Legal Backgrounder

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In the Wake of *Anthem/Cigna*, It's High Time for a Supreme Court Merger Case

by Anthony W. Swisher

In the wake of the US Court of Appeals for the DC Circuit's April 28, 2017 decision[1] that blocked the proposed merger of Anthem and Cigna, much of the resulting commentary has focused on the parties' use of the efficiencies defense, and how the DC Circuit's treatment of the defense compares to recent decisions from the Third and Ninth Circuits on the topic. The merging parties were at least in part the victims of poor timing.[2] They relied on a defense that had recently been the subject of open hostility from senior officials at the US Department of Justice (DOJ) and that has faced considerable judicial uncertainty.

Anthem and Cigna abandoned their deal following the DC Circuit opinion, denying the Supreme Court an opportunity to consider whether the time has finally arrived to take an antitrust merger case. The Court's last substantive consideration of a Federal Trade Commission (FTC) or DOJ merger challenge under § 7 of the Clayton Act was the *General Dynamics* case in 1974.[3]

In the intervening four decades, antitrust doctrine has progressed considerably, rendering the 1960s- and 1970s-era antitrust merger cases increasingly anachronistic. By contrast, the Court has been extremely active in other areas of antitrust law, particularly in the last 20 years. With respect to § 1 and § 2 of the Sherman Act, the Court has systematically updated antitrust doctrine, bringing it into the modern era. These recent antitrust cases have been remarkable not only for their consistent direction in favor of more rigorous application of economic theory, but also for their broad consensus across judicial philosophies that have sometimes divided the justices. This recent history suggests that the Court could provide some much-needed updating and clarity to antitrust merger law as well.

The Court as Antitrust Policymaker

Antitrust law is notable for its common-law tradition. Unlike many statutory regimes that feature lengthy, detailed statutes, the federal antitrust laws are short and simple, and rely upon judicial decision-making to put meat on the statutory bones. The Supreme Court has acknowledged and embraced this antitrust policymaking role in numerous decisions, and it shares remarkably wide agreement. Justices who

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[1] *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017).

[2] *See* Anthony W. Swisher, U.S. v. Anthem/Cigna *and Regrettable Skepticism of Procompetitive Efficiencies*, WLF Legal Pulse, Apr. 4, 2017, https://wlflegalpulse.com/2017/04/04/u-s-v-anthemcigna-and-regrettable-skepticism-of-procompetitive-efficiencies/.

[3] *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). In 2013 the Court unanimously found in favor of FTC in *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 (2013), but that case focused on the state-action exemption, rather than on substantive antitrust merger standards.

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might be skeptical of judicial "gap filling" in other contexts have recognized that antitrust law is built upon the bare-bones structure of the Sherman and Clayton Acts, and they have given it form and contours through Supreme Court opinions. Justices as diverse as Stevens, O'Connor, Kennedy, and Scalia—among others—have all at one time or another recognized the common-law nature of the antitrust laws, and the power of the Court to update its interpretation to reflect the latest economic learning.[4]

Updating Antitrust Doctrine

The Court has been particularly active in antitrust since the turn of the 21st Century. With broad consensus, the Court has issued decisions addressing the requirements for alleging a conspiracy, antitrust duties to deal, and predatory pricing, among other topics. Two of the most prominent Supreme Court antitrust cases of the last 15 years provide useful examples of the Court's willingness to apply modern economic thinking to antitrust doctrine. In *Verizon v. Law Offices of Curtis V. Trinko*, 546 U.S. 398 (2004), the Court established the outer bounds of an antitrust duty to deal with competitors. In so doing, the Court clearly articulated the importance of incentives to economic decision-making, and thus to antitrust theory. Justice Scalia, for the unanimous Court, famously wrote that "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Id.* at 407. In *Bell Atlantic v. Twombly*, Justice Souter, writing for a seven-justice majority, recognized that parallel conduct among competitors may arise from a host of factors other than collusion, and thus that in order to be "plausible on its face," a plaintiff alleging a conspiracy must allege more than mere parallel behavior. 550 U.S. 554, 570 (2007).

Although *Trinko* and *Twombly* attract significant attention, they are not unique. In *Pacific Bell v. LinkLine Communications*, the Court, without dissent, refused to allow a claim for "price squeeze" to proceed under Sherman Act § 2. 555 U.S. 438 (2009). In *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co.*, the unanimous Court applied the *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* predatory pricing standard to a claim of "predatory bidding." 549 U.S. 312 (2007). Like *Trinko* and *Twombly*, each case involved rigorous application of economic theory, and each featured a broad consensus.

Certainly, not all antitrust cases exhibit such harmony. One antitrust issue that has been more contentious than others is the Court's move toward a rule-of-reason standard in resale-price-maintenance cases. The Court's landmark decision in *Leegin Creative Leather Products, Inc. v. PSKS*, 551 U.S. 887 (2007), reversed the long-standing *per se* rule against resale price maintenance first established in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Unlike other recent antitrust cases, the *Leegin* decision drew a four-justice dissent led by Justice Breyer. *Leegin*, however, involved the overturning of a nearly 100-year-old precedent, and the dissenting justices focused their objections principally on the importance of *stare decisis*. Had the decision not required the express overruling of such a long-standing precedent, it is fair to ask whether the *Leegin* decision might have reflected the same consensus shown in the Court's other recent antitrust decisions.

Antitrust Merger Cases

Notably absent from the Court's recent updating of antitrust doctrine is a significant merger case, notwithstanding the relatively large number of DOJ and FTC merger challenges that have made it to courts of appeals in recent years. What topics might the Supreme Court usefully address in a merger matter?

[4] *Nat'l Soc. of Prof. Engineers v. United States*, 435 U.S. 679 (1978) (Stevens, J.); *State Oil Co. v. Khan*, 522 U.S. 2 (1997) (O'Connor, J.); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 887 (2007) (Kennedy, J.); *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988) (per Scalia, J.).

An obvious issue raised by the Anthem/Cigna merger is efficiencies. The DC Circuit relied primarily on the Supreme Court's 1967 decision in *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967), to opine that "it is not at all clear that [efficiencies] offer a viable legal defense to illegality under Section 7." *Anthem, Inc.*, 855 F.3d at 353. The court seemed almost hesitant to reach this conclusion. It noted that Justice Harlan filed a concurring opinion in *Procter & Gamble* in which he accepted "the idea that economies could be used to defend a merger," 386 U.S. at 597 (Harlan, J., concurring), and even suggested that if the Court were writing on a blank slate it might come out differently: "No matter that Justice Harlan's view may be the more accepted today, the Supreme Court held otherwise, and no party points to any subsequent step back by the Court." *Anthem, Inc.*, 855 F.3d at 353.

The court ultimately found as a factual matter that the merging parties had not demonstrated efficiencies sufficient to overcome the merger's anticompetitive effects, and so it could assume, without deciding, the availability of such a defense. But the court left little doubt that had the case turned on the availability of the defense as a legal matter, it felt itself bound by the *Procter & Gamble* decision.

The DC Circuit is not unique in its skepticism. The Third Circuit has questioned whether an efficiencies defense "even exists," *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 348 (3d Cir. 2016), and the Ninth Circuit has commented that "[t]he Supreme Court has never expressly approved an efficiencies defense." *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775, 788 (9th Cir. 2015).

In this context, the Court could usefully provide updated guidance on its view of efficiencies and their availability as a defense to a Clayton Act § 7 challenge. The FTC/DOJ Horizontal Merger Guidelines provide that "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."[5] The agencies state that they will not challenge a merger "if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive."[6]

The Court's recent history suggests that it would likely take into account the agencies' views as expressed in the Guidelines, and that a new decision addressing efficiencies would mark a substantial advancement over the 1960s-era views courts are left to cite today. Moreover, assuming it would not need to expressly overrule *Brown Shoe v. United States*, 370 U.S. 294 (1964), *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), or its other early merger cases, there is cause for optimism that the Court could craft a decision enjoying a broad consensus across the ideological spectrum, similar to its other recent antitrust decisions. In a perfect world, such a decision might recognize the benefits that mergers bring to the economy, and encourage the antitrust enforcement agencies to protect those merger-specific benefits by relying more on targeted divestiture remedies that preserve a merger's efficiencies, and less on full-stop challenges that throw the baby out with the bath water.

Efficiencies is certainly not the only merger topic in need of an update. The Supreme Court's 50-year-old efficiencies jurisprudence hails from the same era as many other significant merger decisions cited by modern courts. How to define a relevant market? Go back to 1962 to *Brown Shoe*'s "practical indicia" test. One should not, however, pay too much attention to the Court's dictum noting approvingly that "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets." *Brown Shoe*, 370 U.S. at 334. Need to argue a structural presumption of illegality? The source is the 1963 *Philadelphia National Bank* decision, wherein the Court held that a combined share of 30%

[5] US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 10, Aug. 19, 2010, https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.
[6] *Ibid*.

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creates a presumption of illegality under § 7, and that such a combined share "warrants dispensing" with such niceties as "elaborate proof of market structure, market behavior, or probable anticompetitive effects." *Philadelphia National Bank*, 374 U.S. at 364. Particularly when held up against the Court's more recent antitrust cases such as *Trinko*, *LinkLine*, and *Twombly*, the lack of economic sophistication in these older cases is striking.

Conclusion

Antitrust merger law has advanced considerably over the last 50 years. The Herfindahl-Hirschman Index—still 20 years in the future at the time of *Brown Shoe*—has been in use for 35 years. Economic modeling has given us the SSNIP test,[7] critical loss analysis,[8] and upward pricing pressure analyses.[9] The 2010 edition of the Merger Guidelines instructs regulators to focus less on structural presumptions and more on analysis of competitive effects. In general, antitrust merger practice of the 21st Century would be largely unrecognizable to a practitioner from the 1960s. One hopes that the Supreme Court finds a suitable vehicle to weigh in on some of these issues, so lower courts—and the merging parties and enforcers who appear before them—do not have to keep citing outdated 1960s cases to deal with 21st Century mergers.

[7] *Id.* at § 4.1.1 (describing the use of a "small but significant and non-transitory increase in price" as a tool to help define relevant markets).

[8] *See, e.g.*, Russell Pittman, *Three Economist's Tools for Antitrust Analysis*, Economic Analysis Group Working Paper, Antitrust Division, US Department of Justice, at 4 (Jan. 2017) (describing the critical loss analysis as "a tool for market definition in merger investigations," and also useful in the analysis of "the unilateral effects of mergers in markets with differentiated products"), https://www.justice.gov/atr/page/file/925641/download.

[9] *Id.* at 15 ("Upward Pricing Pressure (UPP) might be considered a first cousin to the use of critical loss in the analysis of the unilateral effects of a proposed merger, with, among other wrinkles, a more direct focus on the potential efficiencies of the proposed merger and whether they are likely to outweigh the loss of competition in the price-setting of the merged firm.").

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