

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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Class 14 (October 18): H&R Block/TaxACT (Unit 9)¹

On Thursday, we will pick up with our discussion of the market definition in the H&R Block/TaxACT decision. Much of this class will be devoted to the court's examination of the expert testimony in implementing the hypothetical monopolist test (pp. 85-104). Pay close attention to how the court used the facts and the expert testimony in deciding on market definition. Be sure to review Section 4 of the 2010 DOJ/FTC Horizontal Merger Guidelines and the class notes on market definition. Most of the deck is straightforward and will be a mostly familiar read, but pay close attention to the slides on *critical loss* and the *aggregate diversion ratio* at the end. These concepts come up frequently in the opinions and are becoming two of the standard methods of proving the boundaries of the relevant market.

When you finish market definition, you should take a break from the opinion and read the note on expert evidence (pp. 162-69). Expert testimony is essential in antitrust case in general, and merger antitrust cases in particular, which makes familiarity with the rules governing expert testimony equally essential. Then read the Memorandum Opinion and Order Denying Motion in Limine (pp. 147-61) to see how the court handled the DOJ's effort to exclude evidence of the email survey commissioned by the defendants and the portions of Dr. Meyer's testimony that relies on the survey.

Next, read the section of the opinion on whether the DOJ has made out its prima facie case and the arguments of the merging parties in rebuttal (pp. 104-114). This is just the application of the *Philadelphia National Bank* presumption. Be sure to read Section 5 of the Horizontal Merger Guidelines, which gives the view of the agencies on how the *PNB* presumption should be implemented. The first two sections of the deck on Anticompetitive Effect in Horizontal Mergers give a quick refresher on the anticompetitive effect element of a Section 7 violation and the *PNB* presumption. These early parts of the deck should be easy going as it simply is a review of materials we have already covered. Be sure you have a good sense of how the HHIs work and how the court applied them in the case (slides 15-17).

Although we may not get to it on Thursday, I suggest that you read the portion of the H&R Block/TaxACT opinion dealing with competitive effects through coordinated effects (pp. 104-121). This will be a quick read without any complicating analytics.

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

Dale

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