**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.*

**Classes 17 (October 26): H&R Block/TaxACT (Unit 4)[1]**

We will continue our discussion of critical loss analysis in market definition. We will start with a review of the material we covered at the end of the last class. Review the slides on critical loss in the class notes (slides 37-54). Be sure that you understand the formulas for critical loss in absolute units and percentages (slide 39) and the examples (slides 44-45). We will critical loss by examining the "aggregate diversion ration" method and its application to the H&R Block/TaxACT case (slides 51-54).

Next, read the portion of the H&R Block/TaxACT opinion dealing with competitive effects through coordinated effect. As you read through the various subsections of the opinion, I would read the corresponding sections of 2010 DOJ/FTC Horizontal Merger Guidelines (HMG), and the class notes:

1. The plaintiff's prima facie case (pp. 104-07, HMG § 5, and slides 1-26—essentially all review of materials you have seen before).
2. Barriers to entry (pp. 107-14 and slides 81-85)
3. Coordinated effects (pp. 114-121, HMG § 7, and slides 27-51). Just skim the slides on the Cournot model (slides 31-33), which provide some of the theoretical basis for the profit-concentration hypothesis, but you should at least be aware of and understand the last formula on slide 33 even if you do not go through the derivation. Pay some attention to the theoretical and empirical criticisms of the profit-concentration hypothesis (a good antitrust lawyer should know what there are).
4. "Maverick" theory (pp. 118-21, HMG § 2.1.5, and slides 73-79). The court treats this as part of the coordinated effects theory.
5. Unilateral effects (pp. 121-34, HMG § 6, and slides 53-72). Unilateral effects is the primary theory of anticompetitive harm employed by the agencies in their merger investigations. It is hard to find a merger review, much less a litigated case, that did rely on this theory. So it is important that you understand the theory and its application. Try to wade through the math on slides 61-64 so that you can see the difference between the profit-maximizing first order condition for a single firm premerger and the profit-maximizing first order conditions for the combined firm postmerger and how to interpret

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

the terms in the first order condition (bottom of slides 63-64). This is the heart of the unilateral effects theory. Study the numerical example and the charts on slides 65-67. You can just skim the explication of the unilateral effects (slides 68-69).

Another tool used in applying the unilateral effects theory the GUPPI, *the gross upward pricing pressure index*. This is very closely related to the UPP (upward pricing pressure) we saw in the history deck in the slides on the 2010 DO/FTC Horizontal Merger Guidelines (you might want to go back and review those). It is important that you study the slides and understand the example (slides 70-72).

Next week we will finish with anything that did not did cover on unilateral effects and finish the rest of the H&R Block/TaxACT opinion. We will take a break from the more technical aspects of merger antitrust law to look at the ABI/Grupo Modelo beer merger. Then on Thursday we will start on the Sysco/U.S. Foods case study.

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

Dale