Unit 9: Sanford Health/Mid Dakota Clinic

CLASS 13-14 SLIDES
For October 17-22, 2019

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HEALTH

Comparison of injunctive relief standards

Winter standard[1]	Section 13(b) standard
A [private] plaintiff seeking a preliminary injunction must establish	A court must find, after
[1] that he is likely to succeed on the merits,	[1] considering the Commission's likelihood of ultimate success
[2] that he is likely to suffer irreparable harm in the absence of preliminary relief,	
[3] that the balance of equities tips in his favor, and	[2] weighing the equities
[4] that an injunction is in the public interest.	that entry of the preliminary injunction would be in the public interest

[1] Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

Relevant product markets

- What relevant product markets did the district court find?
  1. Adult primary care physician services
  2. Pediatric services
  3. OB/GYN physician services
  4. General surgeon services

Relevant product markets: Some background

- Two complementary tests under in judicial analysis
  - The "outer boundaries" and "practical indicia" criteria of *Brown Shoe*[1]
  - The hypothetical monopolist test of the Merger Guidelines[2]

[1] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

[2] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (rev. Aug. 19, 2010).

Brown Shoe "outer boundaries" test

- *Brown Shoe*:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.[1]

  - This remains the prevailing definition of a relevant product market in the case law
  - Key indicia—
    - Reasonable interchangeability of use
    - [High] cross-elasticity of demand

- General idea
  - The relevant product market should—
    1. *contain* all products that exhibit a reasonable interchangeability of use and a high cross-elasticity of demand with one another, *and*
    2. *exclude* all products that lack reasonable interchangeability of use and have a low cross-elasticity of demand with products in the relevant product market

- Modern usage
  - Reasonable interchangeability of use has largely come to mean high cross-elasticity of demand and is no longer a distinct "outer boundary" test

[1] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

Brown Shoe "practical indicia" test

- Submarkets and "practical indicia" of relevant markets

> However, within this broad market [defined by reasonable interchangeability of use and high cross-elasticity of demand], well-defined **submarkets** may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such **practical indicia** as
>
> [1] industry or public recognition of the submarket as a separate economic entity,
>
> [2] the product's peculiar characteristics and uses,
>
> [3] unique production facilities,
>
> [4] distinct customers,
>
> [5] distinct prices,
>
> [6] sensitivity to price changes, and
>
> [7] specialized vendors.[1]

[1] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

Brown Shoe "practical indicia" test

- Submarkets and "practical indicia" of relevant markets
  - This list of "practical indicia" is not intended to be exhaustive
  - Some additional factors that courts typically consider
    - Relative prices of products in the provisional market
      - A Timex and a Rolex both tell time, but they are unlikely to exhibit a high cross-elasticity of demand with on another
    - Different functional attributes that might appeal to different classes of buyers
    - Differences in reputation
- Problems with the *Brown Shoe* "practical indicia" test
  - The list provides some factors to consider, but does not say what weigh they should be given or any other analytical technique to apply them to determine the boundaries of submarkets
  - This created an enormous amount of confusion, bad analysis, and bad decisions

[1] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

Hypothetical monopolist test: Background

- The original idea
  - The relevant market should be—
    - the smallest group of products containing the products of interest (say, the products of the merging firms in a horizontal merger)
    - in which a hypothetical monopolist of those products would raise prices profitably over the current level
    - by at least "small but significant nontransitory" amount
  - Observations
    - Introduced in the 1982 DOJ Merger Guidelines
    - "SSNIP" = "Small but significant nontransitory increase in price"
    - Under the Merger Guidelines, a SSNIP is usually taken to be a price increase of 5% for at least one year
  - General idea
    - If a hypothetical monopolist—effectively the merger of all firms in the candidate market—could not anticompetitively affect prices, then a merger of only two firms in the candidate market could not affect prices
    - Accordingly, the candidate market should be accepted as a relevant market only if a hypothetical monopolist could raise prices

Hypothetical monopolist test: Background

- Example:
  - Say a hypothetical monopolist
    - Faces an (inverse) demand: $p = 10 - \frac{1}{2} q$
    - Has no fixed costs and constant marginal costs of 4 per unit of production
    - Prevailing (premerger) price: $p_1 = 5$
  - *Question*: If the current market price is 5, would a SSNIP—taken to be 5 percent—be profitable?

Some definitions:

Marginal sales are sales that are lost when the price is increased

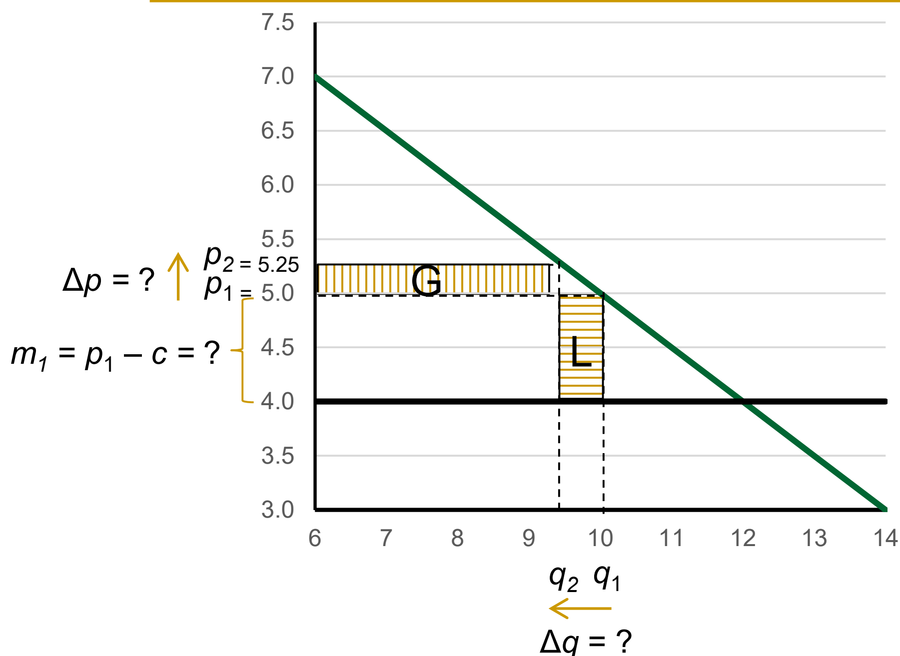
Inframarginal sales are sales that continued to be made at the higher price

Hypothetical Monopolist Test: Background

- Step 1. Set up the problem with what you know:
  - (Inverse) demand: $p = 10 - \frac{1}{2} q$
  - Prevailing (premerger) price: $p_1 = 5$
  - SSNIP = 5%
  - Constant marginal cost $c = 4$

Hypothetical Monopolist Test: Background

- *Step 1*. Set up the problem with what you know:
  - (Inverse) demand: $p = 10 – ½ q$
  - Prevailing (premerger) price: $p_1 = 5$
  - SSNIP = 5%
  - Constant marginal cost $c = 4$
- *Step 2*. Figure out what you need:



The gross gain on inframarginal sales:

Area G = price increase (Δp) times inframarginal sales (q_2)

$= \Delta p q_2$

The gross loss on marginal sales:

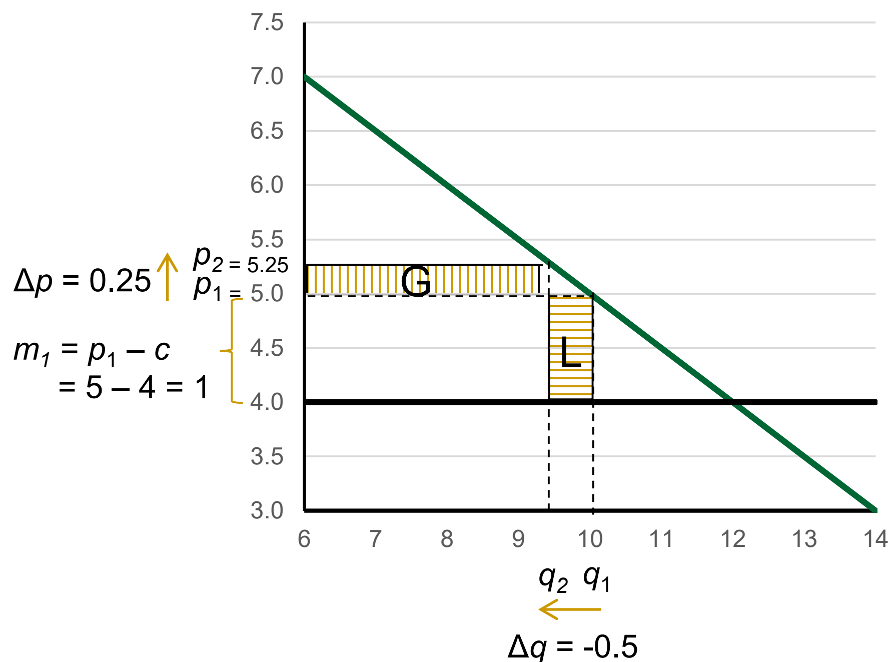
Area L = gross margin on marginal sales (m_1) times (lost) marginal sales (Δq)

$= m_1 \Delta q$

So need p_2, Δp, q_1, q_2, Δq, and m_1

Hypothetical Monopolist Test: Background

- Set up the problem:
  - (Inverse) demand: $p = 10 - ½ q$
  - Prevailing (premerger) price : $p_1 = 5$
  - SSNIP = 5%
  - Constant marginal cost $c = 4$



Step 3. Solve for the variables you need using the parameters given in the problem and the demand curve:

$q = 20 - 2p$ (from the inverse demand curve)

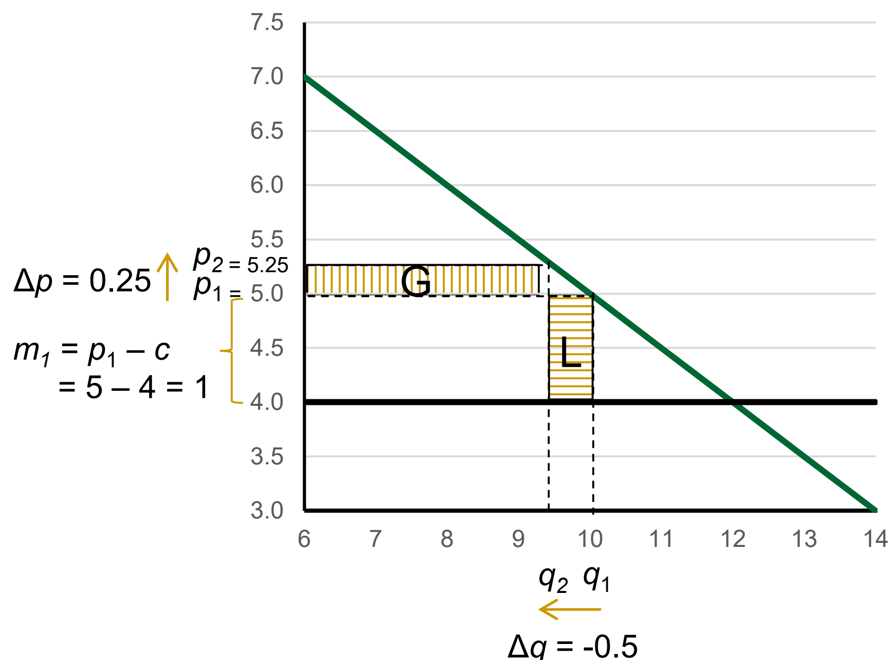
$q_1 = 10$ $\qquad \Delta q = q_2 - q_1 = 9.5 - 10 = -0.5$

$q_2 = 9.5$ $\qquad \Delta p = p_2 - p_1 = 5.25 - 5 = 0.25$

$m_1 = p_1 - c = 5 - 4 = 1$

Hypothetical Monopolist Test: Background

- Set up the problem:
  - (Inverse) demand: $p = 10 - ½\, q$ $\quad q = 20 - 2p$
  - Starting point: $p_1 = 5$ $\quad q_1 = 10$ $\quad \Delta q = q_2 - q_1 = 9.5 - 10 = -0.5$
  - SSNIP = 5% $\quad q_2 = 9.5$ $\quad \Delta p = p_2 - p_1 = 5.25 - 5 = 0.25$
  - Constant marginal cost $c = 4$ $\quad m_1 = p_1 - c = 5 - 4 = 1$



Step 4. Solve problem

Area G = $q_2 \Delta p$ = (9.5)(0.25) = 2.375
Area L = $m_1 \Delta q$ = (1)(-0.5) = -0.5

Incremental profits = Area G – Area L
= 2.375 – 0.5 = 1.875

Therefore, a price increase of 5 percent above the current level is profitable and the HMT is satisfied

Hypothetical Monopolist Test: Homework

	Blue cars	Red cars	Green cars
Price per car	1000	1000	1000
Current sales	2500	3000	1000
Fixed costs	0	0	0
Marginal costs (constant)	700	700	700

Demand curves are specified in subsequent slides

Gain in profits on inframarginal sales: $\Delta p(q_1 - \Delta q)$ $(= \Delta p q_2)$
Loss in profits on the marginal sales: $\Delta q(p_1 - mc)$ $(= m_1 \Delta q)$

Problems:

1. Two blue car manufacturers are going to merge. Are blue cars a relevant market under the hypothetical monopolist test using a 5% SSNIP?

2. Two red car blue car manufacturers are going to merge. Are red cars a relevant market under the hypothetical monopolist test using a 5% SSNIP?

3. Two green car blue car manufacturers are going to merge. Are green cars a relevant market under the hypothetical monopolist test using a 5% SSNIP?

4. A blue car and a red car manufacturer are going to merge. Are blue cars and red cars a relevant market under the hypothetical monopolist test using a 5% SSNIP?

Hypothetical Monopolist Test: Homework

	Blue cars	Red cars	Green cars
Price per car	1000	1000	1000
Current sales	2500	3000	1000
Fixed costs	0	0	0
Marginal costs (constant)	700	700	700

Gain in profits on inframarginal sales: $\Delta p(q_1 - \Delta q)$ $(= \Delta p q_2)$

Loss in profits on the marginal sales: $\Delta q(p_1 - mc)$ $(= m_1 \Delta q)$

- Blue car merger
  1. The demand curve for blue cars is $q_{blue} = 8500 - 6p_{blue}$
  2. Parameters from problem:
     - $p_1 = 1000$
     - $q_1 = 2500$
     - $mc = 700$
  3. Solve for missing variables:
     - $\Delta p = 50$ (a 5% increase in the 1000 price)
     - $p_2 = 1050$ (= 1000 + 50)
     - $q_2 = 2200$ (from the demand curve)
     - $\Delta q = -300$
     - $m_1 = 300$ (=1000 – 700)

4. Solve for net incremental profits:
   - Gain in profits on inframarginal sales:
     $\Delta p q_2 = (50)(2200) = 110{,}000$
   - Loss in profits on the marginal sales:
     $m_1 \Delta q = (300)(-300) = -90{,}000$
   - Net incremental profits:
     110,000 - 90,000 = 20,000

Relevant market: YES

Hypothetical Monopolist Test: Homework

	Blue cars	Red cars	Green cars
Price per car	1000	1000	1000
Current sales	2500	3000	1000
Fixed costs	0	0	0
Marginal costs (constant)	700	700	700

Gain in profits on inframarginal sales: $\Delta p(q_1 - \Delta q)$ $(= \Delta p q_2)$

Loss in profits on the marginal sales: $\Delta q(p_1 - mc)$ $(= m_1 \Delta q)$

- Red car merger
  1. The demand curve for red cars is $q_{red} = 8000 - 5p_{red}$
  2. Parameters from problem:
     - $p_1 = 1000$
     - $q_1 = 3000$
     - $mc = 700$
  3. Solve for missing variables:
     - $\Delta p = 50$ (a 5% increase in the 1000 price)
     - $p_2 = 1050$ (= 1000 + 50)
     - $q_2 = 2750$ (from the demand curve)
     - $\Delta q = -250$
     - $m_1 = 300$ (= 1000 – 700)

4. Solve for net incremental profits:
   - Gain in profits on inframarginal sales:
     $\Delta p q_2 =$ (50)(2750) = 137,500
   - Loss in profits on the marginal sales:
     $m_1 \Delta q =$ (300)(-250) = -75,000
   - Net incremental profits:
     137,500 - 75,000 = 62,500

Relevant market: YES

Hypothetical Monopolist Test: Homework

	Blue cars	Red cars	Green cars
Price per car	1000	1000	1000
Current sales	2500	3000	1000
Fixed costs	0	0	0
Marginal costs (constant)	700	700	700

Gain in profits on inframarginal sales: $\Delta p(q_1 - \Delta q)$ $(= \Delta p q_2)$

Loss in profits on the marginal sales: $\Delta q(p_1 - mc)$ $(= m_1 \Delta q)$

- Green car merger
  1. The demand curve for green cars is $q_{green} = 4000 - 3p_{green}$
  2. Parameters from problem:
     - $p_1 = 1000$
     - $q_1 = 1000$
     - $mc = 700$
  3. Solve for missing variables:
     - $\Delta p = 50$ (a 5% increase in the 1000 price)
     - $p_2 = 1050$ (= 1000 + 50)
     - $q_2 = 850$ (from the demand curve)
     - $\Delta q = -150$
     - $m_1 = 300$ (= 1000 – 700)

4. Solve for net incremental profits:
   - Gain in profits on inframarginal sales:
     $\Delta p q_2 = (50)(850) = 42{,}500$
   - Loss in profits on the marginal sales:
     $m_1 \Delta q = (300)(-150) = -45{,}000$
   - Net incremental profits:
     42,500 - 45,000 = -2,500

Relevant market: NO

Hypothetical Monopolist Test: Homework

	Blue cars	Red cars	Green cars
Price per car	1000	1000	1000
Current sales	2500	3000	1000
Fixed costs	0	0	0
Marginal costs (constant)	700	700	700

Gain in profits on inframarginal sales: $\Delta p(q_1 - \Delta q)$ $(= \Delta p q_2)$

Loss in profits on the marginal sales: $\Delta q(p_1 - mc)$ $(= m_1 \Delta q)$

- Blue + red car merger
  1. The demand curve for green cars is $q_{blue+red} = 9500 - 4p_{blue+red}$
  2. Parameters from problem:
     - $p_1 = 1000$
     - $q_1 = 5500$ [need to add blue + red]
     - $mc = 700$
  3. Solve for missing variables:
     - $\Delta p = 50$ (a 5% increase in the 1000 price)
     - $p_2 = 1050$ (= 1000 + 50)
     - $q_2 = 5300$ (from the demand curve)
     - $\Delta q = -200$
     - $m_1 = 300$ (=1000 – 700)

4. Solve for net incremental profits:
   - Gain in profits on inframarginal sales:
     $\Delta p q_2 = (50)(5300) = 265{,}000$
   - Loss in profits on the marginal sales:
     $m_1 \Delta q = (300)(-200) = -60{,}000$
   - Net incremental profits:
     265,000 - 60,000 = 205,000

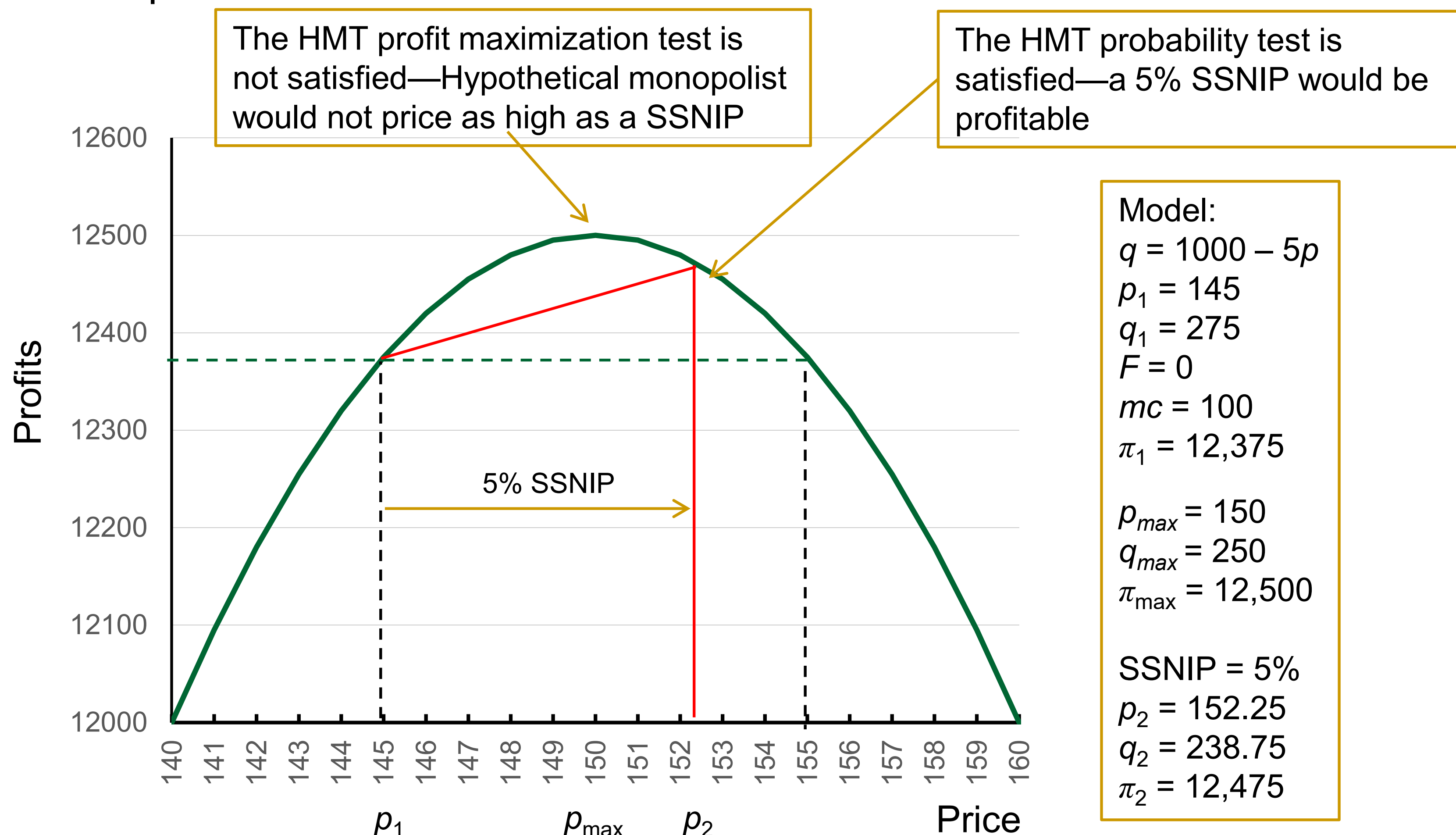
Relevant market: YES

2010 Merger Guidelines

- Adopts the 1992 Merger Guidelines methodology with some very significant changes
  1. Relegates market definition to one of several tools useful in merger antitrust analysis
  2. Abandons the “smallest market” principle and unique relevant markets
  3. Asks whether a profit-maximizing hypothetical would raise price by a SSNIP, not whether it would be profitable to do so
     - *Profitability test*: 1982 and 1992 Merger Guidelines
     - *Profit-maximization test*: 2010 Merger Guidelines
     - Adoption by the courts
     - Conventional wisdom
       - Since the current price would be close to the monopoly price only if the market is operating close to a perfect monopoly, in most cases the profitability test and the profit-maximization test will reach the same result with respect to a candidate market
     - *Query*: Were the 2010 Guidelines correct in adopting the profit-maximization test?
       - Won’t it reject markets close to being monopolized and increase the probability of a *Cellophane* fallacy?

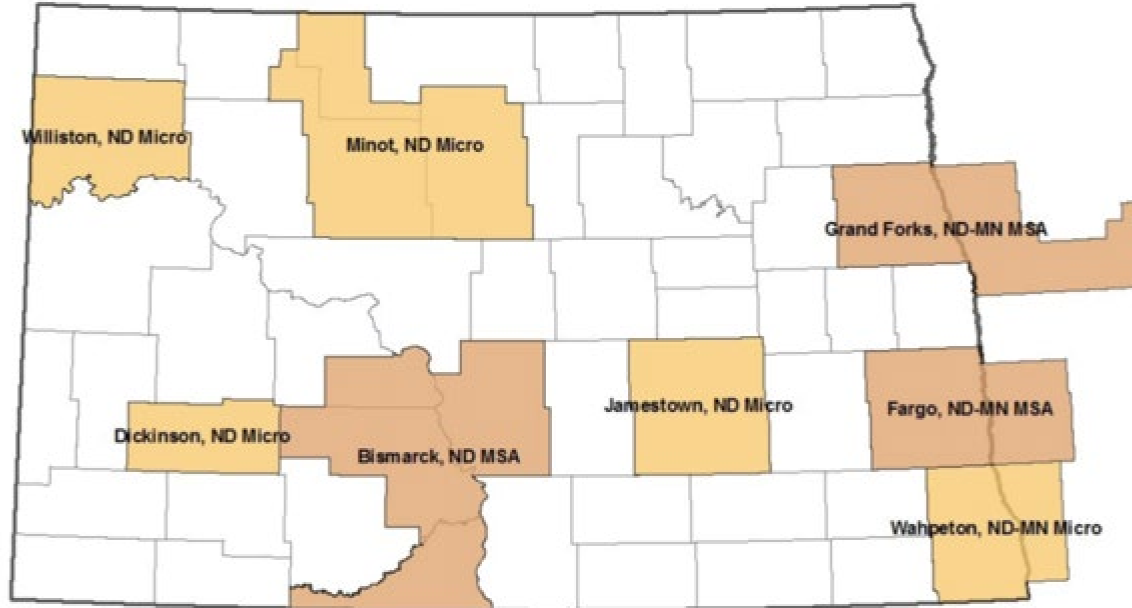
2010 Merger Guidelines

- *Example*: HMT profitability and profit maximization tests in a close to monopolized market



Relevant geographic market

- What relevant geographic market did the district court find?
  - Four-county Bismarck-Mandan Metropolitan Statistical Area

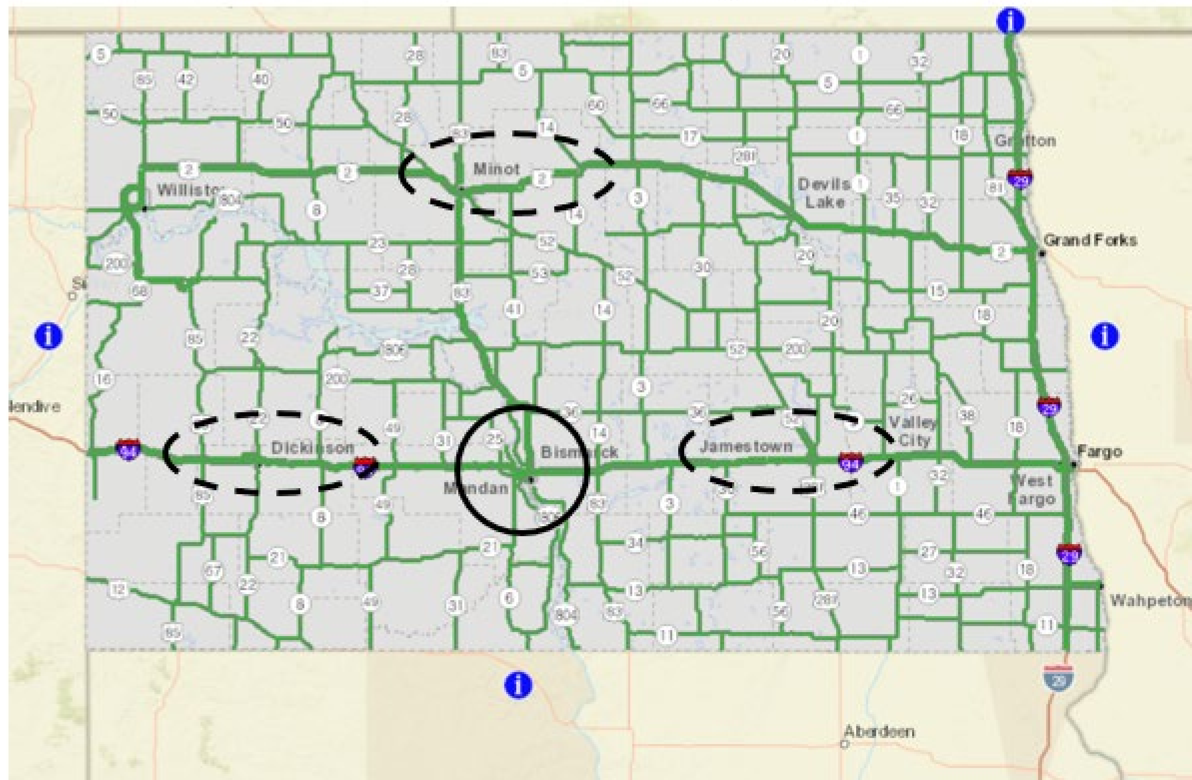


Relevant geographic market

- What did the Eight Circuit say is the legal test of a relevant product market?
  - The “hypothetical monopolist test” governs geographic market definition
- What result did the district court find when it applied the HMT?
  - Commercial health insurers would accept a hypothetical monopolist’s SSNIP rather than market a health insurance plan in the Bismarck-Mandan area that did not include Bismarck-Mandan area physicians providing adult PCP services, pediatrician services, OB/GYN services, and general surgeon services

Relevant geographic market

North Dakota County Map



Market shares and market concentration

- What were the market shares and market concentration found by the district court?
  - Not in Eight Circuit's opinion
  - The Eight Circuit provided only the following summary table:

Service Line	Pre-merger HHI	Post-merger HHI	Change in HHI
Adult PCP	3891	7422	3531
Pediatricians	5333	9726	4393
OB/GYN	6211	7363	1152
General Surgery	5362	9964	4602

- Not challenged by the merging parties at trial

What does all of this mean?

Market shares and market concentration

- HHIs
  - The Herfindahl-Hirschman Index (HHI) is a common measure of market concentration
  - It is equal to the sum of the squares of the market share of each firm in the market.
    - Symbolically, assume that there are N firm in the market and each firm has a market share s_i Then:

$$HHI = \sum_{i=1}^{N} s_i^2$$

    - Example: Market with five firms:

Firm	Market Share	HHI Contribution
1	45%	2025
2	26%	676
3	22%	484
4	5%	25
5	2%	4
	100%	3214

$\left(= s_i^2\right)$ ← 2025

HHI ← 3214

Market shares and market concentration

- In the district court:

The HHI contribution of a firm is the square of the firm's market share (s_i^2)

	Adult PCP		Pediatricians	
	Share	HHI	Share	HHI
Sanford	34.4%	1183	34.0%	1156
MDC	51.3%	2632	64.6%	4173
CHI	7.9%	62		
Others (2)	6.4%	20	1.4%	2
	100.0%	3898	100.0%	5331
Combined	85.7%		98.6%	
PreHHI		3898		5331
Delta		3529		4393
PostHHI		7427		9724

The "delta" is equal to $2 * s_1 * s_2$

There appear to have been two Adult PCPs, so each would have a share of 3.2%. Each then would have a contribution to the HHI of 10.24, so together they would contribute about 20 points to the premerger HHI

Market shares and market concentration

- In the district court:

23.9% +75.1% -15.4%

	OB/GYN				General Surgery	
	Premerger		Postmerger			
	Share	HHI	Share	HHI	Share	HHI
Sanford	23.9%	571	84.6%	7157	36.1%	1303
MDC	75.1%	5640			63.7%	4058
CHI						
Others (1)			15.4%	237		
	99.0%	6211	100.0%	7394	99.8%	5361
Combined			84.6%		99.8%	
PreHHI				6211		5361
Delta				1183		4599
PostHHI				7394		9960

Note: One current MDC OB/GYN (representing a market share of 15.4%) would leave MDC to practice on her own postmerger. So she would be included in MDC's premerger share but subtracted out of the combined firm postmerger and made an independent firm.

The *Philadelphia National Bank* presumption

- Eight Circuit:

> The district court next found that the government made a sufficient *prima facie* showing because "[t]he changes in [Herfindahl-Hirschman Index] in each of the four physician service lines are well above the Merger Guidelines' threshold for presumption that the proposed transaction is likely to enhance market power."[1]

- The district court
  - Invoked the *Philadelphia National Bank* presumption to make out its prima facie case of the requisite anticompetitive harm in the four relevant markets
  - Used the Merger Guidelines to determine the threshold triggers for the presumption

[1] FTC v. Sanford Health, No. 17-3783, at 7 (8th Cir. June 13, 2017) (p. 59 in reading materials)

The *PNB* presumption: Background

- Application in *Philadelphia National Bank*
  - Combined firm had at least a 30% share in the relevant market
    - Enough for an "undue market share"
  - Share of the two largest banks in the relevant market should increase from 44% to 59%:
    - Enough for a "significant increase" in market concentration
  - Therefore, the *PNB* presumption was satisfied
  - Nothing in record to rebut presumption
    - District court misplaced reliance on testimony that competition was vigorous and would continue to be vigorous (problem too complex; witnesses failed to give "concrete reasons" for conclusions)

The *PNB* presumption: Background

- The Court in the 1960s was very aggressive on the market share thresholds of the *PNB* presumption
- Some early Supreme Court precedents
  - Brown Shoe/Kinney (1962)
    - Combined share of as little as 5% in an unconcentrated market
  - Von's Grocery/Shopping Bag Food Stores (1966)
    - 4.7% (#3) + 4.2% (#6) → 8.9% (#2) in an unconcentrated market
  - Pabst Brewing/Blatz Brewing (1966)
    - 3.02% (#10) + 1.47% (#18) → 4.49% (#5) in an unconcentrated market

Bottom line: Through the 1960s and into the 1970s, antitrust law prevented most significant horizontal mergers and acquisitions

The *PNB* presumption: Background

- Status of the *PNB* presumption as of the late 1970s
  - *General Dynamics* (1974) had returned to a rebuttable presumption
  - BUT
    - There was no meaning test of market definition
    - The market share triggers remained very low
    - The evidence sufficient to rebut the presumption remained generally undefined
- 1982 DOJ Merger Guidelines
  - Provided a economically rigorous and sensible means of defining markets
  - Provided new market share thresholds to be used by the DOJ
  - Provided a catalog of defenses to rebut the presumption

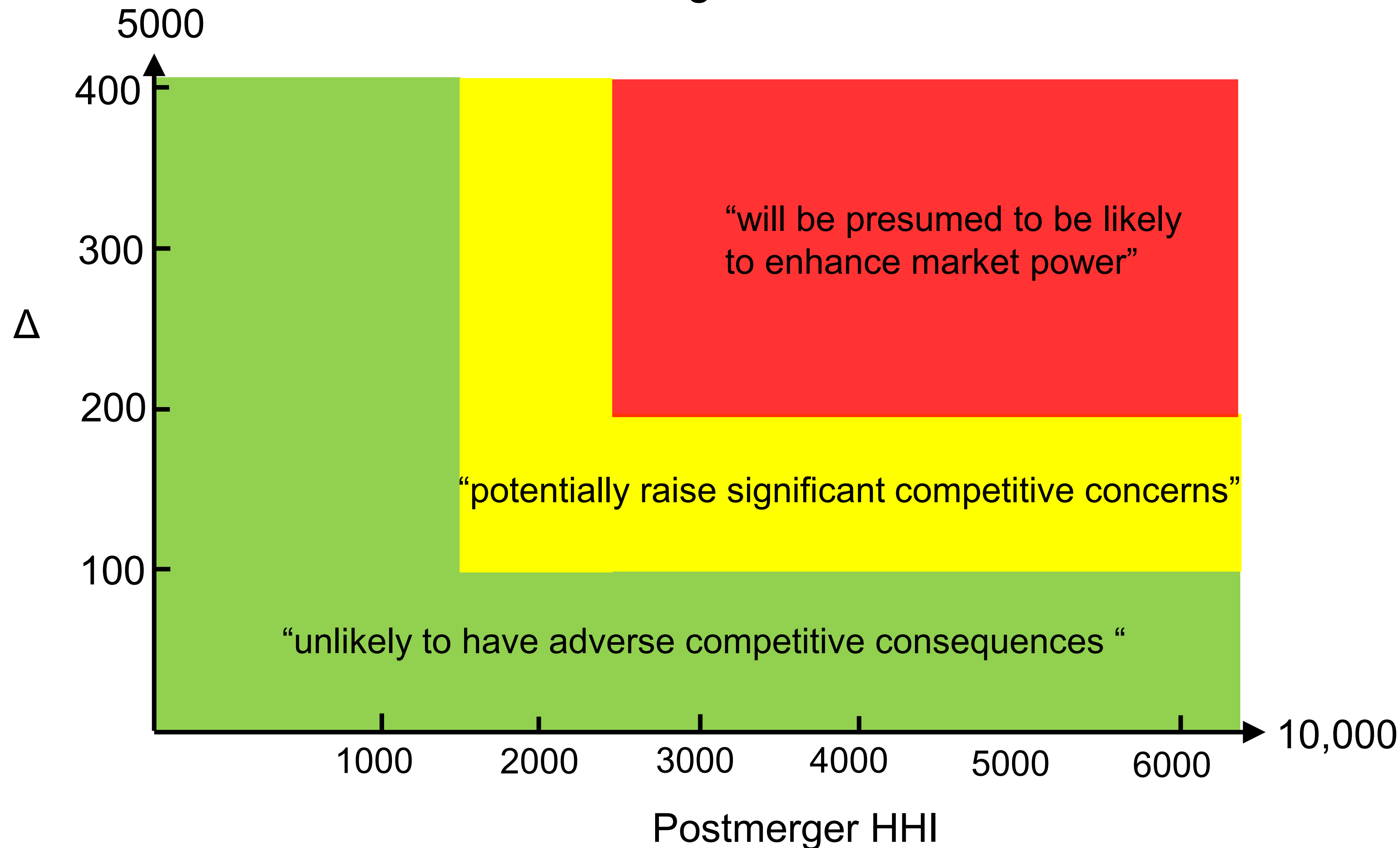
The *PNB* presumption: Background

- The Merger Guidelines
  - The 1982 Merger Guidelines provided new market share thresholds to be used by the DOJ based on:
    - The change in the HHI (the “delta”) resulting from the merger, and
    - The postmerger HHI
- The current thresholds: 2010 Merger Guidelines

Postmerger HHI	ΔHHI	Guidelines
	< 100	“unlikely to have adverse competitive consequences and ordinarily require no further analysis”
< 1500	--	“unlikely to have adverse competitive consequences and ordinarily require no further analysis”
Between 1500 and 2500	≥ 100	“potentially raise significant competitive concerns and often warrant scrutiny”
> 2500	100-200	“potentially raise significant competitive concerns and often warrant scrutiny”
	≥ 200	“will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.”

The *PNB* presumption: Background

- The current thresholds: 2010 Merger Guidelines



The *PNB* presumption: Background

- The DOJ and FTC have not brought "close" cases in alleged markets

Agency	Complaint	Defendant	Combined share[1]	PreHHI	PostHHI	Delta	Deal Status
FTC	2018	Wilhelmsen	84.7	3651	7214	3563	Preclosing
DOJ	2017	Energy Solutions	100	6040	10000	3960	Preclosing
DOJ	2016	Anthem	47	2463	3000	537	Preclosing
DOJ	2016	Aetna			>5000[2]		Preclosing
FTC	2016	Penn State Hershey	64	3402	5984	2582	Preclosing
FTC	2015	Advocate Heath	55	2094	3517	1423	Preclosing
FTC	2015	Staples	75[3]	3036	5836	2800	Preclosing
FTC	2015	Sysco	71[4]	3153	5519	1966	Preclosing
DOJ	2015	Electrolux		3350[5]	5100	1750	Preclosing
DOJ	2013	Bazaarvoice	68	2674	3915	1241	Consummated
FTC	2013	Saint Alphonsus	57	4612	6129	1607	Consummated

[1] When the complaint alleged multiple markets, the market with the most problematic highest HHIs is reported.
[2] The DOJ challenged Aetna's proposed acquisition of Humana in 17 geographic markets. The complaint did not provide HHI statistics for each market, although it noted that in 75% of the markets, the post-HHI would be greater than 5000.
[3] The FTC also challenged the transaction in 32 alleged relevant local geographic markets, with the smallest combined share being 51% and the largest being 100%.
[4] The complaint alleged multiple markets in food distribution. The numbers given are for national broadline distribution.
[5] The complaint alleged three markets. The numbers given are for ranges. Cooktops and wall ovens were similar.

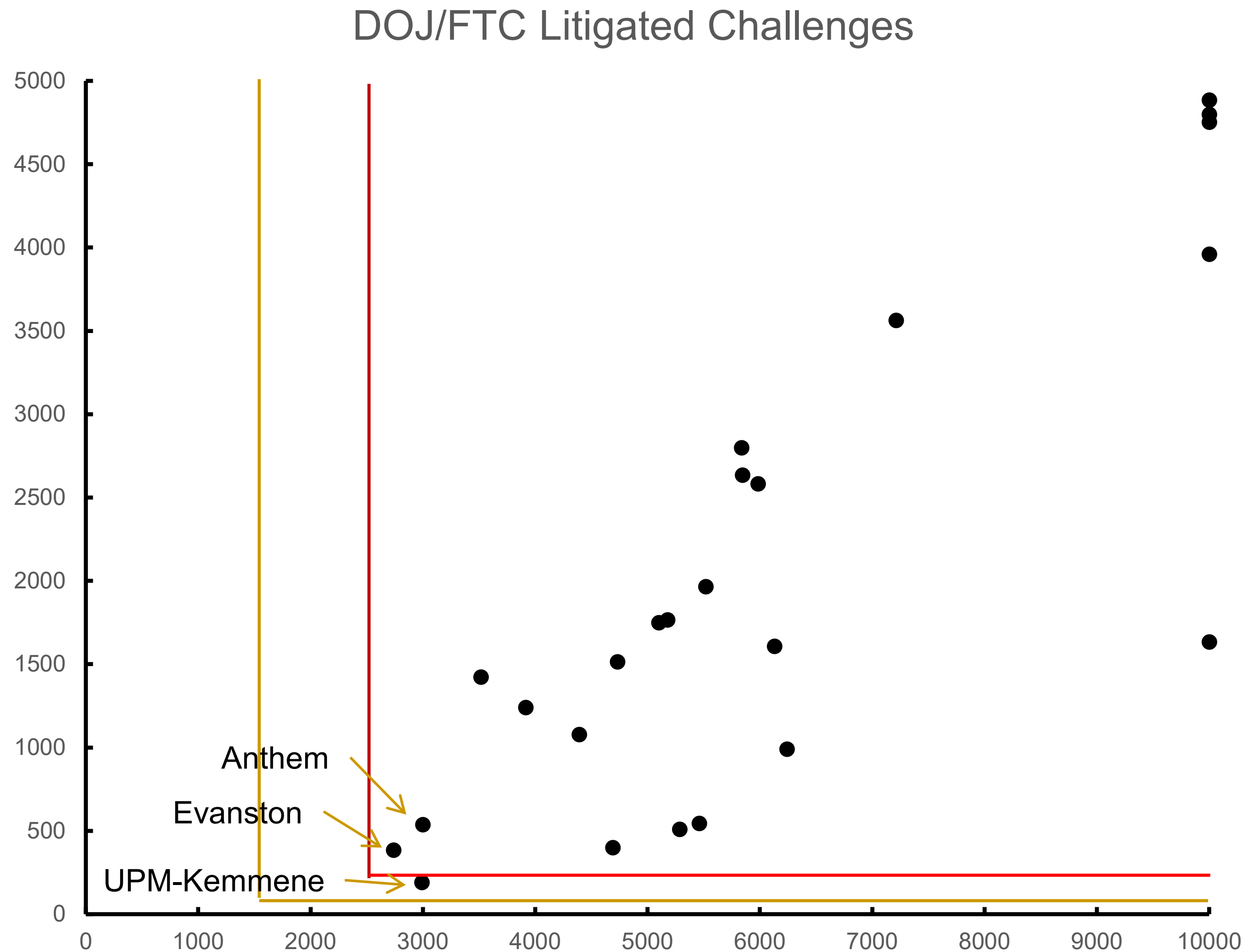
The *PNB* presumption: Background

- The DOJ and FTC have not brought "close" cases in alleged markets

Agency	Complaint	Defendant	Combined Share[1]	PreHHI	PostHHI	Delta	Deal Status
DOJ	2013	US Airways	100[2]	5258	10000	4752	Preclosing
DOJ	2013	ABInbev	100	5114	10000	4886	Preclosing
FTC	2011	OSF Healthcare	59	3422	5179	1767	Preclosing
FTC	2011	ProMedica	58	3313	4391	1078	Preclosing
DOJ	2011	H&R Block	28	4291	4691	400	Preclosing
FTC	2009	CCC	65	4900	5460	545	Preclosing
FTC	2008	Polypore	100	8367	10000	1633	Consummated
FTC	2007	Whole Foods	100[3]		10000		Preclosing
FTC	2004	Evanston	35	2355	2739	384	Consummated
DOJ	2003	UPM-Kemmene	20	2800	2990	190	Preclosing
FTC	2002	Libbey	79	5251	6241	990	Preclosing
FTC	2001	Chicago Bridge	73	3210	5845	2635	Consummated
FTC	2000	Heinz	33	4775	5285	510	Preclosing
FTC	2000	Swedish Match	60	3219	4733	1514	Preclosing
DOJ	2000	Franklin Electric	100	5200	10000	4800	Preclosing

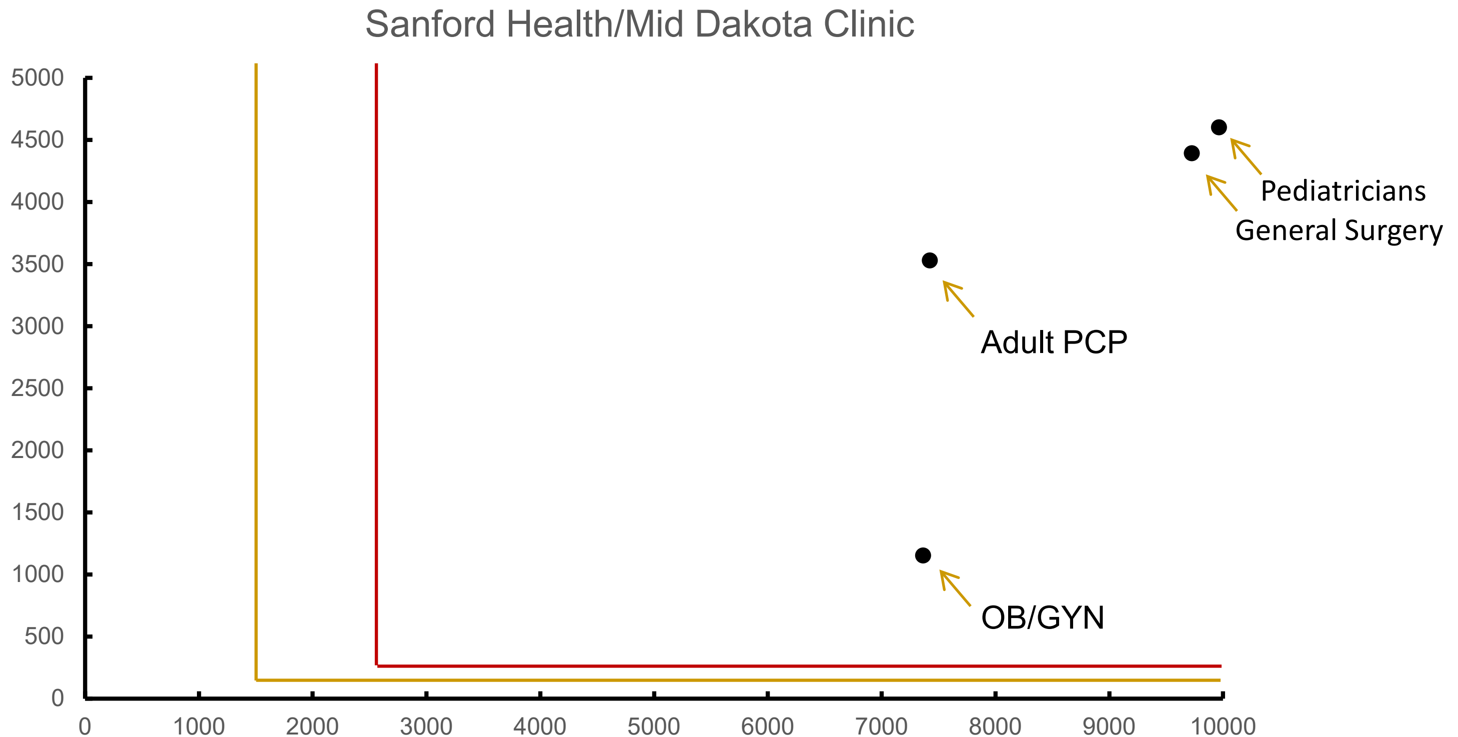
[1] When the complaint alleged multiple markets, the market with the most problematic highest HHIs is reported.
[2] The complaint alleged 1043 markets.
[3] In some local geographic markets, this was a merger to monopoly in the FTC's alleged product market of premium, natural, and organic supermarkets.

The *PNB* presumption: Background



The *PNB* presumption

- District court findings



The Prima Facie Case: Conclusion

- Eight Circuit: No error in—
  - Relevant product markets
    1. Adult primary care physician services
    2. Pediatric services
    3. OB/GYN physician services
    4. General surgeon services
  - Relevant geographic market
    - Four-county Bismarck-Mandan MSA
  - Requisite anticompetitive effect
    - The postmerger HHIs and the deltas
    - Application of the PNB presumption
- Eight Circuit:
  - Prima facie case is very strong
  - Requires strong evidence on rebuttal to raise a genuine issue of fact under the *Baker Hughes* sliding scale

Step 2. Rebutting the Prima Facie Case:

Step 2. Rebutting the prima facie case

- How did the merging parties seek to rebut the plaintiffs' prima facie case?
  1. Market concentration has no relationship to bargaining power in the North Dakota healthcare market
  2. Catholic Health was poised to enter the market to compete with Sanford after the merger
  3. Merger efficiencies offset the potential to harm consumers
  4. Mid Dakota's weakened condition justified the merger

Defense 1: Blue Cross sets prices

- Merging parties
  - Blue Cross is the dominant commercial insurer in the area
  - Blue Cross sets reimbursement rates using a statewide pricing schedule
  - No relationship between market concentration and prices, and so presumption does not apply
- District court analysis
  - Despite market power of Blue Cross, there is a relationship between market concentration after the merger and bargaining leverage
  - Evidence
    - Blue Cross representative:
      - Combined firm would have the power to force Blue Cross to choose between paying higher prices or leaving the market
      - Absent the merger, Blue Cross could stay in the market if *either* Sanford or MDC was in the Blue Cross network
    - "Natural experiment"
      - Blue Cross was forced to modify contract terms with a near-monopoly in another part of the state

Defense 1: Blue Cross sets prices

- Eight Circuit: No clear error in—
  - Crediting the evidence
  - Finding that it outweighed the testimony of the defendants’ expert

Defense 2: Catholic Heath would enter

- Merging parties
  - Catholic Health poised to enter the four relevant product markets in the Bismarck-Mandan MSA
    - Had recruited a top physician in Bismarck
  - Entry would counteract any anticompetitive effects of the merger
- District court
  - *Law*: To be cognizable as a defense, entry must be—
    - Timely
    - Likely
    - Sufficient in magnitude, character, and scope

    to deter or counteract the likely anticompetitive effects of the merger
  - Factual findings:
    - Catholic Heath would not enter quickly
    - Catholic Health president: CH faced difficulties in—
      - recruiting physicians
      - would take time to establish a reputation to compete with the combined company
    - → Entry would not occur in a sufficient time period to deter or offset the anticompetitive effects of the merger

Defense 2: Catholic Heath would enter

- Eight Circuit
  - (Implicitly) No error of law
  - No clear error in
    - Giving more weight to CH’s testimony that it could not timely compete with the combined company
    - Finding that entry would not occur in a sufficient time period to deter or offset the anticompetitive effects of the merger

Defense 3: Efficiencies

- Merging parties:
  - The following benefits would be enabled by the merger and these benefits would offset any anticompetitive harms of the merger
    1. Imagenetics, a program integrating genetic medicine into primary care
    2. Behavioral health therapists embedded into primary care clinics
    3. Cancer care trials and cancer care outreach to communities outside the Bismarck-Mandan area,
    4. A combined and customized electronic medical record system that would better integrate and coordinate patient care
    5. Recruitment of subspecialists to the area

Note: It appears that Sanford owned and Imagenetics and that it had some operated some other programs and had specialists that MDC did not have. The efficiencies were that, after the merger, MDC's patient population would have the advantage of Imagenetics, these other programs, and specialists

Defense 3: Efficiencies

- District court
  - *Law*: To be cognizable as a defense, efficiencies must be—
    - Verifiable
    - Merger specific
    - Sufficient in magnitude
    - [Not the result of an anticompetitive aspect of the merger (such as a reduction in output)]
  - *Factual findings*
    - Only Imagenetics was merger specific
      - FTC expert: MDC could make all other improvements without merger
        - Patient demands—not practice size—drive physician recruitment
        - A combined electronic medical record system was neither required nor certain to integrate and coordinate patient care
        - Mid Dakota and Sanford already provided community outreach services and could expand those services without the merger
      - Sanford witness
        - Admitted that MDC could employ a behavioral health therapist without the merger
- Eight Circuit
  - (Implicitly) No error in law
    - Relevant question was whether MDC *could* offer these services
  - No clear error in factual findings

Defense 4: MDC was weakened

- Merging parties
  - Assert that MDC had only dim long-term prospects
- District court
  - Factual findings
    - MDC was financially healthy
      - Increased revenues in the three years before the FTC action
      - Physician compensation was 32% above the national average
      - 2015 MDC shareholder minutes showed that the motivation to sell was high share value, not concern about long-term viability
- Eight Circuit
  - (Implicit) A weak financial condition is a necessary condition to consider this factor
  - No clear error in factual findings