(ORAL ARGUMENT SCHEDULED MARCH 24, 2017)

No. 17-5024

In the
United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs-Appellees,

v.

ANTHEM, INC.,
Defendant-Appellant.

On Appeal from the U.S. District Court for the District of Columbia
No. 1:16-cv-01493-ABJ (Hon. Amy Berman Jackson)

BRIEF FOR ANTITRUST ECONOMISTS AND BUSINESS PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

All parties appearing in this Court and before the district court are listed in the Brief for Defendant-Appellant Anthem, Inc.

B. Rulings under Review

References to the ruling at issue appear in the Brief for Defendant-Appellant.

C. Related Cases

Amici adopt the statement of related cases presented in the Brief for Defendant-Appellant.

CORPORATE DISCLOSURE STATEMENT

Amici are the individuals listed in Appendix A. They file this brief in their individual capacities and not on behalf of the institutions and organizations with which they are professionally affiliated.

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INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of the individual economists and business professors listed in Appendix A. *Amici* include economists who specialize in the economic analysis of antitrust issues, with particular focus on the proper assessment of the competitive effects of mergers under section 7 of the Clayton Act, 15 U.S.C. § 18. *Amici* also include professors who specialize in business organizations and strategic management. *Amici* share a keen interest in ensuring that the courts uphold and apply a sound economic analysis of the competitive effects of mergers, including predictive assessments of potential price effects.

Amici are concerned that the district court's opinion in the present case fails to give proper consideration to the full scope of potential price effects of the proposed merger of Anthem, Inc. and Cigna Corporation. The decision below exemplifies the errors that occur when courts or antitrust enforcers apply disparate burdens and standards of proof to certain aspects of price-effects analysis in evaluating the competitive effects of a business combination. *Amici* believe that a proper understanding of economic principles will assist this Court in overseeing the correct application of section 7 in this case.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel contributed funds toward the preparation or submission of this brief.

STATUTES AND REGULATIONS

Pertinent statutes are contained in the addendum to the Brief for Defendant-Appellant.

SUMMARY OF ARGUMENT

In its decision below, the district court erred by disregarding an entire category of predicted direct-to-customer price benefits when judging the potential direct competitive effects of the proposed merger. The court accepted the government's expert evidence of the merger's potential upward pricing pressure on fees paid by insureds (the customers of the merged firm) for health-insurance claims-administration services, while simultaneously excluding from its assessment of the merger's potential downward price pressure on healthcare-provider rates that those same customers of the combined firm would pay. Instead, the district court put the burden on the merging parties to prove the predicted direct-to-customer price benefits (reduced healthcare-provider rates) under the more demanding standard of proof reserved by the Department of Justice's Horizontal Merger Guidelines for the analysis of indirect effects on competition resulting from incremental cost reductions and other operational efficiencies realized by the merged firm and potentially passed on to consumers.

The district court's disparate analytical treatment of some direct-to-customer price effects versus others resulted in an incomplete and unequal assessment of the

price effects of the merger and therefore fundamentally distorted the core competitive-effects analysis under section 7. This Court should correct the error in this case and provide clear guidance to ensure that all direct price effects of mergers are subjected to the same level of scrutiny in analyzing the predicted competitive effects of a proposed merger.

ARGUMENT

IN HOLDING THAT THE GOVERNMENT HAD MET ITS BURDEN IN CHALLENGING THE PROPOSED MERGER UNDER SECTION 7, THE DISTRICT COURT ERRED BY CONSIDERING ONLY THE CONSUMER HARM OF POTENTIAL PRICE INCREASES WHILE DISREGARDING THE CONSUMER BENEFIT OF POTENTIAL PRICE REDUCTIONS

In challenging the proposed merger of health-insurance carriers Anthem and Cigna, the plaintiffs presented expert economic evidence predicting that a direct price effect of the merger would be that the combined company could charge its largest customers (national employers) in 14 States higher fees for services provided in administering health-insurance claims. Mem. Op. at 3, 58-59. Anthem's economic expert pointed out that the government's assessment of the potential competitive effects of the merger was incomplete because it ignored the offsetting direct price reductions that these same customers would receive in the form of lower rates they would pay to healthcare providers through the combined network offered by the merged firm. *Id.* at 5, 59. In concluding that the government had

met its prima facie burden of establishing that the proposed merger would substantially lessen competition in violation of section 7, the district court considered only the potential "anticompetitive effects" of the alleged higher administrative fees and "set aside" any assessment of the equally direct and corresponding price reductions in healthcare-provider rates. *Id.* at 60. The court reasoned that the "plaintiffs have established their prima facie case" because both sides' economists were in agreement that the merger would result in some upward pricing pressure "*if one sets the medical cost savings aside*." *Id.* (emphasis added).

Rather than treat consumer-benefiting direct price reductions (lower rates paid by insureds to healthcare providers) on par with consumer-harming direct price increases (allegedly higher administrative fees paid by insureds to insurers), the district court addressed the direct potential price effects on healthcare provider rates under the rubric of the "efficiencies defense" as set forth in the Justice Department's Horizontal Merger Guidelines. *Id.* at 5-8. In doing so, the court first accepted the government's claim that the merger would be "anticompetitive" because of the potential increase in administrative fees paid to health insurers but then shifted the burden to the merging parties to prove that the lower prices paid to healthcare providers would constitute merger-specific operational "efficiencies," that these asserted efficiencies would be verifiable, and that they would be sufficient to rebut the "anticompetitive effects" of the merger. *Id.* at 92-126.

This analysis by the district court was error. The upward pressure on administrative fees alleged by the government and the downward pressure on healthcare-provider rates posited by Anthem are both forms of direct-to-customer price effects that would potentially result from the merger, the latter being akin to an improvement in product quality from the perspective of the consumer (in this case, the insured). As such, they should be considered together and accorded the same legal burden and standard of proof as part of a complete assessment of the overall competitive effects and consumer benefits of the merger under section 7. *See* Robert Willig, *Unilateral Competitive Effects of Mergers: Upward Pricing Pressure, Product Quality, and Other Extensions*, 39 Ind. Org. Rev. 19, 27-31 (2011) (demonstrating the application of upward pricing pressure analysis where a merger directly benefits consumers by impacting product quality, and showing that "the impacts of a merger on product quality and on marginal cost are additive in their influence on pricing pressure, along with the influence of [upward pricing pressure]").

The disparate and asymmetrical treatment of Anthem's evidence of price reductions relative to the government's evidence of alleged price increases produced a distorted and unfair application of section 7. This result follows from the district court's miscasting as an indirect effect on competition what is, in fact, a direct price effect of the merger. Merging parties frequently assert that mergers

that are predicted to have the direct effect of increasing prices to consumers will actually be procompetitive or competitively neutral because of the indirect effects of incremental cost reductions or other efficiencies that will increase competition and be passed on to consumers. The Department of Justice's Horizontal Merger Guidelines subject such claims of indirect effects on competition to a more exacting burden than is applied to the analysis of the direct effects of the merger, an approach that has been subject to substantial criticism. *See, e.g.*, Dissenting Statement of Commissioner Joshua D. Wright, *In re Ardagh Group S.A., and Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain*, 79 Fed. Reg. 22,139, at 22,142 (Apr. 11, 2014) ("To the extent the Merger Guidelines are interpreted or applied to impose asymmetric burdens upon the agencies and parties to establish anticompetitive effects and efficiencies, respectively, such interpretations do not make economic sense and are inconsistent with a merger policy designed to promote consumer welfare."). *See also* Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 Mich. L. Rev. 347, 356-57 (2011) ("The Guidelines implicitly treat efficiencies and anticompetitive risks asymmetrically by insisting that efficiencies be proven to a very high degree of certainty in order to justify a merger whereas risks need not be proven with great certainty in order to block a merger.").

Whatever the merits of the Horizontal Merger Guidelines' approach, the district court here erred in applying to evidence of direct price reductions in the

form of lower healthcare-provider rates a standard that was crafted for the more complex and uncertain analysis of indirect effects that may or may not be passed on to consumers. The district court should have subjected the evidence of direct price reductions to the same level of scrutiny accorded to the government's evidence of direct price increases in the form of higher administrative fees.

Amici respectfully suggest that this Court should correct the error committed below by reversing the district court's decision and confirming that the proper application of section 7 must give full and equal consideration to all direct price effects of a proposed merger.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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APPENDIX

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), I hereby certify that the foregoing brief complies with the applicable type-volume limitations. This brief was prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. The brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), contains 1,517words. This certification is made in reliance on the word-count function of the word processing system used to prepare the brief.

/s/ *Steven G. Bradbury*
Steven G. Bradbury

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United States Court of Appeals
for the District of Columbia Circuit
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No. 17-5024

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by DECHERT LLP Attorneys for Amici Curiae to print this document. I am an employee of Counsel Press.

On **February 24, 2017**, counsel has authorized me to electronically file the foregoing **Brief for Antitrust Economists and Business Professors as Amici Curiae in Support of Appellant and Reversal** with the Clerk of Court using the CM/ECF System, which will serve, via e-mail notice of such filing, to any of the following counsel registered as CM/ECF users:

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