MERGER ANTITRUST LAW

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Tuesdays and Thursdays, 3:30-4:55 pm
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Class 13 (October 16): H&R Block/TaxACT (Unit 9)[1]

In this class we will start on our next major case study, 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 was the largest firm in the DDIY space (62.2%). The space was highly concentrated, with a three-firm concentration ratio (3-FCR) of 90.6%, so the transaction was a three-to-two combination 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 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 in order to predict the decisions the investigating agency is likely to make at the end of an HSR merger investigation and what provisions the merging parties might include in the acquisition agreement to allocate any antitrust risk. Now we are changing tack. For the next several weeks, we will be analyzing how decision-makers, and district court judges in particular, explain the decisions 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, review 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 review Rule 65 of the Federal Rules of Civil Procedure, which govern actions for injunctions and restraining orders (pp. 4-5). You have seen these materials before in Unit 5 on antitrust litigation, so you do not need to spend much time on them.

Next, turn to the case study. As usual, we start with some developments prior to the decision. On October 13, 2010, the parties announced the deal (pp. 8-9). On May 23, 2011, seven months after the announcement and following the completion of its HSR merger review, the DOJ filed a complaint seeking a permanent injunction to block the transaction (pp. 10-35), to which the

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

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. Also, be sure that you understand the analytical structure of the DOJ's complaint and the factual allegations it makes in support of its claim that the transaction if consummated would violate Section 7. Also be sure you understand the structure of the defense the merging parties are asserting in their answer.

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 up through to the expert opinion section on market definition (pp. 55-85). Pay particular attention to the organization of the opinion as set out in the table of contents (p. 57). As we read the opinions in this case and others over the next several weeks, we will uncover the rubric that has emerged for writing merger antitrust opinions. It is important to understand the form, since as I noted earlier advocates not only need to win the "hearts" of the decision-makers, they also need to provide the decision-makers with a way to explain their decision that looks good (and minimizes the prospect of reversal on appeal).

The early sections of the opinion address the parties to the deal, the history of TaxACT and the transaction, and the deal rationale (pp. 58-64). They also discuss tax preparation products and the role of free products (pp. 64-67). In light of these facts, think about the antitrust risk the transaction posed and what antitrust risk-shifting provisions the seller might want in the acquisition agreement.

Turning to the litigation itself, recall the alleged basis for the DOJ's complaint and the merging parties' response to it in their answer from your earlier reading of these documents. We will discuss briefly the steps in the litigation prior to trial (pp. 6-7). The standard of review (pp. 67-69), including the *Baker Hughes* burden-shifting approach, is important and should be familiar to you from earlier classes.

With that behind us, it is time to look at the merits. Historically, merger antitrust opinions address market definition first. Recall that the language of the Clayton Act indicates that an essential element of a Section 7 violation is market definition, which locates the "line of commerce" (product market) and "area of the country" (geographic market) in which the threatened anticompetitive effect of the merger is to be located. Geographic market was not an issue in H&R Block/TaxACT, since the parties stipulated to a national market. Product market definition, however, was the key to the outcome of the case.

There are two basic types of evidence used in defining markets: (1) judicially identified factors, and (2) the hypothetical monopolist test. In product market definition, the judicially identified factors are those identified in *Brown Shoe*, and we will consider those in some detail in this class (pp. 69-85). In the next class, we will look at the expert testimony on product market definition and the court's application of the hypothetical monopolist test (and its various implementing techniques) to confirm the market dimensions indicated by the *Brown Shoe* factors.

The accompanying class notes on market definition will provide some essential background and more explication of some of the analytics than the opinion contains. My suggestion is that you read at least slides 1-47 for this class. You can leave the reminder of the deck on the critical loss implementation of the hypothetical monopolist test for Thursday's class. You should also review with some care the Section 4 of the 2010 DOJ/FTC Horizontal Merger Guidelines on market definition. We are going to walk through the opinion in some detail in class (including the underlying analytics), so be prepared and bring a copy of the opinion to class. Everything in the opinion is fair game for class discussion.

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

Dale