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Title: How Courts Have Redefined the Meaning of "Efficiency"

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Abstract: A primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. Efficiencies were originally claimed as a defense by the merging parties, but today "efficiency analysis" is a more integral part of the agencies' investigation process. Both case law and the Merger Guidelines have evolved to give efficiencies a more active place in merger analysis. To be cognizable, a claimed efficiency must be verifiable, not attributable to reduced output or quality, merger-specific and greater than the transaction's substantial anticompetitive effects. All four of these requirements have evolved through time. This working paper attempts to list the case law in which the efficiency argument has prevailed and where it has failed.

Key Words: Efficiency, Merger Guidelines, Merger-specific

How Courts Have Redefined the Meaning of "Efficiency"

Amaury S. Sibon[1]

I. OVERVIEW

A primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. A defendant may present efficiencies to rebut the presumption of illegality established by a post-merger market share of 30 percent or more.[2] Although the Supreme Court has not sanctioned the use of an efficiencies defense in a Clayton Act § 7 case, most lower courts recognize the defense.

To be accepted by the court, efficiencies must be cognizable and represent more than mere speculation and promises.[3] **The claimed benefits must be (1) verifiable, (2) not attributable to reduced output or quality, (3) merger-specific (cannot be achieved without**

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[2] *But see* Philadelphia Nat. Bank (the Court also held that a merger may not be saved because "on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial."); FTC v. Procter & Gamble Co., 386 U.S. 568, 579 (1967) (possible economies cannot be used as a defense to illegality in section 7 merger cases).

[3] H.J. Heinz, 246 F.3d at 721; *see also* University Health, 938 F.2d at 1223 ("speculative, self-serving assertions" will not suffice); FTC v. Staples, 970 F. Supp. at 1089-90 (rejecting claimed efficiencies that were "unverified" and not supported by "credible evidence").

the proposed merger) and (4) greater than the transaction's substantial anticompetitive effects.[4]

Merger-specific

The only efficiencies that count are those "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."[5] In terms of whether another avenue is available for the same benefits, the agencies consider only "practical" alternatives and "do not insist upon a less restrictive alternative that is merely theoretical."[6]

Verifiable

In addition to being merger specific, efficiencies must be substantiated or verifiable with quantifiable measurements derived – to the maximum extent possible – from information relied on by the parties in the ordinary course of business.[7] As some courts have stated, one "must 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."[8] According to the 2010 Merger Guidelines, "[V]ague, speculative, or [other efficiencies that] cannot be verified by reasonable means" will not be sufficient to receive credit. Projections developed specifically for the transaction will be viewed with particular skepticism.

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[4] *See* FTC v. Cardinal Health, 12 F. Supp. 2d 34 (D.D.C. 1998); *see also* H.J. Heinz; FTC v. ProMedica Health Sys..

[5] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), available at http://www.ftc.gov/os/2010/08/100819hmg.pdf.

[6] Michael Bernstein & Justin Hedge, Maximizing Efficiencies: Getting Credit Where Credit is Due, 12-2 Antitrust Src. 1 (2012).

[7] *Id*.

[8] FTC v. H.J. Heinz Co., 246 F.3d 708, 721 (D.C. Cir. 2001).

Rather, the agencies are most likely to credit "efficiency claims substantiated by analogous past experience."[9]

Additionally, the agencies will not credit efficiencies if there is reason to believe that benefits will not be passed on to consumers.[10] Although some have posited that consumer benefit can be presumed once efficiencies are established as cognizable (i.e., merger specific and verifiable), the agencies do not accept any such presumption.[11] According to the 2009 FTC study, staff frequently failed to credit efficiencies in their recommendation memoranda because they concluded that the savings from the efficiencies would not be passed on to consumers.[12]

Once cognizable efficiencies are established, the agencies consider whether such efficiencies likely would be sufficient to reverse a merger's potential to harm customers in the relevant market. The burden remains on the parties to make the required demonstration.[13] The agencies will not conduct a linear comparison of the magnitude of the cognizable efficiencies and the magnitude of the likely harm to competition absent the efficiencies.[14] Instead, a greater potential for adverse competitive effects requires not only a greater showing of offsetting cognizable efficiencies, but also greater pass-through of the benefits to customers in order for the agencies to conclude that the merger will not have an anticompetitive effect in the relevant market.[15] When the potential adverse competitive effect of a merger is likely to be particularly substantial, parties must show extraordinarily great efficiencies.

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[9] Horizontal Merger Guidelines 2010, *supra* note 4.

[10] Bernstein & Hedge, *supra* note 5.

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] *Id*.

It is not uncommon for the agencies to highlight efficiencies in their closing statements when clearing transactions.[16] For example, in the DOJ's closing statement in the merger of Delta Air Lines and Northwest Airlines, efficiencies appeared to be one of the main reasons for allowing the transaction to proceed. The letter noted that "the merger will result in efficiencies such as cost savings in airport operations, information technology, supply chain economics, and fleet optimization that will benefit consumers."[17]

A change in management for lack of efficiency is never considered a cognizable efficiency:

> Differences in management efficiency among competing firms are well-nigh universal. The usual cure for inefficient management is to replace it, as is frequently and easily done, sometimes by the board of directors, sometimes by disgruntled shareholders. As a result, management replacement is not a "merger-specific" economy. To be sure, a merger may be a quicker way of achieving this goal, particularly where the board is indecisive or the shareholders are divided. But most firms have relatively inefficient management from time to time. To permit all such firms to solve their problems by substantial horizontal merger could eviscerate § 7 of the Clayton Act.[18]

High market concentration levels require a firm to show credible efficiencies of an extraordinary nature. Under the case law and the Merger Guidelines, efficiencies almost never justify a merger to monopoly or near-monopoly.[19] To rebut the government's prima facie case,

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[16] *Id*.

[17] Press Release, U.S. Dep't of Justice, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of the Merger of Delta Airlines Inc. and Northwest Airlines Corp. (Oct. 29, 2008), available at http://www.justice.gov/atr/public/press_releases/2008/238849.pdf.

[18] 4A Areeda, Hovenkamp & Solow, Antitrust Law P 974, at 74 (2d ed. 2006).

[19] *See* In re Integrated Device Tech., Inc., 2012 FTC LEXIS 197 (FTC 2012); *see also* ProMedica ("No court in a 13(b) proceeding, or otherwise, has found efficiencies sufficient to rescue an otherwise illegal merger").

the defendant must present evidence showing that the merger would create significant efficiencies in the relevant market.[20]

II. TREATMENT OF EFFICIENCIES THROUGHOUT THE MERGER GUIDELINES

Implicit throughout the Guidelines is the recognition that the efficiency-enhancing potential of mergers can increase the competitiveness of firms and result in lower prices to consumers.[21] The 1984 revisions clarify that efficiencies do not constitute a defense to an otherwise anticompetitive merger but are one of many factors that will be considered by the Department in determining whether to challenge a merger.[22] But this narrow defense was slowly reshaped by Supreme Court decisions that began to accept certain efficiency arguments.[23]

Under the Guidelines, the DOJ will consider various types of efficiencies including economies of scale, better integration of production facilities, plant specialization, and lower transportation costs. The Department also will consider general selling, administrative and overhead expenses; however, as a practical matter, these types of efficiencies may be difficult to demonstrate (substantiated). In addition, the DOJ will reject claimed efficiencies if equivalent or comparable savings can reasonably be achieved by the parties by other means (merger-specific). The greater the competitive concerns that the merger raises, the greater will be the level of expected efficiencies that the parties must establish.

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[20] United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 146-47 (E.D.N.Y. 1997).

[21] 49 FR 26823.

[22] 49 FR 26823.

[23] *See* U.S. v. General Dynamics Co., 415 U.S. 486 (1974); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 35 (1977); Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979).

The efficiencies defense was initially developed by economist Oliver Williamson in his seminal article Economies as an Antitrust Defense: The Welfare Tradeoffs.[24] Williamson's work prompted the agencies to incorporate into the 1968 Merger Guidelines a limited efficiencies defense. In particular, the 1968 Guidelines recognized that in some "exceptional circumstances" efficiencies might justify a merger that would otherwise be subject to challenge: "Unless there are exceptional circumstances, the Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies."[25] This defense was narrow and limited for the following reasons: (1) the Department's adherence to the standards will usually result in no challenge being made to mergers of the kind most likely to involve companies operating significantly below the size necessary to achieve significant economies of scale; (ii) where substantial economies are potentially available to a firm, they can normally be realized through internal expansion; and (iii) there usually are severe difficulties in accurately establishing the existence and magnitude of economies claims for a merger.[26]

The 1982 Guidelines remained largely unchanged with regards to efficiencies, stating that the defense would only be considered in "extraordinary circumstances."[27] To consider an efficiencies claim, the DOJ now required (1) "clear and convincing evidence," (2) in the form of "substantial cost savings resulting from the realization of scale economies, integration of production facilities, or multi-plant operations," (3) that "are already enjoyed by one or more

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[24] Oliver Williamson, Economies as an Antitrust Defense: The Welfare Tradeoffs, 58 Am. Econ. Rev. 18, 34 (1969) ("[O]nce economies are admitted as a defense, the tools for assessing these effects can be expected progressively to be refined.")

[25] U.S. Dep't of Justice, Merger Guidelines § 10 (1968).

[26] *Id.*

[27] U.S. Dep't of Justice, Merger Guidelines § 10.A (1982).

firms in the industry," (4) where "equivalent results could not be achieved within a comparable period of time through internal expansion or a merger that threatened less competitive harm."

The major widening of the efficiencies argument occurred in 1984 when DOJ, under the leadership of McGrath, completely rewrote the efficiency section of the Merger Guidelines in a way that transformed efficiencies from a defense, like the failing company doctrine, into an integral part of the competitive effects analysis.[28] This change occurred following the U.S. v. LTV Corp. case,[29] and the DOJ noted that "the efficiency-enhancing potential of mergers can increase the competitiveness of firms and can result in lower prices to consumers."[30] The 1984 Guidelines also expanded its explanations of the criteria used to evaluate claimed efficiencies: (1) clear and convincing evidence rather than extraordinary cases, (2) a reasonable necessity standard that the merger achieves efficiencies, (3) a more flexible standard of efficiencies being “significant” rather than “substantial,” and (4) the use of a sliding scale to evaluate efficiencies (the more significant the competitive risks, the higher the level of efficiencies to establish).[31]

McGrath's work endured largely unchanged through the 1992 joint DOJ/FTC Merger Guidelines until 1997, when the Agencies revised the Guidelines to detail the tools they had developed to evaluate efficiency claims based on thirteen years of experience applying the McGrath framework.[32] The 1992 Guidelines did place greater emphasis on qualitative competitive effects analysis (story telling) in an effort to move away from structural

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[28] Kolasky & Dick, Merger Guidelines and Integration of Efficiencies into Antitrust Review of Horizontal Mergers, 71 Antitrust L.J. 207 (2003); *see* 60 Minutes with J. Paul McGrath--Interview, 54 Antitrust L.J. 131, 141 (1985).

[29] U.S. v. LTV Corp., 1984 WL 21973, *14 (D.D.C. Aug. 2, 1984)

[30] U.S. Dep’t of Justice, Merger Guidelines § 3.5 (1984).

[31] *Id*.

[32] Kolaksky & Dick, *supra* note 14.

presumptions.[33] The new 1997 Guidelines gave further explanation on when efficiencies would be viewed as "cognizable," and define the modern requirements of (a) merger-specificity, (b) verified, and (c) not arising from anticompetitive reductions in output or service.[34] The 1997 Guidelines were unable to resolve the issue of whether efficiencies had to be passed on to consumers in order to be cognizable (consumer welfare approach) or not (total welfare approach), an instead created a hybrid analysis.

The 2010 Guidelines remain largely unchanged with regards to efficiency analysis. The Guidelines continue to concentrate on static efficiencies, cost savings that reduce prices to consumers in the short term.[35] Little credit is given to fixed-cost savings that reduce total costs in the longer run but may not necessarily have an immediate impact on shortterm prices to consumers.[36] Second, the 2010 Guidelines continue to discount dynamic efficiencies relating to research and development that can spur innovation. The 2010 Guidelines explain that those efficiencies "are potentially substantial but are generally less susceptible to verification . . . ."[37]

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[33] *Id*.

[34] U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines § 4 (as amended Apr. 8, 1997)

[35] Gary Zanfagna, Pandora's Box Opened: The New Horizontal Merger Guidelines, 10 The Antitrust Source 52 (2010).

[36] *Id*.

[37] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), available at http://www.ftc.gov/os/2010/08/100819hmg.pdf.

Table 3: Market Concentration & Efficiencies

Efficiencies	Concentration: Low (HHI < 2,000)	Medium (HHI 2,000–3,000)	High (HHI > 3,000)
High	Country Lake Carilion Health Long Island		Butterworth
Medium	Tenet Health	Arch Coal Foster Western	
Low	Mercy Health Oracle	Am. Stores Illinois Cereal	Swedish Match Cardinal Health Univ. Health Alliant Tech Heinz PPG Libbey United Tote CCC Rockford Staples Franklin

= Preliminary Injunction Issued

Chart from JH Moffitt's article

III. CASE LAW

A. Cases in which the Efficiency Defense Prevailed

United States v. General Dynamics Corp., 415 U.S. 486 (1974): This was the first time parties to a merger successfully rebutted the government's prima facie market share case by showing that other factors affecting the industry established that the merger would not substantially lessen competition. In this instance, the evidence on which the parties relied showed that uncommitted reserves were a better indicator of a firm's future ability to compete in the coal industry than its historic share of sales and that the acquired firm had nearly no uncommitted reserves, so that its disappearance from the market would not materially lessen competition.

<u>FTC v. Lab. Corp. of Am.</u>, 2011 U.S. Dist. LEXIS 20354 (C.D. Cal. Feb. 22, 2011)[38]:

"Mergers may enhance competition by combining complementary assets, eliminating duplicative assets, or achieving scale economies. These efficiencies may directly benefit consumers by, for example, improving quality, increasing innovation, and lowering prices."[39] The Court held that the efficiencies were cognizable and denied the FTC's preliminary injunction, giving significant weight to cost and supply savings ($22 million) and held that the hold separate would prevent them from eliminating duplicative operations and from realizing these efficiencies.

<u>FTC v. Arch Coal, Inc.</u>, 329 F. Supp. 2d 109 (D.D.C. 2004): This case is one of the very few wins against the FTC. "Defendants claim[ed] that the proposed transaction [would] realize between $ 130 and $ 140 million in efficiencies over the 2004-2008 period," of which $ 107.4 million were merger-specific.[40] The Court held that the defendants had not made a strong case on efficiencies, as evidence was nonexistent or overstated.[41] The court held that only $35 to 50 million would be considered efficiencies (in the area of lower costs of production, inventory reduction, and equipment sharing).[42] However, "the existence of such efficiencies . . . remain[ed] relevant to an assessment of the post-merger market and the potential benefits to consumers from cost reductions and increased competition. Efficiencies resulting from the

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[38] The FTC sought to appeal the ruling but their Motion for Injunction pending appeal was denied. However, a more thorough review was reserved for an extensive FTC adminstrative trial but the FTC dismissed its complaint in April 2011. A statement by Commissioners Leibowitz, Kovacic, and Ramirez concluded, "[w]hile we continue to have reason to believe that LabCorp's acquisition of Westcliff will result in anticompetitive effects, we are convinced that further adjudication of this case will not serve the public interest." (Statement of Commissioners Leibowitz, Kovacic, and Ramirez, In the Matter of Laboratory Corporation of America, et al., Docket No. 9345, April 21, 2011).

[39] <u>FTC v. Lab. Corp. of Am.</u>, 2011 U.S. Dist. LEXIS 20354 (C.D. Cal. Feb. 22, 2011).

[40] <u>FTC v. Arch Coal, Inc.</u>, 329 F. Supp. 2d at 151.

[41] *Id*. at 153

[42] *Id*.

transaction . . . provid[ed] some limited additional evidence to rebut the claim of post-merger anticompetitive effects."[43]

United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121 (D.N.Y. 1997): The Court found that efficiencies would be achieved by the proposed merger. "Among these merger-related savings: a reduction in personnel in various departments of both hospitals, including the financial departments and pain management; some reduction in the cost of clinical laboratory services and medical supplies; claims recovery costs and utilities; laundry costs; in-house consulting services; and computer and information services. Also, there would be capital avoidance savings in amounts difficult to ascertain."[44]

"Reviewing the [expert's] testimony as to the claimed efficiencies in its totality, the Court found that the proposed merger would result in significant efficiencies in the form of annual operating savings in expenses in the sum of approximately $ 25 to 30 million per year. In addition, there [would] be some capital avoidance in an unknown amount."[45]

B. Cases in which the Efficiency Defense Failed

In the Healthcare Industry (United States v. UnitedHealth Group Inc., 73 FR 49834):

Health insurance mergers have generally led to increased subscriber premiums without expansion of medical benefits. There is little evidence if any that any efficiencies achieved in the United-PacifiCare merger have resulted in lower premiums or better service for United or former PacifiCare subscribers. Since the combined United-Sierra would have a dominant market share post-merger it is highly unlikely any savings would be passed on to consumer. The econometric

[43] *Id*.

[44] United States v. Long Island Jewish Med. Ctr., 983 F. Supp. at 148.

[45] *Id*. at 148-49.

literature shows that scale economies in HMO health plans are reached at roughly 100,000 enrollees. Finally, there is little econometric evidence for economies of scope in these health plans (e.g., serving both the commercial and Medicare populations). Serving these different patient populations requires different types of infrastructure. Hence, few efficiencies may be reaped from serving large and diverse client populations. Indeed, really large firms may suffer from diseconomies of scale.

<u>In re Evanston Northwestern Healthcare Corp.</u>, 2007 FTC LEXIS 210 (FTC 2007): The Quality Improvement justification → though quality of care and services is an efficiency to be considered under the Merger Guidelines, the defendant did not argue that the claimed quality improvements have come about as a result of cost-saving efficiencies produced by the merger. Instead, the defendant characterizes quality improvements as benefits distinct from cost-savings that offset any adverse competitive effects produced by the merger. The case law provides no clear answers regarding how, or whether, such claimed qualitative benefits ought to fit into a competitive effects analysis. Other courts have been more receptive to quality-of-care arguments, but those decisions shed little light on how qualitative benefits are to be weighed against the competitive harm shown to result from a merger.

<u>FTC v. OSF Healthcare Sys.</u>, 852 F. Supp. 2d 1069 (N.D. Ill. 2012): The defendants claimed that the proposed merger will generate substantial efficiencies in the form of (1) annual, recurring cost savings based on the consolidation of clinical operations ($15.2 billion), (2) one-time capital avoidance savings ($100.7 million), and (3) the adoption and sharing of "best practices" among the two hospitals.[46] The Court held that the defendants **failed to present**

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[46] <u>FTC v. OSF Healthcare Sys.</u>, 852 F. Supp. 2d at 1089-93.

sufficient proof of the type of extraordinary efficiencies to rebut the FTC's prima facie case and that the efficiencies presented were overstated, speculative, not merger-specific, and inadequately substantiated to allow for verification.[47]

United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011): For purposes of presenting an efficiencies defense in an antitrust case, "*while reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in a party's cost estimates renders them not cognizable by the court. If this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act because management would be able to present large efficiencies based on its own judgment and the court would be hard pressed to find otherwise. The difficulty in substantiating efficiency claims in a verifiable way is one reason why courts generally have found inadequate proof of efficiencies to sustain a rebuttal of the government's case*."[48]

H&R Block's "primary motivation for the TaxACT acquisition was to achieve significant synergies and cost savings that would enable it to provide better products at a lower price and to compete more effectively" (10 efficiencies).[49] Some of the efficiencies claimed: online IT, Emerald Card (allowing TaxACT's prepaid debit card), H&R Block Bank Refund Anticipation Check, corporate website, software IT, download fulfillment… but the court held that the **efficiencies were not merger-specific and not verifiable**: cost savings could be achieved

[47] *Id*. at 1093-94.

[48] H&R Block, Inc., 833 F. Supp. at 91.

[49] *Id*. at 89.

without any merger at all through relocation and by being more cost conscious for instance.[50] The court also examined HRB's previous acquisitions and found that their predicted efficiencies had failed in the past.

"Even if the efficiencies were entirely merger-specific, many of them were also not independently verifiable. As [the expert] explained, . . . [the merged firm's] predicted cost figures for taking over [their] activities were not based on an analysis of facts that could be verified by a third party."[51] Instead, the firm based its cost estimates on management experiential judgment about likely costs rather than a detailed analysis of historical accounting data. By comparison, the merging firm's "estimated costs for the relevant activities were rooted in accounting and planning documents prepared in the ordinary course of business."[52]

<u>FTC v. ProMedica Health Sys.</u>, 2011 U.S. Dist. LEXIS 33434 (N.D. Ohio Mar. 29, 2011): The court used the three-part test of a cognizable efficiency: not credible, speculative and not merger-specific. The defendant alleged the following efficiencies: revenue enhancements (however, no reductions of cost or output were demonstrated), capital cost avoidance opportunities, such as construction of new tower and implementation of electronic medical records system (the Court held that cost avoidance is the essence of healthy competition). Healthcare reform measures cannot be the sole basis of an efficiency.

<u>United States v. Oracle Corp.</u>, 331 F. Supp. 2d 1098 (N.D. Cal. 2004): "Oracle has not proven by the preponderance of the evidence cognizable efficiencies sufficient to rebut [the

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[50] *Id*. at 90 (not a direct quote).

[51] *Id*. at 91.

[52] *Id*.

presumption of] anticompetitive effects of Oracle's acquisition of PeopleSoft."[53] "Oracle claim[ed] that the merger will result in two overall efficiencies: significant cost savings for Oracle in many areas of business [(sales & marketing, R&D, and general & administrative) of over $ 1 billion per year], and an increase in Oracle's scale (i.e., customer base), thereby fueling more competition with [larger competitors (because of the higher innovation and lower costs)] resulting in higher innovation and lower costs."[54] Opposing counsel's expert found that there was no factual basis for these numbers, which were based on personal judgments of the drafter, and no documents to establish the veracity of these inputs. The efficiencies were not verifiable and were speculative, therefore not reliable. Moreover, the innovations were unverified and not merger-specific.[55]

FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001): "In support of its conclusion that post-merger efficiencies will outweigh the merger's anticompetitive effects, the district court found that the consolidation of baby food production in Heinz's under-utilized Pittsburgh plant [would] achieve substantial cost savings in salaries and operating costs. The district court also credited the appellees' promise of improved product quality as a result of recipe consolidation. The only cost reduction the district court quantified as a percentage of pre-merger costs, however, was the so-called 'variable conversion cost': the cost of processing the volume of baby food now processed by Beech-Nut. The [district] court accepted the appellees' claim that this cost would be reduced by 43% if the Beech-Nut production were shifted to Heinz's plant, . . . a reduction the appellees' expert characterized as "extraordinary.'"[56]

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[53] United States v. Oracle Corp., 331 F. Supp. 2d at 1175.

[54] *Id*. at 1173.

[55] *Id*. at 1174.

[56] FTC v. H.J. Heinz Co., 246 F.3d at 721.

However, the variable conversion cost was only a percentage of the total variable manufacturing cost. If the appellees had taken the measure of the total variable manufacturing costs, the cost savings would be cut down to 22% (i.e. not extraordinary).[57] Moreover, the cost reduction must be analyzed throughout the merged firm's combined output. Finally, the district court never explained whether the efficiencies were merger-specific.[58] "[T]he principal merger benefit asserted for Heinz is the acquisition of Beech-Nut's better recipes, which will allegedly make its product more attractive and permit expanded sales at prices lower than those charged by Beech-Nut, which produces at an inefficient plant. Yet, neither the district court nor the appellees addressed the question whether Heinz could obtain the benefit of better recipes by investing more money in product development and promotion, . . . by an amount less than the amount Heinz would spend to acquire Beech-Nut [for instance]."[59]

<u>United States v. Bazaarvoice, Inc.</u>, 2014 U.S. Dist. LEXIS 3284 (D. Cal. Jan 8, 2014): "Bazaarvoice has not demonstrated that merger-specific efficiencies will overcome the anticompetitive effects of the merger." PowerReviews was Bazaarvoice's only competitor and the merger would eliminate its only meaningful commercial competitor. Anticompetitive motives: relieving the corporation from price erosion through the merger and reducing pricing dilution. "[A]ny increase in syndication post-merger is not a cognizable, merger-specific efficiency because there is insufficient evidence to show that Bazaarvoice will pass through that benefit to customers instead of rising prices to customers by a commensurate amount." There is

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[57] *Id*.

[58] *Id*. at 721-22.

[59] *Id*. at 722.

no evidence that the merger caused increased innovation or that, absent the merger, the efficiencies and innovation claimed would not have been realized.

<u>FTC v. CCC Holdings Inc.</u>, 605 F. Supp. 2d 26 (D.D.C. 2009): "Defendants assert that the efficiencies achieved through the merger will produce cost savings of at least $ 48 to $ 55 million per year resulting from the elimination of redundant or overlapping functions and the consolidation of product lines."[60] "[A]lthough the merger may produce substantial efficiencies in the future, such efficiencies are too far afield (2 to 10 years post-merger) and too speculative to overcome the strong presumption of anticompetitive effects created by the large HHIs and the high barriers to entry in the [concerned] markets."[61] According to the Merger Guidelines, "delay[ed] benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict."[62]

<u>St. Alphonsus Medical Center-Nampa et al. v. St. Luke's Health System Ltd.</u>, 1:12-cv-00560: St. Luke argued that the transaction's benefits were merger-specific because "the transaction [would] enhance the ability of the combined St. Luke's/Saltzer to offer coordinated, patient-centered care; to support physicians in the practice of evidence-based medicine in an environment that rewards teamwork and value of care rather than volume of care; to accept risk and accountability for patients' outcomes; and to manage population health. Saltzer and St. Luke could not achieve these benefits as effectively or as quickly by any looser affiliation or other means." The merger would allegedly eliminate the current fee-for-service (FFS) reimbursement

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[60] <u>FTC v. CCC Holdings Inc.</u>, 605 F. Supp. 2d at 73.

[61] *Id*. at 75.

[62] *Id*. at 73 (quoting the Merger Guidelines).

system, which is the leading factor in rising health care costs (under that system, providers are rewarded for doing more, regardless of whether that leads to better health outcomes), and replace it with a risk-based reimbursement system (providers reimbursed by insurers for each patient rather than for each service rendered). However, the Court held that because a committed team could be assembled without employing physicians, a committed team was not a merger-specific efficiency of the acquisition.

Another efficiency that comes up regularly in the healthcare industry is the shared electronic record system (*i.e.*, better monitoring in order to improve preventive care and prevent preventable serious consequences). Though it is crucial that as many physicians have access to these databases (such as the Epic software), St. Luke was already planning on making that service accessible outside the hospital through their Affiliate program, and hence the efficiencies were not merger-specific.

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Daniel Crane, Rethinking Merger Efficiencies, 110 Mich. L. Rev. 347 (2011): The Courts treat the potential benefits and risks of mergers asymmetrically. The system requires considerably greater proof of efficiencies than they do of potential harms if the efficiencies are to offset concerns over the accumulation or exercise of market power. The implicit asymmetry principle has important systemic effects for merger control. It not only stands in the way of some socially desirable mergers but also may indirectly facilitate the clearance of some socially undesirable mergers.

Kolasky & Dick, Merger Guidelines and Integration of Efficiencies into Antitrust Review of Horizontal Mergers, 71 Antitrust L.J. 207, 231 (2003)

Jamie Henikoff Moffitt, Merging in the Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis, 63 Vand. L. Rev. 1697 (2010): this Article argues that if courts do not consistently balance pro-competitive efficiencies against the other anticompetitive effects of proposed M&A deals, corporations facing stricter antitrust regimes will abandon important deals that could have contributed to the competitiveness of the U.S. economy.

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