Merger Antitrust Law: Introduction to Substance and Process

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Topics

- Thinking systematically about antitrust risk
- Substantive risk
  - Predicting merger enforcement outcomes
- Inquiry risk
  - The DOJ/FTC merger review process
- Remedies risk:
  - Restructuring the deal through a settlement (“consent decree”)
  - Blocking the deal through litigation
  - Voluntary terminating the transaction by the merging parties

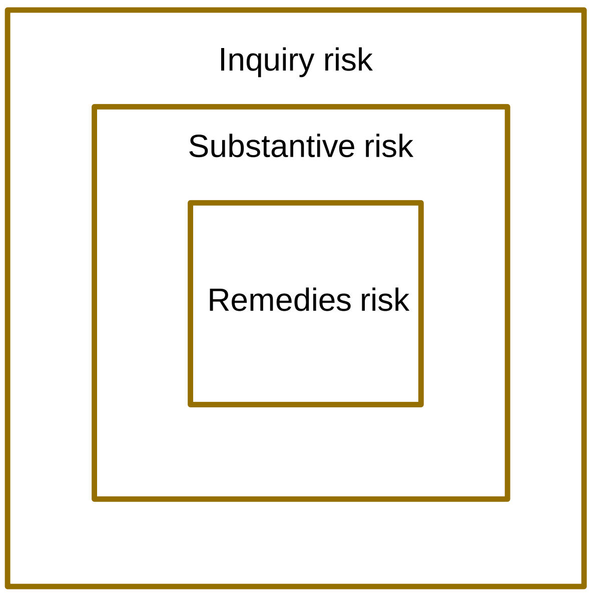
Thinking Systematically about Antitrust Risk

Types of antitrust risks

- *Substantive risk*: The risk that the transaction is anticompetitive and hence unlawful
  - When is a merger anticompetitive?
  - How can we practically assess antitrust risk?
- *Inquiry risk*: The risk that legality of the transaction will be put in issue
  - Who has standing to investigate or challenge the transaction?
  - What is the probability that one of these entities will act?
- *Remedies risk*: The risk that the transaction will be blocked or restructured
  - What are the outcomes of an antitrust challenge?
  - Will the transaction be blocked in its entirety?
  - Can the transaction be "fixed" to alleviate the agency's concerns and if so how?

Types of antitrust risks

- The three risks are nested
  - The substantive risk does not arise unless there is an inquiry
  - The remedies risk does not arise unless the transaction is found to be anticompetitive



But the best way to address the risks is:

- Substantive risk
- Inquiry risk
- Remedies risk

Costs associated with antitrust risk

- Delay/opportunity costs
  - Possible delay in the closing of the transaction and the realization of the benefits of the closing to the acquiring and acquired parties
- Management distraction costs
  - Possible diversion of management time and resources into the defense of the transaction and away from running the business
- Expense costs
  - Possible increased financial outlays for the defense of the transaction
- Outcome costs—Four possible outcomes:
  - The inquiry terminates without resolution
  - The transaction is cleared on the merits
  - The transaction is blocked and the purchase agreement is terminated
  - The parties restructure ("fix") the deal to eliminate the substantive antitrust concern
    - "Fix-it-first"—Restructuring the deal preclosing to avoid a consent decree
    - Post-closing "fix" under a judicial consent decree (DOJ) or a FTC consent order

Substantive Risk:
Predicting Merger Enforcement Outcomes

Clayton Act § 7

- Provides the U.S. antitrust standard for mergers

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[1]

  - *Simple summary*: Prohibits transactions that—
    - "may substantially lessen competition or tend to create a monopoly"
    - "in any line of commerce" (product market)
    - "in any part of the country" (geographic market)

Called the *anticompetitive effects test*

Called the *relevant market*

- Other statutes
  - Sherman Act §§ 1-2 and FTC Act also regulate mergers
  - BUT are either coextensive or less restrictive than Clayton Act § 7

[1] 15 U.S.C. § 18 (remainder of section omitted)

"May be to substantially lessen competition"

- No operational content in the statutory language itself
  - What does in mean to "substantially lessen competition"?
  - Judicial interpretation has varied enormously over the years
- *Modern view*:[1] Transaction threatens—with a reasonable probability—to hurt some identifiable set of customers through:
  - Increased prices
  - Reduced market output
  - Reduced product or service quality
  - Reduced rate of technological innovation or product improvement
  - (Maybe) reduced product diversity[2]

These are called *anticompetitive effects*

A firm that has the power to produce or strengthen an anticompetitive effect is said to have *market power*

- Forward-looking analysis
  - Compare the postmerger outcomes with and without the deal
  - Can view potential competitors today as future competitors tomorrow

[1] The modern view dates from the late 1980s or early 1990s, after the agencies and the courts had assimilated the 1982 DOJ Merger Guidelines.
[2] The idea that reduced product diversity may be a cognizable customer harm was formally introduced in the 2010 DOJ/FTC Horizontal Merger Guidelines.

Theories of anticompetitive harm

- Major theories[1]
  - Elimination of horizontal competition among current rivals
    - Unilateral effects
      - Merger of uniquely close competitors[1]
      - Anticompetitive effect depends only on the elimination of "local" competition between the merging firms
      - Anticompetitive effect does not depend on changes in the behavior of other firms in the market
    - Coordinated effects
      - Merger of significant competitors where customers have few realistic alternatives
      - Anticompetitive effect occurs when merger facilitates pricing or other harmful coordination among a group of firms in the market
    - Elimination of a "maverick"
      - A maverick is a firm that is disruptive in the marketplace and tends to drive market prices down, even through it may have a small market share
      - This is a very ill-defined concept, and may be entirely dependent on the business strategy of the current management
  - Vertical harm—Major in EU/gaining traction in U.S
    - Foreclosure of competitors (upstream or downstream)/raising costs to rivals
    - Anticompetitive information access
    - NB: In the U.S., to be actionable vertical theories require some demonstrable likely anticompetitive market-wide effect on customers in the downstream market

[1] These theories will be developed in detail in later classes. This is just a very high level summary.
[2] This requirement, which was part of the 1992 DOJ/FTC Horizontal Merger Guidelines, was dropped in the 2010 revision.

Theories of anticompetitive harm

- Other possible theories
  - Elimination of actual potential competition
    - Restrictive requirements
      - Oligopolistically performing market in which at least one of the merging parties is an potential entrant
      - Entry by the potential entrant(s) is imminent and would be substantial
      - Entry by the potential entrant(s) would deconcentrate the market and substantially increase its competitive performance over what it would have ben absent entry
      - Entry by other (nonmerging) firms is either distant/not foreseeable or would not be substantial
      - Acquisition eliminates independent entry and negates its procompetitive benefits
    - DOJ/FTC something bring actions on this theory
      - But for the last 35 years all have been settled by consent decree
  - Elimination of perceived potential competition
    - Almost impossible to satisfy requirements
      - Oligopolistically structured market in which one of the merging parties is an incumbent firm
      - The other merging party is perceived by the incumbent firms as ready to enter the market
      - Market performing significantly more competitively than structure of suggest because incumbent firms have moderated their prices ("limit pricing") to discourage that firm from actually entering
      - No other firm is perceived by the incumbent firms as a threat that would cause them to moderate their anticompetitive behavior
      - Acquisition eliminates the threat of entry, so that incumbent firms no longer have an incentive to moderate prices
    - Not seriously used in the U.S. as a theory of anticompetitive harm for over 35 years
      - Historically has had at best limited success in the United States when it was invoked

But this is all too complicated—

- Basic distinction
  - *Decision making*: How do the agencies decide a merger is anticompetitive merger?
  - *Explanation*: How do the agencies explain why they believe that a merger is anticompetitive?

> How the agencies (or the courts) explain their decisions often does not reveal why they decided on that particular outcome.

- A predictive model
  - What follows in the remainder of this section is the model I use in *predicting* agency enforcement behavior before an agency investigation—it works very well
  - The model does not attempt to describe how the agencies actually work, how they explain their decisions, or how they litigate their decisions in court
  - It is *not* defense-biased, although it may appear so to some on a first reading. A biased model is not helpful to the client or the counsel.
  - We will examine how the agencies explain their enforcement decisions and how they advocate their positions in court later in the course.

Assessing substantive antitrust risk

- So how do the DOJ/FTC approach merger antitrust investigations?
  - Recall that the purpose of merger antitrust law is to prevent the creation or facilitation of market power to the harm of customers in the market as a whole through—
    - Increased prices
    - Decreased product or service quality
    - Decreased rate of technological innovation or product improvement
    - [Maybe] decreased product variety

Absent compelling evidence of significant customer harm from other sources, only price increases count

  - Economic theory not well-developed in predicting—
    - Consequences of transaction for nonprice market variables
    - Consequences of changes in nonprice market variables for consumer welfare
  - *Implication*: Need strong direct evidence to proceed on a theory other than a price increase

Assessing substantive antitrust risk

- So how do the DOJ/FTC approach merger antitrust investigations?
  - They ask a simple, basic question:

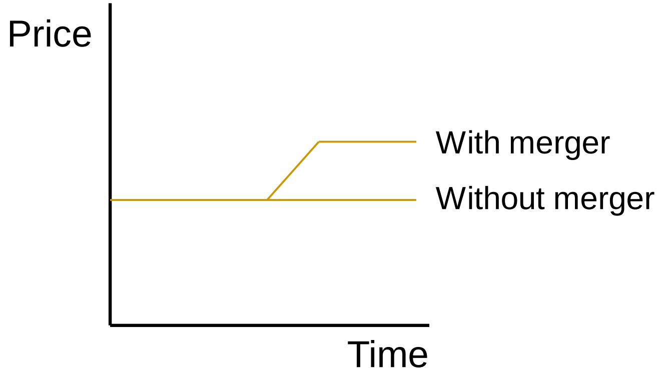
Is the merger likely to result in a price increase or other competitive harm to any identifiable customer group?

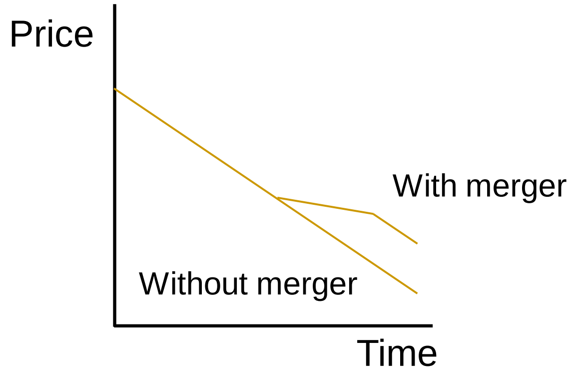
  - If the answer is YES, the investigating agency will find a way to package it into a cognizable theory of anticompetitive merger harm and pursue enforcement action
  - If the answer is NO, the investigating agency will close the investigation without taking enforcement action

Assessing substantive antitrust risk

- What is a price increase?
  - A price increase occurs as a result of a transaction whenever prices, *going forward*, likely would be higher with the transaction than without it[1]
    - A decrease in the rate of a price decline is regarded as a price increase, even if price levels continue to decline

Examples of price increases



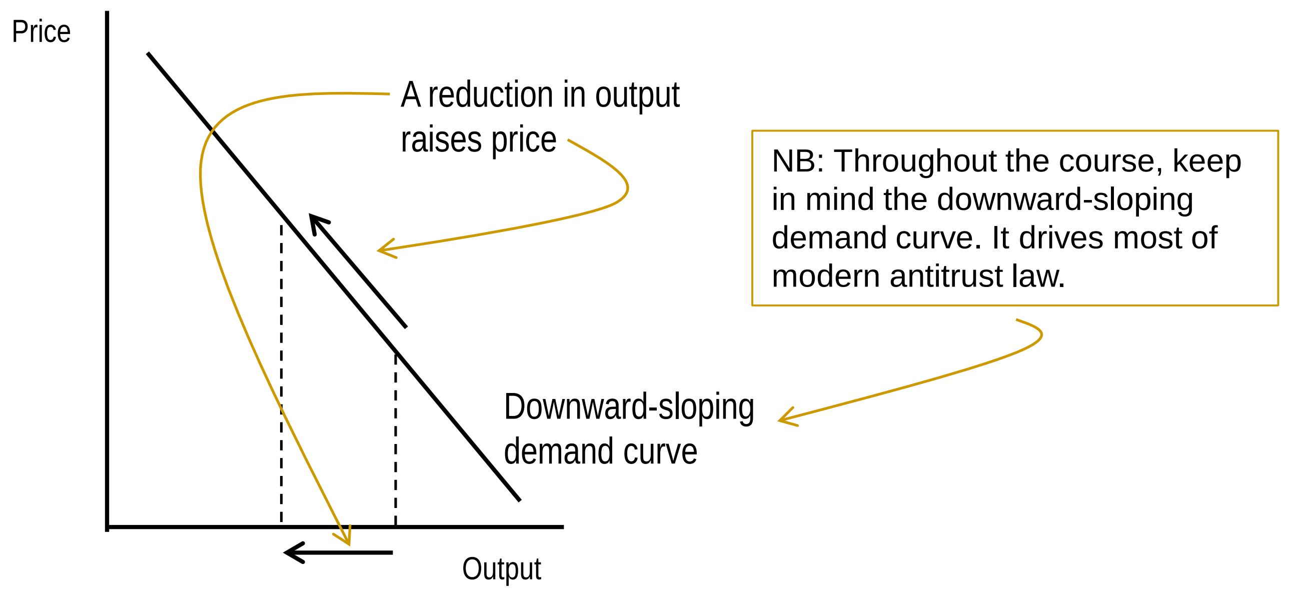


[1] "Likely" in the Section 7 context means "reasonably probable." *See* United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 589 (1957).

Assessing substantive antitrust risk

- What is a price increase?
  - The agencies consider a reduction in market output to be effectively a price increase

A Reduction in Output Implies a Price Increase



- The idea is that when supply becomes limited the customers who value the product the most bid up the prices

Assessing substantive antitrust risk

- Other dimensions of possible anticompetitive effect
  - Historically, there have not been challenges on other dimensions (quality, rate of technological innovation, or product diversity) when there is no alleged price effect
    - Economic theory not well-developed in predicting—
      - Consequences of transaction for nonprice market variables
      - Consequences of changes in nonprice market variables for consumer welfare
    - But adverse effect on other dimensions is sometimes mentioned in complaints that also allege an anticompetitive price effect
  - *Implication*: Agencies will demand strong direct evidence to proceed on a theory other than a price increase—Most likely will require:
    1. An "admission against interest" by the acquiring company that:
       - The merging companies compete significantly in product quality or innovation,
       - This competition is costly and is materially reducing profits, and
       - A benefit of the transaction will be to eliminate this competition and increase profits by saving costs;
    2. Evidence that the merging companies vigorously compete in the nonprice dimension and that other companies will not replace the nonprice competition lost due to the merger; *and*
    3. Evidence that customers will be significantly harmed by the loss of this nonprice competition
       - Customer harm could be reflected in future increased prices (e.g., as a consequence of reduced competition of reduced cost-reducing innovation)

Assessing substantive antitrust risk

- Harm can be to any identifiable group of customers
  - Does not have to affect all customers
  - Sufficient if some identifiable group of customers
    - That is, some group that can be characterized systematically
  - Some common groups
    - Customers in a particular geography
    - Customers of a particular type of product
    - Customers of a particular type of product in a particular geography

NB: Should also note that no merger is too small to challenge.

The agencies believe that no customer group is too small to deserve antitrust protection

- If a relevant market is necessary, the agencies will seek to define the market to be the customer group threatened with harm
  - Success in court has been mixed
  - Not always consistent with the market definition paradigms in the case law and 1992 Horizontal Merger Guidelines
  - 2010 Horizontal Merger Guidelines drafted in part to provide more flexibility

Assessing substantive antitrust risk

- Interesting factoids in agency prosecutorial decision making
  - Key factors in the decision to challenge horizontal mergers:
    - The existence of incriminating documents (or occasionally incriminating public statements)
    - Closeness and uniqueness of competition between the merging parties
    - The number of other significant competitors
    - Customer complaints
    - “Natural experiments” (past events that can be probative of the transaction’s likely effect)
    - History of actual or attempted collusion/coordination in the market
  - The 2010 DOJ/FTC Horizontal Merger Guidelines are rarely invoked by the agencies or the parties during the agency’s assessment of a transaction
    - The 2010 guidelines are sufficiently unpredictive that they can be used to support any enforcement decision
    - That said, the agencies do invoke the 2010 guidelines retroactively when explaining an enforcement decision
    - The agencies are also citing the Guidelines in their court filings, and courts are increasingly citing them as “authority”
  - Formal market definition and HHIs play essentially no role and are rarely addressed in the investigation (although they are important in litigation)
    - Very information-intensive approach of questionable probative value
    - Consequently, not particularly useful for screening by either agencies or parties

Another basic distinction

- Truth v. evidence
  - The agencies (and the courts) deal in *evidence*
  - Having the truth but being unable to prove it will not win the day
  - The investigating staff also needs to be able to prove its case to the agency decision makers and, if necessary, in litigation

So what are the sources of evidence?

Major sources of evidence

- Ordinary course of business documents of the merging firms
- Company responses to second requests
  - Includes responsive documents and responses to data and narrative interrogatories
- Interviews/testimony of merging firm representatives
- Interviews with knowledgeable customers
- Interviews with competitors
- Customer and competitor responses to DOJ Civil Investigative Demands (CIDs) or FTC subpoenas
- Analysis of bidding or “win-loss” data
  - Including the ability of customers to play the merging firms off one another
- “Natural” experiments
- Expert economics analysis

Defense menu in horizontal transactions

- In decreasing order of strength—
  - Parties do not compete with one another
  - Parties compete only tangentially
  - Parties compete but have significant other close and effective competitors
  - Parties do compete and have few existing competitors, but movement into market—
    - is easy (no barriers to entry or repositioning), and
    - would occur quickly if merged company acted anticompetitively
  - Some other reason deal is not likely to harm any group of customers
- Special case
  - Parties have competed in the past, but because of changing conditions would not compete with each other in the future even absent the merger
    - Includes the “failing company” defense
    - Invoked with some frequency, but almost always fails for lack of convincing evidence

Basic structural test for horizontal mergers

Reduction in Bidders/Competitors*

$5 \rightarrow 4$	Usually clears if no bad documents and no material customer complaints
$4 \rightarrow 3$	Usually challenged unless there are no bad documents and there is a strong procompetitive business rationale, customer support, *and* minimal customer complaints
$3 \rightarrow 2$	Almost always challenged unless there are no bad documents, and there is a compelling business rational that is strongly supported by customers and no material customer complaints
$2 \rightarrow 1$	Always challenged

* Critically, these must be meaningful and effective alternatives from the perspective of the customer; "fringe" firms that customers do not regard as feasible alternatives do not count

- Future competitors
  - Can increase the number of future competitors and reduce antitrust concern
  - If the merger involves a potential competitor, will decrease the number of future competitors and can increase antitrust concern
- The chances of success
  - *improve* if there are demonstrable powerful forces that constrain price increases beyond the mere number of players (e.g., powerful customers, low barriers to entry or repositioning)
  - *decrease* if there are factors that facilitate the exercise of market power in the wake of the transaction (e.g., close and unique competition between the merging parties; merging parties are the largest firms)

Recent tightening in enforcement standards

- Chart reflects current enforcement tendencies at both the DOJ and FTC
- Four years ago, $5 \rightarrow 4$ deals almost always cleared and the chart would be compressed to begin at $4 \rightarrow 3$
- *Query*: Will the Trump administration return to the more lenient pre-2015 standards?

Exacerbating factors

- Incriminating (“hot”) company documents
  - Suggest that a strategy of the merged firm will be to raise prices, reduce production or capacity, or reduce the rate of innovation or product improvement
  - Suggest the merging companies are close competitors of one another in some overlapping product
  - Suggest that customers have few realistic alternatives to merging firm
  - Suggest that the competitors pay attention to each other’s prices and
    - are careful not to destabilize high prices, or
    - have attempted to stabilize prices but failed
  - Suggest that the target company is a “maverick” that does not go along with the higher prices that other companies in the market want to charge
  - Expect these documents to be cited in any complaint challenging the transaction
- Incriminating public statements
  - Occasionally, a senior executive of one of the merging parties (typically the buyer) will make an incriminating statement in a public forum, in the press, or on a blog
  - Expect these documents to be cited in any complaint challenging the transaction

Exacerbating factors

- Customer complaints
  - The merging companies are close competitors of one another in one or more overlapping products
  - Customer "plays" the companies off one another to get better prices
  - Insufficient number of realistic alternatives to preserve price competition post-merger
  - Customer conclusion: Customer will pay higher prices as a result of the merger

> Customer complaints are second only to incriminating company documents or statements in their probative value to the DOJ and FTC

- High barriers to entry, expansion, and repositioning
  - Apparent barriers (e.g., high cost, required scale, time, reputation)
  - High gross margins of the merging parties
    - Idea: If high premerger gross margins did not precipitate entry, expansion, or repositioning, then a slightly higher margin due to a postmerger anticompetitive price increase is not likely to precipitate this type of market correction either.

Other considerations

- High market shares
  - Not helpful to the merging parties
  - BUT not decisive if sufficient (realistic) alternatives exist
- Effect on competitors
  - In U.S., irrelevant unless it hurts customers
  - BUT one of the best predictors of enforcement action in the EU
- Efficiencies
  - Heavily discounted by enforcement agencies
  - BUT important to provide a procompetitive deal motivation
- High visibility deals that threaten significant job loss
  - May help explain some Obama administration enforcement decisions not to entertain a consent decree "fix" (e.g., NASDAQ/NYSE)
  - Query how this will play in the Trump administration
- Special note on pleading
  - If the prosecuting agency has a strong case in one market, it is common for the agency to include challenges to markets in which the evidence is much weaker
    - The agency only needs to prove its case in one market to obtain an injunction

Synergies

- Synergies play two roles in an antitrust merger analysis
  - They provide an explanation why the acquiring firm is pursuing the deal (and probably paying a significant premium) that does not depend on price increases to customers or other anticompetitive effects
  - In close cases, large synergies can tip the agencies into not challenging the deal
- Types of synergies enabled by the deal
  - Customer value-enhancing synergies
    - Make existing product better or cheaper, or
    - Create new products or product improvement better, cheaper, or faster
  - Cost-saving synergies
    - Reductions in duplicative costs
    - Increases in the productive efficiency of the combined operation (e.g., through best practices, transfer of more efficient production technology)
- Overall
  - Synergies are very helpful in fashioning a procompetitive narrative
  - But agencies are (irrationally?) skeptical about the existence of synergies
  - Synergies will almost never outweigh evidence of anticompetitive effect

Synergies

- Examples of customer benefits
  - Lower costs of production, distribution, or marketing make merged firm more competitive
    - Elimination of redundant or higher cost facilities, technologies, and personnel
    - Economies of scale or scope
  - Complementary product lines
    - New or broader product offering desired by customers
    - Better integration between merging products further enhances customer value
  - Accelerated R&D and product improvement
    - Greater combined R&D assets (researchers, patents, know-how)
    - Complementarities in R&D assets
    - Greater sales base over which to spread R&D costs
  - Better service and product support
    - More sales representatives
    - More technical service support
- To be credited by Investigating agency, synergies must be—
  - Verifiable by sufficient evidence, and
  - Merger-specific (i.e., could not be accomplished in the absence of the merger)

Delivering the defense

- The best way to assess the substantive risk is to develop the defense with the supporting evidence
- Canonical structure of the initial presentation of a complete defense
  - The parties and the deal
    - Brief overview of the merging parties
    - Brief overview of the deal (including terms, timing, and conditions precedent)
  - The deal rationale
    - Ideally, a rationale that both makes the deal in the profit-maximizing interest of the acquiring company's shareholders and in the interest of customers ("win-win")
    - Include any cost, cross-marketing, or product development deal synergies
  - The market will not allow the deal to be anticompetitive
    - This is equivalent to saying that customers can protect themselves from harm if the merged firm sought to act anticompetitively

The best defense is a good offense:
The transaction is affirmatively procompetitive and *the market would not allow the deal to be anticompetitive even if the combined firm tried*

Putting it together: Some key questions

- All transactions
  - Why are the companies doing the deal? Is the business model behind the combination procompetitive or anticompetitive? How does the buyer expect to recoup any premium paid for the target?
  - Whatever the mechanism, will the combination likely result in increased prices to any identifiable group of customers? (The business people will know.)
  - What cost savings or other synergies are expected from the deal? Can persuasive evidence of likelihood, magnitude, and timing be presented to the agency?
  - Will the deal enhance the ability of the combined company to create better products or services faster or otherwise improve consumer welfare in the long run?
  - What will the customers in the industry say about the deal if asked by the investigating agency?
  - Are there customers that will support the deal? If so, what is the reason for the support?
  - For customers that might complain, is there a way to neutralize their concerns (e.g., extend the term of their premerger contracts to provide additional protection against price increases)

Putting it together: Some key questions

- All transactions (con't)
  - What do the company documents say?
    - About the reason for the deal?
    - About competition between the merging parties (e.g., win-loss data)?
    - About the likely competitive effect of the deal?
    - About the premerger competitive landscape?
  - Does the company have good witnesses?
    - On the strategic rationale and synergies?
    - On each of the business lines likely to be investigated?
  - Same questions on documents and witnesses for the other merging party
  - If the investigating agency wants to challenge the deal, will it have customers that will testify against the deal?
  - Are their competitors or other parties that have the inventive and the wherewithal to work with the investigating agency to develop theories and evidence to challenge the deal?[1]

[1] The U.S. antitrust agencies give little credit to competitor testimony that a deal is anticompetitive. The idea is that an anticompetitive deal is likely to increase market prices and benefit competitors and that the real concern behind most competitor complaints is that the merged firm will become more efficient and procompetitively win business away from the complaining competitor. That said, the agencies are always willing to enlist competitors to help them better understand the market, gain access to industry customers, and generally develop evidence.

Putting it together: Some key questions

- Horizontal transactions
  - Are the merging companies strong and close competitors with one another?
  - How many other effective competitors does each merging party have?
  - Do customers play the merging parties off of one another to get better prices or other deal terms?
  - In bidding situations, do the merging firms frequently bid against one another? How many other bids do they usually face? Do they frequently find themselves competing against one another in the "best and final" round of bidding?
  - Are the conditions in the marketplace conducive to direct oligopolistic coordination on price?
    - If not, is there another mechanism for oligopolistic coordination (e.g., coordinated capacity reductions)?
  - Is the target firm a "maverick" and engage in disruptive market conduct (such as aggressive discounting)?

Putting it together: Some key questions

- Nonhorizontal transactions
  - Potential competition
    - Is either of the merging parties a potential entrant into a market in which the other company is an actual competitor?
    - If so,
      - Is the target market highly concentrated?
      - Is the target market performing more or less competitively or is it performing noncompetitively? (The merging party that is the actual competitor will know)
      - How likely is it that in the absence of the transaction the potential entrant merging party would in fact enter the market and in what scale and in what time frame?
      - Are their other firms equally likely to enter into the market on the same or greater scale and in the same or less time as the potential entrant merging party?
      - What would the effect of this entry be on the performance of the target market?
  - Vertical foreclosure
    - Does one of the merging firms supply an important input or distribution/retail channel to the other merging firm?
    - If so,
      - Could competitors in practice protect themselves from harm in the event of foreclosure or higher input prices (or lower downstream prices) from the combined firm by either (a) dealing with other firms in the market, or (b)vertically integrating into the input or downstream market?
  - Vertical information conduits
    - As a result of the transaction, will one merging party gain greater access to competitively sensitive information of its competitors?

Inquiry Risk:
The DOJ/FTC Merger Review Process

Inquiry risk—Two questions

- *Ability*: Who has standing to investigate or challenge the transaction?
- *Incentives*: What is the probability that one or more of these entities will act?

Inquiry risk

- Preclosing

Potential plaintiff	Considerations	Risk assessment
DOJ/FTC	HSR Act suspensory period and second request powers Substantial congressional funding for merger enforcement Large experienced staff dedicated to merger antitrust enforcement Courts will enter preliminary and permanent injunctions upon proper showing	High *if* 1. there is any indication that the transaction may be anticompetitive, or 2. the transaction has a high public profile and has attracted political interest
State attorneys general (NAAG)	Very expensive to litigate, and AGs have constrained enforcement resources No damages to recover But can obtain injunctions	Very low, *unless transaction* 1. threatens employment, or 2. threatens widespread price increases to voters (so focus is on consumer-facing products such as supermarkets, hospitals, gas stations)
Injured private parties	No damages to recover Courts historically very reluctant to grant preliminary or permanent injunctions	Very low—usually no payoff *unless* 1. a competitor or customer will fund the suit, or 2. a hostile target will challenge the transaction to buy time to find a more suitable acquirer

Inquiry risk

- Postclosing

Potential plaintiff	Considerations	Risk assessment
DOJ/FTC	Courts will enter preliminary divestiture permanent injunctions upon proper showing But No HSR Act leverage Substantial disincentive to find that a “cleared” transaction is anticompetitive and should have been challenged “Eggs may be scrambled” with no effective relief	Extremely low, *unless* 1. the transaction was not HSR reportable and hence not reviewed, but customers complain about anticompetitive effects (especially price increases), or 2. the transaction was reviewed but customers complain and the actual anticompetitive effects are apparent and significant
State attorneys general (NAAG)	Can recover damages (*parens patriae*) and obtain injunctions But constrained enforcement resources Even in state actions courts historically very reluctant to find mergers anticompetitive after DOJ/FTC clearance	Extremely low Actions on the merits are likely to be very lengthy and costly to prosecute, with a negligible chance of success
Injured private parties	Can recover damages and in principle can obtain a permanent injunction of divestiture Courts historically very reluctant to find mergers anticompetitive after DOJ/FTC clearance	Extremely low Actions on the merits are likely to be very lengthy and costly to prosecute, with a negligible chance of success

Inquiry risk

- Bottom line on challengers
  - Absent special circumstances, competitors, customers, targets, and state attorney attorneys general can usually be ignored in the risk analysis
  - If the state attorneys general are interested, they usually piggyback on the DOJ/FTC investigation
  - In the vast majority of cases all of the action is with the federal antitrust agencies
    - No significant difference in the inquiry risk between the DOJ and FTC

The principal inquiry risk is the merger review process under the HSR Act

HSR Act: Basic prohibition

- Section 7A(a)

> [N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification . . . and the waiting period . . . has expired . . . .[1]

- Applies to acquisitions of voting securities or assets by any "person"
  - A merger under state law is deemed to be an acquisition of voting securities
- Imposes reporting and waiting period requirements
  - Preclosing reporting to both DOJ and FTC by each transacting party
  - Post-filing waiting period before parties can consummate transaction
- Creates a new precomplaint discovery tool: The "second request"
  - Authorizes investigating agency to obtain additional information and documents from the merging parties during the waiting period through a "second request"
  - Can only be issued once to each party
  - Can only be issued in the "initial waiting period" (usually first thirty days after filing)
  - No limitations on breadth or scope

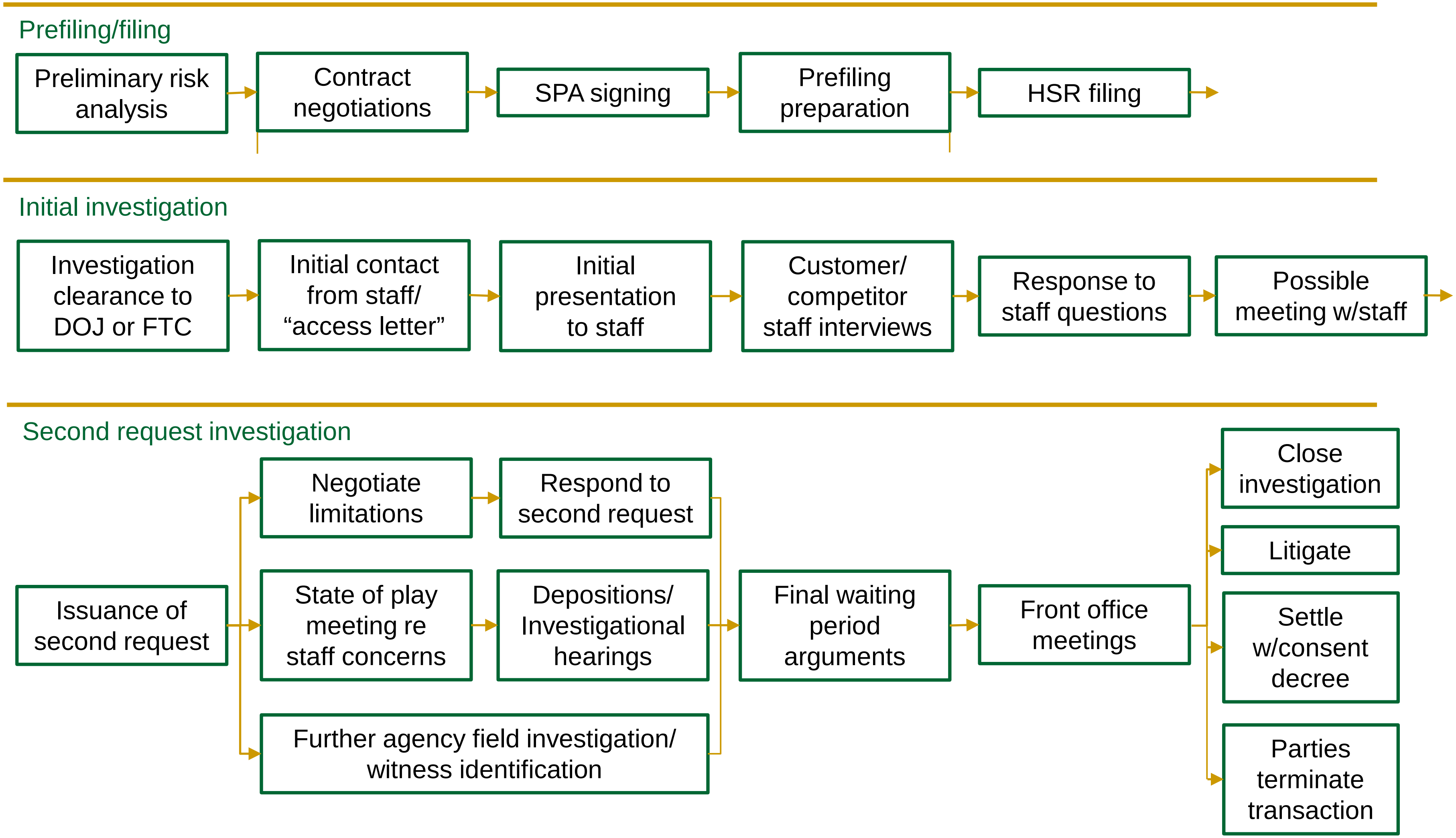
[1] 15 U.S.C.18a(a).

Hart-Scott-Rodino Act

- The basics
  - Enacted in 1976 and implemented in 1978
  - Designed to alert DOJ/FTC to pending transactions to permit them to investigate—and, if necessary, challenge in court—a transaction prior to closing
    - *Idea*: Much more effective and efficient to block or fix anticompetitive deal prior to closing than to try to remediate it after closing
  - Not jurisdictional: Agencies can review and challenge transactions—
    - Falling below reporting thresholds
    - Exempt from HSR reporting requirements
    - "Cleared" in a HSR merger review—no immunity attaches to a transaction that has successfully gone through a HSR merger review
  - A reportable transaction is one that—
    - Involves the acquisition of voting securities or assets
    - Satisfies the thresholds for prima facie reportablility[2]
      - In 2017, mergers and acquisitions resulting in the acquiring person holding more than $80.8 million of the voting stock or assets of the acquired person will be subject to the Act[1]
    - Does not fall into one of the exemptions provided by the HSR Act or implemented by the HSR Rules

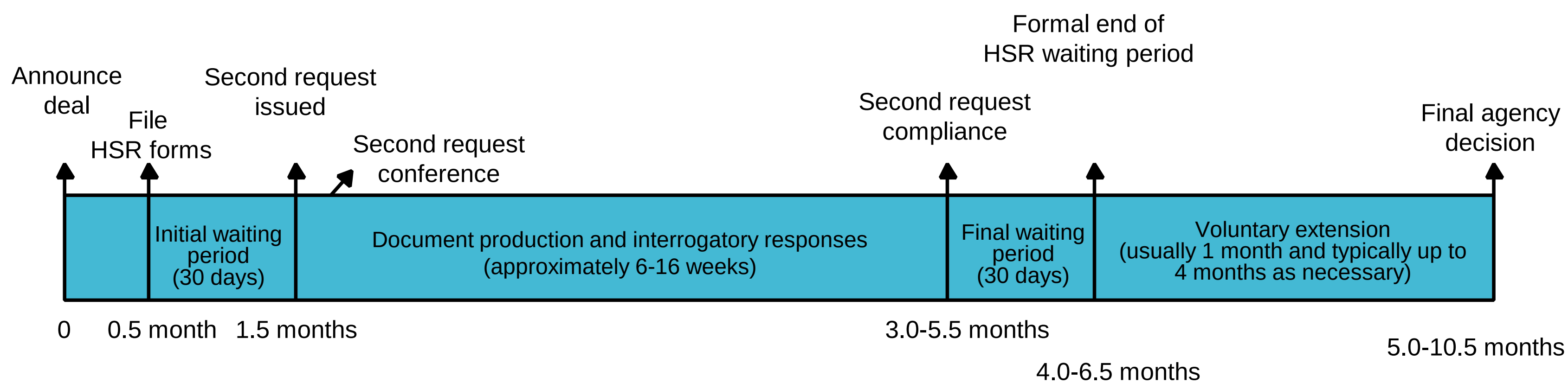
[1] Beginning in FY 2005, the reporting thresholds are adjusted annual by the percentage changes in the gross national product during the prior fiscal year compared to the gross national product for the fiscal year ending September 30, 2003. Pub. L. No. 106-553, 114 Stat. 2762 , 2762A-109 (effective February 1, 2001).

Overview of HSR review process



HSR Act review process

- Typical domestic transaction (without litigation)



Customer rollout

- First telephone call (voluntary request)
- First presentation
- Follow-up meetings
- First DOJ/FTC customer interviews
- First DOJ/FTC competitor interviews
- Filings in other jurisdictions

- Second request conference
- Collect and review documents
- Prepare interrogatory responses
- Depositions of employees
- Additional meetings
- Follow-up DOJ/FTC customer interviews and affidavits
- Follow-up DOJ/FTC competitor interviews

- Final meetings with staff
- Meetings with senior staff

- Negotiate consent decree (if necessary)
- Find and sign acceptable divestiture buyer (if necessary)

Remedies Risk:
Blocking/Restructuring the Deal

Possible outcomes in DOJ/FTC reviews

Close investigation

- Waiting period terminates at the end of the investigation with the agency taking no enforcement action, or
- Agency grants early termination prior to normal expiration
- May occur anytime in the review process

Settle w/consent decree

- Typical resolution for problematic mergers
- DOJ: Consent decree entered by federal district court
- FTC: Consent order entered by FTC in administrative proceeding

Litigate

- DOJ: Seeks preliminary and permanent injunctive relief in federal district court to block the deal
- FTC: Seeks preliminary injunctive relief in federal district court
  Seeks permanent injunctive relief in administrative trial

Parties terminate transaction

- Parties will not settle at agency's ask and will not litigate, or
- Agency concludes that no settlement will resolve agency concerns and parties will not litigate
  - Examples: AT&T/T-Mobile, NASDAQ/NYSE Euronext

Non-DOJ/FTC challenges

- Parties
  - As we have seen, other parties may have standing to challenge a transaction under the private rights of actions contained in the antitrust laws:
    - State attorneys general
    - Customers
    - Competitors
- Forum
  - These challengers must seek relief from a federal district court[1]
  - Technically, the process is the same as for a DOJ injunctive relief action
    - NB: Injured parties may also have standing to seek treble damages relief where the transaction has closed

[1] Parties may also seek relief in state court for violations of state antitrust law. This is very rare in practice and we will not consider merger antitrust actions in state court in this course.

Non-DOJ/FTC challenges

- Frequency
  - States
    - State AGs often join with the DOJ or FTC in challenging a deal that they believe has a significant anticompetitive effect in their state
      - Federal agency typically carries the load in the investigation and litigation
      - Although states may be some effect on the relief sought when it has a particularized effect in their jurisdiction
    - State AGS rarely bring their own merger antitrust actions
      - Although some states are saying that they will step up their own merger enforcement actions if the DOJ and FTC in the Trump administration become too lenient
  - Customers and competitors
    - Very infrequently bring challenges
      - Merger challenges are extremely expensive to prosecute given the requirement of showing a reasonably probable anticompetitive effect in a relevant market
      - There are no damages if the challenge is to a transaction that has not yet closed
      - Empirically, courts rarely grant injunctive or damages relief to nongovernment plaintiffs (especially when the transaction has been reviewed by the DOJ/FTC under the HSR Act and either “cleared” without enforcement action or restructured to eliminate the alleged anticompetitive problem through a consent decree)[1]

[1] There are exceptions. *See, e.g.*, Boardman v. Pac. Seafood Grp., No. 1:15-108-CL, 2015 WL 13357739 (D. Or. Mar. 6, 2015) (entering preliminary injunction), *aff'd*, 822 F.3d 1011 (9th Cir. 2016)

Settling Merger Investigations

Adjudicated relief/consent decrees

- Usual outcome of DOJ/FTC reviews: Overwhelmingly consent relief
  - Rare for merger cases to go to court
  - Even so, noticeable increase in litigations in recent years
    - The agency concludes that nothing less than enjoining the transaction in its entirety is acceptable and the parties are willing to litigate
    - Prelitigation agency demands for a consent settlement are too high and the parties think that they can do better if they begin litigation and then settle
- But—
  - Current policy (last four years):
    - Consent solutions should match adjudicated permanent injunctive relief if the agency were to litigate and win (i.e., no substantive compromises)
    - Up until 2012, agencies showed more of a willingness to compromise
  - Agency negotiates consent relief—
    - Not only to remediate competitive concern with the immediate deal
    - But also with an eye to implications for consent decree negotiations in future deals
- Upshot
  - Agencies have found that they do not have to give much away in negotiations compared to what they would ask a court to order in adjudicated relief

Agency perspectives

- Consent settlements
  - If the parties are willing to offer a consent settlement ("fix") that satisfies the agency that the restructured transaction will not be anticompetitive, the agency will accept it
  - If the parties are unwilling to offer a fix that satisfies the agency's requirements, the agency will litigate to obtain what the agency believes is a suitable permanent injunction (almost always a blocking injunction in a preclosing challenge)
    - Sometimes, when the parties offer a curative divestiture that they believe should solve the problem and the agency rejects it as the basis for a consent decree, the parties will sign a contract with a divestiture buyer to implement the fix contingent on the closing of the main transactions. In this situation, courts will assess the competitive effects of the transaction assuming that the fix has occurred ("litigating the fix").
- To satisfy the agency, the consent settlement must—
  - Fix the agency's competitive concern
  - Be workable in practice
  - Must not involve the agency in continuous oversight or affirmative regulation
  - Although price increases are the central concern in merger antitrust law, DOJ/FTC will not accept settlements that impose price caps
    - Some state consent decrees impose price caps and other behavioral relief

Agency perspectives

- Some deals cannot be fixed
  - In some situations, however, the investigating agency will conclude that there is no remedy that will resolve its concerns and that the deal must be blocked in its entirety
    - Examples:

      Staples/Office Depot (2015)
      Sysco/US Foods (2015)
      NASDAQ/NYSE Euronext (2011)
      AT&T/T-Mobile (2011)
    - Where the transaction is not fixable the agency's satisfaction, the agency will go into court and seek injunctive relief unless the parties voluntarily terminate the transaction
- Enforceability
  - Federal judicial consent decrees are injunctions
    - Violation is enforceable through contempt sanctions
  - FTC consent orders are administrative "cease and desist orders"
    - Violation is enforceable through federal district court action for civil penalties (currently $40K per day)
    - District court will also issue injunction to prevent future violations (enforceable through contempt)

Horizontal remedies: Agency requirements

- Almost always require the sale of a complete “business”
  - Agency view: Essential to the effectiveness/viability of the solution
  - Implication: Entire business of one or the other merger parties in the problematic market must be sold
    - Example: In a supermarket chain store acquisition, Buyer has 10 stores and Seller has 4 stores in a problematic market.
      - Buyer must sell all of Seller’s 4 stores, even if acquiring only 1 of the Seller’s stores would not have raised an antitrust concern.
      - Moreover, Buyer cannot sell 2 of its stores and 2 of the Seller’s stores, even if the two Buyer stores are comparable to the 2 Seller’s stores that the Buyer wants to keep (no “mix and match” with market)
    - Rule not followed religiously by agencies
    - Where there a multiple problematic markets, the Buyer pick whether to sell Buyer or Seller business market-by-market (can “mix and match” across markets)
  - Exceptions:
    - Divestiture buyer has necessary infrastructure and limited divestiture assets will enable rapid and effective entry into divestiture business
    - Divestiture assets are commonly traded (e.g., grocery stores)
- Will permit “trade up” solutions
  - Buyer may sell its own business in order to purchase a larger business

Horizontal remedies: Agency starting point

- Everything associated with the divested business must go
  - Agency will negotiate exclusions
  - But must be convinced that the exclusions will not undermine the effectiveness or viability of the solution
    - Agencies tend to be very deferential to the divestiture buyer
    - Can permit the divestiture buyer to “double dip” on the businesses or assets to be acquired:
      - Negotiate a purchase agreement with the divestiture seller
      - Then tell the DOJ/FTC that it is not enough in the hope that the agency will refuse to accept the consent settlement unless the divestiture buyer is given more

Horizontal remedies: Elements

- Divest physical assets
  - Production plants, distribution facilities, sales offices, R&D operations
  - All associated equipment
  - Leases/property from which business operated
- Divest IP
  - Sale of any IP rights used exclusively in the divestiture business
  - Sale and license back/license of IP rights used in both retained and divested operations
  - Divestiture buyer must have ability to develop and own future IP

Horizontal remedies: Elements

- Make “key” employees available for hire by divestiture buyer
  - All employees necessary for—
    - production,
    - R&D,
    - sales & marketing, and
    - any other specific function connected with the divestiture business
  - Must facilitate access to key employees
  - Divestiture may make offers to key employees
  - Merging parties annot make counteroffer or offer other inducement to prevent defection

Horizontal remedies: Elements

- Assign/release customer contracts and revenues
  - Matter of course for contracts served out of divestiture facilities
  - May also include other contracts to “bulk up” the divestiture business
  - If contracts not assignable, offer customers ability to terminate with no penalties in order to rebid business
- Transfer business information
  - Especially customer-related information
- Provide short-term transition services and support
  - Usually limited to one year
  - May include input supply agreement, technical support, administrative support
- No long-term entanglements
  - Agencies require complete separation between the merged company and the divestiture buyer
  - Long-term entanglements are usually fatal to a consent settlement
    - *Example*: Long-term agreement for merged company to provide divestiture buyer with an input

Horizontal remedies: Agency right of approval

- Agency will demand right of approval over divestiture buyer and the divestiture sales agreement
  - In agency's sole discretion
  - Remedy must eliminate agency's antitrust concerns
  - Buyer must have no antitrust problem in acquiring divested business
  - Buyer must be capable of replacing competition the agency believes would otherwise be lost as a result of the acquisition
- Can be problematic for the merging parties even after the consent decree has been negotiated
  - Agency wants to know if the divested assets are "enough" to make the divestiture buyer a meaningful firm in the market for the divested product
  - If the staff concludes that more assets or other content needs to be added to the divestiture commitment (regardless of what the decree requires), the agency can refuse to approve the divestiture buyer and the divestiture sales agreement
    - The divestiture seller has essentially no option other than to make the requested changes due to consent decree time limits on finding an approved divestiture buyer and an approved divestiture sales agreement
    - Can create incentive and ability for the divestiture buyer to engage in "strategic behavior"

Horizontal remedies: Albertsons/Safeway

- FTC concern
  - Proposed $9.2 acquisition by Albertsons or Safeway would lessen supermarket competition to the detriment of consumers in 130 local markets[1]
- Consent decree
  - Divestiture of 168 supermarkets to cure problematic local markets
  - Upfront buyers
    - Haggen Holdings, LLC will acquire 146 Albertsons and Safeway stores located in Arizona, California, Nevada, Oregon, and Washington
    - Supervalu Inc. will acquire two Albertsons stores in Washington
    - Associated Wholesale Grocers, Inc. will acquire 12 Albertsons and Safeway stores in Texas
    - Associated Food Stores Inc. will acquire eight Albertsons and Safeway stores in Montana and Wyoming
  - Divestiture package
    - Everything associated with each divestiture store had to be divested to the divestiture buyer
    - Exceptions: None of Albertsons' or Safeway's trademarks had to be sold

[1] Complaint, *In re* Cerberus Institutional Partners V, L.P., No. C-4504 (F.T.C. filed Jan. 27, 2015) (see Unit 0 reading materials).

Horizontal remedies: Albertsons/Safeway

- Assets to be Divested

H. "Assets To Be Divested" means the Supermarkets identified on Schedule A, Schedule B, Schedule C, and Schedule D of this Order, or any portion thereof, and all rights, title, and interest in and to all assets, tangible and intangible, relating to, used in, and/or reserved for use in, the Supermarket business operated at each of those locations, including but not limited to all properties, leases, leasehold interests, equipment and fixtures, books and records, government approvals and permits (to the extent transferable), telephone and fax numbers, and goodwill. Assets To Be Divested includes any of Respondents' other businesses or assets associated with, or operated in conjunction with, the Supermarket locations listed on Schedule A, Schedule B, Schedule C, and Schedule D of this Order, including any fuel centers (including any convenience store and/or car wash associated with such fuel center), pharmacies, liquor stores, beverage centers, gaming or slot machine parlors, store cafes, or other related business(es) that customers reasonably associate with the Supermarket business operated at each such location. At each Acquirer's option, the Assets To Be Divested shall also include any or all inventory as of the Divestiture Date.

Provided, however, that the Assets To Be Divested shall not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks, or trade names, *except* with respect to any purchased inventory (including private label inventory) or as may be allowed pursuant to any Remedial Agreement(s).

Provided, further, that in cases in which books or records included in the Assets To Be Divested contain information (a) that relates both to the Assets To Be Divested and to other retained businesses of Respondents or (b) such that Respondents have a legal obligation to retain the original copies, then Respondents shall be required to provide only copies or relevant excerpts of the materials containing such information. In instances where such copies are provided to an Acquirer, the Respondents shall provide to such Acquirer access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes.

[1] Decision and Order, *In re* Cerberus Institutional Partners V, L.P., No. C-4504 (F.T.C. July 2, 2015).

Horizontal remedies: Panasonic/Sanyo

- FTC concern
  - Merging parties produce the highest quality NiMH batteries and are closest competitors – effectively control the market[1]
- Consent decree—Divestiture of Sanyo's NiMH assets[2]
  - Buyer upfront—Fujitsu
  - Divestiture package
    - Manufacturing facility in Takasaki, Japan
    - Supply agreement for NiMH battery sizes not produced at Takasaki
    - All Sanyo IP, including patents and licenses related to portable NiMH batteries
    - Access to identified "key" employees
      - Financial incentives to employees (up to 20% of salary) to move to divestiture buyer
    - Transition services and support for 12 months

[1] Complaint, *In re* Panasonic Corp., No. C-4274 (F.T.C. filed Nov. 23, 2009).
[2] Decision and Order, *In re* Panasonic Corp., No. C-4274 (F.T.C. Jan. 6, 2010).

LITIGATION

Introduction

- Setting
  - To block the closing of the transaction after the waiting period has expired, the DOJ, FTC, or other party any party opposing the transaction must obtain an injunction
- Preliminary injunctions
  - Neither the DOJ nor the FTC has the power to issue a preliminary injunction
  - Must obtain a preliminary injunction from a federal district court
    - DOJ: Cause of action for preliminary injunctive relief under Clayton Act § 15
    - FTC: Cause of action for preliminary injunctive relief under FTC Act § 13(b)
    - Private parties: Cause of action for preliminary injunctive relief under Clayton Act § 16
- Permanent injunctions
  - DOJ: Must obtain permanent injunction relief from a federal district court
    - Cause of action for permanent injunctive relief under Clayton Act § 15
    - Court, with agreement of the parties, can consolidate the preliminary injunction hearing with the trial on the merits under Rule 65(a)(2) of the Federal Rules of Civil Procedure
  - FTC:
    - May adjudicate the merits in an administrative proceeding and enter a permanent injunction (called a "cease and desist order") under FTC Act § 5
    - May also adjudicate the merits in federal district court and obtain a permanent injunction under FTC Act § 13(b)—Very rarely used

Merger antitrust litigation

Plaintiff	Trial Forum	Appeal
DOJ	Federal district court	Court of appeals
FTC –Preliminary inj. –Permanent inj.	 Federal district court FTC administrative trial	 Court of appeals Full commission, then any court of appeals with venue
State AGs*	Federal district court	Court of appeals
Private parties*	Federal district court	Court of appeals

* May bring state claims in state court or join state claims in federal court

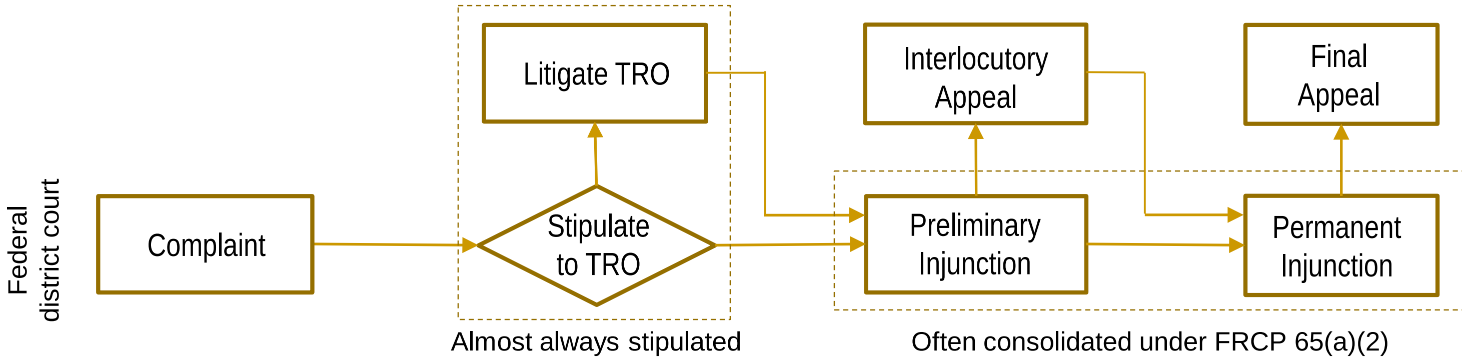
Types of injunctions in merger cases

Injunction type	Relief ordered	
Temporary restraining order (TRO)	Maintain status quo pending decision on a preliminary injunction	
Preliminary injunction	Premerger:	Blocking injunctions (not hold separate) pending a final decision on the merits
	Postmerger:	Hold separate/preserve assets for divestiture
		Recission in the right case
Permanent injunction	Premerger:	Blocking injunction
	Postmerger:	Divestiture (recission in one case)

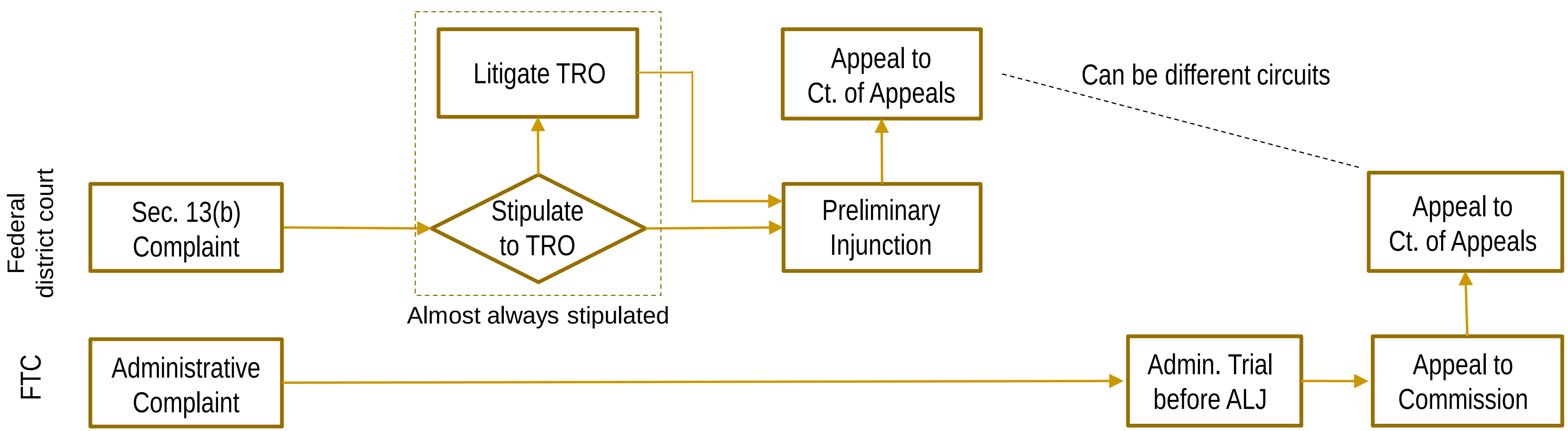
NB: Since actions for injunctive relief are injunctive actions and sound in equity, they are tried to the court, not to a jury

Typical litigation paradigms

DOJ preclosing challenge



FTC preclosing challenge



Typical litigation paradigms

DOJ postclosing challenge

FTC postclosing challenge

Litigation timing—Preclosing challenges

Recent Examples

	DOJ			FTC		
	H&R Block	Oracle	Sunguard	Steris	Sysco	CCC
Complaint	5/23/2011	2/24/2004	10/23/2001	5/29/2015	2/20/2015	11/25/2008
PI hearing	Consolidated	Consolidated	Consolidated	8/17/2015 (3 days)	5/5/2015 (8 days)	1/8/2009 (9 days)
PI				9/24/2015	6/23/2015	3/18/09
PI appeal				Transaction closed; administrative proceeding dismissed	Transaction abandoned after PI	Transaction abandoned after PI
Merits hearing	9/6/11 (9 days)	6/6/04	11/8/01 (10 hours)			
Live witnesses	8 fact 3 experts		3 experts			
Initial merits decision (FTC)	--	--	--			
Final decision	10/31/11	9/9/04	11/14/01			
Merits appeal	None	None	None			
Total time to conclusion	5 months	6.5 months	3 weeks	4 months	4 months	4 months

Litigation timing—Postclosing challenges

Recent Examples

	DOJ	FTC			
	Bazaarvoice	ProMedica	Polypore	Evanston	Chicago Bridge
Complaint	1/10/2013	1/6/2011	9/10/2008	2/10/2004	10/25/2001
Merits hearing	9/23/2013 to10/10/2013	5/31/2011 to 8/18/2011	5/12/2009 to 8/20/2009	2/10/2005 (8 weeks)	11/12/2002 to 1/16/2003
Initial merits decision (FTC)	--	12/5/2011	2/22/2010	10/21/2005	6/18/2003
Final decision	1/8/2014 (merits only)	3/22/2012	12/13/2010	4/28/2008 (remedy)	1/6/2005
Total time to final decision	12 months	14.5 months	17 months	50 months	38.5 months
Merits appeal	(none)	4/22/2014	7/11/2012	(none)	1/25/2008
Total time to conclusion	12 months	39.5 months	46 months	50 months	75 months

The *PNB* presumption

- *Philadelphia National Bank*:

> Specifically, we think that a merger which produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it is must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[1]

- Created in 1963 as the Court was becoming increasingly restrictive on business
  - Next merger antitrust case after *Brown Shoe*
- Originally created as a rebuttable presumption of the requisite anticompetitive effect where the combined firm passed some (undefined) thresholds of
  - Combined market share, and
  - The increase in market concentration caused by the transaction
- But soon treated by lower courts as a conclusive presumption—essentially no defenses
- Returned to a rebuttable presumption by the Supreme Court in 1974 in *General Dynamics*[2]

[1] United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963).
[2] United States v. General Dynamics Corp., 415 U.S. 486 (1974).

The *PNB* presumption

- Two ways to think about the *PNB* presumption
  1. As a presumption grounded in industrial organization economics
     - The citations to the economic literature in *PNB* itself indicate that the majority thought it was grounding the presumption in economics
     - The idea is that as firms become larger and the market becomes more concentrated, there is an increasingly likelihood that the market will exhibit more successful oligopolistic interdependence and higher resulting prices
       - This is sometimes called the *price-concentration hypothesis* or the *profit-concentration hypothesis*
       - This hypothesis was popular among structure-conduct-performance adherents in the 1950s and 1960s
     - Queries:
       - Is there meaningful support for the price/profit-concentration hypothesis?
       - If so, at what levels of combined share and increased market concentration does oligopolistic interdependence become significantly more successful?
  2. As a burden-shifting device in litigation
     - If the presumption is triggered, it shifts the burden to show that the presumption is not reliable in the circumstances of the case to the defendants
       - *Query*: Is the burden here one of production or of persuasion?
     - Presumably, the likelihood that the defendants will fail to discharge their burden increases as the anticompetitive case becomes stronger (“sliding scale”)
     - The effect of the burden shift then is to accept overinclusiveness errors (“false positives” or Type I errors) over underinclusiveness errors (“false negatives” or Type II errors) in close cases

The *PNB* presumption

- Bottom line
  - However viewed, the *PNB* presumption remains the point of departure in the litigation of horizontal mergers in the analysis of competitive effects
  - Curiously, the thresholds for triggering the *PNB* presumption have not been litigated
    - Since the early 1980s, the DOJ and FTC—regardless of administration—have only brought actions where the alleged combined market shares and market concentration have been very high (see chart below)
    - However, conventional wisdom holds that the market shares and market concentration shown in *Rome (Alcoa)/Von's/Pabst* are much too low today to trigger the *PNB* presumption
    - Of course, these shares and market concentration depend on the definition of the relevant market, and the agencies have not always been successful in proving their alleged markets to the satisfaction of the courts
- DOJ/FTC Merger Guidelines
  - The agencies appear to be systematically encouraging the courts to adopt the thresholds in the 2010 Merger Guidelines as sufficient to predicate the *PNB* presumption (see next slide)

The 2010 Merger Guidelines

- "HHI thresholds"[1]
  - Not really *PNB* thresholds, but courts tend to use them that way[1]

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."

[1] The "HHI" is a market concentration statistic. To calculate it, take the square of the market share of each firm in the relevant market and square it, and then add up all of the squared market shares. The "ΔHHI" is the difference between the HHI after the merger and the HHI before the merger.
[2] "The purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, although high levels of concentration do raise concerns. Rather, they provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration." 2010 Merger Guidelines § 5.3.

The 2010 Merger Guidelines

- *Application*: H&R Block/TaxACT

	Premerger Shares	HHI Contribution	
Intuit	62.2%	3869	The square of the firm's market share
HRB	15.6%	243	
TaxACT	12.8%	164	
Others (6)	9.4%	15	Residual share (9.4%) divided by 6 firms and added six times
	100.0%	4291	The sum of the squared shares of all of the firms in the market
Combined share	28.4%		
Premerger HHI		4291	
Delta		400	2 × HRB share × Intuit share
Postmerger HHI		4691	

"Violates" the 2010 Guidelines:
Postmerger HHI exceeds 2500 and delta exceeds 200

Note: Court appears to have assumed that six equal-sized firms are in the "other" category

HHIs in Successful DOJ/FTC Challenges

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

Agency	Year	Defendant	Combined share	PreHHI	PostHHI	Delta	Deal Status
FTC	2015	Staples	75[1]	3036	5836	2800	Preclosing
DOJ	2014	Bazaarvoice	68	2674	3915	1241	Consummated
FTC	2012	OSF Healthcare	59	3422	5179	1767	Preclosing
FTC	2012	ProMedica	58	3313	4391	1078	Preclosing
DOJ	2011	H&R Block	28	4291	4691	400	Preclosing
FTC	2010	Polypore	100	8367	10000	1633	Consummated
FTC	2009	CCC	65	4900	5460	545	Preclosing
FTC	2008	Whole Foods	100[2]		10000		Preclosing
FTC	2007	Evanston	35	2355	2739	384	Consummated
FTC	2005	Chicago Bridge	73	3210	5845	2635	Consummated
DOJ	2003	UPM-Kemmene	20	2800	2990	190	Preclosing
FTC	2002	Libbey	79	5251	6241	990	Preclosing
FTC	2001	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] 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%.
[2] In some local geographic markets, this was a merger to monopoly in the FTC's alleged product market of premium, natural, and organic supermarkets.

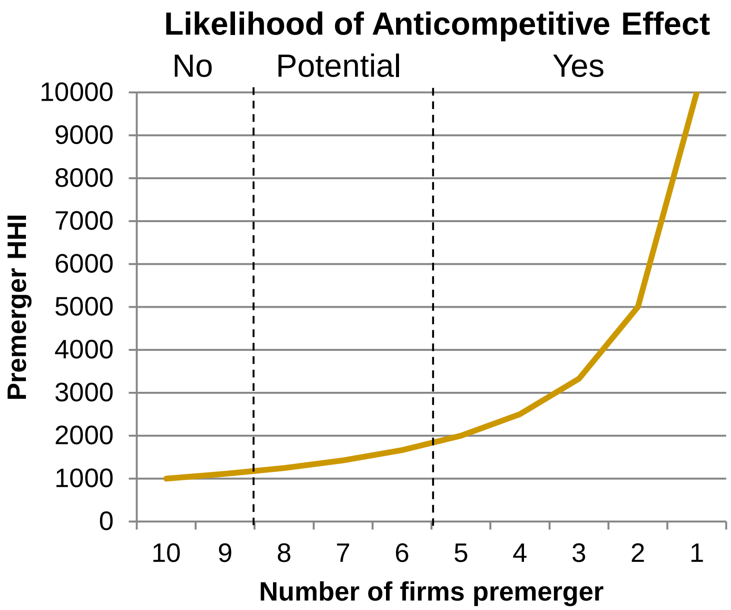
The 2010 Merger Guidelines

- Math notes
  - Calculation of the HHI with *n* firms in the market, with firm *i* having a market share of s_i:

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

  - Shares and HHIs in symmetrical markets with *n* identical firms

n	S_i	Premerger HHI	Delta	Postmerger HHI	Exceeds 2010 Guidelines
10	10.0	1000	200	1200	No
9	11.1	1111	247	1358	No
8	12.5	1250	313	1563	Potential
7	14.3	1429	408	1837	Potential
6	16.7	1667	556	2222	Potential
5	20.0	2000	800	2800	Yes
4	25.0	2500	1250	3750	Yes
3	33.3	3333	2222	5556	Yes
2	50.0	5000	5000	10000	Yes
1	100.0	10000			



Albertsons/Safeway

- Challenged markets with the highest Δs (130 markets)

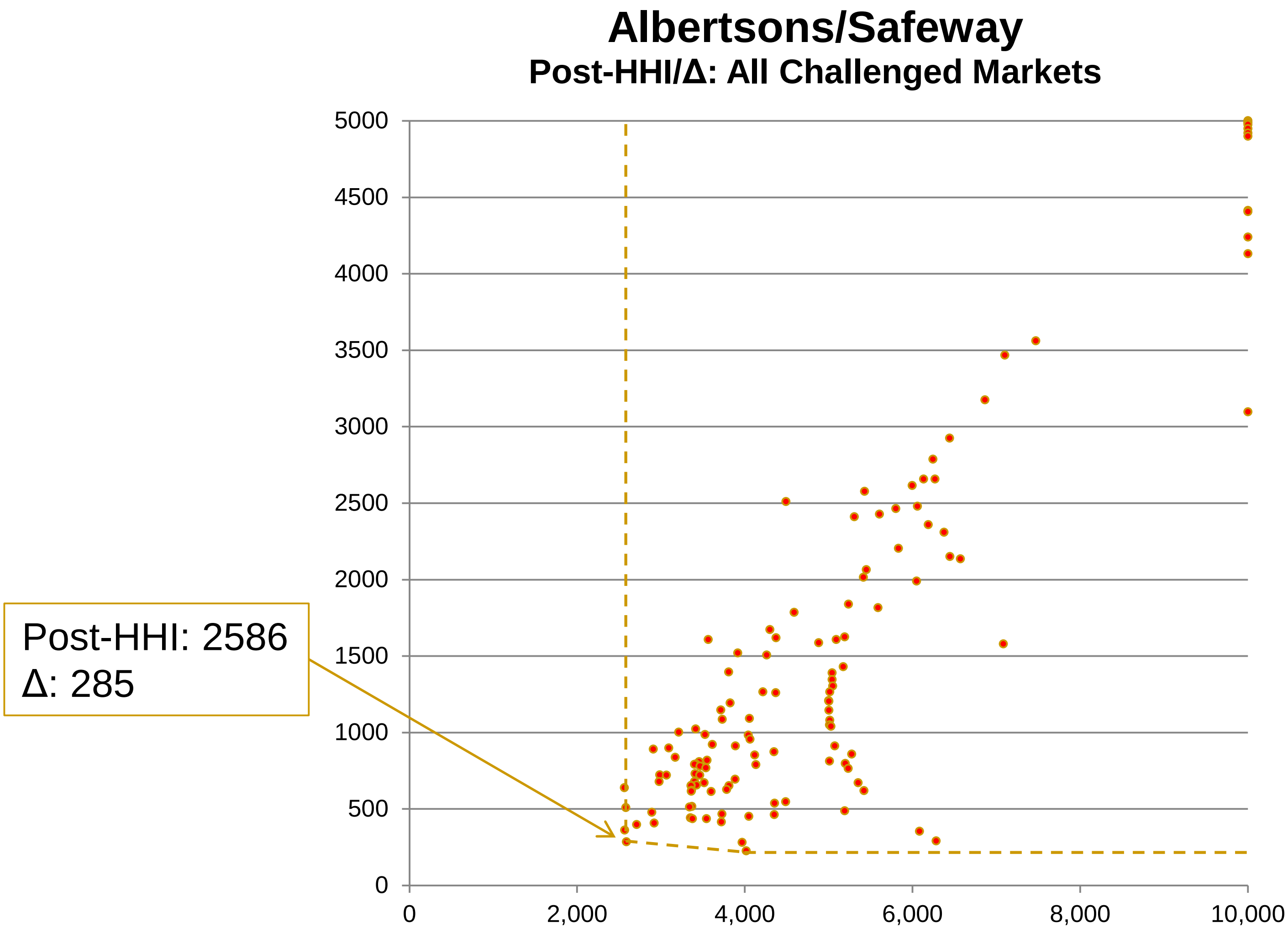
Area Number (See Para. 16 of Complaint)	City	State	Merger Result	HHI (pre)	HHI (post)	Delta
72	Deer Lodge	MT	2 to 1	5000	10,000	5000
83	Happy Valley/ Clackamas	OR	2 to 1	5006	10,000	4994
19	Carpinteria	CA	2 to 1	5012	10,000	4988
78	Ashland	OR	2 to 1	5013	10,000	4987
22	Coronado Island	CA	2 to 1	5025	10,000	4975
74	Boulder City	NV	2 to 1	5051	10,000	4949
29	Ladera Ranch	CA	2 to 1	5081	10,000	4919
79	Baker County	OR	2 to 1	5102	10,000	4898
53	San Diego, CA (Tierrasanta)	CA	2 to 1	5586	10,000	4414
122	Snohomish	WA	2 to 1	5595	10,000	4405
119	Sammamish	WA	2 to 1	5761	10,000	4239
26	Imperial Beach	CA	2 to 1	5869	10,000	4131
58	Santa Barbara/ Goleta	CA	3 to 2	3909	7469	3560
62	Simi Valley	CA	5 to 4	3633	7101	3468
11	Arroyo Grande/ Grover Beach	CA	3 to 2	3690	6864	3174

Albertsons/Safeway

- Challenged markets with the lowest Δs (130 markets)

Area Number (See Para. 16 of Complaint)	City	State	Merger Result	HHI (pre)	HHI (post)	Delta
32	Lakewood	CA	6 to 5	2073	2581	508
71	Butte	MT	3 to 2	4701	5189	488
93	Dallas (Far North)	TX	5 to 4	2413	2891	478
123	Tacoma (Eastside)	WA	4 to 3	3260	3727	467
106	Lake Forest Park	WA	5 to 4	3889	4352	463
21	Chino Hills	CA	4 to 3	3596	4047	451
111	Monroe	WA	4 to 3	2911	3352	441
44	Oxnard	CA	4 to 3	2939	3375	436
98	Plano	TX	4 to 3	3105	3541	436
117	Renton (East Hill- Meridian)	WA	4 to 3	3304	3719	415
85	Klamath Falls	OR	5 to 4	2511	2917	406
104	Federal Way	WA	5 to 4	2312	2709	397
113	Olympia (East)	WA	6 to 5	2205	2566	361
87	Milwaukie	OR	3 to 2	5729	6082	353
55	San Marcos	CA	3 to 2	5991	6282	291
103	Everett	WA	5 to 4	2301	2586	285
65	Tujunga	CA	3 to 2	3688	3969	281
120	Shoreline	WA	4 to 3	3792	4017	225

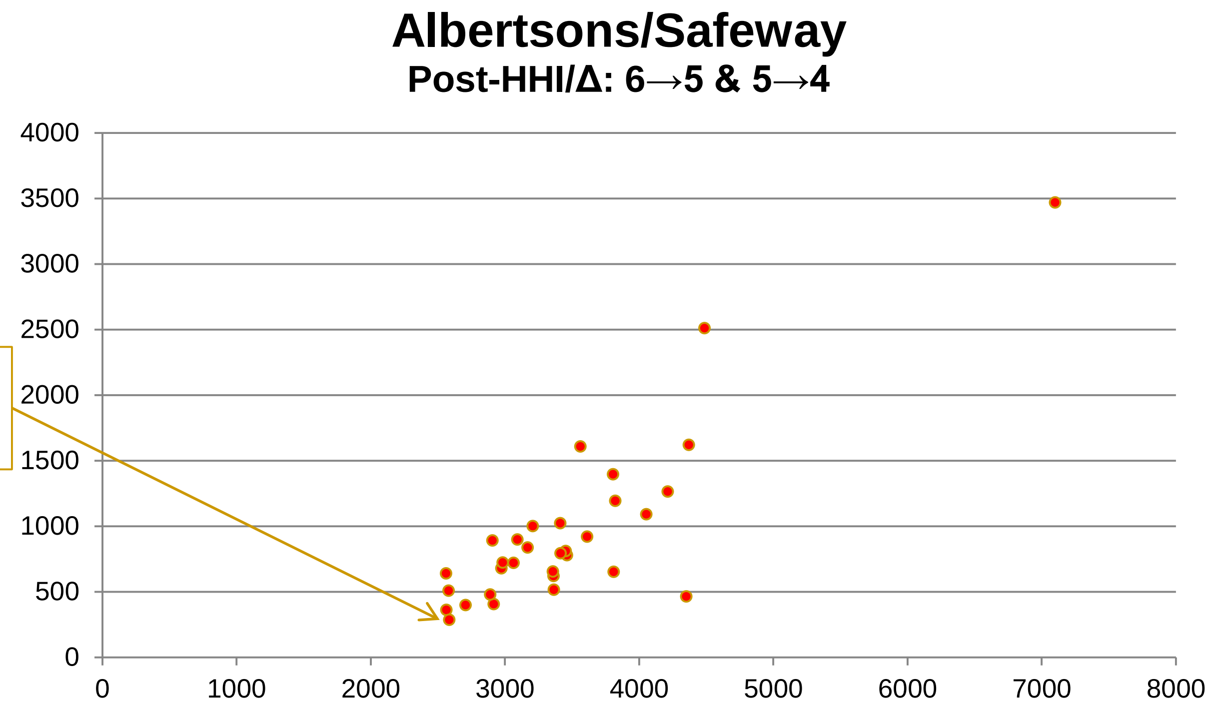
Albertsons/Safeway



6 to 5	5
5 to 4	27
4 to 3	43
3 to 2	42
2 to 1	13
	130

Albertsons/Safeway

Post-HHI: 2586
Δ: 285



AT&T/T-Mobile

- Challenged markets with the highest Δs (100 markets)

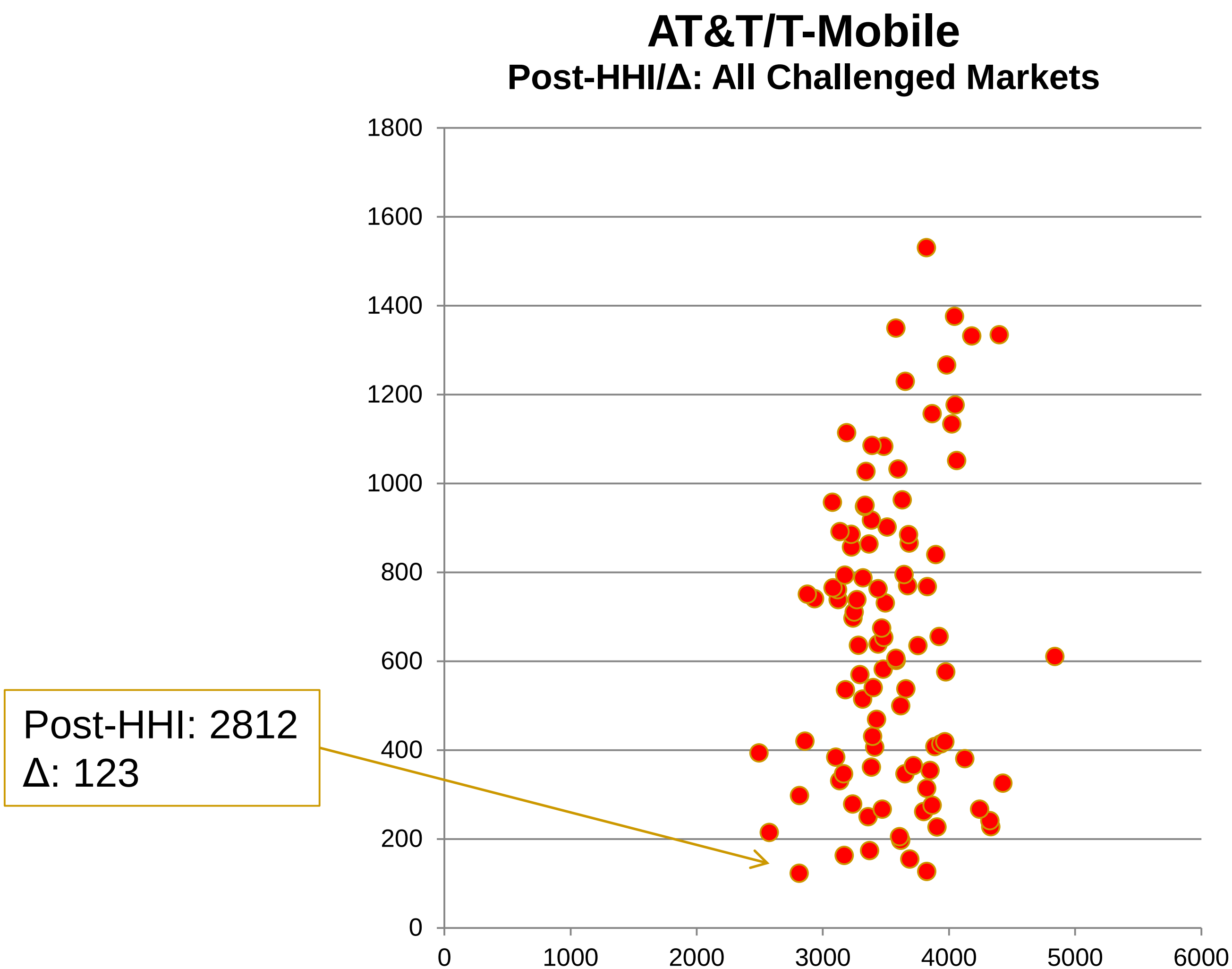
CMA Number and Name	Post-merger share	Post-HHI	Increase in HHI	Share 1	Share 2
050-Honolulu, HI	55.5%	3821	1531	29.9	25.6
020-Seattle-Everett, WA	53.2%	4044	1376	31.0	22.2
010-Houston, TX	52.1%	3578	1350	27.9	24.2
045-Oklahoma City, OK	63.2%	4399	1335	49.8	13.4
041-Birmingham, AL	57.8%	4181	1332	41.9	15.9
009-Dallas-Fort Worth, TX	58.0%	3980	1267	43.4	14.6
039-Salt Lake City-Ogden, UT	49.6%	3653	1230	25.0	24.6
083-Mobile, AL	57.8%	4048	1177	44.6	13.2
075-Austin, TX	54.4%	3867	1157	39.9	14.5
091-San Juan-Caguas, PR	54.3%	4022	1134	40.2	14.1
003-Chicago, IL	48.1%	3189	1114	28.7	19.4
060-Orlando, FL	49.3%	3390	1086	32.7	16.6
051-Jacksonville, FL	50.1%	3482	1084	34.3	15.8
058-Allentown-Bethlehem-Easton, PA-NJ	52.1%	4060	1052	38.4	13.7
015-Minneapolis-St. Paul, MN-WI	45.5%	3596	1033	23.8	21.7

AT&T/T-Mobile

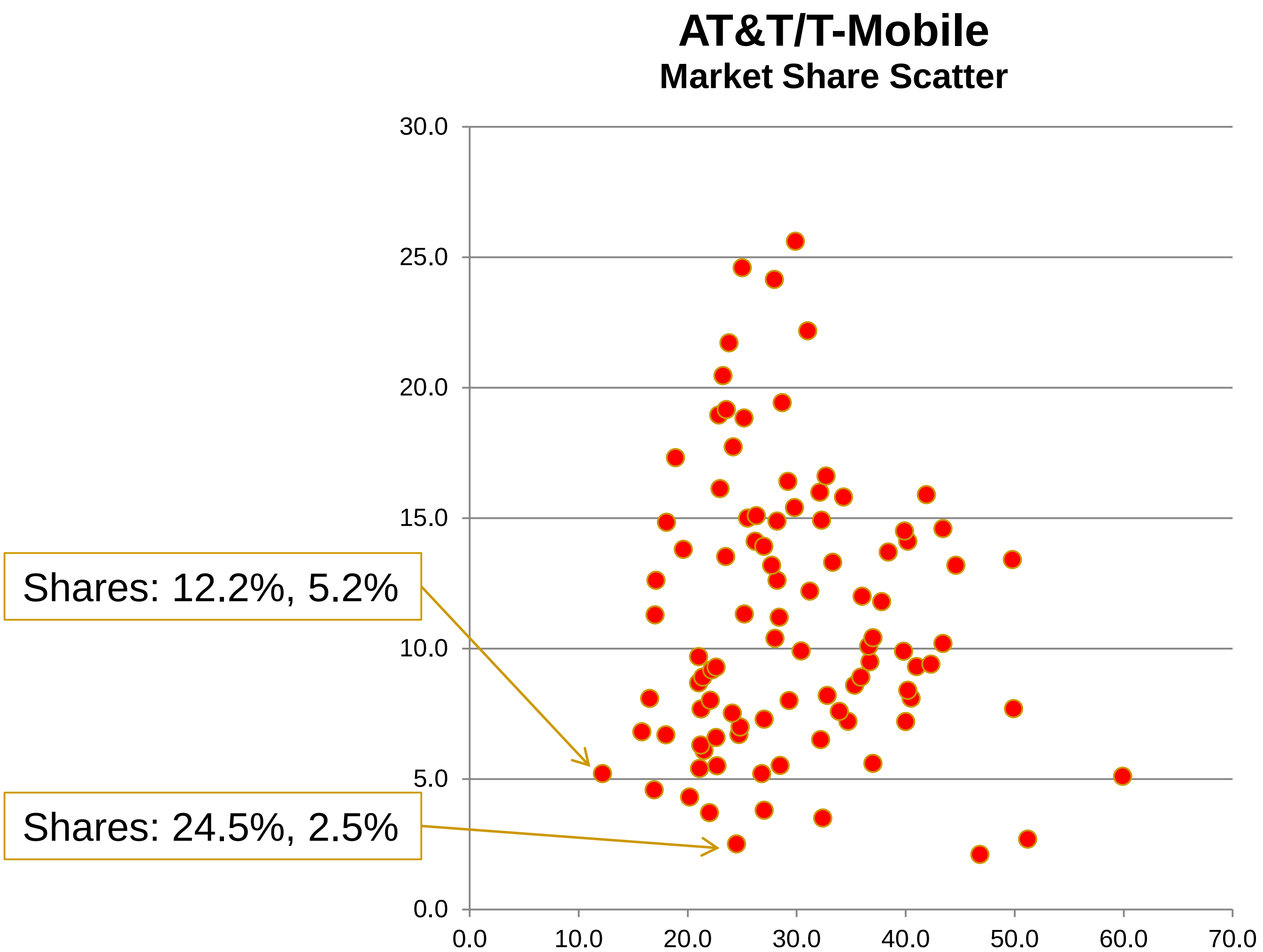
- Challenged markets with the lowest Δs (100 markets)

CMA Number and Name	Post-merger share	Post-HHI	Increase in HHI	Share 1	Share 2
079-Knoxville, TN	27.0%	2812	123	24.5	2.5
048-Toledo, OH-MI	17.4%	3822	127	12.2	5.2
078-Lansing-East Lansing, MI	21.5%	3689	155	16.9	4.6
068-Flint, MI	25.7%	3168	163	22.0	3.7
064-Grand Rapids, MI	24.5%	3370	174	20.2	4.3
100-Shreveport, LA	48.9%	3618	197	46.8	2.1
044-Albany-Schenectady-Troy, NY	30.8%	3607	205	27.0	3.8
023-Cincinnati, OH-KY-IN	22.6%	2575	215	15.8	6.8
053-Syracuse, NY	35.9%	3905	227	32.4	3.5
034-Rochester, NY	26.5%	4330	228	21.1	5.4
085-Johnson City-Kingsport-Bristol, TN-VA	24.7%	4323	241	18.0	6.7
047-Greensboro-Winston-Salem-High Point, NC	28.2%	3358	250	22.7	5.5
088-Chattanooga, TN-GA	27.6%	3799	262	21.5	6.1
087-Canton, OH	27.5%	4242	267	21.2	6.3
059-Richmond, VA	24.6%	3472	267	16.5	8.1
092-Little Rock-North Little Rock, AR	53.9%	3867	276	51.2	2.7
071-Raleigh-Durham, NC	32.0%	3236	279	26.8	5.2
040-Dayton, OH	29.2%	2814	298	22.6	6.6

AT&T/T-Mobile


AT&T/T-Mobile
Post-HHI/Δ: All Challenged Markets
1800
1600
1400
1200
1000
800
600
400
200
0
0
1000
2000
3000
4000
5000
6000
Post-HHI: 2812
Δ: 123

AT&T/T-Mobile


AT&T/T-Mobile
Market Share Scatter
30.0
25.0
20.0
15.0
10.0
5.0
0.0
0.0
10.0
20.0
30.0
40.0
50.0
60.0
70.0
Shares: 12.2%, 5.2%
Shares: 24.5%, 2.5%

Baker Hughes burden shifting

- *Baker Hughes* (1990)[1]
  - Created a three-step burden shifting procedure in horizontal merger cases
    - Plaintiff bears burden of proof in market definition and in market shares and market concentration within the relevant market sufficient to trigger the *PNB* presumption
    - Burden of production then shifts to defendant to adduce evidence sufficient to put the *PNB* presumption in issue
      - "Sliding scale": The higher the level of market concentration and the larger the combined share, the more evidence the merging parties must adduce to put the presumption in issue
    - Burden of persuasion returns to plaintiff to prove in light of all of the evidence in the record that the merger is reasonably probable to have an anticompetitive effect in the relevant market
  - Widely adopted today
    - The law of the circuit in the District of Columbia, where the DOJ and FTC bring most of their merger antitrust cases
    - Also adopted by the FTC in its administrative adjudications
    - Helps that the author of the *Baker Hughes* opinion and one other member of the Baker Hughes panel are now Supreme Court justices (Thomas and Ginsburg, respectively)

[1] United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990).

Baker Hughes burden shifting

- General approach
  - Initial plaintiff's burden in proving a prima facie case
    - Prove boundaries of relevant product and geographic markets
    - Determine market shares and market concentration
    - Predicate the PNB presumption with market shares and market concentration
    - Successful proof of all three elements proves prima facie case
  - Burden of production shifts to defendants to produce evidence that rebuts the *PNB* presumption—Some arguments:
    - *PNB* presumption does not apply because the plaintiffs determined market shares and market concentration in an improperly defined relevant market
    - No likelihood of anticompetitive effect in the relevant market through coordinated interaction*
    - No likelihood of anticompetitive effect in the relevant market through unilateral effects
    - Ease of entry/repositioning ensures postmerger competition
    - Merger-specific efficiencies ensure no harm to customers
    - Failing company
  - Burden of persuasion returns to plaintiff to prove reasonable likelihood of an anticompetitive effect in relevant market on the basis of all of the evidence in the record (plaintiff may adduce additional evidence)

Merger antitrust decisions

- Written opinions
  - Provide the legal basis for the judgment of the court in entering or denying relief
    - Applies the law to the facts according the statutes and judicial precedent
    - Designed to be scholarly
    - Designed to minimize the probability of reversal on appeal
      - Utilize accepted articulations of both the substantive law and the law on relief and avoid any novel articulations (subject to de novo review on appeal)
      - Make detailed finding of fact (subject to the clearly erroneous rule on review)
      - Where appropriate, make credibility findings on witness testimony (including expert witnesses)
  - NB: Do not necessarily provide the thinking process of the judge in reaching a decision on the outcome

Merger antitrust judicial opinions

- Typical organization of horizontal merger judicial opinions
  - Introduction to the parties and the transaction
  - Background
    - Overview of the affected industry
    - Overview of the merging parties
    - History of the merger investigation (in DOJ/FTC cases)
    - History of the court proceedings
  - Legal standards
    - Clayton Act § 7 (substantive standard)
    - Standard for a preliminary/permanent injunctive (as the case may be)
    - A description of the *Baker-Hughes* burden-shifting framework (see below)
  - Discussion
    - The prima facie case
      - Market definition (product and geographic—do separately if both contested
        - Legal principles
          - Case law principles (the *Brown Shoe* “practical indicia”)*
          - “Hypothetical monopolist test” under the DOJ/FTC Merger Guidelines*
        - Application to facts
        - Findings as to the dimensions of the relevant market(s)

* To be discussed later in course.

Merger antitrust judicial opinions

- Analysis (con't)
  - The probable effects of the transaction on competition in the relevant market
    - Application of the *Philadelphia National Bank* presumption to establish a prima facie case of anticompetitive effect (see below)
    - Plaintiff's additional evidence of anticompetitive effect
      - Might include
        - Ordinary course of business documents (especially from the parties)
        - Fact witness testimony (especially from the parties)
        - Industry expert testimony
        - Economic expert testimony
      - Usually includes treatment of the defendants' opposition to this evidence
      - Conclusion on whether the government has established a prima facie Section 7 violation
  - Defendants' response to the plaintiff's prima facie case (to the extent not already considered)
    - Addresses additional evidence on lack of anticompetitive effect
      - Might include
        - Evidence of corrective entry or repositioning by actual or potential competitors
        - Evidence of economic efficiencies (often called *synergies*)
        - Any restructuring of the transaction the merging parties propose to do to eliminate any competitive problem (a "fix-it-first" defense
        - Industry expert testimony
        - Economic expert testimony
      - Includes plaintiff's opposition to this evidence
    - Conclusions on whether the defendant's have rebutted the prima facie case and on the government's likelihood of success on the merits

Merger antitrust judicial opinions

- Analysis (con't)
  - Weighing the equities (always a factor in considering the entry of injunctive relief)
    - *Equities favoring the government*: Heavy weight of the public interest in the effective enforcement of the antitrust laws and the prevention of anticompetitive harm to the market
    - *Equities favoring the defendant*: Usually none

    NB 1: Historically, if the government has established a likelihood of success on the merits, the courts never find that the equities weigh against issuing an injunction

    NB 2: In a government action, there is no requirement that the government plaintiff to show irreparable harm as would be required in a private action
  - Conclusion and order