

**ST. ALPHONSUS MEDICAL CENTER V. ST. LUKE'S HEALTH
SYSTEM: THE UNCERTAIN APPLICATION OF THE
EFFICIENCIES DEFENSE IS LEADING TO UNPREDICTABLE
OUTCOMES IN HEALTHCARE MERGERS**

JAMIE L. BJORKLUND

Jamie L. Bjorklund, *St. Alphonsus Medical Center V. St. Luke's Health System: The Uncertain Application of the Efficiencies Defense is Leading to Unpredictable Outcomes in Healthcare Mergers*, 53 IDAHO L. REV. 577 (2017).

This article © Copyright 2017 Idaho Law Review Except as otherwise expressly provided, permission is hereby granted to photocopy materials from this publication for classroom use, provided that: (1) Copies are distributed at or below cost; (2) The author of the article and the *Idaho Law Review* are properly identified; (3) Proper notice of the copyright is affixed to each copy; and (4) Notice of the use is given to the *Idaho Law Review*.

ST. ALPHONSUS MEDICAL CENTER V. ST. LUKE'S HEALTH SYSTEM: THE UNCERTAIN APPLICATION OF THE EFFICIENCIES DEFENSE IS LEADING TO UNPREDICTABLE OUTCOMES IN HEALTHCARE MERGERS

JAMIE L. BJORKLUND*

TABLE OF CONTENTS

I. INTRODUCTION	578
II. UNDERSTANDING THE ISSUE.....	582
III. SECTION 7 OF THE CLAYTON ACT	584
IV. THE EFFICIENCIES DEFENSE.....	586
A. Elements of the Efficiencies Defense.....	586
B. Cost Based vs. Quality Efficiencies	587
C. The Supreme Court's Uncertain Ruling on the Efficiencies Defense	588
V. THE CIRCUITS' TAKE ON THE EFFICIENCIES DEFENSE.....	589
A. D.C. Circuit	590
B. Sixth Circuit.....	592
C. Eighth Circuit	593
D. Eleventh Circuit.....	594
E. Ninth Circuit.....	596
VI. <i>ST. ALPHONSUS V. ST. LUKE'S</i> : A BACKGROUND OF THE CASE.....	598

* University of Idaho College of Law, J.D., 2017.

A. The Merger.....	598
B. The District Court’s Determination.....	600
C. The Ninth Circuit’s Ruling	601
VII. ANALYSIS: PROBLEMS WITH THE CURRENT LAW AND SUGGESTIONS FOR SOLUTIONS.....	604
A. Under Current Antitrust Law, When, if Ever, Can Post Merger Efficiencies, That Allegedly Improve Patient Outcomes and Enhance Competition, Succeed in Rebutting a Section 7 Clayton Act Violation?	604
B. What Does This Mean for Healthcare Entities Trying to Stay in Compliance With the Affordable Care Act?.....	607
C. Current Antitrust Law is Inconsistent with Healthcare Policy.....	610
D. The Solution: Healthcare Entities Merger Specific Quality Efficiencies Should be Given More Weight in Determining Procompetitive Effects of the Merger.....	613
VIII. CONCLUSION	618

I. INTRODUCTION

In a time of rapid and extreme healthcare change following the passage of the Patient Protection and Affordable Care Act (ACA),¹ the need to have a certain process and application governing

1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

healthcare mergers is of the utmost importance.² The ACA has imposed significant changes on consumers as well as healthcare providers.³ Many providers and hospitals have started consolidating their entities to comply with the ACA, streamline care, and maintain profitability.⁴ In light of this increase in healthcare mergers, antitrust laws governing healthcare mergers should be reexamined and updated to reflect the current healthcare economy, as well as Congress' objective in passing such legislation.⁵

Mergers, specifically healthcare mergers, can potentially violate Section 7 of the Clayton Act if the merger has future anticompetitive effects.⁶ A merger may be enjoined under the Clayton Act if the potential for anticompetitive effects is alleged, even if actual anticompetitive facts are not proven.⁷ First, the entity challenging the merger must show a prima facie Clayton Act violation.⁸ The entity defending the merger then has to show that

2. Brief for Professors & Scholars of Law & Econ. & Int'l Center of Law & Econ. et. al. as Amici Curiae Supporting Appellants at 4–5, *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015) (Nos. 1:12-cv-00560- BLW, 1:13-cv-00116-BLW) [hereinafter Brief for Professors].

3. Melinda K. Abrams et al., *The Affordable Care Act's Payment and Delivery System Reforms: A Progress Report at Five Years*, THE COMMONWEALTH FUND (May 7, 2015), <http://www.commonwealthfund.org/publications/issue-briefs/2015/may/aca-payment-and-delivery-system-reforms-at-5-years>.

4. Leemore Dafny, *Hospital Industry Consolidation — Still More to Come?*, 370 N. ENGL. J. MED. 198, 198–99 (2014).

5. See Brief for Professors, *supra* note 2, at 3–6.

6. David L. Glazer, *Clayton Act Scrutiny of Nonprofit Hospital Mergers: The Wrong Rx for Ailing Institutions*, 66 WASH. L. REV. 1041, 1042 (1991) (citing 15 U.S.C. § 18 (2012)).

7. *Id.*

8. *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd. (St. Lukes)*, 778 F.3d 775, 788 (9th Cir. 2015) (“Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future.” (quoting *Hosp. Corp. of Am. v. F.T.C.*, 807 F.2d 1381, 1389 (7th Cir.1986))).

the merger is not anticompetitive, despite the prima facie showing.⁹ One way of doing this is to show merger-based efficiencies.¹⁰

The efficiencies defense consists of both cost efficiencies, and quality based efficiencies.¹¹ Cost efficiencies look at the financial savings that will result from combining entities, while quality based efficiencies focus on the efficiencies that improve the quality of the merged entity's product or performance.¹² The efficiencies-based defense is being applied inconsistently among the courts, leading to inconsistent and unpredictable outcomes in healthcare mergers relying on the efficiencies defense.¹³ Quality based efficiencies are often not given significant, if any, weight in merger analysis, which essentially disregards potential consumer benefits resulting from mergers generating quality efficiencies.¹⁴

The inconsistent application of the efficiencies defense in healthcare mergers between circuit courts, as well as the lack of certainty from the Supreme Court, leaves healthcare entities with uncertainty regarding the success or failure of mergers.¹⁵ This results in increased litigation, and a disruption in patient care.¹⁶ Some circuits, such as the D.C., Sixth, Eighth, and Eleventh, have recognized the efficiencies defense as a viable method of defeating an alleged Section 7 Clayton Act violation.¹⁷

9. 15 U.S.C. § 18 (2012).

10. *Id.*

11. Roger D. Blair & D. Daniel Sokol, *Quality-Enhancing Merger Efficiencies*, 100 IOWA L. REV. 1969, 1975 (2015).

12. *Id.*

13. *Id.* at 1993.

14. Brief for Professors, *supra* note 2, at 4.

15. *Id.* at 8.

16. *Id.*

17. See *ProMedica Health Sys., Inc. v. F.T.C.*, 749 F.3d 559 (6th Cir. 2014); *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 720–22 (D.C. Cir. 2001); *F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045, 1047 (8th Cir. 1999); *F.T.C. v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991). Each of these circuits has recognized that the efficiencies defense is a defense that can be used successfully in rebutting a prima facie showing under the Clayton Act.

However, other circuits, like the Ninth Circuit in *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.* (*St. Luke's*), have not clearly recognized the viability of efficiencies defenses in healthcare mergers, leaving healthcare entities who would rely on the defense in limbo as to whether or not a merger will be successful.¹⁸ Additionally, the circuits give uncertain and disproportional weight to cost based efficiencies and often ignore or provide unpredictable weight to quality based efficiencies.¹⁹

This article advocates that developing a certain and consistent application of the efficiencies defense in healthcare mergers will decrease litigation by providing a framework for healthcare entities seeking to merge. Additionally, this article advocates that giving increased weight to quality based efficiencies and ACA compliance is the best way to achieve this consistency. Finally, this article advocates that recognizing quality based efficiencies, and giving them greater weight in a Section 7 Clayton Act merger analysis, will bring antitrust law into accord with current healthcare policy. Recognizing quality based efficiencies will also improve the quality of healthcare delivery by acknowledging the benefit to consumers that results from the streamlined, integrated care that is achieved through healthcare mergers.

First, this article will seek to educate the reader on how the ACA has changed healthcare delivery systems.²⁰ This will examine the goals of the ACA, as well as how the ACA has changed the healthcare market for consumers and providers. This article will then look at Section 7 of the Clayton Act,²¹ focusing specifically on

18. *St. Luke's*, 778 F.3d 775, 789 (9th Cir. 2015).

19. *Id.* at 788; *ProMedica Health Sys.*, 749 F.3d at 559; *H.J. Heinz Co.*, 246 F.3d at 720; *Tenet Health Care Corp.*, 186 F.3d at 1047; *Univ. Health, Inc.*, 938 F.2d at 1206.

20. *See infra* Part II.

21. 15 U.S.C. § 18 (2012).

how the efficiencies defense can be used to rebut a prima facie showing of a Section 7 violation.²²

Next, this article looks at the difference between cost based and quality efficiencies, and how this distinction, as well as the efficiencies defense in general, are being applied inconsistently in merger cases in the courts.²³ Then this article will discuss the *St. Luke's* case and how the Ninth Circuit's decision in *St. Luke's* leads to greater inconsistency regarding the efficiencies defense.²⁴ Lastly, this article will advocate that courts, in reviewing healthcare mergers, should give greater weight to quality based efficiencies, because this will improve patient outcomes and bring antitrust law into accord with current healthcare policy.²⁵

II. UNDERSTANDING THE ISSUE

Congress passed the Patient Protection and Affordable Care Act (ACA) in 2010.²⁶ The goal of the ACA was to establish a system of "quality, affordable healthcare for all Americans."²⁷ A main focus of the ACA was to ensure the quality of healthcare, while also bringing down the cost of healthcare, which would in turn provide greater access to healthcare services.²⁸ The ACA's focus was on improving patient outcomes, by linking payment of healthcare services to quality outcomes and shifting towards a prospective payment system rather than a retrospective payment system.²⁹ The ACA created a wave of changes for healthcare entities, including a change in fee structure and repayment, as well as

22. See *infra* Part III.

23. See *infra* Part IV & V.

24. See *infra* Part VI.

25. See *infra* Part VII.

26. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

27. *Id.*

28. *Id.*

29. *Id.*

various other requirements like electronic health records, Medicare requirements, and reporting requirements.³⁰

This drastic change to the healthcare delivery systems created new issues for healthcare entities to solve in order to stay competitive with prices and maintain their foothold in the healthcare market.³¹ Many entities began looking to mergers as a way to increase the efficiency of their healthcare delivery system, and lower costs by combining services, such as electronic health records.³² In turn, these mergers should mean a greater continuum of care for the consumer, as well as lower costs generated by the efficiencies of combining entities.³³

However, even if healthcare entities are meeting the goals of the ACA by merging, that does not mean they are in the clear. Healthcare entity and hospital mergers are still subject to antitrust law.³⁴ As it is today, antitrust law does not make any exceptions for healthcare entities seeking to comply with the ACA.³⁵ An illustration of this will be discussed in *St. Luke's*, a case where a hospital acquired a physician group in order to improve patient outcomes.³⁶ The decision in *St. Luke's* was highly anticipated as the case was the first challenge of a hospital and physician group merger to proceed to trial.³⁷

30. *Id.*

31. Margaret E. Guerin-Calvert & Jen A. Maki, *Hospital Realignment: Mergers Offer Significant Patient and Community Benefits*, CTR. FOR HEALTHCARE ECON. & POLICY 1 (Jan. 23, 2014), <http://www.fticonsulting.com/~media/Files/us-files/insights/reports/hospital-realignment-mergers-offer-significant-patient-and-community-benefits.pdf>.

32. *Id.*

33. *Id.*

34. 15 U.S.C. § 18 (2012).

35. *Id.*

36. *St. Luke's*, 778 F.3d 775 (9th Cir. 2015).

37. David Garcia, *In Highly-Anticipated Decision, Ninth Circuit Affirms That Hospital-Physician Group Merger in St. Luke's Violated Section 7 And Casts Serious Doubt on*

The Ninth Circuit upheld the ruling that St. Luke's must divest itself from the physician group Saltzer.³⁸ The most significant aspect of the Ninth Circuit's ruling was the holding that casts doubt on when, if ever, a healthcare entity merger can rebut a prima facie violation of Section 7 of the Clayton Act through post merger efficiencies.³⁹ This is problematic because in a new era where healthcare entities are compelled to comply with the ACA, generating efficiencies may be the only way to meet these new requirements and stay in compliance with the ACA.⁴⁰

III. SECTION 7 OF THE CLAYTON ACT

"[T]he primary goal of the antitrust laws is to improve consumer welfare."⁴¹ The Clayton Act was originally passed in 1914 and was amended to prohibit all mergers that may substantially lessen competition, or tend to create a monopoly.⁴² Section 7 of the Clayton Act was also amended to control for monopolies and competitive restraints in areas of the market where the Sherman Act fell short.⁴³ The Clayton Act also differed from the Sherman Act because the focus was *potential anticompetitive effects* rather than a showing of *an actual effect of restraining trade*.⁴⁴ The Clayton Act is a broader provision, and applies more readily to hospital mergers, and is thus the focus of this article.

Viability of Efficiencies Defense, ANTITRUST LAW BLOG (Feb. 18, 2015), <http://www.antitrustlawblog.com/2015/02/articles/articles/in-highly-anticipated-decision-ninth-circuit-affirms-that-hospital-physician-group-merger-in-st-lukes-violated-section-7-and-casts-serious-doubt-on-viability-of-efficiencies-defense/>.

38. *St. Luke's*, 778 F.3d at 793.

39. *Garcia*, *supra* note 37.

40. *See generally* Brief for Professors, *supra* note 2.

41. *Id.* at 3.

42. 15 U.S.C. § 18 (2012).

43. *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 768 (1952).

44. Glazer, *supra* note 6, at 1042 (citing *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962)). The law review article discusses the two applications of antitrust law, both the Sherman Act, and Section 7 of the Clayton Act.

The Federal Trade Commission (FTC), the Department of Justice, and private parties can seek to enforce Section 7 of the Clayton Act.⁴⁵ Recently, the FTC has become active in challenging hospital mergers.⁴⁶ With the passage of the ACA causing mergers to become more common, the FTC began critically looking at mergers, and successfully blocking them, or getting an order of divestiture.⁴⁷

In September of 2014, the New York Times published an article stating that the FTC had recently been on a “winning streak” by winning three litigated hospital merger cases in the last two years.⁴⁸ One in Albany, Georgia; one in Toledo, Ohio; and one in Rockford, Illinois.⁴⁹ Additionally, the article boasts of the FTC’s first ever win of a case regarding a health system acquisition of a health group – the *St. Luke’s* case.⁵⁰ The FTC’s continued victories over hospital merger cases caused the number of proposed mergers to slow.⁵¹

With healthcare mergers becoming increasingly difficult to achieve, healthcare systems and doctors were faced with having to come up with other means to survive under the new impositions of the ACA.⁵² One method for survival that evolved out of the need to

45. 15 U.S.C § 18; Fredric J. Entin et. al., *Hospital Collaboration: The Need for an Appropriate Antitrust Policy*, 29 WAKE FOREST L. REV. 107, 111 (1994).

46. Dan Mulholland & Saheli Chakrabarty, *The Effects of the Affordable Care Act and Other Reform Efforts on Providers, Insurers and Patients-Consequences and Hidden Issues of Health Reform*, 85 PA. B.A. Q. 56, 59 (2014).

47. Robert Pear, *F.T.C. Wary of Mergers by Hospitals*, N.Y. TIMES, Sept. 17, 2014, at B1.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

rebut alleged anticompetitive effects resulting from mergers was the increased reliance on the efficiencies defense.⁵³

IV. THE EFFICIENCIES DEFENSE

“[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.”⁵⁴ Prior to asserting an efficiencies defense, a plaintiff must first establish a prima facie case that a merger is anticompetitive.⁵⁵ Once a plaintiff has established a prima facie showing of a Section 7 Clayton Act violation, the burden of proof shifts to the defendant to rebut the presumption of anticompetitive effects.⁵⁶ The focus in *St. Luke’s*, as well as this article, is the efficiencies defense.

A. Elements of the Efficiencies Defense

The entity or entities seeking the merger (usually the defendant) carry the burden of showing that the alleged efficiencies created by the merger are: (1) verifiable; (2) not attributable to reduced output or quality; (3) merger specific; and (4) sufficient to outweigh the transaction’s anticompetitive effects.⁵⁷ The evidence of the alleged efficiencies cannot be “mere speculation and promises about post-merger behavior.”⁵⁸ Additionally, the defendant cannot overcome the illegality of the merger solely based on “self-serving assertions.”⁵⁹

In *St. Luke’s*, the Ninth Circuit stated that because of the high market concentration in the Nampa, Idaho area, the merged entity must show that the proposed merger would generate

53. Blair & Sokol, *supra* note 12, at 1972.

54. U.S. DEPT OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 10 (2010) [hereinafter 2010 MERGER GUIDELINES].

55. *Olin Corp. v. F.T.C.*, 986 F.2d 1295, 1304–05 (9th Cir. 1993).

56. *St. Luke’s*, 778 F.3d 775, 788 (9th Cir. 2015).

57. *See id.*

58. *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 721 (D.C. Cir. 2001).

59. *F.T.C. v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991).

“*extraordinary* efficiencies” to rebut anticompetitive concerns.⁶⁰ The court stated that though the merger would benefit patients, St. Luke’s had not provided proof of efficiencies extraordinary enough to rebut the *prima facie* case under Section 7 of the Clayton Act.⁶¹

The Ninth Circuit’s ruling directly reflects the current dichotomy in healthcare mergers. Where some circuit courts are willing to give weight to the pro-competitive effects of improving healthcare delivery systems by recognizing post-merger efficiencies,⁶² other circuit courts are not, and focus solely on cost based projections. This uncertainty is leading to inconsistent and unpredictable merger outcomes.⁶³

B. Cost Based vs. Quality Efficiencies

There are both cost based and quality based efficiencies.⁶⁴ Currently, in cases where health care entities use the efficiencies defense, courts primarily look at cost based efficiencies and do not consistently take into account quality based efficiencies.⁶⁵ When quality based efficiencies are considered, they are often given less weight than the cost based efficiencies.⁶⁶ This uncertain application of the efficiencies defense has left health care entities

60. *St. Luke’s*, 778 F.3d at 790 (emphasis added) (citing *H.J. Heinz Co.*, 246 F.3d at 720).

61. *Id.*

62. The D.C. Circuit, as well as the Sixth, Eighth, and Eleventh Circuits have all recognized that an efficiencies defense may be able to rebut a *prima facie* showing under the Clayton Act. The Eighth Circuit specifically noted the procompetitive effects of a merged healthcare entity being able to increase the quality of care and attract quality specialists to the hospital. See *F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999).

63. *Id.* (The circuit courts reach differing opinions regarding the efficiencies defense).

64. *Id.*

65. Blair & Sokol, *supra* note 11, at 1973–74.

66. *Id.* at 1973–74.

unable to know if, or how, to structure a merger as to avoid violating antitrust law.⁶⁷

This disparity between an increase in quality and a lack of quality efficiency recognition was demonstrated in *St. Luke's*. One of the main arguments that St. Luke's hospital made was the increase in the quality of health care that would result from the merging of St. Luke's hospital with Saltzer Medical Group.⁶⁸ This would include a change in the fee system, a new electronic health record system, and integrated care.⁶⁹ The court stated that they believed that health care would be improved for patients, but that the efficiencies were not merger specific and dependent as to serve as a quality based efficiencies defense.⁷⁰

The lack of recognition and weight given to a quality based efficiencies defense illustrates a divide between current antitrust law and current health care policy. The ACA was enacted to improve patient outcomes, reduce costs, increase quality, and increase access to health care.⁷¹ However, current antitrust law does not give due weight to these objectives, and focuses heavily on cost based efficiencies, when recognizing efficiencies at all. This results in uncertainty in healthcare entities' ability to merge, when they are merging to meet the demands placed upon them by the ACA.

C. The Supreme Court's Uncertain Ruling on the Efficiencies Defense

The Supreme Court has not recognized the efficiencies defense as sufficient to rebut a claim under Section 7 of the Clayton Act.⁷² In *Brown Shoe Co. v. United States*, the Supreme Court cast doubt

67. *Id.*

68. *St. Luke's*, 778 F.3d 775, 789 (9th Cir. 2015).

69. *See id.*

70. *Id.*

71. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

72. *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568, 597 (1967).

on whether or not the efficiencies defense should be recognized at all.⁷³

Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.⁷⁴

Despite the Supreme Court's uncertain ruling on whether or not an efficiencies defense will allow a merger to be successful, there is a trend among lower courts to recognize the existence of the defense.⁷⁵ However, even the circuit courts that recognize the availability of the efficiencies defense have not been consistent in upholding the defense such as to rebut a prima facie showing under the Clayton Act.⁷⁶ This has created uncertainty in the availability and applicability of the efficiencies defense.

V. THE CIRCUITS' TAKE ON THE EFFICIENCIES DEFENSE

73. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

74. *Id.*

75. *See ProMedica Health Sys., Inc. v. F.T.C.*, 749 F.3d 559 (6th Cir. 2014); *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 720–22 (D.C. Cir. 2001); *F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045, 1047 (8th Cir. 1999); *F.T.C. v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991). Each of these circuits has recognized that the efficiencies defense is a defense that can be used successfully in rebutting a prima facie showing under the Clayton Act. *St. Luke's*, 778 F.3d 775, 788 (9th Cir. 2015).

76. *See ProMedica Health Sys.*, 749 F.3d at 559; *H.J. Heinz Co.*, 246 F.3d at 720; *Tenet Health Care Corp.*, 186 F.3d at 1047; *Univ. Health, Inc.*, 938 F.2d at 1206.

Though the Supreme Court has not expressly recognized or rejected the efficiencies defense, several circuit courts have recognized that an efficiencies based defense may be successful in rebutting a prima facie showing under Section 7 of the Clayton Act.⁷⁷

A. D.C. Circuit

In *FTC v. H.J. Heinz Co.*, the D.C. Circuit recognized the existence of the efficiencies defense, but failed to hold that the defendants succeeded in rebutting the plaintiff's prima facie case.⁷⁸ The case involved a merger between the second and third largest producers of baby food in the United States.⁷⁹

In *Heinz*, the second and third largest manufacturers of jarred baby food sought to merge.⁸⁰ Prior to the merger, the baby food market was dominated by three major players – Gerber, who had a 65% market share; Heinz, which held a 17.4% market share; and Beech-Nut, which held a 15.4% market share.⁸¹ Heinz and Beech-Nut agreed to a merger where Heinz would acquire 100 percent of Beech-Nut's voting securities.⁸² The FTC sought a preliminary injunction which was denied by the district court.⁸³ The district court held that the merger would likely increase competition in the jarred baby food market in the United States.⁸⁴ FTC appealed,

77. See *ProMedica Health Sys.*, 749 F.3d at 559; *H.J. Heinz Co.*, 246 F.3d at 720; *Tenet Health Care Corp.*, 186 F.3d at 1047; *Univ. Health, Inc.*, 938 F.2d at 1206. Though these circuits have recognized the existence of the efficiencies defense, none of the circuits have actually held that the efficiencies defense presented was successful in rebutting the alleged anticompetitive effects. Even though the efficiencies defense has not yet been successful, the circuit courts' recognition of the efficiencies defense shows progress towards a system of recognizing and giving due weight to the efficiencies defense.

78. *H.J. Heinz Co.*, 246 F.3d at 720–22.

79. *Id.* at 711.

80. *Id.* at 712.

81. *Id.* at 711–12.

82. *Id.* at 712.

83. *Id.* at 713.

84. *H.J. Heinz Co.*, 246 F.3d at 712, (citing *Heinz Co.*, 116 F. Supp. 2d 190, 199 (D.D.C. 2000)).

stating that the merger, if completed, would violate Section 7 of the Clayton Act.⁸⁵

The court stated that in order for the FTC to succeed on the merits, it would need to show that the merger of Heinz and Beech-Nut would substantially lessen competition, or tend to create a monopoly, such to establish a prima facie showing under Section 7 of the Clayton Act.⁸⁶ The FTC could do so by establishing that the merged entity would result in an entity controlling an undue percentage share of the relevant market, and would result in an increase in the concentration of firms in that market.⁸⁷ Thus, such a showing establishes a presumption that the merger is anticompetitive, and defendants must rebut such a presumption.⁸⁸

The D.C. Circuit held that based on the market concentration and the anticompetitive effects on wholesale competition, the FTC established a prima facie case that the merger would be anticompetitive,⁸⁹ and that the defendants had failed to carry their burden of rebutting the presumption.⁹⁰

The defendants tried three defenses, including the defense of post-merger efficiencies.⁹¹ The defendants alleged that the efficiencies resulting from the merger would be used to compete more effectively against the leading baby food manufacturer, Gerber.⁹² The D.C. Circuit acknowledged the trend among lower

85. *Id.*

86. *Id.* at 714.

87. *Id.* at 715.

88. *Id.*

89. *Id.* at 717–18.

90. *H.J. Heinz Co.*, 246 F.3d at 718.

91. *Id.* at 720.

92. *Id.*

courts to recognize the defense.⁹³ The court went on to acknowledge courts who have recognized the defense and the benefits of recognizing such a defense, including the ability of the merged firm to achieve lower costs than either firm could have achieved without the merger.⁹⁴

Despite the recognition of the efficiencies defense, the court ultimately found that the efficiencies defense was not sufficient as to rebut the prima facie case, citing that the high market concentration level required proof of “extraordinary efficiencies” which the defendants had failed to prove.⁹⁵ The case was remanded for entry of a preliminary injunction.⁹⁶

B. Sixth Circuit

In *ProMedica Health System, Inc. v. F.T.C.*, the Sixth Circuit acknowledged that an efficiencies defense may be successful in rebutting a Section 7 Clayton Act claim, however, the court did not find such a defense in the case, because the efficiencies defense was not asserted.⁹⁷ In *ProMedica Health*, there was a proposed merger between two of the four hospital systems in Lucas County, Ohio.⁹⁸ One of the entities was the county’s dominant hospital provider, and the other was an independent community hospital.⁹⁹ The two entities merged in 2010, leaving the combined entity with a large percentage share of the relevant market.¹⁰⁰ After an extensive hearing, an administrative law judge and the Commission found that the merger would be anticompetitive in violation of Section 7 and ordered the two entities to divest.¹⁰¹

93. *Id.*

94. *Id.* (citing *Efficiencies*, U.S. DEP’T OF JUSTICE (June 25, 2015), <https://www.justice.gov/atr/4-efficiencies>).

95. *Id.*

96. *H.J. Heinz Co.*, 246 F.3d at 727.

97. *ProMedica Health Sys., Inc. v. F.T.C.*, 749 F.3d 559, 572 (6th Cir. 2014).

98. *Id.* at 561–62.

99. *Id.*

100. *Id.* at 563.

101. *Id.* at 564.

The merged entity (ProMedica) petitioned for a review of the order of divestiture.¹⁰² The Sixth Circuit Court found that the plaintiff had succeeded in establishing a prima facie case by showing a Section 7 Clayton Act violation due to the anticompetitive effects of the merger.¹⁰³ Because a prima facie case had been established, it was up to ProMedica to rebut the presumption of anticompetitive effects.¹⁰⁴

ProMedica asserted several defenses, however it did not assert an efficiencies based defense.¹⁰⁵ The court here noted that it was “remarkable” that the defendants did not assert an efficiencies defense.¹⁰⁶ The court stated that parties seeking an efficiencies defense often argue that the efficiencies enhance consumer welfare by lowering prices.¹⁰⁷ The court went on to talk about consumer welfare, and the beneficial impact that merger generated efficiencies can have on lowering prices, improving quality, and enhancing services.¹⁰⁸ In finding that the defendants failed to rebut the presumption of a Clayton Act violation, the Sixth Circuit noted the lack of an asserted efficiencies defense.¹⁰⁹

C. Eighth Circuit

In *F.T.C. v. Tenet Health Care Corp.*, the Eighth Circuit found that an efficiencies defense may be able to rebut a Section 7 claim.¹¹⁰ In *Tenet Health Care Corp.*, two hospitals in southeastern

102. *Id.*

103. *ProMedica Health Sys.*, 749 F.3d at 561.

104. *Id.* at 571.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *ProMedica Health Sys.*, 749 F.3d at 572.

110. *F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045, 1047 (8th Cir. 1999).

Missouri sought to merge, but the FTC sought and was granted a preliminary injunction preventing them from doing so.¹¹¹ The merged entity appealed to the Eight Circuit.¹¹²

The Eighth Circuit noted that even if the district court rejected Tenet's efficiencies defense, those efficiencies should have been considered in the context of the competitive effects of the merger.¹¹³ The court found that the increased efficiencies generated from combining entities would result in better medical care.¹¹⁴

Additionally, the court noted that the increase in the quality of medical care would help in attracting highly qualified providers and specialists which could in turn increase competition through integrated delivery and tertiary care.¹¹⁵ "In view of the significant changes experienced by the hospital industry in the recent past and the profound changes likely facing the industry in the near future, . . . a merger, deemed anticompetitive today, could be considered procompetitive tomorrow."¹¹⁶

The Eighth Circuit noted that "the merged entity may well enhance competition in the greater Southeast Missouri area."¹¹⁷ The court reversed the district court's enjoining of the merger, and remanded the case for proceedings consistent with the opinion.¹¹⁸

D. Eleventh Circuit

The Eleventh Circuit held that in certain circumstances, showing significant efficiencies generated by a merger could rebut the prima facie case of a Clayton Act violation.¹¹⁹ In *F.T.C. v.*

111. *Id.*

112. *Id.*

113. *Id.* at 1054.

114. *Id.*

115. *Id.*

116. *Tenet Health Care Corp.*, 186 F.3d at 1047 (citing *United States v. Mercy Health Servs.*, 107 F.3d 632, 636 (8th Cir. 1997)).

117. *Id.* at 1055.

118. *Id.*

119. *F.T.C. v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991).

University Health, Inc., University Hospital wanted to acquire the assets of St. Joseph Hospital, which was a nonprofit entity.¹²⁰ The FTC sought a preliminary injunction to prevent hospital operators from acquiring the assets of another hospital, as the FTC alleged that this would result in lessened competition.¹²¹ The district court denied the preliminary injunction, and the FTC appealed.¹²²

The Eleventh Circuit held that Section 7 of the Clayton Act applied to asset acquisitions by non-profit hospitals, and that the FTC had established a prima facie case that the hospital failed to rebut with a showing of significant efficiencies.¹²³ The hospital argued that the acquisition would result in significant efficiencies, so the merger would not substantially lessen competition.¹²⁴ The FTC responded by saying the law would not recognize the efficiency defense in any form.¹²⁵ The court held that “in certain circumstances, a defendant may rebut the government’s prima facie case with evidence showing that the intended merger would create significant efficiencies in the relevant market.”¹²⁶

The hospital went on to state that the merger would reduce “unnecessary duplication” between the two entities and therefore reduced costs.¹²⁷ However, the court found that efficiencies claimed had no proof of sustainability of benefit to consumers.¹²⁸

120. *Id.*

121. *Id.* at 1206.

122. *Id.*

123. *Id.* at 1220.

124. *Id.* at 1222.

125. *Univ. Health, Inc.*, 938 F.2d at 1222.

126. *Id.*

127. *Id.* at 1223.

128. *Id.*

Ultimately, the court held that “an efficiency defense . . . may be used in certain cases to rebut the government’s prima facie showing in a [S]ection 7 challenge . . .” but that the appellees could not use the defense in the current case because they had failed to demonstrate that their acquisition would produce significant economies.¹²⁹

E. Ninth Circuit

The Ninth Circuit in *St. Luke’s* departed somewhat from the view of its sister circuits that had recognized the efficiencies defense.¹³⁰ While the court did briefly entertain the idea that the efficiencies defense may exist, its analysis of the *St. Luke’s* case made it clear that the court was skeptical of the defense, and the success of the defense was unlikely.¹³¹

The court, in the beginning of the *St. Luke’s* opinion, notes that “[t]he status of the defense in this circuit remains uncertain.”¹³² The Ninth Circuit went on to state “[w]e remain skeptical about the efficiencies defense in general and about its scope in particular. It is difficult enough in § 7 cases to predict whether a merger will have future anticompetitive effects without also adding to the judicial balance a prediction of future efficiencies.”¹³³

The court noted that an entity *could* combine to form a more efficient entity and therefore increase competition. “In other words, a successful efficiencies defense requires proof that a merger is not, despite the existence of a prima facie case, anticompetitive.”¹³⁴

St. Luke’s argues that the merger would benefit patients by creating a team of employed physicians with access to Epic, the electronic medical records system used by *St. Luke’s*. The district court found that, even if true, these predicted

129. *Id.* at 1223–24.

130. *St. Luke’s*, 778 F.3d 775, 789 (9th Cir. 2015).

131. *Id.*

132. *Id.* at 789.

133. *Id.* at 790.

134. *Id.*

efficiencies were insufficient to carry St. Luke's' burden of rebutting the prima facie case. We agree.

It is not enough to show that the merger would allow St. Luke's to better serve patients. The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate.¹³⁵

The court went on to echo the district court's finding that the merger would be beneficial to patient care, and would improve the delivery of healthcare in the Nampa area.¹³⁶ However, the court ultimately found that the efficiencies generated were not merger specific and did not increase competition.¹³⁷ The court went on to say that even if the efficiencies were merger specific, "[a]t most, the 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."¹³⁸ St. Luke's was ordered to divest from Saltzer.¹³⁹

The Ninth Circuit mentioned several times the beneficial impact that the merger would have on patient care, and healthcare delivery in Nampa Idaho.¹⁴⁰ However, the court focused solely on cost based projections in assessing St. Luke's presentation of the efficiencies defense.¹⁴¹ The court did not take into account the quality based efficiencies, nor did it take into account the effects of

135. *St. Luke's*, 778 F.3d at 791.

136. *Id.*

137. *Id.*

138. *Id.* at 792.

139. *Id.* at 793.

140. *St. Luke's*, 778 F.3d at 793.

141. *Id.*

the recently passed ACA on healthcare entities.¹⁴² This illustrates the need for antitrust law to be updated and harmonized with the healthcare market as it is in a post-ACA world. The *St. Luke's* case will be examined in greater detail below.

VI. *ST. ALPHONSUS V. ST. LUKE'S*: A BACKGROUND OF THE CASE

As was briefly mentioned previously, the *St. Luke's* case involved a hospital acquisition of a physician group in Nampa, Idaho and a Ninth Circuit ruling on the challenged merger.¹⁴³ Nampa, Idaho is the second largest city in the state of Idaho, and is located about twenty miles west of Boise.¹⁴⁴ Prior to the merger at issue, St. Luke's Health Systems, Ltd. (St. Luke's) was operating as a non-profit health care system, with an emergency clinic in Nampa.¹⁴⁵ Saltzer Medical Group (Saltzer), "the largest independent multi-specialty physician group in Idaho, had thirty-four physicians practicing in Nampa."¹⁴⁶

At the time of the merger, the only hospital in Nampa was operated by Saint Alphonsus Health System, Inc. (St. Alphonsus).¹⁴⁷ Saltzer was "the largest adult primary care physician (PCP) provider in Nampa, with sixteen PCPs."¹⁴⁸ St. Luke's had eight PCPs and St. Alphonsus had nine PCPs.¹⁴⁹

A. The Merger

Saltzer had wanted to integrate patient care and move towards risk based reimbursement, and sought to merge with a

142. *Id.*

143. *Id.* at 789.

144. *Id.* at 781.

145. *St. Luke's*, 778 F.3d at 781.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

large health care system.¹⁵⁰ The physician group needed to upgrade its medical record system to stay current with the industry, but could not afford to do so on its own.¹⁵¹ Saltzer had previously tried to merge with other entities, but was unsuccessful.¹⁵²

In 2012, St. Luke's purchased Saltzer's assets and entered into a five-year service agreement.¹⁵³ The agreement stated that both organizations wanted to discontinue fee-for-service reimbursement.¹⁵⁴ However, the agreement did not include any provisions to implement that goal, but was revised to contain some quality based incentives.¹⁵⁵ The merger did not require Saltzer to refer to St. Luke's or to use St. Luke's facilities.¹⁵⁶

In March 2013, St. Alphonsus filed a complaint seeking to enjoin the merger under Section 7 of the Clayton Act, citing anticompetitive effects in the relevant market of Nampa.¹⁵⁷ The district court denied the preliminary injunction, reasoning that the agreement between Saltzer and St. Luke's did not require referrals

150. *St. Luke's*, 778 F.3d at 781.

151. *Saint Alphonsus Med. Ctr. - Nampa, Inc. v. St. Luke's Health Sys., Ltd. (St. Luke's District Court Decision)*, No. 1:12-CV-00560-BLW, 2014 WL 407446, at *3 (D. Idaho Jan. 24, 2014), *aff'd*, 778 F.3d 775 (9th Cir. 2015).

152. *Id.*

153. *St. Luke's*, 778 F.3d at 781.

154. Fee-for-service reimbursement is a payment system where healthcare providers are paid for every service they perform, such as an office visit, a physical examination, or a test. *Fee-for-Service*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.medicare.gov/medicaid-chip-program-information/by-topics/delivery-systems/fee-for-service.html> (last visited Oct. 26, 2016). The opposite of this is a prospective payment system, where healthcare providers are paid a predetermined, fixed amount based on a classification system. *See Prospective Payment Systems - General Information*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/medicare/medicare-fee-for-service-payment/prospmedicarefeesvcpmtgen/index.html> (last visited Oct. 26, 2016).

155. *St. Luke's*, 778 F.3d at 782.

156. *Id.*

157. *Id.*

to St. Luke's; the agreement would take place over time; and the agreement provided a process for unwinding if so ordered.¹⁵⁸

Also in March of 2013, the Federal Trade Commission (FTC) and State of Idaho filed a complaint in district court "to enjoin the merger pursuant to the Federal Trade Commission Act (FTCA), the Clayton Act, and Idaho Law."¹⁵⁹ The complaint cited anticompetitive effects in the PCP market in Nampa.¹⁶⁰ This case was consolidated with the case brought by St. Alphonsus.¹⁶¹

B. The District Court's Determination

The Idaho district court held a nineteen-day bench trial.¹⁶² St. Luke's argument focused heavily on the efficiencies the merger would create, and how those efficiencies would outweigh any anticompetitive effects.¹⁶³ The district court held that St. Luke's needed to provide convincing proof of merger specific efficiencies that arose as a result of the merger, and were thus, merger specific.¹⁶⁴

The district court discussed the ever-changing United States healthcare system, and found that St. Luke's and Saltzer genuinely wanted to improve patient outcomes through merging the two entities.¹⁶⁵ However, the court noted that the huge market share the merged entity would occupy created a substantial risk of anticompetitive price increases in the Nampa PCP market.¹⁶⁶ The court rejected St. Luke's argument that the post-merger

158. *Id.*

159. *Id.*

160. *St. Luke's*, 778 F.3d at 782.

161. *Id.*

162. *Id.*

163. *St. Luke's District Court Decision*, WL 407446, at *23.

164. *Id.* Merger specific efficiencies are "efficiencies that cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 722 (D.C. Cir. 2001).

165. *St. Luke's*, 778 F.3d at 782.

166. *Id.*

efficiencies outweighed potential price increases, and the court ordered divestiture.¹⁶⁷

After the district court ordered St. Luke's and Saltzer to divest, St. Luke's appealed.¹⁶⁸ The Ninth Circuit, in a highly anticipated decision, ultimately upheld the district court's determination that St. Luke's had to divest from Saltzer.¹⁶⁹

C. The Ninth Circuit's Ruling

Prior to the decision in the *St. Luke's* case, the Ninth Circuit rejected the recognition of the efficiencies defense in a decision over thirty years ago.¹⁷⁰ The Ninth Circuit admitted that it remained skeptical of the defense, noting difficulties in foreseeing the outcome of the alleged efficiencies.¹⁷¹

In the present case, the Ninth Circuit found that the plaintiffs had established a prima facie case of a Section 7 violation under the Clayton Act.¹⁷² The court looked to the high market share, the ability of St. Luke's to charge hospital rates for ancillary services, and the ability to negotiate higher primary care reimbursement rates from insurers.¹⁷³ "Because the plaintiffs established a prima facie case, the burden shifted to St. Luke's to" rebut the alleged

167. *Id.* Divestiture, as it is used here, means essentially to unwind, meaning St. Luke's would no longer possess Saltzer. *Divestiture*, MERRIAM-WEBSTER DICTIONARY (2016), <http://www.merriam-webster.com/dictionary/divestiture>.

168. *St. Luke's*, 778 F.3d at 782.

169. *Id.* at 793.

170. *Id.* at 789 (citing *RSR Corp. v. F. T. C.*, 602 F.2d 1317, 1325 (9th Cir. 1979)). The difference in that case, however, was that the argument put forth was that the efficiencies would allow the defendant to compete outside the market, whereas more recent cases, as well as *St. Luke's*, are using the efficiencies defense to justify competing inside the market. *Id.*

171. *Id.* at 790.

172. *Id.* at 786. A prima facie case is established if the plaintiff proves that the merger will probably lead to anticompetitive effects in that market. *Id.* at 785.

173. *St. Luke's*, 778 F.3d at 786.

anticompetitive effects.¹⁷⁴ St. Luke's relied heavily on its assertion of the post-merger efficiencies that would be generated and the procompetitive effects of those efficiencies.¹⁷⁵ St. Luke's also urged that the merger would allow St. Luke's to move toward integrated care, and risk-based reimbursement.¹⁷⁶

Ultimately, the claimed post-merger efficiencies by St. Luke's was not enough to carry the day, and the Ninth Circuit upheld the district court's order of divestiture.¹⁷⁷ The Ninth Circuit began by looking at the Supreme Court's take on the efficiencies defense, and pointed out that the Supreme Court has never expressly recognized efficiencies as a defense to a Section 7 Clayton Act violation.¹⁷⁸ The Ninth Circuit also looked to the Supreme Court's ruling in *FTC v. Procter & Gamble Co.* where the Supreme Court stated, "[p]ossible 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."¹⁷⁹

Though the Ninth Circuit read the Supreme Court's ruling as precluding an efficiencies defense, the court did acknowledge that four other circuits (D.C., Sixth, Eighth, and Eleventh) have suggested that post-merger efficiencies can rebut a Clayton Act Section 7 prima facie case.¹⁸⁰ However, the court specifically noted

174. *Id.* at 788.

175. *Id.*

176. *Id.*

177. *Id.* at 785.

178. *Id.* at 789 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962)).

179. *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967).

180. *St. Luke's*, 778 F.3d at 789. The Ninth Circuit did go on to point out that though the four circuits recognized the existence of a post-merger efficiencies defense to a prima facie showing under Section 7 of the Clayton Act, none of those circuits actually held that a defendant succeeded in rebutting a Section 7 prima facie claim. *Id.* However, the Eighth Circuit noted:

[A]lthough Tenet's efficiencies defense may have been properly rejected by the district court, the district court should nonetheless have considered evidence of enhanced efficiency in the context of the competitive effects of the merger. The evidence shows that a hospital that is larger and more efficient than Lucy Lee or Doctors' Regional will provide better medical care than either of those hospitals could separately. The merged entity

that even the circuits who have recognized the existence of the efficiencies defense have not actually held that a defendant succeeded in rebutting a Section 7 prima facie case.¹⁸¹ Therefore, the court said, “thus, even in those circuits that recognize [the defense], the parameters of the defense remain imprecise.”¹⁸²

The Ninth Circuit went on to say that the status of the defense in the Ninth Circuit remained uncertain.¹⁸³ The Ninth Circuit stated their skepticism of the defense and its scope, but stated that because Section 7 of the Clayton Act only prohibits mergers that substantially lessen competition, a defendant could theoretically rebut a prima facie case with evidence of a more efficient, combined entity that increases competition.¹⁸⁴ The court went on to say that courts who have recognized the defense require the defendant to clearly demonstrate that the merger would enhance rather than hinder competition because of the increased efficiencies.¹⁸⁵ The court said that because Section 7 of the Clayton Act seeks to avert monopolies, “extraordinary efficiencies” must be shown and the efficiencies must be merger specific.¹⁸⁶

St. Luke’s argued that the merger would benefit patients through an integrated care system and the use of improved electronic health care records.¹⁸⁷ The Ninth Circuit held that even

will be able to attract more highly qualified physicians and specialists and to offer integrated delivery and some tertiary care.

F.T.C. v. Tenet Health Care Corp., 186 F.3d 1045,1054 (8th Cir. 1999).

181. *St. Luke’s*, 778 F.3d at 789.

182. *Id.*

183. *Id.*

184. *Id.* at 790.

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

186. *St. Luke’s*, 778 F.3d at 789.

187. *Id.* at 791

if true, the predicted efficiencies were insufficient to rebut the prima facie case.¹⁸⁸ The court held that “it is not enough to show that the merger would allow St. Luke’s to better serve patients. The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate.”¹⁸⁹

The court upheld the district court’s finding that the merger, though likely to improve patient outcomes, would not increase competition or decrease prices.¹⁹⁰ The court also upheld the district court’s finding that the efficiencies were not merger specific, stating that there was no evidence St. Luke’s needed to merge to integrate care.¹⁹¹ The court concluded the discussion of St. Luke’s efficiencies defense by saying that even if the efficiencies were merger specific, the defense would still fail because improving operations does not allow an entity to lessen competition.¹⁹² The court affirmed the district court’s order that St. Luke’s divest from Saltzer.¹⁹³

VII. ANALYSIS: PROBLEMS WITH THE CURRENT LAW AND SUGGESTIONS FOR SOLUTIONS

The analysis of this article will focus on antitrust law as it is today, and the role that the efficiencies defense plays in healthcare merger analysis under Section 7 of the Clayton Act. The analysis will also look at the implications and goals of the ACA, and how the uncertain and inconsistent application of the efficiencies defense is not improving consumer welfare, or bringing the healthcare industry into accord with current healthcare policy. The analysis will explain the benefits of making healthcare merger review less stringent, namely by giving increased weight to quality based efficiencies. Making it easier for healthcare mergers to survive challenges is essential to moving towards integrated healthcare, and compliance with the ACA.

A. Under Current Antitrust Law, When, if Ever, Can Post Merger

188. *Id.*

189. *Id.*

190. *Id.*

191. *St. Luke’s*, 778 F.3d at 791.

192. *Id.* at 791–92.

193. *Id.* at 793.

Efficiencies, That Allegedly Improve Patient Outcomes and
Enhance Competition, Succeed in Rebutting a Section 7 Clayton
Act Violation?

In the new post-ACA world, many healthcare entities, providers, and hospitals are seeking to merge as a way to survive under the new impositions of the ACA. The issue here is if a hospital or healthcare entity that wants to merge can ever rely on an argument of post-merger efficiencies to rebut a prima facie showing of a Section 7 Clayton Act violation.

The Supreme Court, as noted earlier, has not specifically recognized the viability of the efficiencies defense but has acknowledged the trend among lower courts to recognize such a defense.¹⁹⁴ The Supreme Court's lack of ruling on the issue, and the indecision in application among the circuit courts, leaves healthcare entities in antitrust limbo, unsure if a merger would be successful or not.¹⁹⁵ The trend among the circuit courts has been to recognize the existence of the defense and its viability, though in most cases the Court does not find the defense successful in rebutting the prima facie case.¹⁹⁶

Despite the Supreme Court's lack of guidance, there has been a trend in the circuit courts and some district courts to recognize an efficiencies defense as a viable option, though the courts have still rarely, if ever, held that a defendant has succeeded in showing efficiencies capable of rebutting the government's prima facie

194. *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568, 597 (1967).

195. *See Glazer, supra* note 6, at 1043 (noting the different approaches taken in two circuit courts analyzing a Section 7 issue).

196. *See ProMedica Health Sys., Inc. v. F.T.C.*, 749 F.3d 559 (6th Cir. 2014); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (2001); *F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045, 1047 (8th Cir. 1999); *F.T.C. v. Univ. Health, Inc.*, 938 F.2d 1209 (11th Cir. 1991). Each of these circuits has recognized that the efficiencies defense is a defense that can be used successfully in rebutting a prima facie showing under the Clayton Act. However, the courts did not find that the defense was successful in rebutting the plaintiff's prima facie case.

case.¹⁹⁷ The idea, or illusion, of an efficiencies defense is almost unattainable, as shown by the circuit courts.¹⁹⁸ The courts are willing to acknowledge that an efficiencies defense exists, but not to apply the defense.

The Eighth Circuit, in *F.T.C. v. Tenet Health Care Corp.*, was one circuit that was willing to recognize the defense as well as hold that the defendants had successfully shown efficiencies that should have been taken into account by the district court.¹⁹⁹ The court, in reaching its decision, focused on how improving medical facilities and care would attract higher quality doctors, and in turn those higher quality doctors would increase competition with surrounding health care entities.²⁰⁰ This case seems to suggest that it's not just direct efficiencies that benefit the consumer that the courts should be concerned with. Instead, the indirect benefits, such as attracting higher quality providers that in turn increase competition should also interest the courts.²⁰¹

In applying this reasoning to the decision in *St. Luke's*, it seems that if the case had been decided in the Eighth Circuit, versus the Ninth, the decision may have been in favor of the merger. Since *St. Luke's* would be providing integrated care, as well as a broader scope of care to Saltzer patients that Saltzer could not provide on their own, similar to the merger in *F.T.C. v. Tenet Health Care Corp.*, the decision may have gone the other way.²⁰²

The Eighth Circuit also considered as part of the efficiencies defense, the fact that the merged entity would be able to provide tertiary care, something that neither health care entity would be

197. See *ProMedica Health Sys.*, 749 F.3d 559; *H.J. Heinz Co.*, 246 F.3d at 720; *Tenet Health Care Corp.*, 186 F.3d 1047; *Univ. Health, Inc.*, 938 F.2d 1206.

198. See *ProMedica Health Sys.*, 749 F.3d 559; *H.J. Heinz Co.*, 246 F.3d at 720; *Tenet Health Care Corp.*, 186 F.3d 1047; *Univ. Health, Inc.*, 938 F.2d 1206. Even the circuits that claim to recognize the defense have never actually held the defense successful in rebutting the prima facie showing.

199. *Tenet Health Care Corp.*, 186 F.3d at 1054.

200. *Id.*

201. *Id.*

202. *Id.*

able to provide on their own without the merger.²⁰³ The tertiary care that was to be provided would be a direct result of, and dependent upon, the two entities merging.²⁰⁴ This new merged system would likely have resulted in an increased quality of care, thus increasing competition through patient satisfaction.²⁰⁵ This was a point argued in *St. Luke's*, with the argument being made that the merger would allow a team of St. Luke's and Saltzer physicians to have access to an electronic records system which would result in a higher quality of integrated care.²⁰⁶ The court expressly rejected this argument, noting that "It is not enough that the merger would allow St. Luke's to better serve patients."²⁰⁷ The court went on to write that the only concern is competition, and that the efficiencies claimed needed to rebut the anticompetitive effects of the merger.²⁰⁸

The circuit court's rulings help to illustrate the divide and uncertainty that exists in healthcare merger law as it is today. The lack of consistent recognition of the efficiencies defense causes confusion and inconsistency in healthcare mergers and does not reflect current healthcare policy that seeks to improve patient outcomes and integrate care.

B. What Does This Mean for Healthcare Entities Trying to Stay in Compliance With the Affordable Care Act?

A healthcare entity seeking to merge in order to meet the demands of the ACA needs to be wary of counting on the efficiencies defense to uphold the merger.²⁰⁹ For an entity to

203. *Id.*

204. *See Tenet Health Care Corp.*, 186 F.3d at 1054.

205. *Id.*

206. *St. Luke's*, 778 F.3d 775, 791 (9th Cir. 2015).

207. *Id.*

208. *Id.*

209. An entity seeking to merge should be wary of the efficiencies defense, due to its uncertain application in district and circuit courts. *See ProMedica Health Sys., Inc. v. F.T.C.*,

succeed using post-merger efficiencies defense, the efficiencies need to be: (1) verifiable; (2) not attributable to reduced output or quality; (3) merger specific; and (4) sufficient to outweigh the transaction's anticompetitive effects.²¹⁰

What this actually means for entities varies depending on what circuit they are in, as the application of the defense remains uncertain.²¹¹ What is clear is that the efficiencies shown need to be substantial and more than mere speculation or hopes for cost savings.²¹² The efficiencies need to be specific in articulating to the court exactly how, and why, the merger should be allowed to go forward despite the prima facie case.²¹³ The best example of this was in *F.T.C. v. Tenet Health Care Corp.*, where the Eighth Circuit found that an efficiencies defense may be able to rebut the prima facie case because of the increased ability of the merged entity to attract qualified providers, which would in turn enhance competition.²¹⁴ As noted above, several circuits have held that the efficiencies defense could be able to rebut a prima facie showing of the Clayton Act, whereas the Ninth Circuit has made it clear that an efficiencies defense would be very difficult to successfully allege and prove.²¹⁵

Entities wanting to merge in order to comply with the ACA need to be aware that the FTC is actively monitoring such mergers.²¹⁶ For an entity wanting to merge, there are other defenses to a Clayton Act violation besides just efficiencies, and it

749 F.3d 559 (6th Cir. 2014); *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001); *Tenet Health Care Corp.*, 186 F.3d 1047; *F.T.C. v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991).

210. *H.J. Heinz Co.*, 246 F.3d at 721.

211. See *ProMedica Health Sys.*, 749 F.3d 559; *H.J. Heinz Co.*, 246 F.3d at 720; *Tenet Health Care Corp.*, 186 F.3d 1047; *Univ. Health, Inc.*, 938 F.2d 1206.

212. See *ProMedica Health Sys.*, 749 F.3d 559; *H.J. Heinz Co.*, 246 F.3d at 720; *Tenet Health Care Corp.*, 186 F.3d 1047; *Univ. Health, Inc.*, 938 F.2d 1206.

213. See *ProMedica Health Sys.*, 749 F.3d 559; *H.J. Heinz Co.*, 246 F.3d at 720; *Tenet Health Care Corp.*, 186 F.3d 1047; *Univ. Health, Inc.*, 938 F.2d 1206.

214. *Tenet Health Care Corp.*, 186 F.3d at 1054.

215. See *St. Luke's*, 778 F.3d 775, 791 (9th Cir. 2015); see also *Tenet Health Care Corp.*, 186 F.3d at 1054.

216. Pear, *supra* note 47.

is possible that one of those defenses could allow the merger to continue. However, should a party to a proposed merger seek to hinge its defense on a claim of efficiencies, it needs to be prepared for stringent testing and examining of the efficiencies claimed.²¹⁷ Entities seeking to merge can of course seek other avenues to achieve the goals of the merger without actually merging. This can be difficult, as the entity that is seeking to merge has often exhausted other options, or will be better served through a merger.²¹⁸

For consumers, the strict application of the efficiencies defense has pros as well as cons. The main benefit to consumers is the strict avoidance of healthcare monopolies being formed through mergers.²¹⁹ This can have a short-term benefit to consumers by temporarily keeping costs down and forcing competition.²²⁰ However, as we move forward in a post-ACA world, the negative implications from the strict application of the efficiencies defense will outweigh the benefit of strictly avoiding anything resembling a monopoly.

America is moving towards a healthcare model of integrated care, with electronic health records and an ever increasing number of specialists.²²¹ What this means is that healthcare entities will need to merge to provide integrated care and to keep costs down by lowering the overhead associated with running multiple entities. Allowing healthcare entities who have demonstrated cost-based

217. See generally *St. Luke's*, 778 F.3d 775; *ProMedica Health Sys.*, 749 F.3d 559; *H.J. Heinz Co.*, 246 F.3d at 720; *Tenet Health Care Corp.*, 186 F.3d 1045; *Univ. Health, Inc.*, 938 F.2d 1206.

218. In the *St. Luke's* case, Saltzer needed the help of merging with a larger entity to stay current with the ACA, and had already been unsuccessful in attempts at informal affiliations. *St. Luke's*, 778 F.3d at 781.

219. *Id.* at 789.

220. *Id.* at 792.

221. Diana Culberston, *AMA Update: Physician Practice Arrangements Trend Data*, AM. HOSP. ASS'N RES. CTR. BLOG (July 9, 2015), <https://aharesourcecenter.wordpress.com/tag/physician-employment/>.

and quality-based efficiencies to merge can help integrate healthcare, and move towards improving patient outcomes.

C. Current Antitrust Law is Inconsistent with Healthcare Policy

While the passage of the ACA was a controversial issue, the main goal of the legislature in passing the ACA was simple: get all Americans access to the healthcare they need, and improve the quality of the healthcare Americans receive.²²² Antitrust law, as it is today, is a barrier to achieving these goals.

The way that the legislature chose to achieve its goal of improving healthcare was to pass a law that put new burdens on consumers as well as on healthcare entities and providers.²²³ Consumers would be required to obtain health care coverage, whereas providers would be held to a host of new requirements.²²⁴ Healthcare entities were to improve patients' outcomes through quality reporting methods, changing fee structure, and increasing provider accountability.²²⁵

The healthcare industry was understaffed and overworked before the passage of the ACA, with there already being a shortage of healthcare workers.²²⁶ As a wave of newly insured patients began seeking healthcare, entities and providers began to feel the practical and economic pressures from the new requirements of the ACA.²²⁷

Of course, doctors, nurses, and other medical professionals want to help people in need, but the sheer logistics of expanded care delivery, the current and growing shortage of personnel, and limited resources will certainly undercut

222. Patient Protection and Affordable Care Act, Pub. L. No. 111-48, 124 Stat. 119, 190 (2010).

223. *Id.* at 243.

224. *Id.* at 244.

225. *Id.* at 135.

226. Amy Anderson, *The Impact of the Affordable Care Act on the Health Care Workforce*, THE HERITAGE FOUNDATION (Mar. 18, 2014), <http://www.heritage.org/research/reports/2014/03/the-impact-of-the-affordable-care-act-on-the-health-care-workforce>.

227. *Id.*

the good intentions of the policymakers who crafted the national health law. In fact, the “transformational” changes touted by the law’s champions will likely complicate and negatively affect health care workers and their ability to provide care. These changes will increase regulatory burdens, increase already heavy workloads, reduce payments, impose new penalties, and disregard personal preferences and values. The increased stress will further destabilize the health care industry.²²⁸

One of the ways healthcare entities sought to remedy this situation was through healthcare mergers, which would allow for a combined sharing of costs, the ability to afford specialized medical equipment, as well as integrated care.²²⁹ The economic pressures put forth by the ACA have increased the consolidation rate of providers and entities.²³⁰ In 2014, 32.8% of physicians worked directly for a hospital, an increase from 29% in 2012.²³¹ The trend shows physicians moving from owning their own practices to working for, or merging with, hospitals.²³² The consolidation trends have caused consumers to fear monopolies that will raise prices.²³³ Hospitals, however, maintain that consolidation will control cost and enhance quality, keeping healthcare entities in accord with the ACA.²³⁴

Healthcare mergers allow providers and hospitals to stay financially viable in a time of new regulation and restrictions

228. *Id.*

229. *Id.*

230. Mulholland & Chakrabarty, *supra* note 46, at 59.

231. Culbertson, *supra* note 221.

232. *Id.*

233. Mulholland & Chakrabarty, *supra* note 46, at 59.

234. *Id.*

brought about by the ACA.²³⁵ “Hospitals, individual physicians, group practices, and other health care businesses are merging and consolidating to remain strong in the marketplace. Mergers and acquisitions reduce overhead costs for billing and claims while spreading out the financial risk and increasing market share.”²³⁶

By creating a barrier to considering quality-enhancing efficiencies associated with better care, the approach taken by the [Ninth Circuit] will deter future provider realignment and create a "chilling" effect on vital provider integration and collaboration. If the Panel's decision is upheld, providers will be considerably less likely to engage in realignment aimed at improving care and lowering long-term costs. As a result, both patients and payors will suffer in the form of higher costs and lower quality of care. This can't be – and isn't – the outcome to which appropriate antitrust law and policy aspires.²³⁷

Of course, as these entities continue to merge, the concern of healthcare monopolies is a legitimate possibility. The issue is not that these entities should not be subjected to antitrust law, specifically the Section 7 of the Clayton Act; the issue is that when these merged entities are evaluated under the Clayton Act, the efficiencies generated by the merger—both cost based, as well as quality—are not given consistent, and deserving weight. The stringent examination of these entities under current antitrust law does not take into account the benefit that the merged entity can provide to the consumer through increased efficiencies and better quality care.

When the merged entity forms, the merged entity generates efficiencies that come from consolidation.²³⁸ These efficiencies result in cost savings that make the entity more competitive in their market.²³⁹ The merged entity also may generate quality based efficiencies that allow it to provide a better quality of product or

235. *Id.*

236. Anderson, *supra* note 226.

237. Brief for Professors, *supra* note 2, at 19.

238. Anderson, *supra* note 226.

239. *Id.*

care.²⁴⁰ These efficiencies, both cost based and quality based, can benefit consumers as well as increase competition through better prices and a better quality of care.²⁴¹ However, because the Supreme Court has not expressly ruled on the efficiencies defense, the defense is being applied inconsistently among lower courts. This leaves entities whose merger rests on the efficiencies defense, unsure of what the outcome will be if their merger is challenged.²⁴²

D. The Solution: Healthcare Entities Merger Specific Quality
Efficiencies Should be Given More Weight in Determining
Procompetitive Effects of the Merger

Enhancing consumer welfare is one of the main purposes of the Clayton Act.²⁴³ Consumer welfare includes more than just cost considerations; it also includes well-being and access to quality healthcare.²⁴⁴ “Antitrust merger enforcement turns on predictions of likely competitive effects. The government must demonstrate a substantial likelihood of anticompetitive effects and that these effects are not outweighed by likely consumer benefits.”²⁴⁵ “[T]he primary goal of the antitrust laws is to improve consumer welfare. The efficiencies defense has arisen as a key tool in modern

240. See *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001).

241. *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054 (8th Cir. 1999).

242. See generally *St. Luke's*, 778 F.3d 775, 788 (9th Cir. 2015); *ProMedica Health Sys. v. FTC*, 749 F.3d 559 (6th Cir. 2014); *H.J. Heinz Co.*, 246 F.3d at 720; *Tenet Health Care Corp.*, 186 F.3d 1045; *FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991).

243. See generally *St. Luke's*, 778 F.3d 775, 788 (9th Cir. 2015); *ProMedica Health Sys.*, 749 F.3d 559 (6th Cir. 2014); *H.J. Heinz Co.*, 246 F.3d at 720; *Tenet Health Care Corp.*, 186 F.3d 1045; *Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991).

244. See generally *St. Luke's*, 778 F.3d 775, 788 (9th Cir. 2015); *ProMedica Health Sys.*, 749 F.3d 559 (6th Cir. 2014); *H.J. Heinz Co.*, 246 F.3d at 720; *Tenet Health Care Corp.*, 186 F.3d 1045; *Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991).

245. Brief for *Amici Curiae* Int'l Center of Law and Econ. and Medicaid Defense Fund in Support of Defendants-Appellants Urging Reversal at 6, *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (Nos. 1:12-cv-00560- BLW, 1:13-cv-00116-BLW) [hereinafter Brief for *Amici Curiae*].

antitrust law to ensure that over-enforcement does not preclude arrangements that enhance consumer welfare.”²⁴⁶

Healthcare entities, in light of the ACA, merge in order to combine overhead costs, streamline care, and integrate healthcare delivery. “Integration, including hospital systems acquiring general and specialized practice systems, provides the most cost effective and efficient way for providers to align incentives, share information, adopt higher value programs, and increase investments in patient-oriented care.”²⁴⁷ Healthcare mergers can benefit consumers by keeping costs lower through combining entities, as well as streamlining and integrating care.²⁴⁸

Integration is crucial to bending the cost curve and improving overall healthcare delivery. Healthcare policies and recently enacted laws [the ACA] have begun to bring about a transformational change in healthcare: the decline of a volume-based, fee-for-service approach in favor of a value-based, patient-oriented one. This approach encourages delivery system reform and integration of care in a number of ways including formation of accountable care organizations, bundled payments, reduced hospital payments for readmissions, and value-based payment systems in Medicare and Medicaid.²⁴⁹

In light of the numerous benefits to consumer welfare that are achieved through healthcare mergers, the courts, when reviewing challenged healthcare mergers, should be more stringent in finding that the plaintiff has succeeded in establishing a prima facie case showing anticompetitive effects from the merger.²⁵⁰ A stringent review of the plaintiff’s prima facie showing of alleged anticompetitive effects will help to safeguard mergers whose

246. Brief for Professors, *supra* note 2, at 3–4.

247. Brief for Amici Curiae, *supra* note 245, at 8.

248. *Id.*

249. *Id.* at 9–10.

250. For a plaintiff to establish a prima facie case, one needs only to show the potential that the merger may lessen competition, a plaintiff does not have to show that the merger actually is anticompetitive. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986); 15 U.S.C. § 18 (2012).

alleged anticompetitive effects are minimal in comparison to the benefits the merger will provide to consumers.

However, if a prima facie case is established, the courts should then give greater weight to the merged entities' use of an efficiencies based defense, specifically quality based efficiencies.²⁵¹ "A primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, *improved quality, enhanced service*, or new products."²⁵² The merger guidelines state that improved quality and enhanced service are primary benefits of efficiencies generated by healthcare mergers.²⁵³ Therefore, to be in accord with antitrust law, as well as sound policy, it is imperative that quality improvements, and enhanced service, are taken into account when reviewing a merged entity's efficiencies.

Merged healthcare entities often generate procompetitive efficiencies via quality efficiencies, through offering integrated care, tertiary care, more services, and better specialists.²⁵⁴ These quality measures allow the merged entity to better compete in the marketplace, and therefore may rebut alleged anticompetitive effects.²⁵⁵

[The Ninth Circuit's] decision will signal to market participants that the efficiencies defense is essentially unavailable in the Ninth Circuit, especially if those efficiencies go towards improving quality. Companies contemplating a merger designed to make each party more

251. Once a prima facie case has been established, the burden shifts to the defendant to rebut the alleged anticompetitive effects. *St. Luke's*, 778 F.3d 775, 788.

252. Brief for Professors, *supra* note 2, at 4 (citing 2010 Merger Guidelines § 10 (emphasis added)).

253. *Id.*

254. *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054 (8th Cir. 1999).

255. *Id.*

efficient will be unable to rely on an efficiencies defense and will therefore abandon transactions that promote consumer welfare lest they fall victim to the sort of reasoning employed by the panel in this case.²⁵⁶

Providing a consistent and predictable framework for healthcare mergers will allow entities seeking to merge the ability to predict the success of their merger, and will therefore decrease needless litigation and confusion.²⁵⁷ Additionally, as it is now, mergers that benefit consumer welfare may often not be undertaken, due to the uncertainty regarding potential challenges to the merger.²⁵⁸ Adopting a framework that is 1) certain and predictable in its application, and 2) in favor of advancing beneficial healthcare mergers, will benefit consumers by promoting consolidations that increase healthcare integration and decrease costs.²⁵⁹

To achieve the benefits of integrated healthcare, and still remain cognizant of antitrust concerns, this article suggests the following approach to determine whether or not a merged entity should be ordered to divest. When a healthcare merger is challenged, the reviewing court should balance the alleged anticompetitive effects of the merger with the benefits the merger will provide, giving increased weight to improved consumer welfare and quality based efficiencies. The reviewing court should consider the potential benefit to consumers. This will include decreased overall costs, increased access to healthcare providers and specialists, an increase in integrated care, and increased compliance with the ACA.²⁶⁰ The reviewing court will also look at the potential detriment to consumers, focusing on an increase in pricing power without the benefits mentioned previously. If the

256. Brief for Professors, *supra* note 2, at 2.

257. *Id.* at 3–4 (noting that as it is now, beneficial mergers are not being effectuated due to the uncertainty of the success of the merger.)

258. *Id.*

259. *Id.*

260. Compliance with the ACA, as it is used here, refers to complying with and furthering the goals of the ACA. This includes shifting away from a fee-for-service payment system to a value based, or prospective payment system. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). This also includes establishing an electronic records system; integrating care; improved patient access; and an increased quality of care. *Id.* All of these benefits would have been achieved in the St. Luke's/Saltzer merger. *St. Luke's*, 778 F.3d 775, 791 (9th Cir. 2015).

benefits to consumers outweigh the potential detriments, the merger should be upheld. This approach does not greatly depart from antitrust law as it is today. The main difference is that this approach takes into account *all* benefits to consumers, including an increased quality of healthcare.

The dangerous healthcare monopolies that threaten consumer welfare will still be kept at bay through this new system of analysis, but entities who will benefit consumers through integrated care and improved healthcare delivery, should have their cost and quality-based efficiencies recognized as beneficial to consumers.

Hospital mergers offer substantial benefits for patients and communities. . . . All too frequently, conventional wisdom suggested by media coverage is that hospital realignment, mergers and consolidations systematically result in pricing power, with anticompetitively higher prices for those needing care. Yet, in terms of prices for consumers, this study's extensive review of the literature finds no consistent statistical relationship between consolidation patterns and hospital prices across the studies.²⁶¹

Currently, the efficiencies defense, both cost based and quality based, is often given little weight and an inconsistent application in antitrust analysis by the courts. This leads to unpredictability in healthcare mergers, and serves as a barrier to bringing the healthcare industry into accord with healthcare policy, namely the ACA. Revising the way that the efficiencies defense is analyzed in healthcare merger cases, as well as giving increased consideration to consumer welfare, will help to bring antitrust law into accord with current healthcare policy, and will serve consumers by recognizing the benefits derived from a system with integrated care.

261. Guerin-Calvert & Maki, *supra* note 31, at 1 (a study finding that there is benefit to healthcare mergers, including enhanced access, higher value, and greater efficiency).

VIII. CONCLUSION

The passage of the ACA brought about radical changes impacting how consumers purchase healthcare, as well as how healthcare is delivered to consumers.²⁶² These changes in the healthcare industry require that a new approach to healthcare mergers be developed in order to move towards a better system of healthcare in America. Reexamining how healthcare mergers will be assessed will bring antitrust law into accord with current healthcare policy, as well as benefit consumers through a healthcare model that focuses on integrated care and streamlined services.

Some circuits have recognized the efficiencies defense, whereas others have cast doubt on whether or not the efficiencies defense exists, or is a viable defense.²⁶³ This inconsistency increases litigation regarding healthcare mergers, and does not serve to improve patient care.

The Ninth Circuit, as evidenced by *St. Luke's*, made it clear that post-merger efficiencies must be significant and not merely benefitting the merged entity with some trickle-down benefit to the consumer.²⁶⁴ More appropriately, the Eighth Circuit's reasoning was in accord with healthcare policy, recognizing an efficiencies defense by the ability to attract better doctors and provide better care.²⁶⁵ The Supreme Court could resolve these inconsistencies and provide guidance to healthcare entities by developing a framework for the efficiencies defense that would establish whether or not the defense exists, and if it does, what exactly should be shown in order to succeed.

The new analysis of healthcare mergers should give greater consideration to the efficiencies defense, specifically focusing on quality based efficiencies as well as cost based efficiencies. This shift in focus will help improve healthcare and bring antitrust law

262. Anderson, *supra* note 226.

263. See generally *St. Luke's*, 778 F.3d 775; *ProMedica Health Sys. v. FTC*, 749 F.3d 559 (6th Cir. 2014); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991).

264. *St. Luke's*, 778 F.3d at 791.

265. *Tenet Health Care Corp.*, 186 F.3d at 1054.

into accord with healthcare policy by recognizing the shift in healthcare delivery to a prospective system, that focuses on improved patient outcomes and integrated care.

In conclusion, a certain and predictable application of efficiencies defenses by courts, is necessary in order to move towards a prospective health care system with integrated care. As it is now, courts are divided on what is sufficient in establishing an efficiencies defense, leaving entities that seek to merge without guidance.²⁶⁶ The lack of certainty in healthcare mergers causes confusion and increases litigation. Reexamining the antitrust analysis of healthcare mergers in light of the ACA will improve all aspects of healthcare in America, including consumer welfare. In a world with a changing health care system, merging entities can improve patient outcomes through cost savings and integrated care, and therefore, should be allowed a less stringent efficiencies examination.

266. See generally *St. Luke's*, 778 F.3d 775; *ProMedica Health Sys.*, 749 F.3d 559; *H.J. Heinz Co.*, 246 F.3d at 720; *Tenet Health Care Corp.*, 186 F.3d 1045; *Univ. Health, Inc.*, 938 F.2d 1206.