Supplemental Testimony of David A. Balto

The Market Shares Understate the Competitive Problems in the State of California

Professor Fulton's testimony shows profound increases in concentration across many markets and geographic areas. Markets for sellers of employer-sponsored and individual market preferred provider organization/exclusive provider organization, point of service and health maintenance organization managed care products will become highly concentrated in 18 counties with a combined population of 3,698,709 and moderately concentrated in 31 counties with a combined population of 31,891,524.[1] Markets for sellers of employer-sponsored and individual market preferred provider organization/exclusive provider organization managed care products will become highly concentrated in 41 counties with a combined population of 37,052,524 and will become moderately concentrated in 14 counties with a combined population of 1,622,201.[2] Markets for sellers of employer-sponsored and individual market preferred provider organization/exclusive provider organization managed care products will become highly concentrated in 46 counties with a combined population of 38,257,387 and moderately concentrated in 7 counties with a combined population of 280,379.[3] Markets for insurers as buyers of healthcare services will become highly concentrated in 4 counties with a combined population of 114,314 and moderately concentrated in 23 counties with a combined population of 12,199,724.[4]

This data is compelling and as we explain below demonstrate a prima facie violation of the antitrust laws. But the levels of concentration suggest, but understate the degree of competitive concerns. Market shares are just an initial threshold to looking at the potential competitive effects of the merger.[5] California health insurance markets are already concentrated and Professor Fulton's findings show profound competition concerns throughout California as a result of this merger.

The ultimate question under the antitrust law is whether the effect of the merger "may be substantially to lessen competition, or to tend to create a monopoly."[6] "Congress used the words 'may be' . . . to indicate that its concern was with probabilities, not certainties" and to "arrest restraints of trade in their incipiency and before they develop into full-fledged restraints."[7] Typically, market shares are examined to predict whether the combined firm can exercise market power, that is raise prices and/or reduce services.

But in many of these markets it is clear that Anthem has market power because it has the ability to raise price, and engages in practices that are clearly anti-consumer. Anthem's excessive suggested price increase by as much as 39% in 2009 helped lead to the enactment of the Affordable Care Act.[8] The Department has rejected several other proposed premium increases. In addition, as documented by

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[1] *See* Testimony Regarding Anthem, Inc.'s Proposed Acquisition of Cigna Corporation by Brent D. Fulton, Richard M. Scheffler and Daniel R. Arnold at the California Department of Insurance (March 29, 2016).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410 (5th Cir. 2008) (market concentration should be analyzed within the context of long-term trends and market structure).
[6] 15 U.S. Code § 18.
[7] Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 323 n.39 (1962).
[8] Sheryl Gay Stolberg, Jeff Zeleny and Carl Hulse, *Health Vote Caps a Journey Back From the Brink*, THE NEW YORK TIMES (Mar. 20, 2010), http://www.nytimes.com/2010/03/21/health/policy/21reconstruct.html.

Health Access and Consumers Union Anthem is able to engage in numerous egregious consumer protection violations and successfully offer products that do not meet the standards of care. Both the evidence of the ability to increase price and reduce service is direct evidence of market power.[9] Acquiring Cigna will make things worse.

The law is also clear that high entry barriers or a trend towards consolidation increase competitive concerns even where the market shares show that the markets are moderately concentrated.[10] Both of those factors are met in California. There has been significant consolidation as demonstrated in our earlier testimony.[11] And Aetna's proposed acquisition of Humana will accelerate that trend. The parties identified some new entrants in their testimony. But an "entrant" under the antitrust law is only a firm that is capable of constraining prices or other anticompetitive conduct.[12] There are significant barriers to entry, particularly in developing a provider network. Anthem's excessive price increases and anticompetitive conduct demonstrates that any recent entry does not protect competition.

Even at lower concentration levels, there are substantial monopoly concerns with this proposed merger. Mergers have also been successfully challenged between companies with large market shares and very small market shares.[13] Mergers have also been enjoined by courts in highly concentrated markets even when their combined share is relatively low.[14]

Fulton suggests that the market share calculations suggest there is not a problem with the potential exercise of monopsony or buyer power except in a few rural counties. We disagree with that assessment. Monopsony, or buyer power, concerns can exist at lower market shares than monopoly concerns. Professor Peter Carstensen states that "the sequence of decisional power differentiates the buyer from the seller and is a major explanation for why buyers in many contexts can have significant

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[9] Broadcom Corp. v. Qualcomm Inc., 501 F.3d 287, 315 (3d Cir. 2007) (reversing district court's dismissal; holding that monopoly power was adequately plead in part because plaintiff alleged that defendant had power to extract supracompetitive prices); Spirit Airlines v. Nw. Airlines, 431 F.3d 917, 950-51 (6th Cir. 2005) (reversing summary judgment for defendant because evidence of output reduction and price increases following plaintiff's exit from market could show monopoly power).

[10] United States v. Pabst Brewing Co. 384 U.S. 546, 552-53 (1966) (finding that mergers with small market shares can violate the antitrust laws when there is a finding that the markets are trending towards increased concentration); Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410 (5th Cir. 2008) (evidence in record supported the reasonable inference that entry barriers existed); FTC v. H.J. Heinz Co., 246 F.3d 708, 717 & n.13 (D.C. Cir. 2001) ("[T]he anticompetitive effect of the merger is further enhanced by high barriers to market entry.") Monfort of Colo., Inc. v. Cargill, Inc., 761 F. 2d 570, 579-80 (10th Cir. 1985), rev'd on other grounds 479 U.S. 104 (1986).

[11] Written Testimony of David A. Balto, Hearing Regarding the Proposed Merger of Cigna Corporation into Anthem Inc., Before the California Department of Insurance (March 29, 2016).

[12] *See* Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1440 (9th Cir. 1995) ("The fact that entry has occurred does not necessarily preclude the existence of `significant' entry barriers. If the out-put or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power."). 2010 Merger Guidelines § 9.3 provides examples of entry that may be insufficient to counter anticompetitive effects including an entrant that has an inability to constrain prices.

[13] *See* Complaint at 6, In the Matter of Inova Health System Foundation, (No. 9326), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2008/05/080509admincomplaint.pdf (challenging a merger of a firm with 67% of the market and a firm with 6% of the market).

[14] US v. H & R BLOCK, INC., 833 F. Supp. 2d 36, 72 (D.D.C. 2011) (enjoining a merger with a combined market share of 28.4 percent); FTC v. H.J. Heinz Co., 246 F.3d 708, 711 (D.C. Cir. 2001) (rejecting a merger with a combined market share of 32.8 percent).

power even if they do not dominate the buying side of the market in ways comparable to those associated with seller power."[15] Carstensen points out that doctors and hospitals are especially vulnerable to buyer power, even at lower shares.[16]

For example, even if the combined market share is only 20% of the market, doctors cannot easily replace 20% of their practice if a merged Anthem-Cigna lowers their reimbursement rate. Consider an obstetrician in Santa Clara. Assume that 20% of her business is with Anthem. If Anthem reduces her reimbursement by 10%, she is not going to substitute for that business by adding low reimbursement Medicaid patients or seek patients from Sacramento. Market power is a question of the provider's options and where those options are limited a buyer even at a modest market share can successfully reduce reimbursement. For this reason, the Supreme Court found that even a 20% market share allowed a firm to impose anticompetitive restraints on the buyer side.[17] The Department of Justice also challenged the United-Pacificare merger on monopsony concerns even where there were not concerns that the merger would lead to higher premiums.[18]

The concerns of consumers are coincident with the concerns of providers. As former Congressman Tom Campbell explained "[t]he insurance company's economic incentive is to spend as little as possible on medical care. And if there is no competing insurance company to whom the physician can turn for an alternative offer, the doctor has no choice but to submit to offering the quality of care ordered by the insurance company."[19] Ultimately, when insurance companies possess monopsony power consumers lose, the quality of care goes down.

The Proposed Efficiencies Will Not Overcome a Finding That the Merger is Anticompetitive

There is little question that the significant increase in market shares and Anthem's existing market power demonstrate that the merger is a prima facie violation of the law. The crucial question in this case is whether the proposed efficiencies can clearly outweigh the competitive harm from the merger. This is an appropriately daunting burden that the parties cannot meet

No anticompetitive merger has ever been permitted because of potential efficiencies. Indeed, a recent Ninth Circuit case questioned whether an efficiencies defense even exists.[20] The efficiencies, which have never led to an approval of an anticompetitive merger, don't meet the legal requirements and can't outweigh the harms to consumers. But even if they did, they would have to exceed the harm created by the merger.[21] Those courts which have considered the defense have stated that merging parties

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[15] Peter C. Carstensen, *Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue*, 14 U. PA. J. BUS. L. 775, 783-84 (2012).
[16] *Id.* at 785.
[17] Toys R Us v. FTC, 221 F.3d at 928 (7 Cir. 2000)
[18] Complaint at 5-12, United States v. UnitedHealth Group Inc., (No. 05-2436), *available at* https://www.justice.gov/atr/case-document/file/514011/download (finding market share sufficient for monopsony concerns in Boulder, Colorado but not sufficient for monopoly concerns).
[19] Tom Campbell, *Health insurer mergers a bad Rx for doctors, patients*, THE ORANGE COUNTY REGISTER (Jan. 23, 2016 12:00 AM), http://www.ocregister.com/articles/insurance-700940-doctors-patient.html.
[20] St. Alphonsus Medical Center-Nampa et al v. St. Luke's, 778 F. 3d 775, 789 (9th Cir. 2015).
[21] FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001); U.S. v. Baker Hughes Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990).

prove the acquisition results in “significant economies and that these economies ultimately would benefit competition and, hence, consumers.”[22]

“[C]ourts only consider efficiencies that are verifiable and merger-specific, and it is incumbent upon the court to undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those efficiencies represent more than mere speculation and promises about post-merger behavior.”[23] The Merger Guidelines set three requirements for efficiencies: 1) the efficiencies must be merger specific and unlikely to occur in the absence of the merger; 2) the efficiencies can’t be vague or speculative and must be verifiable through reasonable means; 3) the efficiencies must benefit consumers and be sufficient to reverse the merger’s potential to harm customers in the relevant market.[24]

The key question in this matter is whether the efficiencies are merger specific.[25] Does Anthem need to acquire Cigna to achieve the efficiencies that they claim will result from this deal? As the hearing made clear both companies have programs for increasing the value of care and aligning the activities of health care providers. Commissioner Jones challenged the companies on this, asking “why is a merger necessary then to accomplish value based approaches to healthcare.” The representatives from Anthem and Cigna could not clearly answer this question, stating only that the complimentary natures of the companies will help them to do it in a way that they haven’t been able to do on their own.

Moreover, since the Anthem and Cigna provider networks will remain separate it is difficult to see any benefits of integration. Their claims are like Google and Samsung going to the Justice Department and saying we need to merge our smartphone businesses because we don’t know how to manage our legal expenses well enough, if we merge we will be able to better manage these expenses. Google and Samsung don’t need to merge in order to lower legal expenses.

The reason we have a free market system is because consumers benefit most when competitors have to roll up their sleeves and develop a better product. If one of these firms has a better product in one area, then all other companies in the market should have to learn how to do better to compete against that product. It does not benefit consumers for companies to consolidate simply to fill in their weaknesses.

The crucible of merger efficiency analysis is whether you need the merger to achieve those goals. In other words, there is a certain size which a company needs to have before they can achieve something that is good for consumers. Anthem and Cigna have not told or documented this story.

Anthem’s and Cigna’s testimony at the March 29 hearing included a lot of stated efficiencies involving providers doing something because their insurance company is larger. The engine to the benefits they seek are what the providers will do. These are efficiencies that come from providers working more effectively, not from a merged Anthem-Cigna and therefore should not count.

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[22] *See* FTC v. University Health, Inc., 938 F. 2d 1206, 1223 (11th Cir. 1991) (respondent must prove the acquisition results in “significant economies and that these economies ultimately would benefit competition and, hence, consumers.”).

[23] FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1088-89 (N.D. Ill. 2012) (internal quotes omitted).

[24] Merger Guidelines § 10.

[25] *Id.*

The most important case for the California Department of Insurance to consider is the FTC's case against St. Luke's in the Ninth Circuit. This case has a lot in common with the Anthem-Cigna merger in California. In St. Luke's, a dominant hospital wanted to acquire a physician practice 60 miles away. Their claimed efficiencies mostly revolved around being able to move the physician practice onto their computer system and aligning the incentives for doctors to deliver value based care.[26] The District Court and Ninth Circuit rejected the defense because the merger was unnecessary to achieve those goals. The Ninth Circuit was explicit that "the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations."[27] If Anthem or Cigna need to improve their operations, they can go and do it themselves. That is what the free market system is based on, they don't need a merger to accomplish that.

Remedies Will Not Fix This Merger

In nearly every health insurance merger enforcement action during the last two decades, DOJ has relied on the structural remedy of divestiture.[28] Many of these remedies have failed; one only has to look to the airline industries for an example of how divestitures have been unsuccessful in remedying anticompetitive concerns. And, in particular, studies have shown that divestiture remedies used to resolve competitive concerns in the health insurance industry have failed. Recent studies by the Center for American Progress and the Capitol Forum found that the divestitures in the Humana-Arcadian merger had largely failed to address the competitive concerns, with 2 of the 3 firms failing and a substantial increase in premiums. [29] In fact, premiums were found to have risen in most retrospective studies of permitted health insurance mergers despite remedies. A study found that the 1999 Aetna-Prudential merger resulted in an additional seven percent premium increase in 139 separate markets throughout the United States. [30] Another study found that the 2008 United-Sierra merger resulted in an additional 13.7 percent premium increase in Nevada.[31]

Moreover, the divestitures in this merger present a significant problem of scale. The United-Sierra merger involved overlap in only two small counties in Nevada and yet the divestiture still led to significant premium increases. The Humana-Arcadian merger involved only 12,700 lives in small rural counties in the southwest and yet two of the purchasers failed and premiums rose (in some cases over 40%). This merger will potentially involve the divestiture in many major California metropolitan areas. The divestiture could exceed a million lives in California alone. If divestitures did not work on small scale overlaps in past mergers, there is no way they will work in this merger.

[26] St. Luke's, 778 F. 3d at 791.
[27] *Id.* at 792.
[28] *See, e.g.,* Revised Final Judgment, *United States v. Aetna Inc. and Prudential Insurance Co. of Am*., No. 3-99-cv-1398-H (N.D. Tex. Dec. 7, 1999); Final Judgment, *United States v. UnitedHealth Group Inc. and Sierra Health Servs. Inc.*, No: 1:08-cv-00322 (D.D.C. Sept. 24, 2008); Final Judgment, *United States v. Humana Inc.*, No. 1:12-cv-00464 (D.D.C. March 27, 2012).
[29] Topher Spiro, Maura Calsyn, Meghan O'Toole, Divestitures Will Not Maintain Competition in Medicare Advantage, Center for American Progress (Mar. 8, 2016), https://www.americanprogress.org/issues/healthcare/report/2016/03/08/132420/divestitures-will-not-maintain-competition-in-medicare-advantage/.
[30] Leemore Dafny *et al*., *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry,* 102 AM. ECON. REV. 1161 (2012).
[31] Guardado et al. *The Price Effects of a Large Merger of Health Insurers: A Case Study of United-Sierra,* 1(3) HEALTH MANAGEMENT, POL'Y & INNOVATION 1 (2013).

The State of California Has the Authority to Reject the Merger

The California Attorney General has taken a leading role in the review of mergers in the book publisher, bookstore, health-care provider, school bus, and waste hauling markets.[32] The California Department of Insurance should work closely with the California Attorney General's office to review this deal in order to protect competition in the California market.

[32] Antitrust Highlights, State of California Department of Justice Office of the Attorney General, https://oag.ca.gov/antitrust/highlights (last visited Mar. 31, 2016).

Appendix – Conclusions of Law

The following appendix is a summary of the applicable merger antitrust law. I provide this appendix in order to assist the state of California in its understanding of how the Anthem-Cigna merger will be judged under federal and state antitrust law.

Merger Enforcement Standard

- Section 7 of the Clayton Act, as amended, prohibits any acquisition "where in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." (15 U.S.C. § 18 (emphasis added); United States v. Pabst Brewing Co., 384 U.S. 546, 547 (1966)).
- "Congress used the words 'may be' . . . to indicate that its concern was with probabilities, not certainties" and to "arrest restraints of trade in their incipiency and before they develop into full-fledged restraints." (Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 323 n.39 (1962)). All that is necessary under the law is that the merger create an appreciable danger of such consequences in the future. (Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986)). A "fundamental purpose of amending § 7 was to arrest the trend toward concentration, the tendency to monopoly, before the consumer's alternatives disappeared through merger . . . ." (United States v. Phila. Nat'l Bank, 374 U.S. 321, 367 (1963)).
- "[M]ergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise." (U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 1 (2010)).
- "A transaction resulting in a high concentration of market power and creating, enhancing, or facilitating a potential that such market power could be exercised in anticompetitive ways is presumptively unlawful." (Phila. Nat'l Bank, 374 U.S. at 363; U.S. v. Baker Hughes Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990)).
- Proof that an acquisition will increase concentration in one or more relevant markets with significant barriers to entry establishes a prima facie case that a merger is anticompetitive. (FTC v. H.J. Heinz Co., 246 F.3d 708, 716 (D.C. Cir. 2001) (likelihood of success demonstrated by showing that market concentration would increase substantially)).
- Once a prima facie case has been established, the burden shifts to the Respondent to rebut the prima facie case by attempting to show that market-share statistics do not accurately reflect the market. (Heinz. 246 F.3d at 715; Baker Hughes, 908 F.2d at 982-83). "The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." (Heinz, 246 F.3d at 725 (quoting Baker Hughes, 908 F.2d at 991)). There are two common defenses used – that potential entry will alleviate any competitive harm and that efficiencies will outweigh any anticompetitive effects. (see below).
- When the burden shifts, it is up to the defendant to show that the prima facie case "did not accurately depict the economic characteristics of the . . . market." (United States v. Marine Bancorporation, Inc., 418 U.S. 602, 631 (1974))

Market Concentration

- A merger that allows a firm to control an "undue percentage" of a relevant market and that causes a "significant increase in . . . concentration" 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." (Phila. Nat'l Bank, 374 U.S. at 363 (emphasis added); accord California v. American Stores Co., 872 F.2d 837, 842 (9th Cir. 1989); *see also* United States v. Rockford Memorial Corp., 898 F.2d 1278, 1285 (7th Cir. 1990) ("The defendants' immense shares in a reasonably defined market create a presumption of illegality.")).
- Market concentration can be measured using the Herfindahl-Hirschman Index ("HHI"), as adopted by the federal antitrust enforcement agencies. (Horizontal Merger Guidelines at § 5.3).
- Courts have adopted and relied on the HHI as a measure of market concentration. (See, e.g., FTC v. University Health, Inc., 938 F. 2d 1206, 1211 n.12 (11th Cir. 1991) (HHI is the "most prominent method" of measuring market concentration); FTC v. PPG Indus., Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986); FTC v. Cardinal Health, 12 F. Supp. 2d 34, 53-54 (D.D.C. 1998); FTC v. Staples, 970 F. Supp. 1066, 1081-82 (D.D.C. 1997).
- Sufficiently large HHI figures establish a prima facie case that a merger is anticompetitive. (Heinz, 246 F.3d at 716 (citing Baker Hughes, 908 F.2d at 982-83 & n.3)). "While market share is just the starting point for assessing market power, … market share, at least above some level, could support a finding of market power in the absence of contrary evidence." (Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 925 (9th Cir. 1980)). Significant concentration can create a strong presumption that the acquisition violates the Clayton Act. (*See* Heinz, 246 F.3d at 715). Absent evidence to overcome that presumption, the analysis can have stop there. (*See* American Stores, 872 F.2d at 842, reversed on other grounds, 495 U.S. 271 (1990))
- Mergers potentially raise significant competitive concerns and often warrant scrutiny where the post merger HHI is between 1,500 and 2,500 and the HHI increases between 100 and 200 points. Where the post merger HHI is greater than 2,500 and involves an HHI increase of more than 200 points, it creates a rebuttable presumption that the merger is likely to enhance market power. (Horizontal Merger Guidelines § 5.3).

Market Shares More Significant in Monopsony Cases

- In Toys R Us, the market share that allowed the firm to impose anticompetitive restraints on its suppliers was about 20% of the national market for toys. While no market share is reported in the Klors case, it is unlikely that Broadway-Hale dominated the retail appliance market in California or nationally, but it still had the power to coerce its suppliers into agreeing to cut off Klors. These cases suggest that unilateral effects are possible from mergers resulting in control over 10% to 20% of the buying market. (Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959); Toys R Us v. FTC, 221 F.3d 928 (7 Cir. 2000)).
- The Department of Justice has also challenged health insurance mergers with monopsony concerns at much lower thresholds than the monopoly concerns. (Complaint at 5-12, United States v. UnitedHealth Group Inc., (No. 05-2436), *available at* https://www.justice.gov/atr/case-document/file/514011/download (finding market share sufficient for monopsony concerns in Boulder, Colorado but not sufficient for monopoly concerns)).

Looking Beyond Concentration

- The courts and the enforcement agencies have disavowed exclusive reliance on market share in favor of an analysis of likely competitive effects based on actual experiences in particular industries. (2010 Merger Guidelines § 4.3 (characterizing market concentration as one "often useful indicator" of a merger's likely competitive effects); Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410 (5th Cir. 2008) (market concentration should be analyzed within the context of long-term trends and market structure))
- The Supreme Court and other courts have found that mergers of firms with relatively small combined market shares can violate Section 7, especially in markets with trends toward increasing concentration from mergers or other causes. (United States v. Pabst Brewing Co. 384 U.S. 546, 550-53 (1966) (noting in particular 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."); US v. H & R Block, Inc., 833 F. Supp. 2d 36, 72 (D.D.C. 2011) (enjoining a merger with a combined market share of 28.4 percent); Heinz, 246 F.3d at 711 (rejecting a merger with a combined market share of 32.8 percent))
- Relevant market conditions can enhance or impede the ability of market participants to exploit increased concentration resulting from a merger. For instance, high entry barriers have been held to increase competitive concerns in highly and even moderately concentrated industries. (Chi Bridge & Iron Co. v. FTC, 534 F.3d 410 (5th Cir. 2008); Heinz, 246 F.3d at 717 & n.13)

Effects of Potential Entry

- Potential entry can in some cases be a defense to a prima facie case. However, the defense has strict requirements under the law. Entry must be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects" of a proposed transaction. (Merger Guidelines § 9; St. Alphonsus Medical Center-Nampa et al v. St. Luke's, 778 F. 3d 775, 786 (9th Cir. 2015); United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001), aff'd, 344 F.3d 229, 240 (2d Cir. 2003); Cardinal Health, 12 F. Supp. 2d at 55-58).
- Respondent must show both that entry is likely – meaning both technically possible and economically sensible – and that it will replace the competition that existed in both relevant markets prior to the merger. (See Cardinal Health, 12 F. Supp. 2d at 56 (quotation omitted); In re Chicago Bridge & Iron Co., 138 F.T.C. 1024, 1147 (Jan. 6, 2005) (noting "new entrants and fringe competitors" might not replace lost competition), aff'd sub nom. Chicago Bridge, 534 F.3d 410).
- The higher the barriers to entry, the less likely it is that the "timely, likely, and sufficient" test can be met. (Visa U.S.A., 163 F. Supp. 2d at 342).
- The history of entry "is a central factor in assessing the likelihood of entry in the future." (Cardinal Health, 12 F. Supp. 2d at 56; Merger Guidelines § 9).
- Numerous factors can serve as barriers to successful entry and expansion, including the strong market reputation enjoyed by the merging providers. (See Cardinal Health, 12 F. Supp. 2d at 57 (noting that the "strength of reputation that the Defendants already have over these wholesalers serve as barriers to competitors as they attempt to grow significantly in size"); Horizontal Merger Guidelines § 9.3 (describing "reputational barriers to rapid expansion")). For this reason, the mere possibility of entry or expansion is not sufficient to counteract the anticompetitive effects of the Acquisition.

Efficiencies Defense

- In order to successfully make out an efficiencies defense, the defendant must produce “convincing proof” of “significant” and “merger-specific” benefits. (Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 971 p.48 (3d ed. 2009)). A court must “undertake a rigorous analysis of the kinds of efficiencies being urged … in order to ensure that those ‘efficiencies’ represent more than mere speculation and promises about post-merger behavior.” (Heinz, 246 F.3d at 721). “[I]t is incumbent upon the merging firms to substantiate efficiency claims,” (Merger Guidelines §10), through “evidence of either ‘significant’ or ‘extraordinary’ efficiencies.” (Areeda ¶976d p.106). An efficiency claim “based on mere possibilities” is insufficient to overcome a prima facie case of competitive harm. (Areeda ¶970c p.32). The test is especially demanding where, as here, there are “high market concentration levels.” (Heinz, 246 F.3d at 720). A strong presumption of anticompetitive harm requires “precise proof of a very high degree of efficiency.” (Areeda ¶970b p.26). “Few defendants will be able to make this showing.” (Id.).
- Under the Merger Guidelines and related case law, efficiencies claimed by a defendant are not to be credited unless they are merger-specific (i.e., likely to be achievable only by this transaction), substantiated, and of such a character and magnitude that the transaction is not likely to be anticompetitive in any relevant market. (Merger Guidelines § 10; see also Univ. Health Inc., 938 F.2d 1206, 1223 (11th Cir. 1991) (“defendant [cannot] overcome a presumption of illegality based solely on speculative, self-serving assertions”); Staples, 970 F. Supp. at 1089).
- Merger-specificity means that merging parties must “explain[] why [they] could not achieve the kind of efficiencies urged without merger.” (Heinz, 246 F.3d at 722). “An efficiency is said to be ‘merger specific’ if it is a unique consequence of the merger – that is, if it could not readily be attained by other means.” (Areeda ¶973a p.53; see Heinz, 246 F.3d at 722; In re Evanston Nw. Healthcare Corp., No. 9315, 2007 WL 2286195 at *70 (FTC 2007) (defendant “must show that the claimed benefits are … ones that could not practicably be achieved without the proposed merger”); Merger Guidelines §10 (merger-specific efficiencies are those “unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects”)). If efficiencies are not merger-specific, “the merger’s asserted benefits can be achieved without the concomitant loss of a competitor.” (Heinz, 246 F.3d at 722; accord Areeda ¶976d; Merger Guidelines §10).
- Efficiencies asserted to offset a prima facie showing of anticompetitiveness “must be efficiencies that cannot be achieved by either company alone.” (Heinz, 246 F.3d at 722 (emphasis added)). Thus, “an economies defense generally requires proof that both [merging firms] suffer from substantial diseconomies.” (Areeda ¶976b p.103 (emphasis added)). That is because the merger of “an already efficient firm and an inefficiently small firm would not” create an additional efficient competitor but “would merely increase market concentration.” (Id.)
- Merging parties must “explain[] why [they] could not achieve the kind of efficiencies urged without merger.” (Heinz, 246 F.3d at 722; United States v. Third Nat’l Bank in Nashville, 390 U.S. 171, 189 (1968) (“If the injury to the public interest flowing from the loss of competition could be avoided and the convenience and needs of the community benefited in ways short of merger … it was incumbent upon those seeking to merge … to demonstrate that they made reasonable efforts [to achieve efficiency] … or that any such efforts would have been unlikely to succeed.”)). As Areeda explains, antitrust policy demands a strict showing of merger specificity because “society would be better off if the same or equivalent efficiency gains could be realized without

the anticompetitive merger." (Areeda ¶973a p.53; see also Merger Guidelines §10 ("the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers")). "The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies." (Merger Guidelines §10).

- "The Supreme Court has never expressly approved an efficiencies defense to a § 7 claim." (St. Luke's, 778 F.3d at 788-89 (raising doubt on the existence of an efficiency defense)). The Court has rejected the position that an otherwise anticompetitive merger should be permitted merely because it may be motivated by beneficial goals: "A merger is not saved from illegality under § 7 . . . 'because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. . . . It therefore proscribed anticompetitive mergers, the benign and malignant alike, fully aware, we must assume, that some price might be paid.'" (Ford Motor Co. v. United States, 405 U.S. 562, 570 (1972) (quoting Phila. Nat'l Bank, 374 U.S. at 371)).
- Defendants cannot "overcome a presumption of illegality based solely on speculative, self-serving assertions." (Univ. Health, 938 F.2d at 1223). Defendants must prove the Acquisition will result in "significant economies, and that these economies would benefit competition and, hence, consumers." (*Id.).*
- Respondent must prove the Acquisition results in "significant economies and that these economies ultimately would benefit competition and, hence, consumers." (Univ. Health, 938 F.2d at 1223, see also Butterworth, 946 F. Supp. 1285, 1300 (W.D. Mich. 1996)).
- A defendant's "proof of extraordinary efficiencies" must be "more than mere speculation and promises about post-merger behavior." (Heinz, 246 F.3d at 720-21)
- "[T]he Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations." (St. Luke's, 778 F. 3d at 792)