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DEFENDING HEALTHCARE VERTICAL MERGER CHALLENGES AFTER THE RELEASE OF 2023 ANTITRUST MERGER GUIDELINES

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I. INTRODUCTION

Antitrust laws promote competition and protect consumers from anticompetitive mergers and business practices.[1] Competition in an open marketplace ensures lower prices, higher quality products and services, and choice.[2] Section 7 of the Clayton Act prohibits mergers and acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[3]

Although statutory antitrust law has remained broad and largely untouched for over a century, courts have exercised broad discretion to interpret and enforce antitrust law as markets evolve.[4] The Federal Trade Commission (FTC) and U.S. Department of Justice (DOJ), the agencies charged with enforcement, produce guidelines to layout the burden of proof in establishing Section 7 violations, sources of evidence, and available rebuttals or defenses to antitrust challenges.[5]

Mergers governed by Section 7 may be either horizontal or vertical.[6] Horizontal mergers are mergers between direct competitors and vertical mergers are mergers between companies along a supply

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1 *Guide to Antitrust Laws,* FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws (last visited Mar. 31, 2025).

2 *Id.*

3 Clayton Act, 15 U.S.C. § 18 (1914).

4 *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, DRAFT MERGER GUIDELINES FOR PUBLIC COMMENT 4 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

5 U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 1 (2010), https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf [hereinafter 2010 HORIZONTAL MERGER GUIDELINES].

6 U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 4, at 18–19.

chain for a common good or service.[7] Some mergers may have both horizontal and vertical components, such as is the case when the acquiring firm already includes products and services offered by the downstream or upstream firm.[8] Courts and enforcement agencies have typically focused on horizontal mergers because vertical mergers are often seen as having procompetitive effects.[9] However, vertical mergers may be anticompetitive when they foreclose—cut off—upstream competitors from a downstream partner thereby raising rivals' costs, foreclose customers from upstream competitors, reduce likelihood of entry for new competitors, eliminate existing competitors, or share information to the detriment of downstream competitors.[10]

In healthcare, vertical mergers can include combinations such as hospitals and physician groups, payers and healthcare providers, payers and pharmacy benefit managers, or payers and healthcare technology providers.[11] Proponents of consolidation in the healthcare industry explain that mergers are often designed to improve care and lower patient costs.[12] However, under the Biden Administration, the

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7 United States v. UnitedHealth Grp. Inc., 630 F.Supp.3d 118, 130 (D.D.C. 2022), *dismissed*, No. 22-5301, 2023 WL 2717667 (D.C. Cir. 2023).

8 *See* Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (9th Cir. 2015)*; see also FTC Imposes Conditions on UnitedHealth Group's Proposed Acquisition of DaVita Medical Group*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/news/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition-davita-medical-group (last visited Mar. 31, 2025).

9 D. Bruce Hoffman, Acting Director, Bureau of Competition, Fed'l Trade Comm'n, Remarks at the Credit Suisse 2018 Washington Perspectives Conference: Vertical Merger Enforcement at the FTC 3–4 (Jan. 10, 2018), https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

10 U.S. DEP'T OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES 4 (2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf [hereinafter 2020 VERTICAL MERGER GUIDELINES].

11 MONICA NOETHER & SEAN MAY, CHARLES RIVER ASSOC., HOSPITAL MERGER BENEFITS: VIEWS FROM HOSPITAL LEADERS AND ECONOMETRIC ANALYSIS 4–5 (2017), https://www.aha.org/system/files/2018-04/Hospital-Merger-Full-Report-FINAL-1.pdf.

12 Matthew G. Gibson, *Exceptional Efficiencies: A Valuable Defense for Healthcare Mergers,*

FTC and DOJ have ramped up antitrust enforcement in healthcare, citing fears of increasingly anticompetitive behaviors and a trend of rising patient costs.[13]

In December 2023, the FTC and DOJ released new merger guidelines (New Merger Guidelines) and withdrew from historical guidelines for enforcement of antitrust law in healthcare and other industries.[14] This is likely part of an effort for increased enforcement for both horizontal and vertical mergers.[15] The New Merger Guidelines indicate major changes to the types of defenses, specifically efficiency defenses, the FTC and DOJ will consider when investigating a challenged merger.[16] In 2025, the Trump administration, to some surprise, reaffirmed its commitment to the New Merger Guidelines.[17]

Efficiencies are gained when merging firms are able to reduce costs, eliminate duplicate functions, or achieve scale economies.[18] Efficiencies may result in procompetitive effects such as lower prices, improved quality, enhanced service, or new products.[19] Some courts have stated that one way for a defendant to rebut an antitrust chal-

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122 COLUM. L. REV. 1957, 1960 (2022).

13 Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

14 *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES 1 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [hereinafter 2023 MERGER GUIDELINES]; *Justice Department Withdraws Outdated Enforcement Policy Statements*, U.S DEP'T OF JUST. (Feb. 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.

15 Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

16 2023 MERGER GUIDELINES, *supra* note 14, at 32.

17 *FTC Chairman Andrew N. Ferguson Announces that the FTC and DOJ's Joint 2023 Merger Guidelines are in Effect*, FED. TRADE COMM'N (Feb. 18, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/02/ftc-chairman-andrew-n-ferguson-announces-ftc-dojs-joint-2023-merger-guidelines-are-effect; *but see Trump Administration Signals Strong Approach to Antitrust Enforcement,* DAVIS POLK (Feb. 21, 2025), https://www.davispolk.com/insights/client-update/trump-administration-signals-strong-approach-antitrust-enforcement.

18 *See* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 5, at 29–31.

19 *Id.*; *See* United States v. AT&T, Inc., 310 F.Supp.3d 161, 241 n. 51 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

lenge is to show that post-merger efficiencies gained by merging outweigh the merger's anticompetitive effects.[20] In contrast, the FTC has issued statements pulling away from historical merger guidelines that adopted a broader view of efficiency defenses, reasoning that efficiencies are not a part of statutory law and the Supreme Court has never formally recognized the use of efficiencies as a defense.[21] Lower courts remain split on whether efficiencies are a sufficient defense to antitrust challenges.[22]

The question therefore remains, under the FTC and DOJ's changing guidelines, what remains a sufficient defense, especially for efficiencies, to vertical merger challenges in healthcare? Part 1 of this Comment provides an overview of modern antitrust law and changing guidelines for enforcement. Part 2 provides an overview of antitrust law in healthcare and healthcare-specific factors for considering vertical merger challenges. Part 3 suggests methods to defend against vertical merger challenges in healthcare in the context of increased enforcement and the New Merger Guidelines.

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[20] *AT&T, Inc.*, 310 F.Supp.3d at 190.

[21] *See* Lina Khan et al., *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines*, FED. TRADE COMM'N 3 (Sep. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

[22] *See, e.g.,* Fed. Trade Comm'n v. Penn State Hershey Med. Ctr., 838 F.3d 327, 348 (3d Cir. 2016) (describing *Heinz* as "acknowledging that the Supreme Court has never 'sanctioned the use of the efficiencies defense', but noting that 'the trend among lower courts is to recognize the defense[.]'" (quoting Fed. Trade Comm'n v. H.J. Heinz Co., 246 F.3d 708,720 (D.C. Cir. 2001))); *see also* Fed. Trade Comm'n. v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies, but it struck the balance in favor of protecting competition." (citing Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962))).

II. MODERN ANTITRUST LAW

A. Governing Law

Antitrust laws promote competition and protect consumers from anticompetitive mergers and business practices.[23] Competition in an open marketplace ensures lower prices, higher quality products and services, and choice.[24] Generally, four core federal antitrust laws written in the nineteenth and twentieth century are still in place today: the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, and the Hart-Scott-Rodino Antitrust Improvement Act.[25] First, the Sherman Antitrust Act bars agreements that unreasonably restrain trade such as price fixing, rig bids, or market division.[26] The Sherman Antitrust Act also makes it illegal to create monopolies for products and services.[27] Second, Section 7 of the Clayton Act prohibits anticompetitive mergers and acquisitions.[28] Third, the Federal Trade Commission Act more broadly bans "unfair methods of competition" and "unfair or deceptive acts or practices" and gives the Federal Trade Commission exclusive authority to bring cases under the FTC Act.[29] Fourth, the Hart-Scott-Rodino Antitrust Improvement Act requires companies to file premerger notifications with the FTC and DOJ for certain acquisitions.[30]

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[23] *Guide to Antitrust Laws,* FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws (last visited Mar. 31, 2025).

[24] *Id.*

[25] Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1890); Federal Trade Commission Act, 15 U.S.C. § 45 (1914); Clayton Act, 15 U.S.C. §§ 14, 18, 19 (1914); Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a (1976); *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Mar. 31, 2025).

[26] *The Antitrust Laws, supra* note 25.

[27] *Id.*

[28] Clayton Act, 15 U.S.C. § 18 (1914).

[29] Federal Trade Commission Act, 15 U.S.C. § 45 (1914).

[30] Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a (1976).

In addition to these federal statutes, most states have antitrust laws that mirror federal antitrust laws and are enforced by attorneys general or private plaintiffs.[31] Because federal legislative language has remained so broad, courts have had wide discretion to interpret and enforce antitrust law as markets have grown and evolved over more than a century.[32]

Both the DOJ and the FTC enforce federal antitrust laws.[33] The DOJ has sole antitrust jurisdiction in areas such as telecommunications, banks, and airlines and handles criminal sanctions for violations of antitrust laws.[34] The FTC usually focuses on certain segments of the economy such as healthcare, pharmaceuticals, and other professional services.[35]

This Comment primarily focuses on Section 7 of the Clayton Act. Section 7 of the Clayton Act prohibits mergers and acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[36] Section 7 does not require the Government to prove that a merger is *certain* to cause competitive harm, just that a merger would cause more than a *mere possibility* of such harm.[37] Therefore, Section 7 is regarded as more of a prophylactic measure that seeks to arrest restrictions of trade "before they develop into full-fledged restraints violative of the Sherman Act."[38] In order to challenge a merger under Section 7, the Government must first establish a prima facie case that the specific merger under review is likely to "substantially lessen

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31 *The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers (last visited Mar. 31, 2025).

32 *See The Antitrust Laws*, *supra* note 25.

33 *The Enforcers*, *supra* note 31.

34 *Id.*

35 *Id.*

36 Clayton Act, 15 U.S.C. § 18 (1914).

37 *See* United States v. UnitedHealth Grp. Inc., 630 F.Supp.3d 118, 130 (D.D.C. 2022), *dismissed*, No. 22-5301, 2023 WL 2717667 (D.C. Cir. 2023).

38 Brown Shoe Co. v. United States, 370 U.S. 294, 374 n.39 (1962).

competition" in the relevant market based on real-world evidence.[39] Under this standard, "antitrust theory and speculation cannot trump facts."[40]

Mergers may be either horizontal or vertical.[41] Horizontal mergers are mergers between direct competitors, such as between two manufacturers of the same product.[42] Vertical mergers are mergers between companies along a supply chain for a common good or service.[43] Vertical mergers include, for example, mergers between a buyer and seller or mergers between a manufacturer and distributor.[44]

This Comment focuses primarily on vertical mergers. While horizontal mergers merge competitors, vertical mergers often merge noncompeting companies where one's product is a necessary component or complement to the others.[45] Additionally, while horizontal mergers directly reduce competition by eliminating a substitute, vertical mergers have the potential for *pro*-competitive benefits such as lowered transaction costs and traditionally have drawn less scrutiny from enforcers.[46] In contrast to a horizontal merger, a vertical merger is not anticompetitive on its face and produces no immediate change in the relevant market share.[47]

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[39] United States v. AT&T, Inc., 310 F.Supp.3d 161, 189 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

[40] *Id.* at 190.

[41] *Competitive Effects,* FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/competitive-effects (last visited Mar. 31, 2025).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] Hoffman, *supra* note 9, at 2–3.

[46] *Id.*; *See* Christine A. Varney, *Vertical Merger Enforcement Challenges at the FTC*, FED. TRADE COMM'N (July 17, 1995), https://www.ftc.gov/news-events/news/speeches/vertical-merger-enforcement-challenges-ftc.

[47] United States v. AT&T, Inc., 310 F.Supp.3d 161, 192 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); Hoffman, *supra* note 9, at 2–3.

Even though there is broad consensus that vertical mergers are beneficial, there are still some theories of harm that may arise from a vertical merger.[48] For example, vertical mergers can be anticompetitive if they foreclose or cut off upstream competitors from a downstream partner thereby raising rivals' costs, foreclose customers from upstream competitors, reduce likelihood of entry for new competitors, eliminate existing competitors, or share information to the detriment of downstream competitors.[49]

Both the FTC and DOJ have historically enforced merger regulations via Horizontal Merger Guidelines released in 2010 (2010 Horizontal Merger Guidelines) and separately drafted Vertical Merger Guidelines released in 2020 (2020 Vertical Merger Guidelines) (collectively, the Historical Merger Guidelines).[50] The Historical Merger Guidelines layout the burden of proof in establishing Section 7 violations, sources of evidence, and available rebuttals or defenses to antitrust challenges.[51] While not binding on courts, courts often cite the Historical Merger Guidelines in their analysis.[52]

B. Enforcement Trends

Despite a robust history of enforcement for horizontal mergers, antitrust enforcers have traditionally shown little interest in vertical mergers.[53] In 2019, the DOJ litigated its first vertical merger challenge in over forty years.[54] The FTC and DOJ's tradition of lax enforcement

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48 *See* Hoffman, *supra* note 9, at 4–7.

49 2020 VERTICAL MERGER GUIDELINES, *supra* note 10, at 5.

50 2020 VERTICAL MERGER GUIDELINES, *supra* note 10, at 1; *see* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 5, at 1.

51 *See* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 5, at 1.

52 Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 n.9 (9th Cir. 2015).

53 Thomas L. Greaney, *New Health Care Merger Wave: Does the "Vertical, Good" Maxim Apply*, 46 J. L., MED. & ETHICS, 918, 918–19 (2018).

54 *Id.* at 919; *see* United States v. AT&T, Inc., 310 F.Supp.3d 161, 161 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

is likely at an end.[55] In 2021, the Biden Administration announced a new executive order to strengthen marketplace competition and better enforce antitrust law. [56]

In the same year, and in line with President Biden's executive order's requirement for the FTC and DOJ to review their guidelines, the FTC withdrew from the 2020 Vertical Merger Guidelines. [57] In December 2023, the FTC and DOJ released New Merger Guidelines that combine the previously separately drafted Horizontal and Vertical Merger Guidelines.[58] Over the last decade, many in the antitrust enforcement community have battled with the rationale for separating guidelines for horizontal and vertical mergers.[59] By releasing combined guidelines, the Biden Administration has indicated they will take consistent approaches for horizontal and vertical merger enforcement.[60] The consistency in these new draft guidelines for evaluating horizontal and vertical mergers may indicate heightened enforcement against vertical mergers in a way not seen for decades.[61] In fact, in 2022, the FTC began twenty-four horizontal and vertical merger enforcement challenges, the second highest number of challenges recorded in the last decade.[62]

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55 *See* Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021) .

56 *Id.*

57 *See id.;* Khan et al., *supra* note 21, at 1–2.

58 *FTC and DOJ Seek Comment on Draft Merger Guidelines*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N (Jul. 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines.

59 *See* Hoffman, *supra* note 9, at 1–2.

60 *See FTC and DOJ Seek Comment on Draft Merger Guidelines*, *supra* note 58.

61 *See id.*

62 *See* Maribeth Guarino & Catherine Tran, *The FTC is Cracking Down on Big Healthcare Companies,* U.S. PIRG EDUCATION FUND (Jan. 24, 2024), https://pirg.org/edfund/articles/the-ftc-is-cracking-down-on-big-healthcare-companies/; *see also* LINA KHAN & JONATHAN KANTER, U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2022 2 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/fy2023hsrreport.pdf.

Increased enforcement does not necessarily mean increased litigation, however.[63] If the FTC believes that a proposed merger violates the law, the agency may attempt to attain voluntary compliance by entering into a consent decree with the company.[64] A company that signs a consent decree does not admit that it violated the law, but it must agree to stop the disputed practices or take steps to resolve anticompetitive aspects of the challenged merger.[65] "If a consent decree agreement cannot be reached, the FTC may issue an administrative complaint or seek injunctive relief in federal courts."[66] The FTC may at times go directly to federal court for a preliminary injunction while the agency reviews a proposed merger.[67]

In twenty years of vertical mergers challenged by the FTC and DOJ, many have been settled pre-litigation by consent decree of the FTC and DOJ, and the remedies have been "behavioral."[68] Settlements have allowed vertical mergers if parties agree to remedies that would soften the competitive impact of merging such as information firewalls, non-discrimination requirements, and arbitration.[69]

C. Merger Analysis

1. Theories of Harm

The FTC and DOJ generally rely on the same broad analytical tools to evaluate horizontal and vertical mergers including defining

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63 *The Enforcers*, *supra* note 31.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 Thomas L. Greaney, Visiting Professor of Law, UC Hastings College of Law Chester A. Myers Professor Emeritus, St. Louis University School of Law, Before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights Hearing: Your Doctor Your Doctor/Pharmacist/Insurer Will See You Now: Competitive Implications of Vertical Consolidation in the Healthcare Industry 5 (June 12, 2019), https://www.judiciary.senate.gov/imo/media/doc/Greaney%20Testimony.pdf.

69 *Id.*

markets, testing theories of harm, and evaluating efficiencies.[70] The New Merger Guidelines specifically analyze vertical mergers under "Guideline 5: Mergers Can Violate the Law When They Create a Firm That May Limit Access to Products or Services That Its Rivals Use to Compete."[71] Traditionally, in reviewing horizontal mergers, the government can establish a presumption of anticompetitive effects through statistics and changes in market concentration.[72] However, in vertical mergers, because the merging firms are not direct competitors, there is no immediate change in market shares.[73] For a vertical merger, "there is no short-cut way to establish anticompetitive effects, as there is with horizontal mergers."[74] Instead, the government must show that the merger is likely to substantially lessen competition in a defined relevant market.[75] Through the New Merger Guidelines, the DOJ and FTC clarify the analytical approaches they will take in response to new legal precedent since 2019.[76]

In 2019, the FTC unsuccessfully litigated its first vertical merger in decades between AT&T, a video distributor, and Time Warner, a content producer.[77] The FTC argued three theories of harm: that the vertical merger would 1) allow AT&T to increase their *bargaining leverage* with rival distributors, 2) increase the risk that AT&T will act to *slow the growth of competitors* in virtual video distribution, and 3) *foreclose competitors* from using one of Time Warner's prod-

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70 Hoffman, *supra* note 9, at 1–2.

71 2023 MERGER GUIDELINES, *supra* note 14, at 13.

72 United States v. AT&T, Inc., 310 F.Supp.3d 161, 191 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

73 *Id.* at 192.

74 *Id.*

75 *Id.* at 191.

76 2023 MERGER GUIDELINES, *supra* note 14, at 4.

77 *See AT&T, Inc.*, 310 F.Supp.3d at 178.

ucts as a promotional tool.[78] The court ultimately sided with AT&T because the government's evidence of harm was insufficient.[79]

The New Merger Guidelines adopt three specific theories of harm from vertical mergers, clarifying the FTC and DOJ approach based on precedent since *AT&T*: 1) limiting access, foreclosure, and raising rivals' costs, 2) gaining or increasing access to rivals' completely sensitive information, thereby facilitating coordination or undermining their incentives to compete, or 3) deterring rivals from investing because of the risk that a merged firm could limit their access.[80]

In assessing the risk of the first theory of harm—that a merged firm may limit access to a relevant product that rivals rely on—the New Merger Guidelines adopt two analytical approaches laid out in *Illumina, Inc. v. Federal Trade Commission*.[81] Notably, *Illumina* was decided three days before the release of the New Merger Guidelines and cited multiple times.[82] Under the first approach, the FTC and DOJ will examine the "ability and incentive to foreclose rivals" based on four factors: 1) the availability of substitute products and services downstream or upstream rivals may access, 2) competitive significance of the related product – how important a limited product or service is for rivals , 3) the effect on competition in the relevant market, and 4) the level of actual competition between the merged firm and the dependent firms.[83] Under the second approach, the FTC and DOJ will examine "industry factors and market structure" through 1) structure of the related market—to what extent the share of the related market is foreclosed, 2) structure of the relevant market, 3) nature and purpose of the merger, and 4) trend towards vertical integration

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78 *Id.* at 194.

79 *Id.*

80 2023 MERGER GUIDELINES, *supra* note 14, at 13.

81 *See* 2023 MERGER GUIDELINES, *supra* note 14, at 13; Illumina, Inc. v. Fed. Trade Comm'n, 88 F.4th 1036, 1036 (5th Cir. 2023).

82 *Illumina*, 88 F.4th at 136.

83 2023 MERGER GUIDELINES, *supra* note 14, at 14.

in related and relevant markets. [84] In 2025, after the release of the Merger Guidelines, the Southern District of Texas affirmed the *Illumina* "ability and incentive" approach in a vertical merger opinion for a mattress manufacturer and retailer.[85]

Under the second theory of harm—completely sensitive information—courts weigh whether 1) the merged firm will gain access to data of rivals, 2) the merged firm has the inventive to share the data with the competing portion of the merged firm, 3) rivals' fear of the merged firm using these data or insights will chill innovation, and 4) less innovation means less competition in the relevant markets.[86]

Under the third theory of harm—deterrence of rivals from investing—rivals or potential rivals may be reluctant to invest in a market if their success is dependent on access to products or services from the merged firm. [87] Here, FTC and DOJ view the mere threat of foreclosure as a risk to competition. [88]

2. Defenses

Once the government satisfies a prima facie case under Section 7 through a theory of harm, the burden shifts to defendants to provide sufficient evidence that the government inaccurately predicts the relevant transaction's probable effect on future competition.[89] The New Merger Guidelines recognizes three rebuttal defenses: failing firms, entry and repositioning, and procompetitive efficiencies.[90] This Comment focuses on efficiencies where "post-merger efficien-

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84 2023 MERGER GUIDELINES, *supra* note 14, at 15.

85 Fed. Trade Comm'n v. Tempur Sealy Int'l, Inc., No. 4:24-cv-02508, 2025 WL 617735, at *28–34 (S.D. Tex Jan. 31, 2025).

86 United States v. UnitedHealth Grp. Inc., 630 F.Supp.3d 118, 130 (D.D.C. 2022), *dismissed*, No. 22-5301, 2023 WL 2717667 (D.C. Cir. 2023).

87 2023 MERGER GUIDELINES, *supra* note 14, at 17.

88 2023 MERGER GUIDELINES, *supra* note 14, at 18.

89 United States v. AT&T, Inc., 310 F.Supp.3d 161, 191 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

90 2023 MERGER GUIDELINES, *supra* note 14, at 30–32.

cies…outweigh the merger's anticompetitive effects."[91] Efficiencies are gained when merging firms are able to reduce costs that ultimately lead to cost-savings for the consumer.[92]

Five circuits (the Fifth, Sixth, D.C., Eighth, and Eleventh) have suggested that proof of post-merger efficiencies could rebut a Section 7 prima facie case.[93] However, none of these courts have actually held that the alleged efficiencies were sufficient in their final decisions and have instead relied on other grounds in their decision.[94] Courts recognizing the defense have made clear that a Section 7 defendant must "clearly demonstrate" that "the proposed merger enhances rather than hinders competition because of the increased efficiencies."[95] Because Section 7 seeks to avert monopolies, proof of "extraordinary efficiencies" is required to offset the anticompetitive concerns in highly concentrated markets.[96] In *Illumina,* the court noted that "an efficiency defense is very difficult to establish."[97]

The FTC and DOJ are clearly skeptical of efficiency defenses.[98] In fact, efficiency defenses were the primary reason the FTC pulled away from the 2020 Vertical Merger Guidelines.[99] Specifically, the FTC cited concerns that courts may inappropriately rely on efficiencies such as the Elimination of Double Marginalization doctrine (EDM) as a rebuttal defense to anticompetitive agreements.[100] EDM is the belief that by vertically integrating partners across a supply chain, downstream partners will pass the savings of decreased mark-ups

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91 *AT&T, Inc.,* 310 F.Supp.3d at 191.

92 *See* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 5, at 29–31.

93 Saint Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (9th Cir. 2015); Illumina, Inc. v. Fed. Trade Comm'n., 88 F.4th 1036, 1059 (5th Cir. 2023).

94 *St. Luke's Health Sys.*, 778 F.3d at 790.

95 United States v. Long Island Jewish Med. Ctr., 983 F.Supp. 121, 137 (E.D.N.Y. 1997).

96 *St. Luke's Health Sys.*, 778 F.3d at 790.

97 Illumina, Inc. v. Fed. Trade Comm'n, 88 F.4th 1036, 1061 (5th Cir. 2023).

98 *See* 2023 MERGER GUIDELINES, *supra* note 14, at 32; s*ee also* Khan et al., *supra* note 21, at 4.

99 Khan et al., *supra* note 21, at 1–2.

100 *Id.* at 2.

from an upstream partner to the consumer.[101] The FTC reasoned that efficiencies are not a part of statutory law and use as a defense has never been formally recognized by the Supreme Court.[102] In fact, the Supreme Court has only held that "possible economies [from a merger] cannot be used as a defense to illegality."[103]

Although EDM was prominently included in the 2020 Vertical Merger Guidelines, the first draft of the New Merger Guidelines that was available for public comment was silent on EDM as a defense.[104] Surprisingly, likely after the influx of public comments, the FTC and DOJ reintroduced EDM as a small footnote in the New Merger Guidelines.[105] The New Merger Guidelines indicate that the FTC and DOJ will weigh evidence of efficiencies developed before a merger challenge as more probative than evidence developed during investigation or litigation.[106] Because of the lack of Supreme Court precedent and mixed messaging from the FTC, efficiency arguments, therefore, are more likely to persuade FTC or DOJ to close an investigation or reach a consent decree, not win in court.[107]

Under the New Merger Guidelines, and in line with circuit court opinions, claimed efficiencies must satisfy certain criteria.[108] First, the defendant must demonstrate that the claimed efficiencies are "merger-specific," meaning that the efficiency must only be able to be achieved by merger and not via other methods such as contractual

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101 *See id.* at 4.

102 *Id.* at 3.

103 Fed. Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568, 580 (1967).

104 U.S. DEP'T OF JUST. & FED. TRADE COMM'N, DRAFT MERGER GUIDELINES FOR PUBLIC COMMENT 31–34 (2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

105 *See Federal Trade Commission and Justice Department Release 2023 Merger Guidelines*, FED. TRADE COMM'N (Dec. 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines; 2023 MERGER GUIDELINES, *supra* note 14, at 16.

106 2023 MERGER GUIDELINES, *supra* note 14, at 32 n. 69.

107 *See id.* at 32 n. 69; Gibson, *supra* note 12, at 1970–71.

108 2023 MERGER GUIDELINES, *supra* note 14, at 32.

agreements.[109] Second, claimed efficiencies must be verifiable, not merely speculative.[110] Third, cost-savings must be likely to be passed on to consumers.[111] Fourth, the FTC and DOJ will not consider efficiencies that require a decrease in competition in a separate market.

III. VERTICAL MERGERS IN HEALTHCARE

In healthcare, vertical mergers allow entities and providers, who are at different levels of the healthcare delivery system, to increase their alignment of clinical and financial risk.[112] Vertical arrangements may include products where one is an input or a complement for another such as surgeons and hospitals, or primary care physicians and specialists.[113] In healthcare, vertical mergers can include combinations such as hospitals and physician groups, payers and healthcare providers, payers and pharmacy benefit managers, or payers and healthcare technology providers.[114] Additionally, vertical integration allows for healthcare models such as capitated insurance plans.[115] In capitated insurance plans, integrated payer-providers can undertake coordinated management of clinical and financial risk.[116] Proponents of consolidation in the healthcare industry explain that mergers are often designed to integrate the delivery of care, provide new services,

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109 *Id.*; Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790–91 (9th Cir. 2015).

110 2023 MERGER GUIDELINES, *supra* note 14, at 32; *St. Luke's Health Sys., Ltd.*, 778 F.3d at 791.

111 *See* 2023 MERGER GUIDELINES, *supra* note 14, at 32; Illumina, Inc. v. Fed. Trade Comm'n, 88 F.4th 1036, 1059 (5th Cir. 2023).

112 Brian J. Miller & George L. Wolfe, *Managed Care Marketplaces: Growing Drivers of Payer-Provider Vertical Integration*, ANTITRUST SOURCE 3 (Apr. 2017), https://www.akingump.com/a/web/57128/aoiok/wolfe-article.pdf.

113 *See id.* at 3–4.

114 NOETHER & MAY, *supra* note 11, at 3.

115 Miller & Wolfe, *supra* note 112, at 4.

116 Miller & Wolfe, *supra* note 112, at 4.

lower patient costs, share technology, and bear the financial risk of value-based care.[117]

Many healthcare entities argue that the combined effect of recent legislation such as the Affordable Care Act and Medicaid Access & CHIP Reauthorization Act, has created incentives for vertical integration.[118] The Affordable Care Act (ACA) creates incentives for hospitals and physicians to develop innovative organizational structures that are beneficial to bundled payments and global reimbursements.[119] By creating marketplaces that spur innovation in risk-sharing arrangements and insurance design, the ACA has promoted vertical integration.[120] The Medicaid Access & CHIP Reauthorization Act ties reimbursement incentives for physicians to join alternative payment models which include greater payor, hospital, and physician coordination.[121]

A. Withdrawal of Healthcare Safety Zones

The FTC and DOJ have successfully challenged several horizontal mergers in hospital, physician, and insurance sectors that demonstrate a close scrutiny of antitrust enforcement in healthcare.[122] Historically, vertical challenges in healthcare have been sparce.[123] However, under the Biden administration, the FTC and DOJ have indicated they are ramping up antitrust enforcement in healthcare, citing fears of increasingly anticompetitive behaviors and rising patient costs.[124] For example, in 2021, the FTC began requesting claims data

117 Gibson, *supra* note 12, at 1960.

118 Greaney, *supra* note 53, at 918.

119 *Id.*

120 *See* Miller & Wolfe, *supra* note 109, at 4.

121 Greaney, *supra* note 53, at 919, 920.

122 *Id.* at 918.

123 *Id.* at 919.

124 Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 9, 2021).

from insurers claims to better understand healthcare markets and mergers.[125]

In addition to the merger guidelines, since the 1990s, the healthcare industry has relied on joint statements from the FTC and DOJ as a roadmap for antitrust enforcement.[126] These joint statements include the 1993 "FTC and DOJ Antitrust Enforcement Policy Statements in the Health Care Area", the 1996 "Statements of Antitrust Enforcement Policy in Health Care", and the 2011 "Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program." [127]

The original 1993 Statements were designed to provide reassurance that smaller hospitals and physician practices could adapt to managed care without violating antitrust law.[128] The statement creat-

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[125] Cory Capps et al., *Stacking the Blocks: Vertical Integration and Antitrust in the Healthcare Industry,* CPI ANTITRUST CHRON. 4 (May 2021), https://www.bateswhite.com/media/publication/212_02-CPI_-_CDSZ_-_FINAL.pdf; Michael G. Vita, *Physician Group and Healthcare Facility Merger Study*, FED. TRADE COMM'N (Apr. 14, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/04/physician-group-healthcare-facility-merger-study.

[126] Jesse Berg, *A New Vacuum in Antitrust? DOJ Withdraws Longstanding Health Care Enforcement Statements*, LATHROP GPM (Feb. 10, 2023), https://www.lathropgpm.com/newsroom-alerts-72707.html; *see* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, DEPARTMENT OF JUSTICE AND FTC ANTITRUST ENFORCEMENT POLICY STATEMENTS IN THE HEALTH CARE AREA (1993), https://www.justice.gov/archive/atr/public/press_releases/1993/211661.pdf [hereinafter 1993 STATEMENT]; s*ee also* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 3 (1996), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf [hereinafter *1996 Statement*]; *see also* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, STATEMENT OF ANTITRUST ENFORCEMENT POLICY REGARDING ACCOUNTABLE CARE ORGANIZATIONS PARTICIPATING IN THE MEDICARE SHARED SAVINGS PROGRAM 3 (2011), https://www.justice.gov/d9/atr/legacy/2011/10/20/276458.pdf [hereinafter 2011 STATEMENT].

[127] *See* 1993 STATEMENT, *supra* note 126, at 1; *See also* 1996 STATEMENT, *supra* note 126, at 3; *See also* 2011 STATEMENT, *supra* note 126, at 3.

[128] Thomas L. Greaney et al., *The Department of Justice Withdraws 'Outdated' Antitrust Health Care Guidance*, HEALTH AFFAIRS (Apr. 5, 2023), https://www.healthaffairs.org/content/forefront/department-justice-withdraws-outdated-antitrust-health-care-guidance; *see* 1993 STATEMENT, *supra* note 126, at 1, 5–6.

ed "antitrust safety zones" that were exempt from antitrust challenges.[129]

The 1996 Statements of Antitrust Enforcement Policy in Health Care—Statement 9 in particular—addressed vertical mergers in healthcare.[130] Statement 9 clarified that although agreements among competitors to fix prices are per se illegal, if the providers' integration through the network is likely to produce significant efficiencies that benefit consumers and the agreements are reasonably necessary to achieve said efficiencies, the agencies would analyze the merger under a "rule of reason." [131] Under a "rule of reason" analysis, FTC and DOJ will abandon challenges where anticompetitive effects are outweighed by any procompetitive efficiencies resulting from the venture.[132]

Additionally, Statement 9 created a safety zone for vertically merged multi-provider networks such as physician-hospital organizations where participants demonstrate substantial financial and clinical integration.[133] Substantial financial risk includes agreements to provide capitated rates, agreements to provide designated services to a health plan for a predetermined percentage of premiums or revenue from the plan, use by the venture to achieve cost-containment goals such as withholding compensation or establishing cost and utilization targets, and agreements by the venture to provide a mix of services for a fixed, predetermined payment.[134] Clinical integration, for example, includes standards and protocols to govern treatment and utilization of services, information systems to measure and monitor both the individual performance of the hospital and physicians and aggregate network performance, and procedures to modify hos-

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[129] Greaney et al., *supra* note 128.

[130] 1996 STATEMENT, *supra* note 126, at 115.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

pital and physician behavior and assure adherence to network standards and protocols.[135]

Expanding on antitrust enforcement in healthcare, in 2011, the FTC and DOJ issued a statement creating additional safety zones for Accountable Care Organizations (ACOs).[136] ACOs are groups of doctors, hospitals, and other health care providers who share responsibility and financial risk for a set of patients. [137] The ACO model was created by the Centers for Medicare and Medicaid Innovation to test alternative methods of healthcare financing.[138] ACOs contract with Medicare to deliver care and are either rewarded with shared cost-savings, if health care spending for patient beneficiaries is below Medicare cost targets, or are denied reimbursement, if spending is too high.[139] Because of this financial risk, ACOs encourage partnerships among doctors, hospitals, and other clinicians to vertically integrate.[140] These ACO safety zones created by FTC and DOJ in 2011 were another example of FTC and DOJ's previously relaxed attitude for vertical mergers in healthcare.

However, in February 2023, the DOJ, and later the FTC, abruptly abandoned all three joint statements, leaving the healthcare industry without much guidance on antitrust boundaries. [141] The DOJ justified its withdrawal by citing the changing modern health care industry

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135 *Id.*

136 2011 STATEMENT, *supra* note 126, at 6.

137 *Accountable Care Organizations (ACOs): General Information*, CTR. FOR MEDICARE & MEDICAID SERV., https://www.cms.gov/priorities/innovation/innovation-models/ACO (last visited Mar. 31, 2025); Emily Gee & Ethan Gurwitz, *Provider Consolidation Drives Up Health Care Costs*, CTR. FOR AM. PROGRESS (Dec. 5, 2018), https://www.americanprogress.org/article/provider-consolidation-drives-health-care-costs/.

138 Miller & Wolfe, *supra* note 112, at 6.

139 *Id.*

140 *See id.*

141 *See Justice Department Withdraws Outdated Enforcement Policy Statements*, U.S DEP'T OF JUST. (Feb. 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.

and directly pointed towards overly permissive guidance on information sharing allowed under the joint statements.[142]

B. Types of Healthcare Vertical Mergers

Procompetitive efficiencies and anticompetitive restraints of vertical mergers differ depending on the types of healthcare entities involved.[143] Below are common types of vertical mergers in healthcare.

1. Hospitals & Physician Groups

First, for mergers between hospitals and physician groups, proponents state that mergers facilitate more efficient exchange of patient clinical data, which should lower prices because providers and hospitals are complementary products rather than substitutes.[144] However, some economic research has shown that integration between hospitals and physician groups results in higher prices because hospitals are able to negotiate higher prices for physician services from payers than physician groups could themselves.[145] Additionally, physicians may foreclose referrals to physicians in rival hospitals.[146] When hospitals in concentrated markets acquire physician groups, they have the ability to raise the prices their employed physicians charge, exercising their market power.[147] As of 2018, thirty-one percent of physician practices were owned by hospitals, and few have been challenged or even investigated by the FTC.[148]

In *Omni Healthcare v. Health First,* a federal district court evaluated whether dominant hospital system's acquisition of a large physician practice is a violation of Section 7 of the Clayton Act. [149] In that

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142 *Id.*

143 Capps et al., *supra* note 125, at 2.

144 *Id.* at 4.

145 *Id.* at 5.

146 *Id.* at 6.

147 Greaney, *supra* note 68, at 3.

148 Capps et al., *supra* note 125.

149 Omni Healthcare Inc. v. Health First, Inc., No. 6:13-cv-1509, 2016 WL 4272164, at *11 (M.D.

case, challengers argued that the vertical merger created two types of foreclosures.[150] First, customers were foreclosed from other providers when the merged firm creates exclusive referral arrangements between providers in the merged firm. Second, inputs were foreclosed because the merged firm would forego contracts with third party payers.[151] *Omni* settled before the case was fully tried and the merged hospital-physician group was never able to defend itself in court.[152]

In 2015, the Ninth Circuit reviewed a merger between a hospital and physicians in *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.*[153] Although the FTC successfully challenged the merger based on the horizontal impacts of overlapping primary care physician practices, the agency never challenged the vertical integration between hospital and physicians.[154] As a defense, the hospital claimed that shared electronic medical records between the hospital and acquired physicians would improve efficiencies, but the court held that "the Clayton Act does not excuse mergers that lessen competition simply because the merged entity can improve its operations."[155] Because of the relatively short history of enforcement by the FTC and DOJ in vertical mergers and low thresholds for mandatory reporting of mergers under the Hart-Scott-Rodino Antitrust Improvements Act, legal precedent on mergers between hospitals and physicians is not available and analytical frameworks remain untested.[156]

Fla. 2016).

150 *Id.* at *13.

151 *Id.*

152 Miller & Wolfe, *supra* note 112, at 3.

153 Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 781 (9th Cir. 2015).

154 Capps et al., *supra* note 125, at 4; *St. Luke's Health System, Ltd.*, 778 F.3d at 790.

155 Capps et al., *supra* note 125, at 4; *St. Luke's Health System, Ltd.*, 778 F.3d at 790.

156 Capps et al., *supra* note 125, at 4.

2. Payers & Providers

Second, for mergers between payers and providers, proponents argue that consumers may benefit from a seamless care experience.[157] This includes providing single-source billing for consumers.[158] Increased vertical alignment may also improve quality and safety through central planning and the design of safety and IT systems.[159] Vertically integrated payer-providers can also eliminate insurance coverage disputes that occur in loosely integrated provider networks.[160] For example, Medicare Advantage plans operated by a vertically integrated payer-provider have been shown to perform better on customer ratings and provide a better customer care experience.[161] Unlike hospitals who may have incentive for higher volume, insurers benefit from lower health costs and services provided to its enrollees by providers.[162] However, insurers may anticompetitively foreclose its acquired providers from contracting with rival health plans.[163] Further, insurers may foreclose their enrollees from accessing rival providers outside of the merged firm through mechanisms such as network tiering.[164] Network tiering allows insurers to grade providers and subsequently incentivize patients to use preferred providers by reducing their copayment and/or co-insurance responsibilities.[165]

In 2019, the FTC, citing both horizontal and vertical concerns, challenged UnitedHealth's, a large payer's, $4.3 billion acquisition of DaVita, a provider group.[166] The FTC alleged that the acquisition

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157 Miller & Wolfe, *supra* note 112, at 5.

158 *Id.* at 8.

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at 8, 9.

163 *Id.* at 10.

164 *Id.* at 5.

165 *Id.* at 1.

166 *FTC Imposes Conditions on UnitedHealth Group's Proposed Acquisition of DaVita Medical Group*, FED. TRADE COMM'N (Jun. 19, 2019), https://www.ftc.gov/news-

would result in a near monopoly of eighty percent of the market for services delivered by managed care provider organizations in the Nevada area.[167] Further, the FTC alleged that the acquisition would increase the likelihood that the merged firm would increase the costs of provider services to rival plans, and the result would be increased payments from Medicare and increased costs for seniors.[168] Ultimately, the FTC approved the deal once UnitedHealth and Davita agreed to divest, or sell, a provider group within Davita to a rival provider and insurer.[169] Nationally, UnitedHealth Group, Centene, Humana, and Anthem have recently acquired provider groups.[170]

Similar to hospitals and physician groups, the analytical frameworks for evaluating vertical merger challenges of payers and providers remain largely untested.

3. Pharmacies & Health Plans

Third, for mergers between pharmacies and health plans, proponents argue that information sharing through merging allows for better designed formularies and better designed incentives for medication compliance.[171] Further, simplifying and marketing preventive care such as flu shots available through pharmacies would benefit patients and lower downstream care through preventive medicine. [172]

Challengers argue that mergers between health plans and pharmacies would foreclose other retail pharmacies by requiring enrollees

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events/news/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition-davita-medical-group.

167 *Id.*

168 *Id.*

169 *Id.*

170 Capps et al., *supra* note 125, at 7.

171 GAUTAM GOWRISANKARAN ET AL., COMMENTS ON THE JANUARY 2020 VERTICAL MERGER GUIDELINES AND THE HEALTHCARE SECTOR 4 (2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg15_gowrisankaran_kifer_older_aguilar_sfekas_comment_on_vertical_guidelines_2-22-20.pdf.

172 *Id.*

to use the acquired pharmacy system.[173] Further, the retail pharmacy may foreclose customers not enrolled in the merged health plan.[174] In response, proponents argue health plans have weak incentive to foreclose rival pharmacies because enrollees would be pushed to other insurers. [175]

In recent years, the FTC and DOJ have challenged pharmacy-health plan mergers between CVS and Aetna, United Healthcare and Optum, and Cigna and Express Scripts.[176] Despite the challenges, each merger has gone forward with consent from the FTC and DOJ through consent decrees and settled modifications to the original merger set-up.[177] In the DOJ's statement closing the investigation into Cigna and Express Scripts, the agency reasoned that other vertically integrated pharmacy benefit managers and smaller pharmacy benefit managers will continue to be available to compete for Cigna customers.[178]

4. Payers & Healthcare Technology Providers

Fourth, for mergers between payers and healthcare technology providers, proponents claim that increased data insights simplify core clinical, administrative, and payment processes resulting in lower costs for patients and healthcare systems.[179] Opponents argue that a merged payer-technology provider could provide sensitive data insights into patient claims from competitor health plans.[180] Access to

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173 Greaney, *supra* note 53, at 920.

174 *Id.*

175 GOWRISANKARAN ET AL., *supra* note 171, at 8.

176 Greaney, *supra* note 68, at 4.

177 *Id.*

178 *Statement of the Department of Justice Antitrust Division on the Closing of Its Investigation of the Cigna-Express Scripts Merger*, U.S. DEP'T OF JUST. (Sept. 17, 2018), https://www.justice.gov/atr/closing-statement.

179 *Optum and Change Healthcare Complete Combination*, UNITEDHEALTH GRP. (Oct. 3, 2022), https://www.unitedhealthgroup.com/newsroom/2022/2022-10-3-optum-change-healthcare-combination.html.

180 Paige Minemyer, *UnitedHealth Closes Acquisition of Change Healthcare*, FIERCE

sensitive data involving rivals can undermine competition or facilitate coordination among firms by allowing the merged firm to observe its rival's competitive strategies faster and more confidently.[181]

In 2023, the DOJ, in *United States v. UnitedHealth Group Inc.,* challenged a $13 billion vertical merger between UnitedHealth Group, a large payer, and Change Healthcare, a healthcare data clearinghouse.[182] There, the court found that the ability to access sensitive data for anticompetitive purposes is not equivalent to being likely to do so.[183] First, because the merged firm already had access to similar payer-agnostic data pre-merger and did not use the data to unfairly undermine competitors, the court reasoned that there was insufficient real-world evidence.[184] Second, the court placed special weight on data firewalls that limit access to sensitive data as evidence against likely data misuse.[185] Lastly, the court believed that divestiture portions of Change Healthcare before the merger restored competition lost by the merger.[186] Because of these factors, the DOJ failed in its attempt to challenge the vertical merger under a completely sensitive information theory of harm.[187] Ultimately, the DOJ dropped the appeal of its case because of the divestiture.[188]

HEALTHCARE (Oct. 3, 2022, 12:11 PM), https://www.fiercehealthcare.com/payers/unitedhealth-closes-acquisition-change-healthcare.

181 2023 MERGER GUIDELINES, *supra* note 14, at 17.

182 United States v. UnitedHealth Grp. Inc., 630 F.Supp.3d 118, 126 (D.D.C. 2022), *dismissed*, No. 22-5301, 2023 WL 2717667 (D.C. Cir. 2023).

183 *Id.* at 143.

184 *Id.* at 141–43.

185 *Id.* at 144.

186 *Id.* at 135.

187 *Id.* at 140–43.

188 Paige Minemyer, *DOJ, State Attorneys General Drop Appeal to UnitedHealth-Change Healthcare Deal Ruling*, FIERCE HEALTHCARE (Mar. 21, 2023, 5:15 PM), https://www.fiercehealthcare.com/payers/doj-state-ags-drop-appeal-unitedhealth-change-healthcare-deal-ruling.

C. Unique Challenges in Healthcare

In public comments to the 2020 Vertical Merger Guidelines, industry experts have suggested several distinct features of healthcare that should be better incorporated into antitrust analysis of healthcare mergers.[189]

First, consumer patients have *moral hazard*—patients with health insurance do not typically bear the full marginal cost of healthcare services.[190] Moral hazard may incentivize providers and patients to overutilize care in ignorance of the costs.[191] However, vertical integrations, such as those between payers and providers, curtail moral hazard by incentivizing shared financial risk and cost-savings.[192] This integration is beneficial to antitrust law's central concern – protecting the consumer.[193]

Second, consumer patients have *information asymmetry*—patients have limited information on the price and value of different treatments and may rely on guidance from medical professionals, who are generally not the payers.[194] This information asymmetry allows healthcare entities to foreclose rival competitors from patients because patients do not have a full view of the available market and substitutes. [195]However, foreclosure has procompetitive benefits when referrals within the merged entity result in better continuity of care and less duplication of services.[196]

Third, providers follow *complex reimbursement schemes*—this includes bundled payments, rebates based on cost savings achieved

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189 GOWRISANKARAN ET AL., *supra* note 171, at 1–2, 13.

190 *Id.* at 2.

191 *Id.* at 2.

192 *Id.* at 12.

193 *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Mar. 31, 2025).

194 Gowrisankaran et al., *supra* note 171, at 2.

195 *Id.*

196 *Id.*

(e.g. ACOs), and higher reimbursements conditioned on meeting quality metrics (e.g., Medicare Merit-based Incentive Payments, "MIPS" payments).[197] By withdrawing from historical enforcement guidance in healthcare, the FTC and DOJ have made it extraordinarily unclear to what extent healthcare entities can continue innovative integration mechanisms without running afoul of antitrust law.[198]

Fourth, healthcare has a unique *two-stage competition process*.[199] In the first stage providers compete to be included in insurer networks and negotiate reimbursement rates.[200] In the second stage, providers compete for patients.[201] This complex process creates murky analysis for relevant affected markets and effect on the consumer.[202]

IV. DEFENSES AGAINST VERTICAL MERGERS

Although the New Merger Guidelines provide some clarity on the boundaries of healthcare mergers, the guidelines place a clear emphasis on broader enforcement against mergers.[203] For example, by including the *Illumina* factors, the FTC and DOJ have expanded their capacity to find that a merged firm may limit access to a related product.[204] Although the FTC lost its challenge against UnitedHealth and Change Healthcare's access to patient data from rival health plans, the FTC and DOJ have doubled down and kept access to completely sensitive information as a major theory of harm for vertical

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197 *Id.*

198 *See Justice Department Withdraws Outdated Enforcement Policy Statements*, U.S. DEP'T OF JUST. (Feb. 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.

199 Gowrisankaran et al., *supra* note 171, at 2.

200 *Id.*

201 *Id.*

202 *Id.*

203 2023 MERGER GUIDELINES, *supra* note 14, at 4.

204 2023 MERGER GUIDELINES, *supra* note 14, at 13–14, 15.

mergers.[205] Looking towards the near future, merging healthcare entities will be forced to defend against aggressive antitrust enforcement for vertical mergers using only limited court precedent and fresh agency guidance. Based on court opinions and settlements since the seminal 2019 *AT&T* challenge, entities may be able to defend against vertical merger challenges by 1) proving the government failed to make a prima facie case under Section 7 of the Clayton Act, 2) demonstrating procompetitive efficiencies outweigh the anticompetitive effects of a vertical merger, or 3) proactively applying behavioral and structural remedies to settle cases or close investigations before litigation.[206]

A. Failure to make a Prima Facie Case

1. Real World Evidence

As discussed in Part I, under Section 7 of the Clayton Act, in order to establish a prima facie case, the government has the initial burden of showing that the specific merger under review is "likely to substantially lessen competition" in the relevant market based on real-world evidence.[207] Further, the evidence must not be based on speculation but must be based on a fact-specific analysis.[208]

In *AT&T*, the court rejected the government's assertion that the proposed vertical merger would cause increased bargaining leverage because although price increases would be possible, real-world pricing data from prior instances of vertical integration within the general industry had not produced the effects the government predict-

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[205] *See Justice Department Withdraws Outdated Enforcement Policy Statements*, *supra* note 198; *See also* United States v. UnitedHealth Grp. Inc., 630 F.Supp.3d 118, 141 (D.D.C. 2022), *dismissed*, No. 22-5301, 2023 WL 2717667 (D.C. Cir. 2023).

[206] *See Statement of the Department of Justice Antitrust Division on the Closing of Its Investigation of the Cigna-Express Scripts Merger*, U.S. DEP'T OF JUST. (Sept. 17, 2018), https://www.justice.gov/atr/closing-statement; *see also* 2023 MERGER GUIDELINES, *supra* note 14, at 30–32.

[207] United States v. AT&T, Inc., 310 F.Supp.3d 161, 190 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

[208] *Id.*

ed.[209] To defend against allegations of price increases, vertically merging healthcare firms can point towards claims data of similarly situated firms to show that price increases are unlikely to occur in the merger at issue. The recently requested health insurance claims data from large payers being sent to the FTC, as referenced in Part II, may be able to support such a defense.[210]

Similarly, in the FTC challenge with *UnitedHealth*, the government's allegation that confidentially sensitive information would be used to undermine competitors failed because of a lack of real-world evidence.[211] Because UnitedHealth already had access to similar data and there was no evidence that UnitedHealth had used that data to undermine competition or facilitate coordination among other firms previously, the court could not speculate that increased access to confidentially sensitive information would result in an anticompetitive violation. Under *UnitedHealth,* mere access to data is not enough to show that a merged firm is "likely to substantially lessen competition." [212]

2. Trends of Vertical Integration

Additionally, under the *Illumina* factors adopted by the New Merger Guidelines, to determine the risk that the merged firm may limit access to a related product or service so as to weaken or exclude rivals, the FTC and DOJ consider evidence about the trends of vertical integration between other firms in the relevant market as a mitigating factor. [213] The New Merger Guidelines state that vertical integration trends may be shown through evidence that a merger was motivated by a desire to avoid having its access limited due to similar

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209 *Id.* at 199.

210 *See* Michael G. Vita, *Physician Group and Healthcare Facility Merger Study*, FED. TRADE COMM'N (Apr. 14, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/04/physician-group-healthcare-facility-merger-study.

211 United States v. UnitedHealth Grp. Inc., 630 F.Supp.3d 118, 144 (D.D.C. 2022), *dismissed*, No. 22-5301, 2023 WL 2717667 (D.C. Cir. 2023).

212 *Id.* at 139–41.

213 2023 MERGER GUIDELINES, *supra* note 14, at 16.

transactions among other companies.[214] As discussed in Part II, healthcare legislation such as the ACA and the Medicaid Access & CHIP Reauthorization Act has promoted widespread vertical integration between payers, providers, and other health systems for coordinated management of clinical and financial risk.[215] Using evidence such as the thirty-one percent of hospital owned physician practices or the multiple payer-pharmacy benefit manager mergers already approved by FTC settlement and decree can be used to show that the risk of limited access theory of harm is mitigated by vertical trends within the industry. [216]

For decades, the FTC allowed vertical mergers of smaller hospitals and physician practices under an antitrust safety zone. [217] Pulling back from this allowance means that future hospitals and physician practices will not be able to merge in order to compete fairly with their merged competitors.[218] Thus, even with the rescinded healthcare safety zones, under the New Merger Guidelines, merging hospitals and physician groups that would have fallen into or close to the safety zone can point towards the previously allowed trend in vertical integration as a defense to competing fairly against merged firms in the market.[219]

B. Efficiencies

The recent withdrawals of the FTC and DOJ from Historical Merger Guidelines make clear that the FTC and DOJ approach efficiencies as a defense with skepticism. [220] Further, although some cir-

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214 2023 MERGER GUIDELINES, *supra* note 14, at 16.

215 Greaney, *supra* note 53, at 918.

216 *See* Capps et al., *supra* note 125, at 4; *see also* Greaney, *supra* note 68, at 3.

217 Berg, *supra* note 126; *see generally* 1993 STATEMENT, *supra* note 126, at 6; *see also* 1996 STATEMENT, *supra* note 126, at 2; *see also* 2011 STATEMENT, *supra* note 126, at 6.

218 Berg, *supra* note 126.; *see generally* 1993 STATEMENT, *supra* note 126, at 6; *see also 1996* STATEMENT, *supra* note 126, at 3; *see also* 2011 STATEMENT, *supra* note 126, at 1, 3.

219 *See* Berg, *supra* note 126.

220 Khan et al., *supra* note 21, at 3.

cuit courts have recognized efficiencies as a defense, it has never been grounds for a judgment.[221] Proponents of vertical mergers in healthcare often point towards greater clinical and financial efficiency which ultimately should result in cost-savings to the patient.[222] However, the FTC's recent 2023 withdrawal from antitrust safety zones for healthcare, which coincidentally were originally conceived to promote clinical and financial efficiency, indicates that healthcare defendants would likely be unsuccessful in using any type of efficiency as a defense with the DOJ and FTC.[223] Although efficiencies are included in the New Merger Guidelines, its value as a defense is in practice limited to reaching settlements or ending investigations, not for rebutting violations of Section 7 of the Clayton Act in trial.[224]

C. Proactive Remedies

Although remedies are not one of the listed defenses expressly listed under the New Merger Guidelines, court precedent and a history of settled FTC challenges demonstrates that if merged firms proactively initiate structural and behavioral remedies, challenges may be settled quickly or never even initiated.[225]

In the FTC's challenge to UnitedHealth and Change Healthcare, the court stated that the divestiture of a part of Change Healthcare handling confidentially sensitive information was not only a mitigating factor, it *resolved* the anti-competitive concerns raised by the government.[226] In the *Davita* settlement, divesting a portion of physician services to another health plan led the FTC to drop the claim al-

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221 Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 789-90 (9th Cir. 2015); Illumina, Inc. v. Fed. Trade Comm'n, 88 F.4th 1036, 1059 (5th Cir. 2023).

222 Miller & Wolfe, *supra* note 112, at 4.

223 1996 STATEMENT, *supra* note 126, at 123.

224 Gibson, *supra* note 12, at 1970; *See* 2023 MERGER GUIDELINES, *supra* note 14, at 32.

225 *See* 2023 MERGER GUIDELINES, *supra* note 14, at 2–3; *see also* United States v. UnitedHealth Grp. Inc., 630 F.Supp.3d 118, 135 (D.D.C. 2022), *dismissed*, No. 22-5301, 2023 WL 2717667 (D.C. Cir. 2023).

226 *See UnitedHealth Grp. Inc.*, 630 F.Supp.3d at 135.

together.[227] Proactive structural remedies, such as divesting portions of the merging parties most likely to cause anticompetitive concerns, seems to not only work as a rebuttal in court but also as a deterrent to further FTC and DOJ investigation and litigation.[228]

Additionally, merging firms may enter into behavioral remedies that may defeat the likelihood of substantially lessening competition.[229] The FTC frequently issues consent decrees that include remedies such as firewalls, non-discrimination requirements, and arbitration provisions before dismissing challenges.[230] In the FTC's challenge of UnitedHealth and Change Healthcare the court labeled UnitedHealth's existing data firewall policy as probative that the merged firm is *not* likely to exploit rival data.[231] In healthcare, therefore, having safeguards in place like those remedies frequently requested by the FTC is a sufficient defense against the government making a prima facie case under Section 7 of the Clayton Act.[232]

V. CONCLUSION

Over the last few years, antitrust enforcement has increased.[233] The FTC and DOJ—the agencies charged with antitrust enforcement—have repealed historical guidance on horizontal mergers, ver-

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227 *FTC Imposes Conditions on UnitedHealth Group's Proposed Acquisition of DaVita Medical Group*, FED. TRADE COMM'N (June 19, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition-davita-medical-group.

228 *Id.; see UnitedHealth Grp.*, 630 F.Supp.3d at 135.

229 *See UnitedHealth Grp.*, 630 F.Supp.3d at 150.

230 Greaney, *supra* note 68, at 6.

231 *UnitedHealth Grp.*, 630 F.Supp.3d at 150.

232 *Id.*

233 *See Promoting Competition in the American Economy*, 86 Fed. Reg. 36989 (July 14, 2021); Tara L. Reinhart & David P. Wales, *Biden's Broad Mandate Has Altered the Antitrust Landscape, Making Merger Clearance Process Less Predictable*, SKADDEN (Jan. 19, 2022), https://www.skadden.com/insights/publications/2022/01/2022-insights/regulation-enforcement-and-investigations/bidens-broad-mandate-has-altered-the-antitrust-landscape.

tical mergers, and healthcare antitrust safety zones and have left merging healthcare entities with little insight on appropriate boundaries for merging.[234] In tandem with rapidly changing guidance, the FTC and DOJ have exponentially increased the number of challenged mergers that are investigated and litigated.[235] Traditionally, the FTC and DOJ have focused on horizontal mergers between direct competitors, but over the last four years the agencies have placed an increased emphasis on vertical mergers.[236] Vertical mergers, mergers between parties along a supply chain, such as between a health plan and provider, can often have procompetitive effects like greater clinical and financial integration.[237] However, vertical mergers can also be anticompetitive when the merged firm forecloses patients or providers from rivals or when parties use the merger to access confidentially sensitive information about rivals.[238]

In December 2023, the FTC and DOJ jointly released New Merger Guidelines that laid out consolidated frameworks for how the agencies will analyze the competitive effects of both horizontal and vertical mergers as well as available defenses for challenges.[239] The New Merger Guidelines recognize only three defenses to rebut challenged mergers: 1) failing firms, 2) entry and repositioning, and 3) procompetitive efficiencies. [240] Recently, the FTC and DOJ have strongly critiqued the rebuttal weight of efficiency defenses against any anticompetitive effects of a merger.[241] Efficiencies are when merging firms are able to reduce costs, eliminate duplicative functions, or

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234 *See* 2023 MERGER GUIDELINES, *supra* note 14; *Justice Department Withdraws Outdated Enforcement Policy Statements*, U.S DEP'T OF JUST. (Feb. 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.

235 Guarino & Catherine, *supra* note 62; KAHN & KANTER, *supra* note 62, at 2.

236 Khan et al., *supra* note 21, at 2.

237 Gibson, *supra* note 12, at 1957.

238 2020 VERTICAL MERGER GUIDELINES, *supra* note 10, at 10.

239 2023 MERGER GUIDELINES, *supra* note 14, at 4.

240 2023 MERGER GUIDELINES, *supra* note 14, at 30–32.

241 2023 MERGER GUIDELINES, *supra* note 14, at 32.

achieve scale economies that pass on to the consumer through lower prices, improved quality, and enhanced services.[242] Efficiency defenses have never been formally recognized by the Supreme Court, and of the few circuit courts that have recognized it, none have relied on the defense alone as grounds for a final decision.[243] In practice, efficiency defenses carry more weight in investigation and settlement decisions than in trial. [244]

However, based on court opinions and settlements since the seminal 2019 *AT&T* vertical merger challenge, merging entities may also be able to defend against vertical merger challenges by proving the government failed to make a prima facie case under Section 7 of the Clayton Act.[245] Courts have placed significant emphasis on requiring real-world evidence of the likelihood of substantial competitive effects rather than simply conjectured or possible effects. [246]Additionally, by proactively applying behavioral and structural remedies such as divestitures or data firewalls, merged firms may be able to settle cases or close investigations before litigation. [247]

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242 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 5, at 29–31 (2010).

243 Saint Alphonsus Med. Ctr-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (9th Cir. 2015).

244 2023 MERGER GUIDELINES, *supra* note 14, at 32; *See* LATHAM & WATKINS LLP, U.S. FEDERAL JUDGE RULES EFFICIENCIES ANALYSIS INADMISSIBLE IN ANTITRUST MERGER TRIAL 2 (2022), https://www.lw.com/admin/upload/SiteAttachments/Alert%203009.pdf.

245 United States v. AT&T, Inc., 310 F.Supp.3d 161, 189 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

246 *Id.* at 192.

247 Greaney, *supra* note 68, at 6.