

## MERGER ANTITRUST LAW

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Georgetown University Law Center  
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Tuesdays and Thursdays, 3:30-4:55 pm  
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*Links to the required reading and the class notes may be found on the assignments page of Canvas and on the [Merger Antitrust Law](#) page of [AppliedAntitrust.com](#).*

### **Class 15 (October 19): H&R Block/TaxACT (Unit 4)<sup>1</sup>**

This unit involves a case study of the H&R Block/TaxACT transaction. The case involves the proposed acquisition in 2010 by H&R Block of TaxACT for \$287.5 million in cash. H&R Block was the largest firm in “assisted preparation” of income tax returns and the second largest firm in digital “do-it-yourself” (DDIY) tax software (15.6%). TaxACT was the third largest firm in DDIY tax software (12.8). Intuit is the largest firm in the DDIY space (62.2%). The space is highly concentrated, with a three-firm concentration ratio (3-FCR) of 90.6%, so the transaction is three-to-two with less than a 10% fringe *if* DDIY is the proper relevant product market. The DOJ challenged the deal and ultimately prevailed at trial, resulting in a permanent injunction blocking the transaction. The parties then voluntarily terminated their merger agreement, and shortly thereafter TaxACT was acquired by InfoSpace.

While we will spend some time on the litigation aspects of the case, we will focus on primarily on how Judge Beryl A. Howell of the District Court of the District of Columbia explained his decision that that the transaction, if consummated, would violate Section 7 of the Clayton Act. Recall that we have drawn a distinction between how antitrust decision-makers come to a decision about the legality of a transaction and how they explain that decision. To this point in the course, we have focused on modelling the former I order to predict the decisions the investigating agency is likely to make at the end of a HSR merger investigation. For the next several weeks, we will turn to how decision-makers, and district court judges in particular, explain the decision that they have made. Good litigation advocacy, whether as a plaintiff or as a defendant, requires that you provide the court with both a compelling reason to decide in your favor *and* a way to explain that decision—which may be different—that is consistent with the statute and prevailing precedent, compelling, scholarly, and minimizes the prospect of reversal on appeal.

First, read Section 15 of the Clayton Act, which gives the Attorney General a right of action to seek injunctive relief for threatened or actual violations of Section 7 (p. 4). Also read Rule 65 of the Federal Rules of Civil Procedure, which govern actions for injunctions and restraining order (pp. 4-5).

Turning to the case study, as usual we start with the announcement of the deal on October 13, 2010 (pp. 8-9). On May 23, 2011, seven months later after the announcement and following the completion of its HSR merger review, the DOJ filed a complaint seeking a permanent injunction

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<sup>1</sup> A reasonably set of the most important filings in the litigation (including the trial transcript) may be found [here](#) on AppliedAntitrust.com.

to block the transaction (pp. 10-35), to which the parties filed an answer denying any violation a little over a month later (pp. 36-51). Following the parties' unsuccessful motion to transfer venue and discovery, the court's minute order of August 4, 2011, set a hearing date of September 6, 2011, and the parameters for trial (p. 52). Eight days of trial began on September 6, 2011, and concluded on September 19, 2011, and the court heard closing arguments on October 3, 2011. The complaint, answer, and orders are easy reads, but do not go through them too quickly since this is going to be our only time to look at some pretrial papers.

On October 31, 2011, the court issued an order entering a blocking permanent injunction (pp. 53-54) and released a public version of the memorandum opinion in support of the order on November 10, 2011. Read the opinion through market definition (pp. 55-104). The accompanying class notes on market definition will provide some essential background and more explication of some of the analytics than the opinion contains. You should also review with some care the market definition section of the 2010 DOJ/FTC Horizontal Merger Guidelines. We are going to walk through the opinion in some detail in class (including the underlying analytics), so be prepared. Everything in the opinion is fair game for class discussion.

My hope is to get through the market definition section of the opinion on Thursday, and then finished the rest of the opinion on Tuesday the week after. But as history is any guide, this is wishful thinking. We will know much better after we see if we finish the evolution unit this coming Tuesday.

Enjoy the reading! Email me if you have any questions.

Dale