

Is the Efficiencies Defense a Unicorn?

Jeff Miles

American Antitrust Institute/Navigant Economics

Healthcare Roundtable

February 22, 2017

Is an Efficiencies Defense a Theoretical Possibility?

- Yes:
 - Merger Guidelines
 - “When substantiated . . . , [quality of care] claims may well carry the day, overcoming high concentration levels.” Perry & Cunningham
 - “In a number of cases, efficiencies have played a role in our decision not to take action.” E. Ramirez
 - “Competitive impacts can’t be full assessed without assessing efficiencies. M. Gaynor, FTC Bureau of Econ.

- Maybe:
 - “The Supreme Court has never expressly approved an efficiencies defense, . . . [and w]e remain skeptical about the efficiencies defense in general and about its scope in particular.” St. Alphonsus
 - “[T]he Supreme Court has instead, on three occasions, cast doubt of its availability [W]e are skeptical that such an efficiencies defense even exists.” Hershey
 - “[N]one of the reported appellate decisions have actually held that a . . . defendant has rebutted a prima facie case with an efficiencies defense.” St. Alphonsus

- “[C]ourts have expressed skepticism about accepting such a defense.” FTC Post-Remand Brief, Advocate Health Network
- “No court has *ever* found efficiencies sufficient to offset the harm of a presumptively unlawful merger.” Id.

Defendants Are Behind the Eight-Ball From the Start

- Very lenient PI standard
 - Likelihood of success standard met if defendants not clear-cut winners?
- The presumption—Easy prima facie case
 - Is it justified?
 - Colors the court's initial judgment?
 - Defendants start with two strikes?
 - Effectively reverses the actual burden of persuasion?

Too Strict Interpretation of Merger Specificity?

- Merger Guidelines:
 - “Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished [absent the merger]”
- Is the standard “could” achieve or “would achieve the efficiencies absent the merger?”

- FTC and courts appear to apply the “could” standard, regardless of whether efficiencies “likely” “would” be achieved
 - “Highland Park *could* have made the large majority of the quality improvements . . . without the merger.” Evanston Northwestern

Isn't Quality Improvement Inherently Procompetitive?

- “Although the district court believed the merger would eventually ‘improve the delivery of health care, . . .’ the judge did not find that the merger would increase competition or decrease prices.” St. Alphonsus
 - Must the defendants adduce additional evidence that increased quality improved competition?
 - Must the quality improvements “decrease prices”?

Should the Burdens Be Different in §1 and § 7 Cases?

- “[T]he hospitals cannot ‘clearly’ show that their claimed efficiencies will offset the anticompetitive effects” Hershey
- The hospitals have the burden to show that the efficiencies are merger-specific.
 - In a §1 case, plaintiff would have these burdens
 - Why not in a §7 case as well?
 - The presumption from the HHI? See St. Alphonsus.

Does Capital Avoidance Count?

- Yes:
 - Merger Guidelines
- No (or maybe):
 - “[C]apital avoidance claims are not cognizable efficiencies” because they reduce output. ProMedica district court
 - “[C]apital savings, in and of themselves, would not be cognizable efficiencies” because they result in reduced output. Hershey
 - Is that true?

Defendants Frequently Dig Their Own Graves

- Late starts, and unfinished, vague, and investigation-generated efficiencies claims
 - ProMedica district court:
 - Party testified: “if we don’t find those efficiencies, we will find other efficiencies”
 - Expert report: “estimates . . . are preliminary and subject to further analysis, revision, and substantiation
 - Party testified that expert report based on “gut feeling”
 - Party testimony: “I don’t believe this claim”
 - Expert report: Efficiencies “may” be accomplished
 - Court: “projections appear designed for litigation”

– OSF Healthcare

- Expert’s “analysis is still ongoing, at the time of the hearing”
- “We have not made any decisions on the relocation . . . of our clinical services”
- “[Defendants] had not started the process of developing a plan of consolidation, saying, ‘why do we start to spend the money not knowing where we’re at . . . with the FTC’”

Conclusion

- What does it take to convince the FTC of efficiencies claims?
- Is an efficiencies argument worth the time and money where the presumption applies?
- But how do the parties decide to do the deal without first carefully examining efficiencies?