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THE PROTECTION OF PATIENTS UNDER THE CLAYTON ACT

*Elizabeth S. Kraus**

The vast consolidation among health-care providers in the aftermath of the Affordable Care Act's enactment has led to much debate over the benefits of mergers in the health-care industry. In 2016, the Federal Trade Commission filed motions in federal court to enjoin three hospital mergers in various parts of the country. This amounted to more challenges to hospital mergers in a single year than any year in recent history. Though two of these motions succeeded at the district court level, both were overturned on appeal, which led many to wonder what the effect of these decisions would be on future health-care mergers.

While many fear that hospital mergers lead to higher prices for consumers, there are also those who contend that mergers lead to efficiencies, which allow merging parties to utilize resources more effectively, increase the quality of patient care and coordination, and potentially save lives. This Note argues that the possibility of quality-enhancing or life-saving efficiencies is worth the risk that consumers see increased prices. To allow mergers that may realize these types of efficiencies, antitrust enforcement agencies and courts must begin placing greater weight on merging parties' efficiency arguments by easing the current standard. Additionally, in light of new research suggesting that cross-market health-care mergers, or mergers between providers in different geographic markets, affect bargaining dynamics between providers and insurers, this Note argues that parties' relative bargaining power must be considered in agencies' and courts' analyses of the competitive landscape relevant to a merger.

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INTRODUCTION

Competition among health-care providers benefits consumers by incentivizing firms to offer lower-priced services of higher quality and gives consumers greater choice.[1] Mergers[2] have the potential to enhance or harm

1. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) ("The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

2. This Note uses the term "merger" to refer to mergers, acquisitions, affiliation agreements, joint ventures, and similar transactions.

competition.[3] In the United States, the antitrust laws grant power to federal officials to regulate competition and protect consumers.[4] The Department of Justice (DOJ) and the Federal Trade Commission (FTC) have the power to investigate and challenge mergers that are likely to have anticompetitive effects.[5]

There are many reasons why health-care providers may seek to merge. A merged firm may use its resources more efficiently, obtain tax benefits, or diversify its portfolio to smooth corporate earnings over the business cycle.[6] Additionally, hospitals may merge to spread high fixed costs over a larger patient population,[7] coordinate patient care,[8] reduce duplicative costs,[9] or avoid penalties imposed by the government for readmitting discharged patients for continued care of prior illnesses.[10] Merging increases the likelihood that the hospital system will provide all the relevant services for a patient's illness and decreases the chance that a patient will be readmitted because a prior hospital visit failed to provide adequate treatment.[11]

Firms' incentives to merge play a crucial role in the antitrust review conducted by the FTC and DOJ ("the agencies").[12] The agencies seek to determine the likely effects of a proposed merger.[13] This guessing game requires knowledge of the industry, the way in which the merged firm may profit, and the benefits that consumers may see.[14] The agencies consider all of this information to determine whether the proposed merger is likely to substantially lessen competition.[15]

Mergers that result in high market share and increased market concentration are presumed to reduce competition and lead to price increases

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3. *See* Peter Bamford et al., *Mergers*, *in* A FRAMEWORK FOR THE DESIGN AND IMPLEMENTATION OF COMPETITION LAW AND POLICY 41, 41–44, 49 (1999).

4. *See The Antitrust Laws*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/N87A-PR7W] (last visited Mar. 15, 2018).

5. *The Enforcers*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers [https://perma.cc/9VY8-A8CZ] (last visited Mar. 15, 2018).

6. WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 460–62 (5th ed. 2016).

7. *See* Leigh L. Oliver & Robert F. Leibenluft, *A Mixed Bag: Sorting Out Efficiencies Arguments in Hospital Mergers*, ANTITRUST, Fall 2015, at 18, 21–22.

8. *Id.* at 22–23.

9. *Id.* at 21.

10. William M. Sage, *Assembled Products: The Key to More Effective Competition and Antitrust Oversight in Health Care*, 101 CORNELL L. REV. 609, 655 n.216 (2016); Thaddeus J. Lopatka, Note, *Cross-Market Mergers in Healthcare: Adapting Antitrust Regulation to Address a Growing Concern*, 102 CORNELL L. REV. 821, 832–33 (2017).

11. Lopatka, *supra* note 10, at 833.

12. *See* U.S. DEP'T OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES §§ 1–2 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES]*; see also* Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) ("[K]nowledge of intent may help the [adjudicator] to interpret facts and to predict consequences.").

13. HORIZONTAL MERGER GUIDELINES, *supra* note 12, §§ 1–2 (discussing the agencies' goals during merger investigations and the evidence they rely upon); *see also* Clayton Act, 15 U.S.C. § 18 (2012).

14. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 12, §§ 1–2.

15. *Id.* § 1.

that harm consumers.[16] Where harm to competition is small, the agencies may decline to challenge a merger if they also find that efficiencies,[17] which will benefit consumers, will likely occur.[18] Courts may also allow a merger to be consummated on these grounds but rarely do.[19] Courts hesitate to accept parties' arguments that future efficiencies will offset the harm to competition.[20] Alternatively, the agencies have argued that efficiencies will not justify an otherwise highly anticompetitive merger.[21]

This Note argues that courts need to give greater weight to hospitals' efficiency arguments and parties' relative bargaining power because efficiencies in hospital mergers are worth the risk of higher prices. Additionally, parties' relative bargaining power is a necessary consideration for understanding the relationship between merging health-care providers and their competitors.

Part I of this Note provides an overview of the antitrust laws, the merger-review process, and new evidence explaining the effects of cross-market hospital mergers on competition. Part II discusses the evolution of the efficiency defense, arguments for and against placing greater weight on parties' efficiency arguments, and common efficiency arguments presented by merging hospitals in court and why they fail. Finally, Part III suggests how courts should interpret parties' efficiency arguments. Part III also proposes a new efficiency argument that the agencies and courts should consider in their review of mergers.

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16. *Id.* § 2.1.3.

17. Common efficiencies that may result following a hospital merger include improved quality of care, upgraded facilities and equipment, and better utilization of hospital capacity. *See* MONICA NOETHER & SEAN MAY, HOSPITAL MERGER BENEFITS: VIEWS FROM HOSPITAL LEADERS AND ECONOMETRIC ANALYSIS 4–10 (2017), http://www.crai.com/sites/default/files/publications/Hospital-Merger-Full-Report-_FINAL-1.pdf [https://perma.cc/R7R7-KAVL].

18. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 10; *see also* Richard D. Raskin & Bruce M. Zessar, *Telling the Efficiencies Story: Practical Lessons from the Hospital Merger Field*, ANTITRUST, Spring 1999, 21, 21 (noting that "the agencies recognize that efficiencies generated by a merger may lead to lower prices, improved quality, enhanced service, or new products").

19. Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 789 (9th Cir. 2015) ("[N]one of the reported appellate decisions have actually held that [merging parties] rebutted a prima facie case with an efficiencies defense . . . .").

20. *See id.* at 789–90. Agencies, however, have allowed transactions to proceed where potential efficiencies outweighed the potential harm to competition. *See* Edith Ramirez, Chairwoman, FTC, Remarks at the Ninth Annual Global Antitrust Enforcement Symposium: The *Horizontal Merger Guidelines* Five Years Later 11 (Sept. 29, 2015), https://www.ftc.gov/system/files/documents/public_statements/805441/ramirez_-_georgetown_antitrust_enforcement_symposium_9-29-15.pdf [https://perma.cc/5NR9-ZYS9].

21. *See* Brief of Appellees the United States of America and Plaintiff States at 28, United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir. 2017) (No. 17-5024) ("The policy of the antitrust laws—including Section 7—bars the argument that anticompetitive effects promote consumer welfare and thus justify an anticompetitive merger."); Brief of the Federal Trade Commission and the Commonwealth of Pennsylvania at 28, FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016) (No. 16-2365).

I. MERGERS ARE SUBJECT TO ANTITRUST REVIEW

To understand the way in which agencies and courts currently analyze mergers, it is necessary to understand the purposes of the antitrust laws, why the antitrust laws were enacted, and how the agencies and courts have interpreted them. Part I.A discusses the historical beginnings of the antitrust laws as they relate to potentially anticompetitive mergers. Part I.B explains the merger-review process. Part I.C then discusses the substance of the agencies' merger review, specifically in the context of hospital mergers. Next, Part I.D explores courts' analyses of merger challenges brought by the FTC. Finally, Part I.E presents new evidence that certain hospital mergers may result in higher prices because the merged parties have greater bargaining power.

A. The Antitrust Laws Preserve Competition to Protect Consumers

Three laws form the foundation of past and present antitrust enforcement[22]: the Sherman Act,[23] the Clayton Act,[24] and the Federal Trade Commission Act (FTC Act).[25] The Sherman Act, enacted in 1890, was the first of these laws.[26] In the years preceding its enactment, the Industrial Revolution had caused drastic changes to the nature of business and competition.[27]

The dominant economic theory of the time was laissez-faire capitalism, whereby the government did not intervene or attempt to regulate businesses' operations.[28] Many believed, and some still believe, that laissez-faire capitalism benefits society by enabling those with the most skill to advance to the top of their fields and share the best products and services in the marketplace.[29] In application, this policy allowed trusts[30] to gain control of certain industries, most notably railroads, oil, steel, and sugar.[31] Because

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22. Arjun Mishra, *History of Antitrust Laws*, JURIST (Dec. 30, 2013, 8:53 PM), http://www.jurist.org/feature/2013/12/a-history-and-the-main-acts.php [https://perma.cc/FS6Y-YGDD].

23. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012).

24. Clayton Act, 15 U.S.C. §§ 12–27 (2012).

25. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2012).

26. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).

27. *See* NORMAN WARE, WEALTH AND WELFARE: THE BACKGROUNDS OF AMERICAN ECONOMICS 103–05 (1949).

28. *See* BERNARD SCHWARTZ, THE REINS OF POWER: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 140, 143 (1963).

29. *Id.* at 143.

30. The trust was an organization of business competitors that delegated authority to a trustee to make decisions about industry-wide pricing and output. ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 103 (3d ed. 2017). During the Industrial Revolution, all monopolies were colloquially referred to as trusts. Prather S. McDonald, *A Colloquial upon the Sherman Anti-Trust Law*, 1 TENN. L. REV. 1, 2 (1923). For a discussion of the economic conditions that affected the formation of trusts, see Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2292–334 (2013).

31. *FTC Fact Sheet: Antitrust Laws: A Brief History*, FED. TRADE COMMISSION 1, https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-

these industries centralized supply and set prices, prices drastically increased and businesses were not incentivized to offer quality products.[32]

Many Americans, dissatisfied with decreased quality and increased prices, called upon the government to regulate the trusts.[33] In response, Congress passed the Sherman Act, which states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."[34]

The Sherman Act was a "paper tiger" for the first twelve years of its life.[35] Courts continuously ruled in favor of businesses and found no violations of the Sherman Act.[36] For instance, in *United States v. E.C. Knight Co.*,[37] the U.S. Supreme Court held that the defendants' monopoly in the manufacturing of refined sugar was not illegal under the Sherman Act because the business did not constitute commerce and only commerce could be regulated by the Sherman Act.[38] In so holding, the Court found a loophole to the antitrust law and allowed the monopoly to remain.[39]

Despite prosecutorial setbacks such as this, President Theodore Roosevelt continued to encourage the DOJ to bring suits against monopolies under the Sherman Act.[40] In the landmark case *Northern Securities Co. v. United States*,[41] the Court held for the first time that the combination into a trust of several railroads was a violation of the Sherman Act and mandated the monopoly's dissolution.[42]

After *Northern Securities*, businesses discovered that they could continue to control prices and production by lawfully merging instead of forming trusts.[43] The resulting increase in mergers and the limited ability of the Sherman Act to block them sparked the adoption of the Clayton and FTC Acts in 1914.[44] Section 7 of the Clayton Act prohibits a merger if "the effect of such acquisition may be substantially to lessen competition, or to tend to

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Competition_Antitrust-Laws.pdf [https://perma.cc/43Y7-ZTUL] (last visited Mar. 15, 2018); *see also* LOUIS D. BRANDEIS, BUSINESS—A PROFESSION 208–21 (1933); McDonald, *supra* note 30, at 1.

32. *See* BRANDEIS, *supra* note 31, at 212; Dow Votaw, *Antitrust in 1914: The Climate of Opinion*, 24 A.B.A. SEC. ANTITRUST L. 14, 16–17 (1964).

33. Jonida Lamaj, *The Evolution of Antitrust Law in USA*, 13 EUR. SCI. J. 154, 161 (2017).

34. 15 U.S.C. § 2 (2012).

35. *The Trust Buster*, U.S. HIST., http://www.ushistory.org/us/43b.asp [https://perma.cc/2ERU-LM2Y] (last visited Mar. 15, 2018); *see also* Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 16 (2008).

36. *See* Crane, *supra* note 35, at 16 ("[T]he Act was rarely used and, when it was, its axe most often fell on labor rather than capital.").

37. 156 U.S. 1 (1895).

38. *Id.* at 12.

39. *See id.*

40. *See* Crane, *supra* note 35, at 17–18; Votaw, *supra* note 32, at 19.

41. 193 U.S. 197 (1904).

42. *Id.* at 357–60.

43. *See* ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 117 (1955) (noting the "limitations of . . . the Sherman Act in curbing mergers").

44. *See* Votaw, *supra* note 32, at 19–20, 27.

create a monopoly."[45] Additionally, to help the DOJ in enforcing the antitrust laws, Congress passed the FTC Act, which created the FTC, an independent federal agency.[46] The FTC Act gave the FTC the power to take action against parties engaging in "unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce."[47]

About sixty years later, Congress passed another important antitrust law: the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act").[48] The HSR Act requires parties to large mergers[49] to give the DOJ and FTC advance notice of the proposed mergers.[50] In effect, the HSR Act solidified the agencies' ability to prospectively review mergers and stop anticompetitive mergers at the outset.[51]

Today, the overarching purpose of the antitrust laws is to protect competition within the marketplace.[52] The idea behind this goal is that free and open competition benefits consumers by incentivizing businesses to offer lower-priced and higher-quality goods or services to attract customers.[53] This ideology is not so different from the laissez-faire view from the nineteenth century.[54] However, the antitrust laws enable the government to ensure the marketplace remains competitive, which protects consumers from higher prices and other harmful effects.[55]

B. The FTC and DOJ Review Proposed Mergers

The FTC and DOJ are responsible for investigating potentially anticompetitive mergers.[56] The agencies seek to determine whether a merged firm will be able to increase prices or reduce quality postmerger due to increased market power.[57] This Part discusses the regulatory investigation process to which most mergers are subject.

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45. 15 U.S.C. § 18 (2012).

46. 15 U.S.C. § 41 (2012).

47. 15 U.S.C. § 45.

48. Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended in scattered sections of 15 U.S.C.).

49. The HSR Act only requires that mergers of a certain value be reported to the DOJ and FTC. 15 U.S.C. § 18a (2012). The threshold amount is adjusted each year. In 2017, parties were required to submit an HSR premerger notification filing (HSR filing), so named for the HSR Act, for mergers valued in excess of $80.8 million. *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 82 Fed. Reg. 8524, 8524 (Jan. 26, 2017).

50. 15 U.S.C. § 18a.

51. *Id.*; *Milestones in FTC History: HSR Act Launches Effective Premerger Review*, FED. TRADE COMMISSION, https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/milestones-ftc-history-hsr-act-launches-effective [https://perma.cc/8E5A-ZNDF] (last visited Mar. 15, 2018).

52. *FTC Fact Sheet*, *supra* note 31, at 1; *Antitrust Enforcement and the Consumer*, U.S. DEP'T JUST. 1 (Dec. 18, 2015), https://www.justice.gov/atr/file/800691/download [https://perma.cc/27F3-7TY6].

53. *Antitrust Enforcement and the Consumer*, *supra* note 52, at 1.

54. *See supra* notes 28–29 and accompanying text.

55. *Antitrust Enforcement and the Consumer*, *supra* note 52, at 1–2.

56. *Id.* at 3; *FTC Fact Sheet*, *supra* note 31, at 2.

57. Lopatka, *supra* note 10, at 824.

If a transaction meets the size requirements prescribed by the HSR Act,[58] the merging parties must inform the DOJ and FTC of their intent to merge before the merger is consummated.[59] Parties do so by submitting premerger filings, often referred to as HSR filings, to the agencies in accordance with the HSR Act.[60] The HSR filings provide the agencies with key information about the proposed merger, the merging parties' businesses, and the industry or industries that the merger will affect.[61]

Although merging parties submit HSR filings to both the FTC and DOJ, only one agency[62] reviews the proposed transaction.[63] The agency responsible for reviewing the merger is usually designated based upon the agencies' expertise in different industries.[64] For instance, the FTC usually reviews mergers between health-care providers, such as hospitals[65] and physician groups,[66] while the DOJ usually reviews mergers between health insurance providers ("payers").[67]

After submitting their HSR filings, parties must wait for agency clearance before consummating the merger.[68] The reviewing agency initially has thirty days to complete its preliminary review.[69] Based on its findings, the reviewing agency may either (1) allow the parties to merge by granting early termination of the thirty-day waiting period, (2) allow the merger by letting the thirty-day waiting period expire without taking further action, or (3) extend the review period by issuing a request for more information,

58. *See supra* note 49 and accompanying text.

59. *Premerger Notification Program*, FED. TRADE COMMISSION, https://www.ftc.gov/enforcement/premerger-notification-program [https://perma.cc/GJE2-67FN] (last visited Mar. 15, 2018).

60. *Id.*; *see also supra* note 49 and accompanying text.

61. *What Is the Premerger Notification Program?: An Overview*, FED. TRADE COMMISSION 1 (2009), https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf [https://perma.cc/923Q-EY4D]; *see also Premerger Notification Program*, *supra* note 59.

62. State Attorneys General may also review transactions and enforce state and federal antitrust laws. HSR Act, 15 U.S.C. § 15c (2012); Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL'Y 5, 8 (2004). This Note focuses on antitrust enforcement by the federal agencies.

63. *Premerger Notification and the Merger Review Process*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review [https://perma.cc/5RFE-T6EY] (last visited Mar. 15, 2018).

64. Michael G. Egge & Jason D. Cruise, *Practical Guide to the U.S. Merger Review Process*, CONCURRENCES, Feb. 2014, at 1, 3; Bill Baer, Assistant Attorney Gen., U.S. Dep't of Justice, Remarks as Prepared for Delivery to European Competition Forum 2014, Public and Private Antitrust Enforcement in the United States 5 (Feb. 11, 2014), https://www.justice.gov/atr/file/517756/download [https://perma.cc/7WEA-7BW8].

65. *See generally, e.g.*, FTC v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016); FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016).

66. *See generally, e.g.*, FTC v. Sanford Health, No. 1:17-cv-00133 (D.N.D. Dec. 15, 2017), *appeal docketed*, No. 17-3783 (8th Cir. Dec. 26, 2017).

67. *See generally, e.g.*, United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir. 2017); United States v. Aetna Inc., 240 F. Supp. 3d 1 (D.D.C. 2017).

68. *Merger Review*, FED. TRADE COMMISSION, https://www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review [https://perma.cc/38WV-8GME] (last visited Mar. 15, 2018).

69. Egge & Cruise, *supra* note 64, at 3.

known as a "Second Request."[70] Agencies typically issue a Second Request when the initial review identifies potential anticompetitive concerns and the agencies need more information to confirm or allay the concerns.[71] A Second Request allows the agency to further investigate the merger's likely effects on competition.[72]

After the agency completes its Second Request investigation, the agency will either allow the merger to be consummated, approve a modified merger plan, or attempt to block the merger by suing in federal court and/or initiating an FTC administrative proceeding.[73] Most transactions are approved in original or modified form.[74] The agencies challenge very few in court or FTC administrative proceedings.[75]

The process for challenging a merger beyond the investigation period differs based on which agency has reviewed the transaction.[76] For instance, the DOJ will typically seek a permanent injunction in federal court,[77] whereas the FTC will typically seek a preliminary injunction in federal court to enjoin the merger until the matter can be decided by the FTC's administrative

70. *Premerger Notification and the Merger Review Process*, *supra* note 63. A buyer can also withdraw its HSR filing one time and refile within two business days without repaying the filing fee. FTC Withdraw and Refile Notification, 16 C.F.R. § 803.12 (2018). This gives the parties more time to work through issues with the FTC or DOJ and may allow the parties to avoid a time-consuming and costly Second Request. *See* Premerger Notification Office Staff, *Getting in Sync with HSR Timing Considerations*, FED. TRADE COMMISSION (Aug. 31, 2017, 8:57 AM), https://www.ftc.gov/news-events/blogs/competition-matters/2017/08/getting-sync-hsr-timing-considerations [https://perma.cc/57VW-FQQ8].

71. *Premerger Notification and the Merger Review Process*, *supra* note 63.

72. *Merger Review*, *supra* note 68.

73. *Id.*

74. *Id.*

75. *See* William McConnell, *Obama Administration Most Aggressive Ever in Regulating Mergers and Acquisitions*, THESTREET (Apr. 28, 2016, 11:27 AM), https://www.thestreet.com/story/13538758/1/big-government-steps-up-challenges-to-big-business-in-merger-wars.html [https://perma.cc/F49J-BVJY] (stating that, although the number of mergers challenged since the Reagan administration has increased, the percentage of transactions challenged by the DOJ and FTC peaked at fewer than 5 percent between 1981 and 2015). In 2015, there were 1754 merger transactions reported to the agencies. CORNERSTONE RESEARCH, TRENDS IN MERGER INVESTIGATIONS AND ENFORCEMENT AT THE U.S. ANTITRUST AGENCIES: FISCAL YEARS 2006–2015, at 3 (2d ed. 2016), https://www.cornerstone.com/Publications/Reports/Trends-in-Merger-Investigations-and-Enforcement-2006-2015 [https://perma.cc/EZS4-Q2YF]. Only forty-two of these transactions, or approximately 2 percent, were challenged. *Id.* at 12.

76. Shepard Goldfein & James A. Keyte, *Merger Review at FTC and Department of Justice*, N.Y.L.J., Dec. 9, 2014, at 1, 1 ("[The agencies] sue[] to enjoin mergers under different statutes: the FTC under Section 13(b) of the FTC Act and Justice Department under Section 15 of the Clayton Act."). As of this writing, a proposed bill—the Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act—seeks to eliminate the differences in challenges brought by the FTC and DOJ. Standard Merger and Acquisition Reviews Through Equal Rules Act of 2017, H.R. 659, 115th Cong.; *see also* Daniel A. Friedman & Melissa R. Ginsberg, *"SMARTER" Act Advances in Congress: Will It Become Law?*, PATTERSON BELKNAP (Apr. 13, 2017), https://www.pbwt.com/antitrust-update-blog/smarter-act-advances-in-congress-will-it-become-law [https://perma.cc/GEU5-9MXM].

77. Goldfein & Keyte, *supra* note 76, at 1 (noting that the DOJ often consolidates its claims for preliminary and permanent injunctive relief under Federal Rule of Civil Procedure 65(a)(2)).

court.[78] Despite this difference, a court's decision on a preliminary injunction challenge brought by the FTC is often the final ruling.[79] Losing parties typically abandon the deal before proceeding to the FTC hearing.[80] Similarly, upon defeat, the FTC will likely abandon its challenge.[81]

C. The Horizontal Merger Guidelines Explain the Agencies' Merger Review

The agencies have identified two types of mergers that are likely to substantially lessen competition or lead to monopolies: vertical mergers and horizontal mergers.[82] A vertical merger is one between businesses at different levels within an industry.[83] For instance, a merger between a supplier of goods and the retailer who sells the goods would be a vertical merger. The agencies define horizontal mergers as "mergers and acquisitions involving actual or potential competitors."[84] A merger between two competing retailers would be a horizontal merger.

The FTC and DOJ have jointly published two sets of guidelines, which help practitioners and the business community understand the agencies' processes for reviewing mergers: the Non-Horizontal Merger Guidelines and the Horizontal Merger Guidelines.[85] Lawyers seeking to defend vertical mergers may turn to the Non-Horizontal Merger Guidelines, issued in 1984, to understand the theories under which an agency may challenge a nonhorizontal merger.[86] However, this set of guidelines is not very useful

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78. *Id.* at 2.

79. *Id.*

80. *Id.*; *see also* Respondents' Memorandum Addressing the Propriety of Proceeding with the Part 3 Trial When Respondents Cannot Yet Close the Transaction at 11 n.2, *In re* Cabell Huntington Hosp., Inc., No. 9366 (FTC dismissed July 6, 2016) ("[T]he pending injunction hearing in the federal court . . . generally hangs like a Sword of Damocles over [the FTC administrative] proceeding.").

81. Goldfein & Keyte, *supra* note 76, at 2.

82. The FTC's website actually identifies three types of mergers that are likely to be anticompetitive: vertical mergers, horizontal mergers, and "potential competition mergers." *Competitive Effects*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects [https://perma.cc/7G9Q-2C8S] (last visited Mar. 15, 2018). Prior to 2010, a horizontal merger involved the combination of two actual competitors and a potential competition merger involved the combination of two potential competitors. *See id.* In 2010, the Horizontal Merger Guidelines were updated to combine the latter two categories of mergers. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 1. Horizontal mergers are now defined in the Guidelines as "mergers and acquisitions involving actual or potential competitors." *See id.*

83. Steven C. Salop & Daniel P. Culley, Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners 4 (Dec. 8, 2014) (unpublished manuscript), https://ssrn.com/abstract=2522179 [https://perma.cc/FLG9-GYVF].

84. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 1.

85. *See generally* HORIZONTAL MERGER GUIDELINES, *supra* note 12; U.S. DEP'T OF JUSTICE, NON-HORIZONTAL MERGER GUIDELINES (1984) [hereinafter NON-HORIZONTAL MERGER GUIDELINES].

86. *See generally* NON-HORIZONTAL MERGER GUIDELINES, *supra* note 85.

today because the agencies apply theories of competitive effect that are not included in the Guidelines.[87]

Luckily for practitioners seeking to defend a merger between two health-care providers, a different set of guidelines is available. Most hospital mergers evaluated by the FTC are horizontal mergers.[88] As such, the Horizontal Merger Guidelines describe the evidence and analytic tools the agencies utilize to determine whether a merger will violate the federal antitrust laws.[89] The Guidelines were most recently updated in 2010 to more accurately describe the agencies' practices and are a helpful tool for the business community and private antitrust practitioners.[90]

Most mergers are brought to the agencies' attention through an HSR filing before they are consummated.[91] One difficulty agencies face in reviewing unconsummated mergers is uncertainty.[92] The agencies cannot be sure whether anticompetitive effects will, in fact, result.[93] Because of this, the agencies review an array of evidence to make an informed prediction.[94]

Part I.C.1 of this Note discusses how the agencies define the relevant market in which merging parties compete. Part I.C.2 explains how the agencies evaluate postmerger market share and changes to market concentration. Part I.C.3 then discusses the defenses that merging parties may assert.

1. The Relevant Market

To predict a proposed merger's likely impact on competition, the agencies must first define the market.[95] A market is defined by how and where the merging parties compete.[96] For instance, hospitals may compete in the

87. Jon Sallet, Deputy Assistant Attorney Gen. for Litig., U.S. Dep't of Justice, Remarks as Prepared for Delivery to ABA Fall Forum: The Interesting Case of the Vertical Merger 1 (Nov. 17, 2016), https://www.justice.gov/opa/speech/file/938236/download [https://perma.cc/MU83-5RW4].

88. Joe Cantlupe, *New Scrutiny for Hospital Mergers*, NEJM CATALYST (Nov. 29, 2016), https://catalyst.nejm.org/scrutiny-hospital-cross-market-mergers/ [https://perma.cc/X6HM-R5C2].

89. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 1.

90. Christine A. Varney, *The 2010 Horizontal Merger Guidelines: Evolution, Not Revolution*, 77 ANTITRUST L.J. 651, 651 (2011).

91. In 2013, 1326 transactions were reported and reviewed under the HSR Act and thirty-eight transactions were reviewed after the FTC or DOJ initiated independent action. *Merger Review by the Numbers*, FED. TRADE COMMISSION, https://www.ftc.gov/news-events/blogs/competition-matters/2014/05/merger-review-numbers [https://perma.cc/34N3-F6RF] (last visited Mar. 15, 2018).

92. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 1.

93. *Id.*

94. *Id.* § 2.2.

95. *Id.* § 4.

96. *Id.* The Supreme Court stated that "[t]he 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')." Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).

relevant *product* market by offering similar services.[97] Hospitals may compete in the relevant *geographic* market by offering health care to individuals in the same region or community.[98] According to the Horizontal Merger Guidelines, market definition is centered on "customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service."[99] In the hospital context, the product and geographic markets are likely to intersect because the agencies want to determine whether patients will be able to receive comparable services and specialties without traveling far from home.[100]

The agencies define the geographic and product markets by employing the "hypothetical monopolist test."[101] The test seeks to determine the smallest area in which a hypothetical monopolist could profitably impose a "small but significant and non-transitory increase in price" (SSNIP) for a given product or service.[102] The geographic market consists of all hospitals where patients would be willing to seek care in response to a SSNIP at their preferred hospital.[103] The agencies' goal is to identify hospitals that are reasonably interchangeable with one of the merging hospitals.[104]

2. Market Share and Concentration

Once the hypothetical monopolist test defines the relevant market, the agencies can evaluate the merging parties' market share and the effect of the merger on market concentration.[105] The agencies seek to analyze market shares and concentration in a narrowly defined market under the hypothetical monopolist test because a narrow market best allows the agencies to assess whether the proposed merger will likely substantially lessen competition.[106]

A hospital's market share is defined by its percentage of patient discharges in the relevant market.[107] The market shares of all the hospitals in the

97. *See, e.g.*, FTC v. Advocate Health Care Network, 841 F.3d 460, 468 (7th Cir. 2016) ("[T]he parties here agree that the product market here is . . . inpatient general acute care services—specifically, those services sold to commercial health plans and their members.").

98. *See, e.g.*, *id.* at 470 (noting that "because most patients prefer to go to nearby hospitals, there are often only a few hospitals in a geographic market").

99. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 4.

100. *See* Amy D. Paul, *The Complexities of Hospital Merger Review*, A.B.A., https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/complexities_of_hospital_merger_review.html [https://perma.cc/A2GE-LQDL] (last visited Mar. 15, 2018).

101. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 4.1.1.

102. *Id.*; *see also* Lopatka, *supra* note 10, at 825.

103. Lopatka, *supra* note 10, at 825.

104. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 4.1.1.

105. *Id.*

106. *Id.*

107. H.E. Frech III, James Langenfeld & R. Forrest McCluer, *Elzinga-Hogarty Tests and Alternative Approaches for Market Share Calculations in Hospital Markets*, 71 ANTITRUST L.J. 921, 935 (2004); *see also* James B. Albertson, Note, *Hospital Antitrust: The Merging Hospital and the Resulting Exposure to Antitrust Merger and Monopolization Laws*, 24 WASHBURN L.J. 300, 319 (1985).

relevant market are then used to determine whether the market is highly concentrated, moderately concentrated, or not concentrated.[108]

Market concentration is calculated by summing the squares of each hospital's market share.[109] This figure is known as the Herfindahl-Hirschman Index (HHI).[110] For instance, if there are four hospitals in the relevant market, each with a 25 percent market share, then the calculation is $25^2 + 25^2 + 25^2 + 25^2 = 2500$.[111] The HHI is first calculated using the hospitals' market shares before the merger takes place and then again using the prospective market shares of the same hospitals postmerger.[112] If two of the hospitals in the previous example merged, the postmerger calculation would be $50^2 + 25^2 + 25^2 = 3750$. The effect of the merger on market concentration is determined by comparing pre- and post-merger HHIs.[113] The greater the increase in HHI will be postmerger, the greater the agencies' antitrust concerns will be.[114]

The determination of the geographic market is extremely important because the merging parties' postmerger market share, and thus market concentration, will be higher in a narrowly defined geographic market. The agencies presume that mergers that significantly increase market concentration or result in a highly concentrated market increase the merging parties' market power.[115] The agencies seek to block these mergers because they presume that increased market power will lead to higher prices, reduced product quality and variety, reduced service, and diminished innovation.[116]

3. Defenses

Once the agencies have determined that a merger will likely be anticompetitive, the parties may argue that the transaction should be allowed because competition will not be adversely affected, or that other benefits may result.[117] The Horizontal Merger Guidelines identify several defenses that the agencies are likely to find persuasive.[118] According to the Guidelines, the agencies will recognize the failing-firm defense when one of the parties is in imminent danger of failing, such that

108. Lopatka, *supra* note 10, at 826.

109. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 5.3.

110. *Id.* An HHI below 1500 suggests that the market is not concentrated, while an HHI between 1500 and 2500 suggests that the market is moderately concentrated. *Id.* An HHI above 2500 suggests the market is highly concentrated. *Id.*

111. *See id.* § 5.3 n.9.

112. *Id.* § 5.3.

113. *Id.*

114. *Id.*

115. *Id.* § 2.1.3. An increase of more than 200 "will be presumed to be likely to enhance market power." *Id.* § 5.3.

116. *Id.* § 1. Increased market power is presumed to be anticompetitive because price is dependent upon supply and demand. *See Price Maker*, INVESTOPEDIA, https://www.investopedia.com/terms/p/pricemaker.asp [https://perma.cc/EN9Y-A3TK] (last visited Mar. 15, 2018). With fewer competitors, companies have greater "control over the supply released into the market, allowing [them] to dictate prices." *Id.*

117. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 2.1.3.

118. *See id.* §§ 8–11.

> (1) the allegedly failing firm would be unable to meet its financial obligations in the near future;
>
> (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and
>
> (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.[119]

The failing-firm defense may be successful when the parties can show the merger will not likely enhance market power because the assets of the failing firm will likely exit the relevant market absent a merger, which would ensure that consumers will not be harmed by the merger.[120]

The existence of powerful buyers in the market may also weigh in favor of a merger.[121] Although the presence of a powerful buyer does not eliminate anticompetitive effects, parties may argue that the buyer will be able to constrain prices following the merger.[122] For instance, in *FTC v. Sanford Health*,[123] the merging physician groups argued that Blue Cross Blue Shield of North Dakota was a powerful buyer and its presence in the market would limit their ability to raise prices postmerger.[124]

Additionally, merging parties may argue that barriers to entry are low, such that the merger will not harm competition because increased prices will lead new firms to enter the market and entice consumers.[125] In analyzing barrier-to-entry claims, the agencies consider historical evidence of entry in the relevant market.[126] According to the Horizontal Merger Guidelines, parties may pose a successful defense "if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern."[127]

Merging parties can also argue that the merger will create efficiencies that will allow the merged firm to better compete, possibly resulting in lower prices, improved quality, or new products.[128] There are several requirements that efficiency arguments must meet to be cognizable to the agencies.[129] Efficiencies must be merger-specific, verifiable, and must not arise from anticompetitive reductions in output or service.[130] Merging parties must show the likelihood that each efficiency asserted will result, how and when each will be achieved, any costs associated with achieving the efficiencies,

119. *Id.* § 11.
120. *Id.*
121. *Id.* § 8.
122. *Id.*
123. No. 1:17-cv-00133, slip op. at 1 (D.N.D. Dec. 15, 2017), *appeal docketed*, No. 17-3783 (8th Cir. Dec. 26, 2017).
124. *Id.* at 35–41.
125. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 9.
126. *Id.*
127. *Id.*
128. *Id.* § 10.
129. *Id.*
130. *Id.*

and how the efficiencies will enable the merged firm to compete more effectively.[131] It may be difficult for merging parties to prove that beneficial efficiencies will result because there is no definitive proof of what will occur once the merger is consummated.[132] Further, even if the merging parties can show that efficiencies will result, the agencies have the discretion to determine whether the efficiencies outweigh the potential harm.[133]

D. Courts Follow the Horizontal Merger Guidelines

If the agencies determine, upon weighing all the evidence, that a transaction will likely substantially lessen competition, they may seek to enjoin the merger.[134] Courts apply different standards to mergers challenged by the FTC and DOJ because the agencies sue to enjoin mergers under different statutes.[135]

Although it may seem that the burden of proof would be the same regardless of the agency bringing the suit, this is not true. The FTC enjoys a lower burden of proof than is normally required in a preliminary-injunction hearing.[136] The FTC Act provides that a preliminary injunction should be granted when the FTC has shown that upon "weighing the equities and considering the Commission's likelihood of ultimate success, [a preliminary injunction] would be in the public interest."[137] Courts have interpreted this statutory language as placing a lower burden of proof on the FTC because the statute uses a public interest standard, instead of the traditional equity standard.[138] Courts give great deference to the FTC in preliminary-injunction hearings because, in conducting this balancing test, merging parties' interests are not given much weight and often cannot outweigh the public interest in enforcing the antitrust laws.[139]

The FTC initially has the burden of proving that a transaction will be anticompetitive.[140] The FTC can meet its burden by proposing relevant geographic and product markets and showing that the merger will likely have

131. *Id.*

132. *Id.*; *see also* Dennis A. Yao & Thomas N. Dahdough, *Information Problems in Merger Decision Making and Their Impact on Development of an Efficiencies Defense*, 62 ANTITRUST L.J. 23, 28–30 (1993).

133. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 10. ("The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers . . . ."); D. Daniel Sokol & James A. Fishkin, *Antitrust Merger Efficiencies in the Shadow of the Law*, 64 VAND. L. REV. EN BANC 45, 56–57 (2011).

134. *See supra* Part I.B.

135. Goldfein & Keyte, *supra* note 76, at 1.

136. *Id.*

137. 15 U.S.C. § 53(b) (2012).

138. FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1042 (D.C. Cir. 2008) (citing FTC v. Exxon Corp., 636 F.2d 1336, 1343 (D.C. Cir. 1980)). Unlike plaintiffs under the traditional equity standard, the FTC does not need to show a likelihood of irreparable harm or that private equities are subordinated to public equities. *Id.* at 1060 n.7.

139. *See* FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 352 (3d Cir. 2016).

140. *Id.* at 337 (citing Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 783 (9th Cir. 2015)).

anticompetitive effects within those markets.[141] The relevant market should be defined in accordance with the hypothetical monopolist test.[142] Once the relevant market is defined, the court will infer that a transaction will likely be anticompetitive if it will significantly increase market concentration or the merged firm's market share.[143]

Once the FTC has met its burden of proof, the burden shifts to the merging parties to rebut a presumption of anticompetitive effects.[144] There are a few defenses that merging hospitals may employ to rebut a presumption of anticompetitive effects.[145] Parties might argue that the FTC's market is not well defined and that the market shares being considered are inaccurate because the relevant market is actually larger and has more competitors.[146] Parties can also argue that one of the defenses described in the Horizontal Merger Guidelines applies.[147] Specifically, parties might argue that the transaction will create efficiencies,[148] the benefits of which outweigh any potential harm to competition.[149]

Courts view the efficiency defense with skepticism.[150] It has not been formally endorsed by most courts, including the Supreme Court, and the governing statute does not prescribe it.[151] Thus, when courts analyze the sufficiency of efficiency claims, they often impose a very strict standard of proof.[152]

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141. *Id.* at 337–38; FTC v. Advocate Health Care Network, 841 F.3d 460, 464, 467 (7th Cir. 2016).

142. *Advocate Health*, 841 F.3d at 464; *Penn State Hershey*, 838 F.3d at 338; *St. Luke's Health*, 778 F.3d at 784.

143. *Penn State Hershey*, 838 F.3d at 347 (finding that an increase in HHI over 200 and the merged parties' likely high market share postmerger were sufficient to find the merger presumptively anticompetitive); ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 570 (6th Cir. 2014) (finding that the "strong correlation between market share and price, and the degree to which th[e] merger would further concentrate markets that are already highly concentrated . . . fully supports the Commission's application of a presumption of illegality").

144. *Penn State Hershey*, 838 F.3d at 337 (citing *St. Luke's Health*, 778 F.3d at 783).

145. Matthew L. Cantor, *Defending Hospital Mergers: 4 Antitrust Defenses*, BECKER'S HOSP. REV. (Nov. 13, 2013), https://www.beckershospitalreview.com/hospital-transactions-and-valuation/defending-hospital-mergers-4-antitrust-defenses.html [https://perma.cc/5TRF-WUDM].

146. *Id.*

147. *See supra* Part I.C.

148. This Note focuses on the efficiency defense.

149. Cantor, *supra* note 145; *see also* HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 10.

150. FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality."); United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963) (finding that an anticompetitive merger cannot be saved because it may result in social or economic benefits); Brown Shoe Co. v. United States, 370 U.S. 294, 344–45 (1962); FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347–48 (3d Cir. 2016) (holding that a hospital merger that would allow the parties to better utilize their capacity did not justify allowing the presumptively anticompetitive transaction to be consummated); Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 788–92 (9th Cir. 2015).

151. *Penn State Hershey*, 838 F.3d at 348 ("Based on [the Supreme Court's] language and on the Clayton Act's silence on the issue, we are skeptical that such an efficiencies defense even exists.").

152. *Id.* at 349 (citing *St. Luke's Health*, 778 F.3d at 790; FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991)). It is difficult to know what standard of proof the agencies

No merging parties have yet prevailed before a circuit court by proving efficiencies sufficient to rebut a presumption of anticompetitive effects.[153] Yet most circuit courts have adopted at least some of the Horizontal Merger Guidelines' requirements for successfully proving efficiencies. In 2016, the Third Circuit adopted four requirements from the Horizontal Merger Guidelines: merging parties must show that efficiencies (1) will "offset the anticompetitive concerns in highly concentrated markets," (2) are "merger specific," (3) are "verifiable, not speculative," and (4) "must not arise from anticompetitive reductions in output or service."[154] The Eleventh Circuit recognizes the last three requirements but only credits arguments for price-related efficiencies.[155] The D.C. Circuit requires that merging parties prove "extraordinary efficiencies" that are merger-specific.[156]

E. Cross-Market Mergers May Increase Hospitals' Bargaining Power

The FTC and courts have not yet considered the effects of cross-market mergers—mergers between firms that compete in different markets—in their analyses of horizontal hospital mergers.[157] This Part explains how cross-market give some hospitals increased bargaining power for some hospitals. Because of the unique way that hospitals must market their products to health insurers (i.e., payers), cross-market merged hospitals enjoy greater competitive strength, despite potentially occupying a smaller share of the market.

To date, the FTC has not sought to enjoin a cross-market health-care merger: a merger between two hospitals that offer services to patients in separate and distinct markets.[158] This may be because it is assumed that parties do not have increased bargaining power unless there is less

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actually require because their investigations remain confidential. *Mergers*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers [https://perma.cc/Z93U-E7B6] (last visited Mar. 15, 2018).

153. *See supra* note 19 and accompanying text.

154. *Penn State Hershey*, 838 F.3d at 348–49.

155. *St. Luke's Health*, 778 F.3d at 791–92 ("[T]he district court concluded that St. Luke's might provide better service to patients after the merger. That is a laudable goal, but the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations."); Roger D. Blair, Christine Piette Durrance & D. Daniel Sokol, *Hospital Mergers and Economic Efficiency*, 91 WASH. L. REV. 1, 54–55 (2016).

156. FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001) (citing *Univ. Health*, 938 F.2d at 1223).

157. David A. Argue & Lona Fowdur, An Examination of New Theories on Price Effects of Cross-Market Hospital Mergers 6 (unpublished manuscript), https://pdfs.semanticscholar.org/c909/cc1194b13cda18059ec26d85a2c4f1623b00.pdf [https://perma.cc/M6M5-Y2TT] (last visited Mar. 15, 2018).

158. *See* Leemore Dafny, Kate Ho & Robin S. Lee, *The Price Effects of Cross-Market Hospital Mergers* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 22106, 2017). As of this writing, the DOJ has challenged the cross-market merger of Time Warner and AT&T, possibly marking a change in the agencies' policy toward cross-market mergers. Cecilia Kang & Michael J. de la Merced, *U.S. Sues to Stop AT&T's Takeover of Time Warner*, N.Y. TIMES, Nov. 21, 2017, at A1.

competition in the market.[159] Additionally, the Horizontal Merger Guidelines and the Non-Horizontal Merger Guidelines both fail to explain to practitioners or agency staff how to evaluate these types of mergers.[160]

As previously discussed, agencies and courts are willing to assume that a transaction will have anticompetitive effects if the merger increases market concentration or the merged firm's market share.[161] This is likely because historical evidence shows that mergers that increase market concentration and the merged firm's market share cause higher prices due to increased bargaining power.[162] Moreover, evidence suggests that cross-market hospital mergers lead to increased prices due to increased bargaining power. Economists have recently begun to analyze price increases resulting from cross-market mergers to understand how and why this may be occurring. This Part discusses three models that have been used to analyze cross-market price increases and economists' theories as to why price increases occur. Part I.E.1 explains the employer-choice model. Part I.E.2 then describes the common-customers model. Finally, Part I.E.3 explains the health-plan-pricing model.

1. The Employer-Choice Model

Gregory Vistnes and Yanis Sarafidis were two of the first economists to study cross-market mergers and the effect they may have on prices.[163] Because health-care providers must compete for both patients and inclusion in payers' health plans,[164] Vistnes and Sarafidis suggest that even if patients do not view two hospitals as substitutes for one another, anticompetitive effects may still occur if payers view the hospitals as substitutes.[165]

Payers compete on two levels.[166] First, because most Americans receive health insurance through their employer or a family member's employer, payers must compete to have employers offer their health plans to employees.[167] Second, payers compete to be chosen by employees who are offered a choice of more than one health plan.[168]

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159. Dafny, Ho & Lee, *supra* note 158, at 2.

160. David A. Argue & Scott D. Stein, *Cross-Market Health Care Provider Mergers: The Next Enforcement Frontier*, 30 ANTITRUST 25, 25 (2015) ("[T]hey do not raise concerns under the competitive effects analysis of the [Horizontal Merger] Guidelines because the providers would not be viewed as substitutes.").

161. *See supra* Parts I.C–D.

162. *See supra* note 116 and accompanying text.

163. *See* Gregory Vistnes & Yanis Sarafidis, *Cross-Market Hospital Mergers: A Holistic Approach*, 79 ANTITRUST L.J. 253, 258 (2013).

164. Argue & Stein, *supra* note 160, at 25.

165. Vistnes & Sarafidis, *supra* note 163, at 260.

166. *Id.* at 266; Gregory Vistnes, *Hospitals, Mergers, and Two-Stage Competition*, 67 ANTITRUST L.J. 671, 673 (2000).

167. Vistnes & Sarafidis, *supra* note 163, at 265–66.

168. Most employers seek to offer their employees a single health plan or a choice of two or more health plans that will be attractive to all of their employees, even though the employees may live and work in various geographic markets. *Id.* The number of plans offered to employees varies with the size of the firm. KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TR., EMPLOYER HEALTH BENEFITS: 2017 ANNUAL SURVEY 66 (2017). In 2017,

Payers' health plans primarily compete based on the health-care providers from which members can receive care,[169] such as hospitals, physicians, and ancillary care providers.[170] Because payers need to include the maximum number of providers in their network to remain competitive with other payers, merged firms may enjoy greater bargaining power because the loss of two hospitals will have a much greater effect on the payer's ability to compete than the loss of one hospital.[171]

Before a merger occurs, if a hospital attempts to increase its price, the payer can threaten to drop the hospital from its network and steer its members to another hospital.[172] If patients view two hospitals as substitutes for one another (as identified by the hypothetical monopolist test), then the health plan will retain power to constrain prices.[173] If patients are willing to seek care from other hospitals in the payer's network, then the health plan will not be affected if it fails to contract with one.[174]

Vistnes and Sarafidis suggest that, because payers seek to sell their plans to employers whose employees live and work in various geographic markets, the most attractive health plans are those with the fewest holes in their network.[175] Cross-market mergers allow the merged hospitals to threaten payers with more holes in the various markets in which the ultimate customers may live.[176] The more holes a plan has, the less likely it is that employers will choose to offer that health plan to their employees.[177] Even if the employer did offer the health plan, employees may be more likely to use a different plan that has fewer holes in the geographic market where they seek care. Because payers depend so heavily on the inclusion of hospitals in their health plans, hospital systems garner increased bargaining power to raise rates.[178]

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approximately 71 percent of large employers (with 5000 workers or more) gave their employees the opportunity to choose from more than one health plan. *Id.* Smaller employers were less likely to offer more than one health plan. *Id.*

169. Vistnes & Sarafidis, *supra* note 163, at 267.

170. Ancillary care providers typically offer outpatient specialty services, such as lab testing and imaging, rehabilitation, and long-term acute care. For a more detailed list of ancillary care services, see *Ancillary Care Categories*, ANCILLARY CARE SERVICES, http://www.anci-care.com/providers-categories.html [https://perma.cc/9MZ3-RYMB] (last visited Mar. 15, 2018).

171. Vistnes & Sarafidis, *supra* note 163, at 257, 268. The authors rely on two underlying assumptions that are important to recognize: (1) health plans charge the same premium for each of the employer's employees, regardless of where they live and (2) health-care providers contract on "an 'all-or-nothing' basis." *Id.* at 268, 282.

172. *Id.* at 269.

173. *Id.*

174. *Id.*

175. *Id.* at 275.

176. *Id.*

177. *Id.* at 278–81.

178. *Id.* at 275.

2. The Common-Customers Model

In 2016, Leemore Dafny, Kate Ho, and Robin S. Lee published a study using the common-customers model to demonstrate why prices increase following cross-market mergers.[179] The common-customers model is a variation of the employer-choice model.[180] Under this model, insurers compete for "customers who in turn may aggregate the preferences of multiple individuals," such as employees or households.[181] The study shows that when two merging hospitals are valued by a common customer, price increases may result.[182]

Dafny, Ho, and Lee suggest that common customers will generally buy a bundle of provider services from payers.[183] For instance, employers may seek a bundle of providers in two geographic markets where their employees reside, and families may seek a bundle of adult and pediatric hospitals.[184] The authors suggest that the common customer's preference for a cross-market bundle leads to the elimination of a competitor and increased bargaining power for the hospital system.[185]

3. The Health-Plan-Pricing Model

Vistnes and Sarafidis hypothesize that another reason prices increase following cross-market mergers is that payers typically charge the same price to all of an employer's employees, regardless of where they live.[186] If a payer offers its health plan to an employer whose employees live in different geographic markets and the employees have a choice of more than one plan, the payer must adjust its pricing based on any holes that exist in the geographic markets where the employees live.[187] These price adjustments must be made after analyzing how the price changes will affect the plan's profits in all of its markets, not just those with holes.[188]

If payers marketed their health plans separately for each market, they would likely charge less in markets with holes and maintain a competitive price in markets without them.[189] However, because payers charge the same price to all employees regardless of where they seek care, the payer must set a compromise price.[190] Payers cannot price their plans too low based on the existing holes or they would lose profits in the markets without holes.[191] The

179. Dafny, Ho & Lee, *supra* note 158, at 1–2.
180. Argue & Stein, *supra* note 160, at 26–27.
181. Dafny, Ho & Lee, *supra* note 158, at 1.
182. *Id.*
183. *Id.* at 5.
184. *See id.*
185. Argue & Stein, *supra* note 160, at 27.
186. Vistnes & Sarafidis, *supra* note 163, at 281.
187. *Id.* at 282.
188. *Id.*
189. *Id.*
190. *Id.* at 283.
191. *Id.*

compromise price will likely be set between the desired prices for a market with holes and a market without holes.[192]

This pricing practice provides cross-market merged hospital systems with increased bargaining power for two reasons. First, insurers will suffer incremental losses in profit as the number of holes in their networks increase.[193] Second, the health plan's profits will decline even in markets without any holes because of the lowered price across the plan.[194]

II. SHOULD HEALTH-CARE PROVIDERS' EFFICIENCY ARGUMENTS BE GIVEN GREATER WEIGHT?

There is much debate over whether the agencies and courts should give greater weight to efficiency arguments presented by merging health-care providers.[195] On the one hand, mergers may produce efficiencies that benefit consumers, such as cost savings that can be passed on, clinical standardization that can improve patient care, and utilization of capacity at two locations that allows for better management of care.[196] On the other hand, research differs on whether these efficiencies actually occur postmerger.[197]

This Part discusses the relevant issues in the debate of whether efficiency arguments should be given more weight. Part II.A discusses how the efficiency defense has evolved in the various revisions of the Horizontal Merger Guidelines. Part II.B then provides arguments in favor of expanding the efficiency defense. Next, Part II.C discusses arguments against expanding the efficiency defense. Lastly, Part II.D examines common efficiency arguments that merging hospitals present in court and the grounds on which they typically fail.

A. The Efficiency Defense's Increasing Importance

The agencies first incorporated the efficiency defense in the Horizontal Merger Guidelines in 1968.[198] Contrary to prior decisions by the Supreme

192. *Id.*

193. Argue & Stein, *supra* note 160, at 26.

194. *Id.*; *see also* Vistnes & Sarafidis, *supra* note 163, at 283–85.

195. Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 704 (2017).

196. NOETHER & MAY, *supra* note 17, at 4–10.

197. Thomas C. Tsai & Ashish K. Jha, *Hospital Consolidation, Competition, and Quality: Is Bigger Necessarily Better?*, 312 JAMA 29, 29–30 (2014). *Compare* NOETHER & MAY, *supra* note 17, at 18 (finding that quality and cost efficiencies occur following hospital mergers), *with* Melanie Evans, *Merger Indigestion: Big Hospital Mergers Failing to Deliver Promised Results*, MOD. HEALTHCARE (Apr. 23, 2016), http://www.modernhealthcare.com/article/20160423/MAGAZINE/304239980 [https://perma.cc/8RMU-6TKQ] (finding that some recent hospital mergers did not result in quality and cost efficiencies). Numerous studies have measured health-care quality following mergers. *See* Roger D. Blair & D. Daniel Sokol, *Quality-Enhancing Merger Efficiencies*, 100 IOWA L. REV. 1969, 1991–93 (2015) (arguing that more robust quality measurements should be utilized in analyses of possible merger efficiencies).

198. William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, U.S. DEP'T JUST. 4 (Aug. 5, 2015),

Court,[199] the Guidelines suggested that exceptional efficiencies could justify a merger that would normally be subject to challenge.[200] However, for years, the agencies did not give much, if any, credit to efficiency arguments.

In 1982, the Horizontal Merger Guidelines made it easier for the agencies to show that a merger was likely to be anticompetitive; at the same time, they made it more difficult for merging parties to prove efficiencies sufficient to overcome the presumption of anticompetitive effects.[201] The Guidelines lowered the burden of proof in response to concerns about the connection between concentration and the exercise of market power.[202] It became evident that if a single firm exercised control over the majority of a product's supply, that firm would also be able to control the output of such product, increasing demand and price.[203] However, this standard of proof was short lived.

Due to fears that mergers, which could produce efficiencies that would enable firms to compete more effectively on a global scale, would be prohibited under the previous standard, the agencies began to refrain from blocking some mergers.[204] As a result, the agencies updated the Horizontal Merger Guidelines to reflect a more nuanced approach.[205] In 1984, the agencies recognized that postmerger efficiencies could increase overall competition and lead to lower prices for consumers.[206]

Since then, the efficiency defense has become more highly valued, with the FTC noting that several agency investigations have been resolved in favor of efficiencies that benefit competition.[207] However, even after these changes, it remains very difficult for merging parties to prevail in court by proving efficiencies sufficient to outweigh findings of potential anticompetitive harms.[208]

B. Why Courts Should Consider Merger Efficiencies

There are several arguments for crediting merging parties' efficiency arguments. First, there may be a benefit to consumers and the general public that outweighs any detriment to competition or price.[209] Mergers between

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https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11254.pdf [https://perma.cc/7QVK-2LE9].

199. In three early cases, the Court declined to accept the efficiency defense in merger cases. FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967); United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

200. Kolasky & Dick, *supra* note 198, at 8.

201. Deborah A. Garza, *Market Definition, the New Horizontal Merger Guidelines, and the Long March Away from Structural Presumptions*, ANTITRUST SOURCE 2 (Oct. 2010), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct10_Garza10_21f.authcheckdam.pdf [https://perma.cc/C2BN-7P5C].

202. *Id.*

203. *Id.*

204. *Id.* at 3.

205. *Id.*

206. Blair, Durrance & Sokol, *supra* note 155, at 54.

207. Ramirez, *supra* note 20, at 11.

208. *See* Garza, *supra* note 201, at 3.

209. Kolasky & Dick, *supra* note 198, at 13.

inefficiently small firms may increase competition by creating a more efficient firm.[210] If two firms are unable to compete effectively with larger players in the market, then allowing the merger may actually increase competition and lead to lower prices.[211] Additionally, efficiencies, which could increase patient outcomes and the quality of care, may result from mergers between health-care providers.[212] The benefits of increased quality may outweigh any anticompetitive effects, such as price increases.

Second, the statutory language and legislative history of the antitrust laws do not suggest that Congress intended for the agencies or courts to disregard merger efficiencies.[213] In fact, the Supreme Court acknowledged in *Brown Shoe Co. v. United States*[214] that Congress, in amending the Clayton Act, did not intend for the antitrust laws to block "a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market."[215] This suggests that Congress was open to the idea that efficiencies may weigh in favor of a transaction. The Supreme Court did not ultimately rely on this legislative history and instead found that Congress favored competition over efficiencies.[216]

Third, the conceptualization of efficiency arguments as a defense is a mischaracterization.[217] Efficiency arguments are a defense to a prima facie showing of anticompetitive effects.[218] Yet, efficiencies should nonetheless be considered an integral part of the determination of whether a merger will lessen competition in the first place.[219] Efficiencies play a crucial role in competition. They can drive competition because increased quality by one party will incentivize its competitors to match or exceed that quality.[220]

C. Why Courts Should Remain Skeptical of Efficiency Arguments

There are also several arguments for why agencies and courts should not credit merging parties' efficiency arguments. One reason the presumption of anticompetitive effects should remain difficult to overcome, especially in the health-care context, is that price increases can have an outsized effect on

210. *Id.*
211. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 10.
212. NOETHER & MAY, *supra* note 17, at 4–5.
213. Kolasky & Dick, *supra* note 198, at 13.
214. 370 U.S. 294 (1962).
215. *Id.* at 319.
216. *Id.* at 344; Kolasky & Dick, *supra* note 198, at 5.
217. Kolasky & Dick, *supra* note 198, at 13.
218. *See supra* notes 144–49 and accompanying text.
219. Kolasky & Dick, *supra* note 198, at 13.
220. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978); *Competition in the Healthcare Market*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care [https://perma.cc/DZT3-2DFM] (last visited Mar. 15, 2018) (noting the purpose of the antitrust laws is to incentivize competition that may improve quality).

consumers.[221] Additionally, unscrambling a consummated health-care merger that later proves to be harmful is very difficult.[222]

In 1976, Judge Richard Posner vehemently rejected the idea that courts should analyze merger efficiencies.[223] He argued that presumptively anticompetitive mergers should only be allowed when there is evidence that the acquiring or acquired firm effectively lacks the ability to compete.[224] In these instances, market-share and concentration figures would be inaccurate representations of the competitive landscape for those firms.[225] He reasoned that evaluation of efficiencies by courts would be intractable to deal with in litigation, estimates of cost savings would be difficult to weigh against the monopoly costs of the merger, and any expenditures made in the process of seeking merger approval would likely dissipate any cost savings that could be achieved.[226]

Empirical evidence varies as to whether efficiencies actually occur postmerger.[227] Some research suggests that mergers may lead to higher costs and less efficiency and innovation due to reduced competition.[228] Former FTC Chairwoman Edith Ramirez, quoting the former director of the FTC Bureau of Economics, stated that "the cost of an average inpatient stay at a hospital that faces no competition is almost $1,900 higher than those where there are at least four competitors, which results in higher premiums that get passed on to consumers."[229] Other evidence suggests that a hospital system's size does not correlate with cost.[230] Because there is no clear evidence that mergers lead to efficiencies, it is difficult to evaluate whether the efficiencies claimed by merging parties will counteract anticompetitive effects or produce benefits that offset price increases.

There are several hypotheses for why health-care mergers might fail to realize efficiencies. First, merged facilities often continue to operate separately and, thus, fail to benefit from the cost savings of integrating their administrative services.[231] Second, hospital systems fail to implement system-wide standards.[232] Third, cost synergies are not the focus of many

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221. *See* Blair, Durrance & Sokol, *supra* note 155, at 64.

222. *Id.*

223. RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 112 (1976).

224. *Id.*

225. *Id.*

226. *Id.*

227. *See supra* note 197 and accompanying text.

228. Michael Hiltzik, *Mergers in the Healthcare Sector: Why You'll Pay More*, L.A. TIMES (May 27, 2016, 12:05 PM), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-healthcare-mergers-20160527-snap-story.html [https://perma.cc/3DZC-TT7J].

229. Edith Ramirez, FTC Chairwoman, Keynote Address at Antitrust in Healthcare Conference 2–3 (May 12, 2016), https://www.ftc.gov/system/files/documents/public_statements/950143/160519antitrusthealthcarekeynote.pdf [https://perma.cc/8J27-4L8Q].

230. Anil Kaul, K.R. Prabha & Suman Katragadda, *Size Should Matter: Five Ways to Help Healthcare Systems Realize the Benefits of Scale*, PWC: STRATEGY& (Mar. 15, 2016), https://www.strategyand.pwc.com/reports/size-should-matter [https://perma.cc/QBD3-7KPE].

231. *Id.*

232. *Id.*

mergers.[233] Fourth, executives of the merging firms are often focused on closing the deal rather than integrating the hospitals.[234]

D. Hospitals' Efficiency Arguments Typically Fail at the Circuit Court Level

One requirement, imposed by the agencies in the Horizontal Merger Guidelines and adopted by several courts, is that efficiencies must be merger-specific to rebut a presumption of anticompetitive effects.[235] As such, certain efficiency arguments are likely to fail because the benefits could be obtained through other means, such as contractual arrangements between the parties or a third party who is not a competitor.[236]

Parties often argue that merging will reduce costs by eliminating duplicative services, such as surplus administrative personnel.[237] Since each separate hospital will have an administrative office that conducts nonclinical tasks, such as billing, finance, credentialing, and procurement, a merger may reduce headcount by allowing these offices to be consolidated.[238] The resulting savings could be passed on to patients by investing in new or improved services or discounts.[239] However, these arguments are likely to fail because the cost savings could be achieved through contractual arrangements and, therefore, are not merger-specific.[240]

Parties may also argue that savings will be generated through postmerger standardization of purchasing medical supplies[241] and information technology (IT) systems.[242] Hospitals often participate in at least one group purchasing organization (GPO), through which they secure discounts on supplies and equipment.[243] However, hospitals will often be able to receive better deals by negotiating with suppliers directly if they purchase a substantial volume of goods.[244] Because a hospital operating on its own likely does not require a large quantity of goods, it may be unable to reap the benefits of direct negotiating or to access the best GPO-provided discounts.[245] A merger may allow parties to negotiate for better rates on supplies and provide them with the ability to store and distribute supplies

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233. *Id.*
234. *Id.*
235. FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 348 (3d Cir. 2016) (citing Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (9th Cir. 2015)); HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 10; *see also supra* Part I.D.
236. Oliver & Leibenluft, *supra* note 7, at 23.
237. *Id.* at 21.
238. *Id.*
239. *Id.*
240. *Id.*
241. NOETHER & MAY, *supra* note 17, at 4–5.
242. Oliver & Leibenluft, *supra* note 7, at 21–22.
243. NOETHER & MAY, *supra* note 17, at 4. *See generally* Michael A. Lindsay, *Antitrust and Group Purchasing*, 23 ANTITRUST 66 (2009) (discussing group purchasing organizations).
244. Lindsay, *supra* note 243, at 68 ("A buying group's bargaining position is strongest if it can commit to delivering a volume of business . . . .").
245. NOETHER & MAY, *supra* note 17, at 4.

more efficiently.[246] IT systems for electronic medical records operate in the same way. Mergers may allow hospital systems to share these expensive systems, which are likely to generate cost savings that may be passed on.[247] Because these cost savings can result from contractual arrangements between parties, such efficiency arguments typically fail.[248]

Another requirement that creates difficulties for merging parties is that efficiencies must be verifiable, not speculative.[249] Hospitals may argue that merging will allow them to share their best practices and clinical protocols, thereby improving patient care.[250] Clinical standardization can, in theory, similarly reduce costs and produce better quality.[251] If physicians are better able to identify avoidable complications in outlier patients, there may be improvements in the quality of care and patient outcomes.[252] However, because quality is not a set standard, it is very difficult for parties to prove that quality improvements will result.[253]

Hospital mergers may also enable parties to utilize excess capacity at one hospital and alleviate capacity constraints at another, which allows the constrained party to avoid a capital expenditure.[254] For instance, the acquiring hospital may not have sufficient capacity to house all of its patients, especially if it is an academic medical center (AMC) with a strong reputation.[255] At the same time, community medical centers often underutilize their capacity.[256] By combining the two, the community hospital can take over the care of patients requiring less complex procedures, and the AMC can focus on high-end services.[257] A merger between two such hospitals may generate capital savings by allowing the AMC to avoid building new facilities.[258] These savings can then be passed on to consumers through investments in new service lines, equipment, and building renovations that will allow the hospitals to run more smoothly.[259] In asserting this defense in court, however, parties must prove that the efficiency will be achieved, is merger-specific, and will not result in an anticompetitive reduction in output.[260]

In *FTC v. Penn State Hershey Medical Center*,[261] the parties argued that the proposed merger would relieve the acquiring hospital's capacity

246. *Id.*
247. Oliver & Leibenluft, *supra* note 7, at 21–22.
248. *See id.* at 22.
249. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 10.
250. Oliver & Leibenluft, *supra* note 7, at 22.
251. NOETHER & MAY, *supra* note 17, at 6.
252. *Id.*
253. Oliver & Leibenluft, *supra* note 7, at 22.
254. *Id.* at 21; *see also* FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 349–50 (3d Cir. 2016).
255. NOETHER & MAY, *supra* note 17, at 6.
256. *Id.*
257. *Id.*
258. *Id.*
259. Oliver & Leibenluft, *supra* note 7, at 21.
260. *Id.*; *see also supra* Part I.D.
261. 838 F.3d 327 (3d Cir. 2016).

constraints.[262] However, the circuit court rejected this argument and found that the merger would have the anticompetitive effect of making it unnecessary for one party to build a new bed tower that would increase output.[263] The parties argued that the acquiring hospital, Penn State Hershey Medical Center ("Hershey"), was overly constrained and struggling to find a solution to its capacity problems.[264] The Hershey board of directors had been considering a proposal to build a new bed tower, which would cost $277 million.[265] However, these plans were not yet finalized or approved by the board, and they would have taken a long time to implement.[266] The hospital that Hershey sought to acquire, PinnacleHealth System ("Pinnacle"), had excess capacity.[267] The district court found that the merger would create efficiencies sufficient to rebut any presumption of anticompetitive effects, if found.[268] However, the Third Circuit found that "Hershey's ability to forego building the 100-bed tower" would be an anticompetitive reduction in services that would not justify allowing the merger to occur.[269]

III. GREATER WEIGHT SHOULD BE GIVEN TO HOSPITALS' POSSIBLE POSTMERGER EFFICIENCIES

This Note proposes that the agencies and courts should give greater weight to health-care merger efficiencies. The possibility that mergers between health-care providers may lead to quality improvements that can benefit patients is worth the risk of increased prices. Although higher prices are undesirable, the possibility of improved patient outcomes should justify price increases. Various government agencies have placed monetary values on human life exceeding $8 million per life.[270] Although the FTC has not set a monetary value on life, assuming the value of life is above $8 million suggests that certain price increases at merged hospitals may be justified when there is a reasonable probability that lives will be saved due to merger

262. *Id.* at 347.
263. *Id.* at 349–50.
264. FTC v. Penn State Hershey Med. Ctr., 185 F. Supp. 3d 552, 559–60 (M.D. Pa. 2016), *rev'd*, 838 F.3d 327.
265. *Id.* at 560.
266. *See* Heather Stauffer, *Expansion Could Increase Hershey Medical Center Capacity by up to Fifteen Percent*, LANCASTER ONLINE (Apr. 21, 2017), http://lancasteronline.com/news/local/expansion-could-increase-hershey-medical-center-capacity-by-up-to/article_e9d78784-2600-11e7-bd3d-6334729f1421.html [https://perma.cc/V7FS-XDTC].
267. *Penn State Hershey*, 185 F. Supp. 3d at 561.
268. *Id.* at 559–63.
269. FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 349–50 (3d Cir. 2016).
270. Dave Merrill, *No One Values Your Life More Than the Federal Government*, BLOOMBERG (Oct. 19, 2017), https://www.bloomberg.com/graphics/2017-value-of-life/ [https://perma.cc/9KD8-9BWL]. The Department of Agriculture values an individual human life at $8.9 million, the Food and Drug Administration and Department of Health and Human Services value life at $9.5 million, and the Environmental Protection Agency values life at $10 million. *Id.* These values are used by these agencies to determine whether the benefits of proposed regulations outweigh their costs. *Id.*

efficiencies.[271] Additionally, when viewed from the perspective of the consumer, the possibility of saving the life of a family member or neighbor may be priceless.

Allowing hospitals to merge based on efficiency arguments may increase the number of lives saved.[272] This is a more important goal than reducing price. Though not all mergers will result in saved lives, it is too difficult to determine when life-saving efficiencies will be generated.[273] The agencies and courts should be willing to accept efficiency arguments at a lower standard than is currently present because the possibility that lives will be saved is a risk worth taking.

The current Horizontal Merger Guidelines and the courts' interpretation of the Guidelines present too high a hurdle and likely block mergers that could have great benefits to patient quality, outcomes, and care.[274] Although it is difficult to know for certain how the agencies are interpreting the requirements laid out in the Horizontal Merger Guidelines,[275] it is possible to analyze the way that courts view merging parties' efficiency arguments.[276]

This Part argues that the burden of proof courts place upon merging health-care providers to prove efficiencies is too high.[277] The Horizontal Merger Guidelines outline requirements that courts should continue to rely upon.[278] However, in doing so, courts should lower the standard for these requirements and refrain from blocking mergers between hospitals and other health-care providers where efficiencies may plausibly result. Part III.A explains how courts should interpret the requirements of the efficiency defense. Part III.B then proposes a new efficiency argument based on the effects of cross-market mergers that agencies and courts should consider in analyzing mergers' effects on competition.

A. There Should Be a Lower Standard for Proving Health-Care Merger Efficiencies

Parties who have undergone agency investigations and choose to argue their case in court likely believe there are compelling reasons that their

271. For instance, if prices increase by $24 million following a merger, this merger may be justified if at least three lives are saved. Because increased costs are diluted among those seeking care in the geographic market, each person's increase in price may contribute to the merging hospitals' abilities to save lives.

272. *See generally* NOETHER & MAY, *supra* note 17 (discussing the benefits of hospital mergers).

273. *See supra* note 132 and accompanying text.

274. Since 2008, the FTC's actions have led to the abandonment of six hospital mergers. David J. Balan, *Hospital Mergers That Don't Happen*, NEJM CATALYST (Oct. 24, 2016), https://catalyst.nejm.org/hospital-mergers-dont-happen/ [https://perma.cc/2CKZ-RWNM].

275. *See supra* note 152 and accompanying text.

276. *See supra* Parts I.D, II.D.

277. This Note does not take a stance on the standard that should be applied in analyzing efficiencies that may result from mergers in other industries. This Note argues specifically that agencies and courts should lower the standard for health-care providers because of the high likelihood that efficiencies will benefit life and health.

278. *See supra* Part I.C.

mergers should not be enjoined.[279] The overly simplistic treatment of the efficiency defense by courts suggests that courts may be uncomfortable analyzing merger efficiencies.[280] The Horizontal Merger Guidelines were updated in 2010 to cure biases that undervalued efficiencies, yet courts often make up their minds about a transaction without giving efficiency arguments much weight or attention.[281]

The Supreme Court, in three cases, expressed its hesitance to accept arguments that efficiencies generated from a merger could overcome a presumption of anticompetitive effects.[282] Courts have latched onto the language of these cases and remain skeptical of efficiency arguments because of the precedent set by the Supreme Court.[283] The precedent that courts continue to rely on, however, is from the 1960s, when the efficiency defense was first introduced in the Horizontal Merger Guidelines and there was strong hesitancy to accept any type of efficiency defense.[284]

The Horizontal Merger Guidelines have continued to evolve.[285] Today, efficiency arguments are credited by agencies in their investigatory review of mergers,[286] but courts remain hesitant because they rely on an outdated ideology.[287] Courts have expressed a willingness to allow a merger that will result in "extraordinary efficiencies," yet no court has ever ratified a transaction on this basis.[288] As the law stands, it is unclear what constitutes an extraordinary efficiency. Going forward, courts need to be aware of the role that efficiencies have played in antitrust merger review and how that role has developed. Without understanding the evolution of the efficiency defense, courts cannot understand that they are relying on outdated precedents.

Although precedent is obviously important in the American common law system, judicial interpretations of laws have developed over time in many fields in response to changing social ideology, new empirical evidence, and more.[289] Similar to other areas of law, the antitrust laws should be interpreted as a fluid body of law that must adapt with the times. Because of the possible

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279. Blair, Durrance & Sokol, *supra* note 155, at 58.

280. *Id.*

281. *Id.* at 58–59.

282. FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967); United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

283. *See, e.g.*, FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347–48 (3d Cir. 2016).

284. *See supra* notes 198–200 and accompanying text.

285. *See supra* Part II.A.

286. *See supra* note 207 and accompanying text.

287. *See supra* text accompanying note 284.

288. *Penn State Hershey*, 838 F.3d at 347; Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (9th Cir. 2015); FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001); *see also* FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223–24 (11th Cir. 1991).

289. *See* Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 684 (2015) (noting that "extant law becomes risibly maladapted to the relevant problems as the policy environment changes over time"). *See generally, e.g.*, Emma Green, *Gay Marriage Is Now a Constitutional Right in the United States of America*, ATLANTIC (June 26, 2015), https://www.theatlantic.com/politics/archive/2015/06/gay-marriage-legal-in-the-united-states-of-america/396947/ [https://perma.cc/3LXV-CJNA].

benefits to patients from hospital mergers,[290] courts should value parties' efficiency arguments more heavily. Part III.A.1 argues that efficiencies should only be discredited for failing to be merger-specific when perfect substitutes exist. Part III.A.2 contends that courts and agencies should not require proof that efficiencies will result. Part III.A.3 discusses the error in the Third Circuit's decision in *Penn State Hershey* and argues that anticompetitive reductions in output should only be found when the current output will be decreased, not when failure to achieve an increase in output may occur.

1. Alternatives to Merger-Specific Efficiencies Should Be Perfect Substitutes

As discussed previously, courts require efficiencies, especially cost-saving efficiencies, to be merger-specific.[291] However, the standard for hospital mergers is currently very high.[292] Parties are often unable to prevail on efficiency arguments when other contractual arrangements could be utilized instead.[293] However, efficiencies from contractual arrangements are not perfect substitutes for the efficiencies that could be gained from a merger.[294]

Many hospital leaders believe that efficiencies will not be as extensive or durable if sought through looser affiliation agreements, for several possible reasons: (1) "[l]ack of accountability and long-term commitment," (2) "[i]nability to align incentives sufficiently to make the difficult choices necessary to substantially improve the efficiency of care delivery," (3) "[a]cquirers' unwillingness to invest substantial capital without commitment for the returns on the investment," (4) "[l]egal or regulatory prohibitions on sharing financial information as well as detailed clinical information," (5) "[r]eluctance to share valuable intellectual property with a loose affiliate," and (6) "[f]ailure to create a common culture."[295]

Requiring that efficiencies be merger-specific to rebut a presumption of anticompetitive effects makes sense. It would be preferable and generate the most benefits if efficiencies could be achieved without reducing competition. However, the idea that contractual arrangements may have the same long-term effects as a merger neglects the realities of the health-care industry. Because hospital executives fear that contractual arrangements will be short term, they are not likely to invest any savings in future care and innovation.[296] If the parties believe the arrangement is only temporary, any savings are

290. *See generally* NOETHER & MAY, *supra* note 17 (discussing possible postmerger benefits to patients).

291. *See supra* Parts I.D, II.D.

292. See Part II.D for a discussion of the arguments that parties typically pose in support of a merger and why they fail in court.

293. *See supra* note 236 and accompanying text.

294. NOETHER & MAY, *supra* note 17, at 10–11.

295. *Id.* at 10.

296. *See id.* at 11.

likely to be maintained and protected, not reinvested in service improvements.[297]

Even if a contractual arrangement could produce the efficiencies in the short term, courts also need to realize the benefits of long-term solutions. Long-term solutions likely give hospital executives the confidence to reinvest cost savings.[298] The lasting result of efficiencies from long-term solutions should be crucial to the analysis of whether there is a lessening of competition. The FTC has argued that contractual arrangements are sufficient to have the same effect and at least one court has agreed.[299] Contracts may have the same effect in the short term, but the benefit of a merger is that the effect will last in the long term. Savings are typically greater over a longer period of time and more likely to benefit patients.[300]

The Horizontal Merger Guidelines state that agencies will not discount efficiency arguments when there is a "less restrictive alternative that is merely theoretical."[301] Similarly, courts should evaluate the real-life practicality of substitutes that may create efficiencies without the proposed merger. Courts should look beyond the theoretical possibility that another arrangement could create the same efficiencies and only discount efficiency arguments on merger-specificity grounds when there is proof that another arrangement will create the exact benefits that the merger will produce. A close substitute should not be enough.

2. Parties Should Not Be Required to Verify Efficiencies

When the FTC seeks to prove that a hospital merger will be anticompetitive, it may show, despite uncertainty, that a merger is likely to be anticompetitive because the merged firm will have a higher market share or the market will be more concentrated.[302] The FTC does not need to show anticompetitive effects will, in fact, occur, only that they are likely.[303] However, merging parties' efficiency arguments must be verifiable—an unfairly high standard.[304]

297. *See id.*

298. *See id.*

299. *Id.* at 10; Oliver & Leibenluft, *supra* note 7, at 21. The district court in *St. Luke's* discounted the parties' arguments that the ability to share the cost of transitioning to an electronic patient record system was a merger-specific efficiency. The court found the efficiencies claimed could not rebut the presumption of anticompetitive effects because the efficiencies could be achieved through another method. Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd., No. 1:12-CV-00560-BLW, 2014 WL 407446, at *23 (D. Idaho Jan. 24, 2014), *aff'd*, 778 F.3d 775 (9th Cir. 2015).

300. *See* NOETHER & MAY, *supra* note 17, at 12–13.

301. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 10.

302. *See supra* Part I.D.

303. *See supra* note 141 and accompanying text.

304. *See* Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 348 (2011) ("[M]erger law implicitly requires a greater degree of predictive proof of merger-generated efficiencies than it does of merger-generated social costs.").

It is very difficult to verify efficiency claims, especially those relating to quality improvements.[305] First, there is little historical data on quality measures.[306] Second, there are varying opinions as to what constitutes best practices, which make it unclear how sharing practices will be beneficial.[307] Third, this benefit is not necessarily merger-specific and could be accomplished merely by discussing best-care practices with consultants.[308] Lastly, there is conflicting evidence on whether mergers lead to improved quality.[309] Thus, efficiency arguments often are very difficult to prove.[310]

Because research and evidence remain split on whether mergers truly generate efficiencies, especially efficiencies affecting quality, courts have remained hesitant to credit efficiency arguments.[311] Yet it is unlikely that economists and practitioners will ever agree on what constitutes a quality increase, how to measure one, and how to identify a quality-adjusted price postmerger. Amid debates over what constitutes quality, it is unreasonably difficult for merging parties to prove that quality efficiencies will result. Thus, in evaluating efficiency claims, courts need to lower the burden of proof on the efficiency defense. Courts should instead evaluate whether the efficiencies asserted are plausible.

It is too difficult to know what will happen following a merger. This is why the agencies must only show that a presumption of anticompetitive effects is likely. It is unfair to require that merging parties anticipate and convince the court of what will occur postmerger when they have no ability to know what will happen. Although merging parties are in the best position to make the claimed efficiencies happen, there needs to be some trust by courts that health-care providers will seek to provide the best quality of care to their patients. Merging parties have great incentive to do so because they need to recruit and maintain patients and health plans. Poor patient outcomes may result in press nightmares and loss of their patient base.[312]

3. The Flaw in *Penn State Hershey*: Reductions in Output Should Only Be Considered from Current Levels

The Third Circuit in *Penn State Hershey* correctly recognized that the efficiencies, which would have been created by allowing Hershey to use

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305. There is no standard dictating how to measure quality of health care. CONG. RESEARCH SERV., R40749, MEASURING HEALTH CARE QUALITY: MEASURE DEVELOPMENT, ENDORSEMENT, AND IMPLEMENTATION 2 (2009); *see also* Kristin Madison, *The Law and Policy of Health Care Quality Reporting*, 31 CAMPBELL L. REV. 215, 218–19 (2009). Without a uniform standard for measuring quality, parties face immense difficulties proving that quality improvements will result. *See* Yao & Dahdough, *supra* note 132, at 29–30.

306. Oliver & Leibenluft, *supra* note 7, at 22.

307. *Id.*

308. *Id.*

309. *See supra* note 197 and accompanying text.

310. Sokol & Fishkin, *supra* note 133, at 55 n.39.

311. *See supra* Part II.C.

312. *See generally, e.g.*, Tamar Lapin, *Hospital Probed for 6-Year-Old Boy's Heated Blanket Death*, N.Y. POST (Aug. 29, 2017), https://nypost.com/2017/08/29/hospital-probed-for-6-year-old-boys-heated-blanket-death/ [https://perma.cc/64QC-DTUU].

Pinnacle's excess capacity, were merger-specific.[313] Hershey had proposed building a new one-hundred-bed tower to alleviate its capacity constraint.[314] Even though the bed tower was a nonmerger remedy that was available to the parties, the court correctly found the efficiencies were merger-specific because the efficiencies that would have been generated by building the bed tower in the absence of the merger would not have been realized in the same way.[315] Building the bed tower would have been more expensive and time consuming, while the merger efficiencies could have been achieved much faster.[316]

Instead, the Third Circuit erred in finding that the merger would lead to an anticompetitive reduction in output.[317] The district court found convincing evidence that the merger would alleviate capacity constraints and refrained from questioning the business judgment of the Hershey officers who testified that, without the merger, the bed tower would be necessary.[318] However, on appeal, the Third Circuit found that the "evidence [was] ambiguous at best that Hershey needed to construct a 100-bed tower to alleviate its capacity constraints."[319] The court then went on to find that "Hershey's ability to forego building the 100-bed tower [would be] a reduction in output."[320] Yet the court failed to explain why this would be a reduction in output. It seems that the court confused output and capacity. The court seemingly viewed this as a choice between (1) no bed tower (i.e., no expansion) and (2) building a new bed tower (i.e., expansion). The court ruled in favor of expansion based on its belief that if Hershey did not expand its facilities, it would be reducing its output.[321]

This view is wholly misguided and makes little sense. First, the court found that Hershey did not need to increase its capacity.[322] Second, the court found that Hershey could not merge because doing so would lessen its expansion and result in fewer patients being served.[323] This is simply not true. Hershey sought to increase its output postmerger by allowing for more patients to be cared for and housed at the acquired hospital, Pinnacle.[324]

Additionally, the court assumed that without the merger, the bed tower would be built.[325] However, many factors could have stymied Hershey's

313. *See* FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 350 (3d Cir. 2016).

314. *Id.*

315. *See id.*

316. David Wenner, *Hershey-Pinnacle Merger Hinges on Hearing This Week*, PENN LIVE (July 26, 2016), http://www.pennlive.com/news/2016/07/penn_state_hershey_ftc.html [https://perma.cc/F6A8-MXF4].

317. *Penn State Hershey*, 838 F.3d at 350.

318. FTC v. Penn State Hershey Med. Ctr., 185 F. Supp. 3d 552, 559–61 (M.D. Pa. 2016), *rev'd*, 838 F.3d 327.

319. *Penn State Hershey*, 838 F.3d at 350.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. Brief of Appellees Penn State Hershey Medical Center and PinnacleHealth System at 43, *Penn State Hershey*, 838 F.3d 327 (No. 16-2365).

325. *See Penn State Hershey*, 838 F.3d at 350.

plan to build a new bed tower. For instance, the board of directors could have refused to approve the $277 million capital expenditure project.[326]

Here, the court made up its mind without seriously analyzing the parties' efficiency arguments.[327] It realized that the efficiencies that could be derived from creating a new bed tower were not a substitute for the immediate solution the merger could provide to alleviate Hershey's capacity-constraint problem.[328] Thus, the court needed some ground on which to discount the parties' efficiency arguments, and the requirement that efficiencies not reduce output was a viable excuse.[329] The court then went on to add a catchall by stating that the merger was so likely to be anticompetitive that only "extraordinarily great cognizable efficiencies" could rebut the presumption of anticompetitive effects.[330] Apparently, the Third Circuit did not consider alleviating capacity constraints and increasing the hospital's ability to provide care an extraordinary efficiency.[331]

Courts need to engage in a deeper analysis of parties' efficiency arguments. Proposals to solve capacity constraints, in lieu of a merger that would also solve those issues, cannot be deemed certain to occur. Finding that the proposed merger would render another viable option unnecessary should not be a ground for discrediting an efficiency. If courts continue to do so, parties, like Hershey, who are pursuing a merger, may be deterred from simultaneously considering alternative capacity-constraint solutions. If parties wait to find alternative solutions and the court enjoins their proposed merger, the process for finding alternative solutions will take much more time. The capacity issues the parties already face might not be resolved as quickly, causing patients to suffer.

B. Agencies and Courts Should Consider Cross-Market Merger Effects in Evaluating Horizontal Mergers

As discussed in Part I.E, one way in which hospitals compete is for inclusion in health insurance plans.[332] A hospital's bargaining power in this exchange is essential to competition. Yet the agencies and courts do not

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326. *See supra* notes 265–66 and accompanying text. As of this writing, Hershey is not planning to build a new bed tower but instead is "considering a build-and-shuffle approach." Stauffer, *supra* note 266. Hershey is "planning to add on to the children's hospital, move [women's services and the neonatal intensive care unit], and see how things look in a couple years." *Id.* It is also currently "add[ing] a 12-bed observation unit and expand[ing] the emergency department." *Id.*

327. *See supra* note 281 and accompanying text.

328. *Penn State Hershey*, 838 F.3d at 350.

329. *See id.* Research, to date, has not identified any other hospital merger case where efficiencies were discredited based on a finding that there would be an anticompetitive reduction in output.

330. *Penn State Hershey*, 838 F.3d at 350 (quoting HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 10). The Third Circuit's ruling neither explicitly adopted nor rejected the efficiency defense as a viable argument, which leaves uncertainty about its application in the future. Recent Case, FTC v. Penn State Hershey Med. Ctr., *838 F.3d 327 (3d Cir. 2016)*, 130 HARV. L. REV. 1736, 1743 (2017).

331. *Penn State Hershey*, 838 F.3d at 350.

332. *See supra* note 164 and accompanying text.

currently consider how different parties' bargaining powers affect competition in the market.[333] This may be because the agencies and courts assume that parties' market shares are an accurate reflection of their bargaining power. However, as the research by Vistnes and Sarafidis, and Dafny, Ho, and Lee, suggests, cross-market merged firms may have substantial bargaining power in markets where their market share is not very high.[334] Theoretically, a cross-market merged hospital could have twice the bargaining power of another hospital, while also having half the output—that is, market share.

In the past six years, there has been a drastic increase in consolidation among health-care providers resulting in the formation of major hospital systems.[335] To adjust to the reality of these sprawling health systems, the antitrust laws should allow consolidation among smaller parties that seek to compete with larger systems. Merging parties should be permitted to demonstrate to the agencies and courts that their proposed merger will allow them to increase their bargaining power and overcome the disparity in power between them and the larger health-care systems with whom they compete. For instance, the parties in *Penn State Hershey* could have argued that they sought to merge to better compete with several megasystems: University of Pennsylvania Health System ("Penn Medicine"),[336] Geisinger Health System ("Geisinger"),[337] Community Health Systems (CHS),[338] and WellSpan Health System ("WellSpan").[339] Because these systems offer payers more hospitals throughout Pennsylvania to fill holes in the payers' health plans, cross-market research would suggest these systems have greater bargaining power than their market shares indicate.[340]

333. Agencies and courts instead consider the parties' postmerger market power—an abstract concept derived from market share and market-concentration statistics. HORIZONTAL MERGER GUIDELINES, *supra* note 12, § 1; *see also* Louis Kaplow, *On the Relevance of Market Power*, 130 HARV. L. REV. 1303, 1304–06 (2017).

334. *See supra* Part I.E.

335. Jeffrey A. Singer, *Obamacare's Catch 22*, U.S. NEWS (Aug. 11, 2016, 3:15 PM), https://www.usnews.com/opinion/articles/2016-08-11/obamacare-gave-rise-to-the-health-care-mergers-its-advocates-oppose [https://perma.cc/53Y7-QG4J].

336. University of Pennsylvania Health System includes five hospitals. *See Penn Medicine Locations*, PENN MED., https://www.pennmedicine.org/for-patients-and-visitors/penn-medicine-locations [https://perma.cc/C3BN-WRQA] (last visited Mar. 15, 2018).

337. Geisinger Health System operates eleven hospitals in various markets. *See Locations*, GEISINGER, https://www.geisinger.org/patient-care/find-a-location [https://perma.cc/ZD74-7VZU] (last visited Mar. 15, 2018).

338. Community Health Systems owns 127 hospitals in twenty states. *See Locations*, COMMUNITY HEALTH SYSTEMS, http://www.chs.net/serving-communities/locations/ [https://perma.cc/N7NB-YPSN] (last visited Mar. 15, 2018).

339. WellSpan Health System owns and operates six hospitals. *See WellSpan Hospitals*, WELLSPAN HEALTH, http://www.wellspan.org/offices-locations/hospitals/?utm_source=Website&utm_medium=Mega%20Menu&utm_campaign=Hospitals [https://perma.cc/ZZ4R-T6WM] (last visited Mar. 15, 2018).

340. *See generally* Vistnes & Sarafidis, *supra* note 163 (discussing the employer-choice and health-plan-pricing models for analyzing price effects following cross-market mergers); Dafny, Ho & Lee, *supra* note 158 (discussing the common-customers model for analyzing cross-market merger-related price increases).

The merging parties in *Penn State Hershey* did, in fact, argue that the merger would not produce anticompetitive effects because its competitors—Penn Medicine, Geisinger, CHS, and WellSpan—would respond to the merger by offering substitutable products, which would sufficiently constrain prices following the merger.[341] However, despite finding that this response would "assuage some of the concerns that the proposed combination will have anticompetitive effects," the Third Circuit rejected this argument because payers testified that Pinnacle and Hershey were necessary to their networks.[342] The court recognized that Hershey and Pinnacle would face difficulties competing with such large, well-known, reputable systems.[343] However, the court ultimately could not find persuasive legal reasoning on which to allow the merger on this ground.

With an increasing amount of evidence and research suggesting that cross-market mergers have real effects on competition,[344] the agencies and courts need to be willing to look deeper into the interactions among the relevant payers, parties, competitors, and patients. Research should find a way to quantify parties' bargaining power. If this could be achieved, bargaining power may be a better proxy for hospital market share than patient discharge data. Research is necessary to understand exactly how much a cross-market merger increases the bargaining power of one hospital relative to the bargaining power of its market rivals.

In the meantime, without such research, agencies and courts should evaluate the relative strength of merging hospitals' competitors based on reputation and cross-market connections. The agencies should accept this efficiency argument and add it to the Horizontal Merger Guidelines. The Guidelines should advise parties that they may succeed by showing their ability to compete will be enhanced postmerger and that merging will allow them to compete with cross-market merged firms that have a stronger bargaining position. Market share in the hospital context should only be used as a baseline from which efficiency arguments (e.g., that mergers will lead to improved quality or more effective competition) should be given greater weight to tip the scale in favor of allowing hospitals to merge.[345]

CONCLUSION

Although courts remain skeptical, there are compelling reasons why certain efficiencies should be sufficient to rebut a presumption of anticompetitive effects. Efficiencies are an integral part of the competition analysis and have the potential to bring considerable benefits to consumers. Mergers between health-care providers can strengthen competition and lead to cost savings and improved care for patients. Because of their benefits,

341. FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 351–52 (3d Cir. 2016).
342. *Id.* at 352.
343. *See id.* at 351–52.
344. *See supra* Part I.E.
345. Scholars have similarly argued that market share should not be the sole factor in determining parties' market power. Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 259 (1987).

efficiencies should be given greater weight, especially in analyses relating to health-care mergers, where the efficiencies gained will likely result in better patient outcomes. After all, life and health are more important than the price one may pay.