

Buyer Power in Recent Merger Reviews

BY JONATHAN SALLET

IMAGINE A MERGER BETWEEN TWO buyers that would increase the new firm's buyer power over an important input it would purchase from upstream sellers. The merging parties assert that their increased ability to obtain lower prices will result in cost savings to them, some of which will be passed through to their downstream customers and that these lower prices are a procompetitive benefit. Opponents of the transaction allege that the increased buyer power, perhaps even constituting monopsony power, may substantially lessen competition in the market for the purchase of those inputs regardless of whether any of the fruits of the merger-specific buyer power are passed along to customers. That might happen, for example, if the increased buyer power resulted in lower prices to the upstream providers and had the effect of decreasing their output.¹ On what basis should a reviewing agency or a court determine whether this buyer power is improper under Section 7 of the Clayton Act?

Two cases throw this issue into sharp relief. In 2012, the Federal Trade Commission closed its eight-month investigation of the acquisition of Medco Health Solutions by Express Scripts, Inc., two of the nation's three largest pharmacy benefit managers (PBM), by concluding that "even if the transaction enables the merged firm to reduce the reimbursement it offers to network pharmacies, there is no evidence that this would result in reduced output or curtailment of pharmacy services generally."² Rather, the FTC emphasized, "It is likely that a large portion of any of these cost savings . . . would be passed through to PBM customers."³

Four years later, the Department of Justice sued to stop the proposed merger of two health insurers, Anthem and Cigna, and alleged, in part, that the increased buyer power of the combined firm would "enhance Anthem's leverage—both

over physician practices . . . and hospitals and physician groups" and, as a result "Anthem likely would reduce the rates that both types of providers earn . . ."⁴ The complaint predicted likely reductions in output from hospitals and physicians but the DOJ argued that "the Court need not answer the question whether lower rates on balance will reduce output or quality of care, or otherwise cause consumer harm."⁵

And the DOJ took the view that "Anthem's defense that its acquisition of Cigna will enable it to lower reimbursement rates 'confirms rather than refutes the anticompetitive purpose and effect' of the acquisition."⁶ In other words, the Department believed that in these circumstances harm to competition among purchasers of inputs proved a Section 7 violation no matter the effect on downstream competition.

It is axiomatic that buyers may be able to influence the terms on which they purchase goods and services.⁷ As the Horizontal Merger Guidelines explain, "Powerful buyers are often able to negotiate favorable terms with their suppliers."⁸ A recent example arose in the DOJ's review of the Danone/White Wave transaction, in which it alleged that a newly combined company would be purchasing 70 percent of available raw organic milk from upstream Northeastern milk producers and that this increased buyer power would likely lead to the imposition of contract terms very favorable to the new company but very unfavorable to organic milk producers, who would be paid less for their organic milk. At the same time, the Horizontal Merger Guidelines emphasize that buyer power can result simply from factors unrelated to market power, such as through reduced transaction costs or the increased ability to take advantage of volume discounts.⁹

So the question arises: Is the goal of antitrust low prices?¹⁰ Or is it to achieve competitive outcomes without regard to price levels?¹¹ Recent merger reviews raise a series of important issues that include both the assessment of the nature of buyer power and the consideration of competitive effects. Two critical questions emerge: (1) Under what circumstances does the exercise of buyer power promote recognizable procompetitive outcomes, and (2) in what markets are such procompetitive efforts cognizable?

Monopsony and the Structural Presumption

Monopsony is a subset of buyer power—limited to circumstances that are the buyer-side equivalent of monopoly power held by a seller.¹² Monopsony has long been recognized as a threat to competition precisely because "a monopsony is to the buy side of the market what a monopoly is to the sell side."¹³ Areeda and Hovenkamp suggest that the line between monopsony and lesser forms of buyer power lies at the border between lower and higher output.¹⁴

It is important to recognize, however, that lower output in the downstream market will not always result from the existence of monopsony power, for example, if the monopsonist sells downstream into a perfectly competitive product market. A paper mill may have market power in the local mar-

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ket to purchase timber and consequently will buy less timber to drive down the price the firm pays for timber. But if the firm sells paper into a perfectly competitive national market, there may not be any less paper sold as a result of this—other paper mills will expand their output by buying inputs in different upstream markets to offset the reduction by the monopsony mill, and paper prices will remain constant. Competition in the local market for timber is harmed, but there may be no downstream effect on consumers.¹⁵ The Horizontal Merger Guidelines expressly state that the agencies do not “evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell.”¹⁶

The proposed Anthem-Cigna transaction would have combined two of the leading five national health insurance companies. Although its complaint largely raised seller-side issues,¹⁷ the DOJ focused as well on the exercise of buyer power in the upstream market in which health insurers agree to pay hospitals and doctors for the supply of medical services. Here, the Department alleged that combining the two companies would “enhance Anthem’s leverage” and as a “result of the merger, Anthem would likely reduce the rates that both types of providers earn by providing medical care to their patients.”¹⁸ By contrast, the merging companies counted on the same buyer-side dynamic as a basis for demonstrating efficiencies, asserting that their increased buyer power would lead to lower prices and thus directly benefit customers and consumers.¹⁹

The buyer-power issue was not decided by the district court, but the subsequent appeal to the D.C. Circuit featured the merging parties’ assertion that the district court had failed to credit their efficiencies, including the assertion of their ability to gain and pass through lower prices through increased buyer power. The D.C. Circuit upheld the district court judgment that efficiencies had not been adequately demonstrated, but in his dissent Judge Brett Kavanaugh set out his view of the buyer-power question, concluding that the proposed transaction could violate the Clayton Act, but only if the merged company “would be able to unlawfully push healthcare providers to accept rates that are below competitive levels.”²⁰ As he explained:

[T]he exercise of monopsony power to temporarily reduce consumer prices does not qualify as an efficiency that can justify an otherwise anti-competitive merger. . . . Although both monopsony and bargaining power result in lower input prices, ordinary bargaining power usually results in lower prices for consumers, whereas monopsony power usually does not, at least over the long term. Therefore, the exercise of *bargaining power* by Anthem-Cigna is *procompetitive* because it usually results in lower prices By contrast, the exercise of *monopsony power* by Anthem-Cigna may be *anti-competitive* because it may result in higher prices.²¹

For Judge Kavanaugh, therefore, the critical question for the district court to resolve in the first instance—had the case

continued—would have been: “Would Anthem-Cigna obtain lower provider rates from hospitals and doctors because of its exercise of unlawful monopsony power in the upstream market where it negotiates rates with healthcare providers?”²² Similarly, Commissioner J. Thomas Rosch in the *Express/Medco* case viewed the case as “subject to the principles of monopsony power,” and the FTC’s Closing Statement emphasized that “the proposed transaction would produce a firm with a smaller share of retail pharmacies sales—approximately 29%—than is ordinarily considered necessary for the exercise of monopsony power.”²³

For purposes of this analysis, the common ground is that the creation of monopsony power supports a governmental action under the Clayton Act. But Judge Kavanaugh goes a step further, perhaps suggesting that the only form of buyer power that could be treated as illegal would be monopsony. The fundamental difficulty with such a contention is that it breaks the symmetry between seller and buyer power in merger reviews. The Clayton Act does not require that sellers in a horizontal merger have to gain a monopoly in order to raise the threat of harm to competition. This follows from the plain language of Section 7, which establishes as separate bases for liability transactions that would “tend to create a monopoly” and those that may “substantially lessen competition.” And the “substantially lessen” standard demonstrates Congress’s intent to attack potential harms to competition in their incipiency without regard to the likelihood of monopoly/monopsony.²⁴ Neither clause specifies that harm must occur in a seller-side market rather than a buyer-side one.

Of course, the Horizontal Merger Guidelines establish a rebuttable presumption that a merger that creates significant concentration in a market is likely to increase market power.²⁵ The concentration levels identified in the Horizontal Merger Guidelines are well below the shares associated with monopoly power.²⁶ In a market with an HHI above 2500, application of that standard would target, for example, the acquisition by a firm with 30 percent market share of a firm with 4 percent market share.²⁷ This formula establishes the so-called structural presumption by which the antitrust agencies present a prima facie case that the merging parties must rebut (and, if that were successfully done, then requires the government to produce additional evidence demonstrating anti-competitive effects).²⁸ This is also known as the *Philadelphia National Bank* presumption²⁹ and it was used by both district courts in the recent health care mergers.³⁰

The DOJ’s view in the *Anthem* case applies just this approach, invoking *Philadelphia National Bank* and the structural presumption as establishing a prima facie case on the seller side.³¹ The use of the structural presumption means that the DOJ would not have to show specific evidence of harm to establish its prima facie case. That, the DOJ argued, is the rule in seller-side mergers and, given its logic, it invoked the same rule in *Anthem*.³²

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er-specific increase in concentration that falls short of monopsony but that triggers the same presumption as established on the seller-side by *Philadelphia National Bank*.³³ Nothing in the use of the structural presumption would, of course, bar merging parties from demonstrating that a full understanding of the nature of the market, including, for example, low barriers to entry or the ability of smaller competitors to play a larger role, should lead a reviewing court to reject the view that competition may be lessened. This is the kind of analysis the FTC performed in its seller-side analysis of the *Express Scripts/Medco* transaction and that, it has been argued, supports the FTC's buy-side conclusion as well.³⁴

When Do Lower Input Prices Constitute Harm and When Can They Be Treated as an Efficiency?

The DOJ argued in the *Anthem* case that it needs to “show only that the merger would give Anthem increased market power that risks harm to providers”³⁵ First, the DOJ relied on a line of cases in which the Supreme Court rejected assertions that the antitrust laws should consider whether the use of market power might yield procompetitive outcomes.³⁶ So, for example, in *National Society of Professional Engineers*,³⁷ the Supreme Court rejected the claim that a prohibition on competitive bidding by members of an engineering association could be justified on the ground that low prices could mask inferior service, saying “the statutory policy [of the Sherman Act] precludes inquiry into the question whether competition is good or bad.”³⁸ The Court emphasized, as well, the role of the judiciary, stating that a view of the rule of reason “based on the assumption that competition itself is unreasonable” would create a “sea of doubt.”³⁹ Thus, the DOJ believed that once the structural presumption was established, merging parties would not be able to rely on the very same increase in buyer power to achieve “good” outcomes, including lower prices, in rebutting the prima facie case.

The DOJ invocation of the competitive process invokes a second basis for its conclusion, by focusing attention on the input market. *Philadelphia National Bank* holds that harm in one market cannot be offset by benefits in another,⁴⁰ from which follows the conclusion that benefits to downstream consumers cannot be balanced against harm to upstream input suppliers. Symmetry requires that the potential disad-

vantage to suppliers be treated exactly the same as the potential disadvantage to buyers in a sell-side merger, which does not consider effects in other markets.

One should not assume that the “competitive process” position treats competitive effects as irrelevant. Here, the “incipiency” purpose of the Clayton Act is important, as is the notion that a buy-side analysis simply turns the normal sell-side analysis upside down. Thus, the buyer-power defense could be rejected either on the ground that it relies on the use of market power as an improper basis for “good” outcomes or that the asserted benefits require balancing harm in one market against benefits in another.

In her concurring opinion in *Anthem*, Judge Millett addressed the first issue, concluding that “a proffered efficiency cannot arise from anticompetitive effects” and, therefore, “once a court has found a Section 7 violation, a generic statement that prices will go down proves nothing by itself.”⁴¹ Judge Millett continued: “[I]ncreased bargaining power is not a procompetitive efficiency when doing so ‘simply transfers income from supplier to purchaser without any resource savings.’”⁴² Additional bargaining power absent resource savings could be used to artificially increase the percentage of the surplus created by the bargain that goes to the buyer, to the disadvantage of the seller.⁴³

Areeda and Hovenkamp, in the section of their treatise on which Judge Millett relies, assert that “genuine resource savings” exist when, for example, newly merged firms qualify for quantity discounts or are able to search more widely for favorable prices available for their larger purchases, but not simply because the new firm has more bargaining power or, of course, monopsony power.⁴⁴ In other words, where cognizable efficiencies exist, the new bargaining equilibrium between the merging parties and an input supplier may benefit both sides to the transaction; where such efficiencies do not exist, there is merely the transfer from input suppliers to buyers to which Judge Millett refers.

This is not the only view. Dennis Carlton and Mark Israel, asking “under what conditions can a merger of buyers lead to merger efficiencies that are due to changes in the bargaining outcome,” suggest that efficiencies would exist where the use of new-found buyer power would drive input prices closer to competitive levels or where the process of contract formulation becomes more efficient, such as where transaction costs are effectively reduced or asymmetric information problems are solved.⁴⁵

To what extent is the “competitive process” approach inconsistent with the FTC's review of buyer power in *Express Scripts/Medco*? In that transaction, the “most highly-publicized and politically-charged issue”⁴⁶ was whether the acquisition of one significant PBM by another would reduce the reimbursement rates that pharmacies receive from such firms, which undertake the task of establishing a network of pharmacies that can then be used by health plans as they offer prescription drug plans. PBMs assemble their networks by negotiating with pharmacies over the rate at which they will

be reimbursed for filling prescriptions. Pharmacies alleged that the new firm would enjoy and exercise monopsony power.

The FTC's Closing Statement cited the post-transaction market share of 29 percent of retail pharmacies' sales as evidence that the new firm would not have monopsony power and relied, as well, on evidence that increase in the size of PBMs was not correlated with lower reimbursement rates paid to pharmacies. The Commission also referred to the potential benefit to consumers that would follow if lower input prices resulted in lower health care costs to consumers.⁴⁷ But the Closing Statement does not tell us whether such ability to obtain lower prices would result from cognizable efficiencies, that is to say resource savings, whether the competition benefits would appear outside of the relevant market, or whether buyer power short of monopsony could support a finding that the Clayton Act would be violated.

Considering the Puts and Takes of Buyer Power

Suppose that some portion of the increased ability to obtain lower input prices really does qualify as an efficiency, perhaps through decreased transaction costs that would not otherwise be available to the pre-merger firms, but also that there is increased buyer power not attributable to those efficiencies that could lead to anticompetitive outcomes. This situation could arise even in cases that do not trigger the structural presumption. After all, the Horizontal Merger Guidelines are careful to caution that “[t]he purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones”⁴⁸

In *United States v. Charter*, the DOJ considered the impact of the merger of two cable operators that purchase video programming from upstream content companies. In its Competitive Impact Statement accompanying a settlement complaint, the DOJ neither alleged monopsony power nor concentration of the type that would qualify for the structural presumption.⁴⁹ Rather it alleged that the new company would be “a critical distribution channel” for online video and would have more leverage by virtue of having “over 17 million video subscribers” nationally.⁵⁰ Thus, the DOJ concluded that absent the proposed settlement, the combination would violate Section 7 by negotiating non-price contract terms that would “limit[] or foreclos[e]” online video distributors like Amazon, Hulu, or Netflix from obtaining “access to the video content that is vital to their competitiveness.”⁵¹ It is important, in other words, to note that the alleged harm was not that the new company would gain lower prices, but that it would use increased buyer power to demand non-price terms that would be harmful to competition.

Take the facts derived from the Charter transaction as a hypothetical and imagine further that the merging parties had agreed that there would be a merger-specific increase in buyer power but had also argued that some portion of the increased buyer power resulted from true resource savings, which would

result in lower costs to consumers. For these purposes, we are assuming that there is a merger-specific increase in buyer power, that both outcomes—programming limitations and lower prices to consumers—are equally likely, and that the increase in concentration neither triggers the structural presumption nor qualifies as monopsony.

In this hypothetical, the argument would be that there is more buyer power and that it is being used to impact the bargaining between the newly formed cable company and a programmer, that this bargaining should itself be understood to be a form of competition, and that the non-price terms limit output of the video programmers. But the hypothetical also assumes that there are cognizable efficiencies associated with some portion of the increased buyer power and that these are passed through, in whole or in part, to consumers. A critical question is whether and how, in balancing the effects in the input market, an antitrust enforcer or court should consider the downstream impact, perhaps as illustrative of potential impacts in the input market.

Conclusion

This analysis suggests that buyer-power merger reviews would likely be analyzed on the basis that: (1) the use of market power created separately from any efficiency or resource would support both a monopsony conclusion or, with lower market share, the structural presumption; both of which would bar the use of the same market power to justify allegedly pro-competitive outcomes and (2) *Philadelphia National Bank* bars a balancing of harm in the input market with benefits on the downstream consumer (or any other) market. Less certain is the treatment of such buyer power that falls short of the structural presumption, including when true efficiencies also exist. ■

¹ PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 575 (2014).

² Fed. Trade Comm'n, Statement Concerning the Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc., FTC File No. 111-0210 at 8 (Apr. 2, 2012) [hereinafter ESI Closing Statement], https://www.ftc.gov/sites/default/files/documents/closing_letters/proposed-acquisition-medco-health-solutions-inc.express-scripts-inc./120402expressmedcostatement.pdf.

³ *Id.*

⁴ Complaint at 27, *United States v. Anthem, Inc.*, No. 16-1493 (ABJ) (D.D.C. 2017).

⁵ Plaintiffs' Supplemental Memorandum on the Buy-Side Case at 2, *United States v. Anthem, Inc.*, No. 16-1493(ABJ) (Dec. 19, 2016) [hereinafter DOJ Anthem Buy-Side Memo].

⁶ *Id.* at 4 (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 693 (1978)).

⁷ In the *Anthem* case, the general understanding was that Anthem would be able to bargain for lower prices from hospitals and physicians, but it is possible to imagine a buyer that does not bargain—for example a large manufacturer that simply sets the price it will pay for an input. That is, buyer power can involve bargaining power and bargaining leverage, see *infra* note 21, but it need not always.

⁸ U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines

- § 8 (2010) [hereinafter Horizontal Merger Guidelines], <http://ftc.gov/os/2010/08/100819hmg.pdf>.
- ⁹ *Id.* § 12.
- ¹⁰ *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 931 (1st Cir.) (“[T]he Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too *high*, not too low.”)(emphasis added).
- ¹¹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (“[A] combination formed for the purpose and with the effect of *raising, depressing, fixing, pegging, or stabilizing* the price of a commodity in interstate or foreign commerce is illegal per se.”) (emphasis added).
- ¹² Horizontal Merger Guidelines, *supra* note 8, § 12.
- ¹³ *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*, 549 U.S. 312, 320 (2007).
- ¹⁴ AREEDA & HOVENKAMP, *supra* note 1, § 575 (“The important and often overlooked consequence of monopsony power is reduced output on the monopsonist’s selling side: that is, since the monopsonist reduces its buying price by purchasing less, it must ordinarily sell less.”).
- ¹⁵ See *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*, 549 U.S. 312, 321 n.2 (2007) (similar fact pattern as Court considered predatory bidding claim).
- ¹⁶ Horizontal Merger Guidelines, *supra* note 8, § 12, which also gives this example:
- Example 24: Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output.*
- ¹⁷ See, e.g., Complaint at 5, *United States v. Anthem, Inc.*, No. 16-1493(ABJ) (D.D.C. 2017).
- ¹⁸ *Id.* at 27.
- ¹⁹ It is important to understand that there was no disagreement that increased ability to obtain lower input prices would result from the proposed transaction. Rather, Anthem argued that the greater buyer power would lead to lower prices for its customers, which should be treated as efficiencies. Anthem took the position that its prices for inputs could be too low only if they fell below long-run marginal costs. DOJ Anthem Buy-Side Memo, *supra* note 5, at 9. At oral argument before the D.C. Circuit, Anthem agreed that its claim of lower prices would not be cognizable were an actual monopsony to result from the transaction. *United States v. Anthem, Inc.*, 855 F.3d 345, 378 (D.C. Cir. 2017) (Kavanaugh, B., dissenting).
- ²⁰ *Anthem*, 855 F.3d at 378.
- ²¹ *Id.* at 377–78 (citations omitted). As noted above, the Horizontal Merger Guidelines recognize that a combination of buyers can lead to lower transaction costs that will lead to lower input prices in a manner that qualifies as a cognizable efficiency. Horizontal Merger Guidelines, *supra* note 8, § 12. An issue arises around the use of the term “bargaining power.” Economics literature treats “bargaining power” as “a party’s relative negotiating skill” and “bargaining leverage” as “a party’s payoff in case the negotiation breaks down and the parties fail to reach an agreement.” Gregory Vistnes & Yianis Sarafidis, *Cross-Market Hospital Mergers: A Holistic Approach*, 79 ANTITRUST L.J. 253, 257 n.20 (2013). In context, Judge Kavanaugh’s usage appears to be synonymous with bargaining leverage that falls short of monoposony.
- ²² *Anthem*, 855 F.3d at 378.
- ²³ ESI Closing Statement, *supra* note 2, at 1 n.2, 7–8.
- ²⁴ *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) (Congress’ “concern was with probabilities, not certainties.”). The Clayton Act was enacted in 1914 and reflected the events that Congress had observed since the passage of the Sherman Act in 1890. Because the Sherman Act was understood to focus chiefly on agreements between independent firms, the turn of the 20th century saw a merger boom because the acquisition of assets was thought to avoid antitrust issues. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 2.1c (5th ed. 2016). The Clayton Act, both as designed and then as amended in 1950, instructs antitrust enforcers to take a forward-looking perspective on pending transactions. See Bill Baer, Assistant Att’y Gen., Dep’t of Justice, Remarks at the American Bar Association Clayton Act 100th Anniversary Symposium (Dec. 4, 2014), <https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-bill-baer-american-bar-association-clayton-act-100th>.
- ²⁵ Horizontal Merger Guidelines, *supra* note 8, § 5.3 (“Market concentration is often one useful indicator of likely competitive effects of a merger.”).
- ²⁶ *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) (“[N]umerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power . . . [where cases] involve claims of actual monopolization.”).
- ²⁷ HOVENKAMP, *supra* note 24, § 12.46; see *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014).
- ²⁸ *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982–83 (D.C. Cir. 1990).
- ²⁹ *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 364–65 (1963).
- ³⁰ See *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 191 (D.D.C. 2017); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 18–19 (D.D.C. 2017).
- ³¹ DOJ Anthem Buy-Side Memo, *supra* note 5, at 5 (quoting *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*, 549 U.S. 312, 321–22 (2007)).
- ³² See *id.* at 9 (Dec. 19, 2016) (citing *United States v. Rice Growers Ass’n of Cal.*, 1986 WL 12562 (E.D. Cal. Jan. 31, 1986), and *United States v. Pennzoil Co.*, 252 F. Supp. 962 (W.D. Pa. 1965)).
- ³³ The structural presumption could be applied where the market for the purchase of an input has a post-merger HHI of above 2500 and the effect of the merger is an increase of more than 200, which is the current standard for a seller-side merger. The question of how to fashion a rebuttable presumption for buyer-side analysis is discussed in detail in Peter Carstensen, *Buyer Power and The Horizontal Merger Guidelines: Minor Progress on an Important Issue*, 14 U. PA. J. BUS. L. 775, 817 (2012) (“if the post-merger HHI exceeds 2000, there should be a rebuttable presumption that the merger is illegal.”).
- ³⁴ See Rani Habash & John Scaif, *An Inside Look at Monopsony Issues in the FTC’s Express Scripts-Medco Merger Investigation*, ANTITRUST HEALTH CARE CHRON. 24 (ABA Section of Antitrust Law Newsl.) (2012); see also *United States v. Syfy Enters.*, 903 F.2d 659 (9th Cir. 1990).
- ³⁵ DOJ Anthem Buy-Side Memo, *supra* note 5, at 1. The DOJ identified such harm as “lower reimbursement, diminished quality, or reduced innovation.”
- ³⁶ See, e.g., *FTC v. Superior Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 414, 421–23 (1990); *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 339, 341–42 (1982).
- ³⁷ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 694–95 (1978).
- ³⁸ *Id.* at 695.
- ³⁹ 435 U.S. at 696 (citation omitted).
- ⁴⁰ *Philadelphia National Bank*, 374 U.S. at 370–71; see DOJ Anthem Buy-Side Memo, *supra* note 5, at 10 (citing *Philadelphia National Bank* for this conclusion).
- ⁴¹ *Anthem*, 855 F.3d at 369 (Millett, J., concurring). The majority opinion authored by Judge Rogers did not address the buyer-power issue expressly, because it affirmed the conclusion that the claimed efficiencies had not been proven, although it opined that the dissent’s “single-minded focus on price ignores that in highly concentrated markets like this one, lower prices, if they occur at all, may be transitory.” *Id.* at 366.
- ⁴² *Id.* at 371 (quoting AREEDA & HOVENKAMP, *supra* note 1, ¶ 975i, at 106 (2009)).
- ⁴³ Aviv Nevo, Deputy Ass’t Att’y Gen. for Econ., Antitrust Div., U.S. Dep’t of Justice, *Mergers that Increase Bargaining Leverage*, Remarks as Prepared for the Stanford Institute for Economic Policy Research and Cornerstone Research Conference on Antitrust in Highly Innovative Industries (Jan. 22, 2014), <https://www.justice.gov/atr/file/517781/download>.
- ⁴⁴ AREEDA & HOVENKAMP, *supra* note 1, ¶ 975i, at 106 (2009); see also Hori-

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- zontal Merger Guidelines, *supra* note 8, § 10 (describing cognizable efficiencies).
- ⁴⁵ Dennis W. Carlton & Mark Israel, *Proper Treatment of Buyer Power in Merger Review*, 39 REV. INDUS. ORG. 127, 130–31 (2011). For a discussion of the relationship between the FTC approach in *Express Scripts* and earlier statements reflecting a “more aggressive” DOJ approach, as well as a suggested analysis of the pros and cons of those DOJ statements, see John D. Shively, *When Does Buyer Power Become Monopsony Pricing?*, ANTITRUST, Fall 2012, at 90.
- ⁴⁶ Habash & Scalf, *supra* note 34.
- ⁴⁷ ESI Closing Statement, *supra* note 2, at 8. The Commission did not expressly apply a structural analysis to the buy-side claim (other than to say that it would not qualify as a monopsony) although its conclusion about lack of competitive effects could be read to mean that any such concentration would have been offset by other market factors, such as the fact that “dispensing fees are negotiated individually between each PBM and each pharmacy.” *Id.* at 8 n.15. Two authors who provided support for Medco during the transaction describe a similar analysis. See Habash & Scalf, *supra* note 34.
- ⁴⁸ Horizontal Merger Guidelines, *supra* note 8, § 5.3.
- ⁴⁹ At the beginning of 2017, the new Charter had about 19% of the subscribers held by the top 7 national MVPDs. Mike Farrell, *Top 25 MVPDs*, MULTICHANNEL NEWS (Feb. 27, 2017), <http://www.multichannel.com/top-25-mvpds/411157>.
- ⁵⁰ Competitive Impact Statement at 11, *United States v. Charter Commc’ns Inc.*, 1:16-cv-00759(RCL) (D.D.C. 2016), www.justice.gov/atr/file/850161/download.
- ⁵¹ Complaint at 4, *United States v. Charter Commc’ns Inc.*, 1:16-cv-00759 (RCL) (D.D.C. 2016), <https://www.justice.gov/opa/file/846046/download>. See also Nicholas Hill et al., *Economics at the Antitrust Division 2014–2015: Comcast/Time Warner Cable and Applied Materials/Tokyo Electron*, 47 REV. INDUS. ORG. 425, 428–29 (2015). Discussing a similar proposed merger of cable operators, DOJ economists explained that “the [cable company’s] leverage . . . is believed to come from the size of its customer base. The advertising that a programmer can earn on its content depends upon the breadth of the audience that can see that content. Further, widely distributed content is more likely to garner buzz and praise than is content that can be seen only in a small part of the country. Thus, while Comcast and Time Warner Cable are rarely substitutes for access to particular customers, they are substitutes when a programmer is trying to build a national audience for content.” *Id.*