mergers that are likely to substantially lessen competition, courts should not disregard or devalue proof of efficiencies by imposing stricter burdens of production on merging entities than apply to plaintiffs' proof of potential anticompetitive effects. Nor should courts shift the burden of persuasion to defendants to prove that a merger is procompetitive or refuse to compare a merger's propensity to increase prices due to higher concentration and decrease prices due to lower fixed and variable costs. ■

[1] 15 U.S.C § 18.

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

[3] *Id.* at 991.

[4] *Id.* at 983.

[5] *Id.* at 989.

[6] United States v. Phila. Nat'l Bank, 374 U.S. 321, 362-63 (1963). The Supreme Court subsequently backed away from this "clearly showing" language in a series of cases beginning with *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). *See Baker Hughes*, 908 F.2d at 990-91 (explaining that the court "at the very least lightened the evidentiary burden on a section 7 defendant" by requiring merely a showing to rebut a prima facie case, rather than a clear showing).

[7] *Phila. Nat'l Bank*, 374 U.S. at 364-65.

[8] United States v. Aluminum Co. of Am., 377 U.S. 271, 278-281 & n.6 (1964). The Court also may have been concerned that Rome was a quasi-maverick producer, because it noted that Rome "was a pioneer in aluminum insulation" and that Rome had a first-class marketing operation that Alcoa used to distribute its entire product line after the merger. *Id.* at 281.

[9] United States v. Von's Grocery Co., 384 U.S. 270, 272, 277 (1966).

[10] *Id.* at 272-74.

[11] *Id.* at 280-81 (White, J., concurring).

[12] *Von's Grocery*, 384 U.S. at 281 (White, J., concurring).

[13] The HHI measures concentration by adding together the squares of the market shares of each firm in the relevant market. *See, e.g.*, FTC v. H.J. Heinz Co., 246 F.3d 708, 716 & n.9 (D.C. Cir. 2001). An increase in HHI from pre-merger to post-merger can be derived by calculating 2ab, where a and b represent the combining firms' respective pre-merger market shares. *Id.*

[14] Available at https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf. Section III.A.1 of the 1982 Merger Guidelines specifies that the DOJ likely would not challenge any merger where the post-merger HHI was below 1000, or any merger with a post-merger HHI between 1000 and 1800, with less than a 100-point increase in HHI. In *Von's Grocery*, the HHI increase was just under 40, given the 4.7% and 4.2% market share of Von's and Shopping Bag pre-merger. Moreover, because the other top 10 firms post-merger would have split approximately 35% share among them (after removing the 8% share of the market leader and the 7.5% share of the number two grocer, the combined Von's-Shopping Bag, from the 50% share held by the top 12 firms), with none of them having greater than the merged entity's 7.5% share, the total post-merger market HHI could not have exceeded 1000. Since the 1982 Merger Guidelines were adopted, the HHI thresholds have only increased. *See* U.S. Department of Justice and Federal Trade Commission, 2010 Horizontal Merger Guidelines § 5.3, available at https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf (defining unconcentrated markets as below 1500 HHI, moderately concentrated markets as between 1500 and 2500 HHI, and highly concentrated markets as above 2500 HHI, and specifying that increases of at least 100 HHI points in moderately and highly concentrated markets are required to potentially raise significant competitive concerns).

[15] California v. Am. Stores Co., 495 U.S. 271, 275 (1990).

[16] *See* 1968 Merger Guidelines §§ 5-7, available at https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf. While *Von's Grocery* was decided before the 1968 Merger Guidelines were promulgated, the guidelines may have reflected the DOJ's positions taken in mergers challenged in the preceding years, including in *Von's Grocery*.

[17] *See* 1968 Merger Guidelines §§ 6-7.

[18] United States v. Pabst Brewing Co., 384 U.S. 546, 547 (1966).

[19] *Id.* at 551-53.

[20] *Von's Grocery*, 384 U.S. at 301 (Stewart, J., dissenting).

[21] *Id.* at 282-83.

[22] *Gen. Dynamics*, 415 U.S. at 494-98. Furthermore, two years prior to the merger the combined firm represented 12.4% and 23.2% share based on past production in the two relevant geographic markets. By 1967, eight years after the merger, their combined share had dropped to 10.9% and 21.8% in those markets. *Id.* at 496.

[23] *Id.* at 498-504.

[24] United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 359-61 (1970).

[25] *Id.* at 374-77 (Harlan, J., dissenting) (referring to this approach as "antitrust numerology" and a "numbers test").

[26] *Id.* at 379-81 (noting that such entities "are of much greater competitive significance in this market" than the majority acknowledged because they "offer close substitutes for the products and services that are most important to the appellee banks," and thus must be considered in "appraising the *significance* of the concentration percentages thus calculated") (emphasis in original).

[27] *Gen. Dynamics*, 415 U.S. at 498-99.

[28] Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 Mich. L. Rev. 347, 390 (2011).

[29] *Baker Hughes*, 908 F.2d at 984.

[30] FTC v. Sysco Corp., 113 F. Supp. 3d 1, 66-67 (D.D.C. 2015).

[31] *Baker Hughes*, 908 F.2d at 985.

[32] *Id.* at 985-86; *see also* United States v. Rockford Mem'l Corp., 898 F.2d 1278, 1282-83 (7th Cir. 1990) (noting that the trend of outlawing virtually all horizontal mergers under Section 7 culminated with *Von's Grocery*, and since then "a more moderate interpretation of section 7 has prevailed" that focuses on whether mergers are likely to harm consumers). The Second Circuit recently acknowledged this shift away from relying on "post-merger market share as essentially irrebuttable proof of market power" in the 1960s to the "more nuanced and text-based interpretation of Section 7" that the Supreme Court adopted in the 1970s. *See* In re AMR Corp., 2023 U.S. App. LEXIS 6504, at *3-7 (2d Cir. Mar. 20, 2023).

[33] *Phila. Nat'l Bank*, 374 U.S. at 371.

[34] FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967).

[35] *Phillipsburg Nat'l Bank*, 399 U.S. at 367-68.

[36] 386 U.S. at 597-58 (Harlan, J., concurring). In that case, Justice Harlan was referring to mergers involving "a conglomerate or product-extension merger [that] rests on a market-structure demonstration that the likelihood of anticompetitive consequences has been substantially increased." *Id.* at 598. But the principle remains the same and ought to apply regardless of the form of merger under consideration.

[37] 2010 Merger Guidelines § 10. The new draft merger guidelines proposed by the DOJ and the FTC seek to make this requirement even harsher by requiring that the efficiencies "will produce substantial competitive

benefits that could not be achieved without the merger," rather than looking at whether the efficiencies likely would be produced and are unlikely to be achieved without the merger. Draft Merger Guidelines § IV.3.A, available at https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmerger-guidelines2023.pdf.

[38] 2010 Merger Guidelines § 10. Merging parties should be wary of relying only on the judgments of internal employees in calculating efficiencies, as many courts require that any facts or assumptions used to calculate efficiencies must be based on objective and reasonable sources "that could be verified by a third party." United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 91 (D.D.C. 2011).

[39] *Baker Hughes*, 908 F.2d at 985-86; Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984) (acknowledging, in Section 1 action, that mergers and other similar combinations "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively").

[40] *Heinz*, 246 F.3d at 720 n.18 (quoting 4 Phillip Areeda & Donald Turner, *Antitrust Law* ¶ 941b, at 154 (1980)).

[41] *Id.* at 720. The D.C. Circuit reversed the district court's decision not to enter a preliminary injunction, finding that the high market concentration levels presented by the government could be rebutted only by "proof of extraordinary efficiencies" that the merger parties had not yet supplied. *Id.* at 720-21. But the court cautioned that it was not deciding whether the claimed efficiencies were sufficient to rebut a prima facie case. *Id.* at 727 & n.26.

[42] FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222-23 (11th Cir. 1991). The court held that the trial court improperly considered efficiencies in that case because the evidence of efficiencies was pure speculation and the merging parties never specifically explained how they expected to generate their claimed efficiencies. *Id.* at 1223-24.

[43] ProMedica Health Sys. v. FTC, 749 F.3d 559, 571 (6th Cir. 2014).

[44] FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054-55 (8th Cir. 1999).

[45] *Id.* In a decision not recommended for full-text publication, the Sixth Circuit also affirmed a district court order finding that the defendants successfully rebutted the FTC's prima facie case, in part through evidence of more than $100 million in cost savings "that would redound to the benefit of consumers." FTC v. Butterworth Health Corp., 1997 U.S. App. LEXIS 17422, at *6-9 (6th Cir. July 8, 1997).

[46] FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 151-53, 158-59 (D.D.C. 2004) (explaining that evidence established the merger would result in some cost reductions that would benefit competition); *see also* United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 140, 146-49 (E.D.N.Y. 1997) (finding $25-$30 million in efficiencies were likely to be achieved and benefit consumers, but not relying on these efficiencies in declining to enjoin the merger, because the government did not establish a relevant product market); United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 680 (D. Minn. 1990) (finding expected efficiency of increased production volume would better enable firm to compete with the market leader and such evidence, in conjunction with proof of easy entry and that buying power by downstream customers would mitigate potential price increases, was sufficient to show that no substantial lessening of competition was likely). The agencies also have credited likely efficiencies in deciding to permit proposed mergers, as when the third and fourth largest pharmaceutical wholesalers merged. *See, e.g.*, Statement of the FTC, AmeriSource Health Corp./Bergen Brunswig Corp. (Aug. 24, 2001), https://www.ftc.gov/sites/default/files/documents/cases/2001/08/amerisourcestatement.pdf.

[47] New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 207-17 (S.D.N.Y. 2020).

[48] *Id.* at 217.

[49] *Id.* at 244-46, 248-49.

[50] St. Alphonsus Med. Ctr. - Nampa, Inc. v. St. Luke's Health Sys., 778 F.3d 775, 788-90 (9th Cir. 2015). Previously, the Ninth Circuit refused to consider a defendant's argument that its merger would increase its operational efficiency, contending that "[t]his argument has been rejected repeatedly." *RSR Corp. v. FTC*, 602 F.2d 1317, 1325 (9th Cir. 1979) (citing *Phila. Nat'l Bank*, 374 U.S. at 370). In *St. Luke's*, the Ninth Circuit suggested that *RSR* dealt only with efficiencies outside of the relevant market, and therefore it remained "uncertain" whether the defense could apply in other contexts. *St. Luke's*, 778 F.3d at 789.

[51] *St. Luke's*, 778 F.3d at 790-91 ("[A] successful efficiencies defense requires proof that a merger is not, despite the existence of a *prima facie* case, anticompetitive.").

[52] *Id.* at 790-92 ("Courts recognizing the defense have made clear that a Clayton Act defendant must 'clearly demonstrate' that 'the proposed merger enhances rather than hinders competition because of the increased efficiencies.'" (quoting *Long Island Jewish Med. Ctr.*, 983 F. Supp. at 137)).

[53] *Id.* at 791-92.

[54] FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347-48, 350 (3d Cir. 2016). The Third Circuit later clarified that its holding in *Hershey* about the need for "extraordinary" efficiencies did not require efficiencies to be extraordinary in every case. Rather, the "magnitude of the efficiencies needed to overcome a prima facie case depends on the strength of the likely adverse competitive effects of a merger," and the extraordinarily high HHI numbers in *Hershey* required that verifiable efficiencies be "equally extraordinary to overcome the likely anticompetitive effects." FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160, 176-77 (3d Cir. 2022).

[55] *Heinz*, 246 F.3d at 720-22.

[56] United States v. Anthem, Inc., 855 F.3d 345, 353-55 (D.C. Cir. 2017) ("*Anthem II*") (stating it would proceed as though efficiencies "could be such a defense under a totality of the circumstances approach").

[57] *See, e.g.*, *Penn State Hershey*, 838 F.3d at 347-48; *see also St. Luke's*, 778 F.3d at 790-91.

[58] *Anthem II*, 855 F.3d at 353.

[59] *Id.* at 356. Health insurance customers generally fall into one of two buckets: (1) fully insured customers, who pay premiums to a health insurer for processing medical claims and paying for medical services, with the health insurer bearing the risk that the amount it receives in premiums may not cover the cost of paying for medical services; and (2) self-insured customers, also called administrative services only or ASO customers, who pay an ASO fee to a health insurer for processing claims and providing access to a network of doctors and medical facilities that have committed to providing services at negotiated prices, with the customer bearing the responsibility to pay the cost of all services utilized. *Id.* at 351.

[60] *Id.* at 356 (emphasis added).

[61] *Id.* at 359-60.

[62] *Id.* at 360, 362-63. Oddly, the majority admitted that over 70% of the calculated medical cost savings were expected to go to ASO customers (*id.* at 353), for whom the majority found "any reduction in medical rates would result in savings that automatically pass through to the customer." *Id.* at 362.

[63] *Anthem II*, 855 F.3d at 375-77 (Kavanaugh, J., dissenting).

[64] *Id.* at 376-77 (quoting *Baker Hughes*, 908 F.2d at 984, 986).

[65] *Id.* at 374 (Kavanaugh, J., dissenting) (emphasis in original). In *Anthem I*, the DOJ also brought a monopsony claim, in which it alleged that the merged Anthem-Cigna would exercise so much purchasing power that it would achieve an anticompetitive reduction in provider prices upstream. United States v. Anthem, Inc., 236 F. Supp. 3d 171, 234 (D.D.C. 2017) ("*Anthem I*"). In other words, to save its prima facie Section 7 case, the government argued that provider prices would not go down, but to bolster its monopsony case the government also argued that provider prices necessarily would go down. The district court never decided the monopsony claim. *Id.* at 203.

[66] *Anthem II*, 855 F.3d at 362.

[67] *Id.* at 375.

[68] *Baker Hughes*, 908 F.2d at 984 (emphasis in original).

[69] *Anthem II*, 855 F.3d at 380 (Kavanaugh, J., dissenting) (emphasis in original).

[70] *See, e.g.*, FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1090 (N.D. Ill. 2012) (rejecting efficiencies that the parties had an economic incentive to pursue because "the fact that it might make business sense to [pursue such efficiencies] after the merger does not *guarantee* that the identified efficiencies will be attained") (emphasis added).

[71] For example, in United States v. Aetna Inc., 240 F. Supp. 3d 1, 42-43, 46-47 (D.D.C. 2017), the government's case relied on high post-merger HHIs and

a merger simulation predicting $500 million in increased insurance premiums (although its expert cautioned this figure was imprecise and the focus should therefore be on the direction of predicted price changes, not their magnitude). The defendants presented evidence of $2 billion in efficiencies that would initially go to the merged firm, of which about 42% would then flow to consumers in indirect cost savings, as well as another $300 million in savings that would go directly to consumers. *Id.* at 95-96. But the court questioned whether $460 million in claimed efficiencies were likely to be realized in their entirety, and held that $170 million in other efficiencies were not merger-specific. *Id.* at 96-98. But then, without stating what portion of the efficiencies it believed were cognizable and comparing those to the harm it thought likely to occur, the court summarily concluded that the merging parties failed to prove "extraordinary efficiencies" sufficient to rebut the high HHIs. *Id.* at 98.

[72] Remarks of Christine S. Wilson, *Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies*, June 24, 2020, available at https://www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-_bates_white_presentation_06-24-20-_final.pdf.

[73] Herbert Hovenkamp, Appraising Merger Efficiencies, 24 GEO. MASON L. REV 703, 725-26 (Spring 2017).

[74] *Id.* at 713-15; *see also* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) ("noting that "the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively"); *ProMedica*, 749 F.3d 559, 571 (6th Cir. 2014) ("[T] he goal of antitrust law is to enhance consumer welfare.").

[75] Hovenkamp, *supra* note 73, at 734-35.

[76] Hovenkamp, *supra* note 73, at 735.

[77] George Kosicki & Miles B. Cahill, *Economics of Cost Pass Through and Damages in Indirect Purchaser Antitrust Cases*, 51 Antitrust Bull. 599, 612 (2006).

[78] *Baker Hughes*, 908 F.2d at 982-83.

[79] Crane, *supra* note 28, at 387-88.

[80] Indeed, *Philadelphia National Bank* may prohibit using efficiencies as an affirmative defense: "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." 374 U.S. at 371. This tracks how an affirmative defense would work, excusing the merger despite its violation of Section 7 because there is some other social or economic reason to permit it. In the typical efficiencies case, however, efficiencies evidence is used to show there will be no substantial lessening of competition—and hence no Section 7 violation—in the first place.

[81] *Baker Hughes*, 908 F.2d at 991.

[82] Crane, *supra* note 28, at 387-89 (noting that the 2010 Merger Guidelines § 10 already contain a mnemonic device, but one that promotes asymmetrical treatment by confirming that the agencies will not compare the magnitudes of cognizable efficiencies and likely harm to competition).

[83] With other efficiencies—such as improved innovation or quality—there may be no choice but to approximate. For example, it is unclear how one could compare the claimed healthcare quality improvements in *St. Luke's* to likely price increases, although quality-adjusted prices could have been used to make some comparisons. *See, e.g.*, Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. Pitt. L. Rev. 503, 516 (2001). That is no reason, however, to insist on nothing more than a "rough approximation" of how price efficiencies compare to likely price increases, or to require greater proof of quality efficiencies than proof of negative price effects. *But see* 4A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 971f (2016) ("As a general matter we would not require any calculus comparing likely price increase effects with likely efficiency effects and showing that resulting post-merger prices will be no higher than pre-merger prices as anything other than a rough approximation.").

[84] *See, e.g.*, *Anthem II*, 855 F.3d at 364 (holding the district court did not clearly err in finding a lack of "extraordinary efficiencies" sufficient to "constrain likely price increases," while admitting the district court never calculated proven efficiencies or harms in order to compare them, and holding that it was not even required to do so); *Aetna*, 240 F. Supp. 3d at 96-98 (questioning cognizability of only certain efficiencies and then concluding that the efficiencies would not outweigh likely harms, without quantifying either likely efficiencies or likely harms).

[85] *See, e.g.*, *Sysco*, 113 F. Supp. 3d at 66-67 (D.D.C. 2015) (discussing a merger simulation model offered by the FTC's expert witness that calculated increased prices in the relevant product market of approximately $900 million).

[86] *See, e.g.*, *Long Island Jewish Med. Ctr.*, 983 F. Supp. at 146-49; *Arch Coal*, 329 F. Supp. 2d at 151-53.

[87] *Univ. Health*, 938 F.2d at 1223.

[88] *Baker Hughes*, 908 F.2d at 984.