MERGER ANTITRUST LAW

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READING GUIDANCE

Class 11 (October 5): Sanford Health Mid Dakota Clinic (Unit 8)

In the first part of the course, we examined antitrust institutions (the substantive statutes, the federal enforcement agencies and other potential plaintiffs, the DOJ/FTC merger review process under the HSR Act, merger antitrust litigation, and settlements of investigations and litigations), developed a model for predicting antitrust challenges and enforcement outcomes in the context of these institutions, used this model to assess the inquiry, substantive and relief risks in transactions, and then used this risk assessment to inform the negotiations on behalf of a buyer or seller on various provisions in the merger agreement to allocate the antitrust risk.

As we have discussed, effective advocacy—either as a prosecutor or defense counsel—depends on capturing both the "heart" and "mind" of the decision maker, whether that be the ultimate decision-makers in the DOJ or FTC or a federal court judge.

Consider, for example, advocacy before a federal district court judge. Capturing the judge's heart means successfully appealing to the judge's judgment, experience, and common sense that the position you are advocating is the one that best serves justice. This will make the judge look for ways to find in your favor. Capturing the judge's mind means providing the judge a way to justify the outcome that you are advocating consistent with the prevailing analytical paradigm and governing judicial precedent. More to the point, ideally you should provide the judge with legal arguments and supporting evidence that the judge can incorporate into her opinion that will make the judge look like a scholar to the bench and bar, is likely to be regarded as a model by other judges writing opinions in future cases, and (by no means least) will not be reversed on appeal. The bottom line: even if you capture the "heart" of the decision maker and convince them you have "right" on your side, you may still lose if you cannot provide the "mind" with an acceptable way to justify a decision in your favor. We will spend the rest of the course on the "mind" part of this equation by examining how modern judges in fact justify the outcomes they reach.

As a quick aside, when writing briefs, the fact section should be written not only to provide the factual predicates for the theory of the case but also to provide a compelling narrative to appeal to the "heart" of the judge. The argument section is more intended to speak to the judge's "mind." If the judge is not convinced that you have right on your side by the time the judge has finished reading the fact section, you have a problem.

This brings us to our first merger antitrust decision in the course: the proposed acquisition by Sanford Health of Mid Dakota Clinic, P.C. We will read only the Eighth Circuit's opinion affirming the district court. The facts are easily understood and largely uncontested, and the appellate opinion is straightforward and short (which is why it is our first opinion). That said, I expect you to spend the time to develop a deep understanding of the structure and reasoning of

the opinion.[1] Although the Eighth Circuit's opinion is short, there is a lot of material here to give you a good foundation in basic formal merger analysis. We will spend two classes on this case study. I assure you that the time you spend on this unit will pay significant returns as the course proceeds, especially when the cases get much more complicated.

Sanford Health is an integrated healthcare system operating in North Dakota and several other states.[2] In the Bismarck-Mandan region of North Dakota, Sanford operates an acute care hospital, eight primary care clinics, and several specialty clinics. It employs approximately 160 physicians in the region, including 37 adult primary care physicians (PCPs), five pediatricians, eight OB/GYN physicians, and four general surgeons. Sanford's two main competitors in the Bismarck-Mandan region are Mid Dakota Clinic (MDC) and Catholic Health Initiatives St. Alexius Health (CHI).

MDC is a multispecialty for-profit physician group with nine clinics and one ambulatory surgery center in the region. MDC has approximately 60 physicians, including 23 adult PCPs, six pediatricians, eight OB/GYN physicians, and five general surgeons.

CHI operates CHI St. Alexius, the only other acute care hospital in the Bismarck-Mandan area. CHI employs approximately 88 physicians, primarily hospitalists.[3] Its physicians include five adult PCPs but no pediatricians, OB/GYN physicians, or general surgeons.

The following table summarizes these facts:

Physicians in the Bismarck-Mandan Region

	Sanford Bismarck	Mid Dakota	CHI St. Alexius	Others
Adult PCPs	37	23	5	10
Pediatricians	5	6	0	1
OB/GYNs	8	8	0	1
General surgeons	4	5	0	0

On June 23, 2017, the FTC filed a complaint under Section 13(b) of the FTC Act in the Federal District Court of the District of North Dakota alleging that the transaction, if consummated, would violate Section 7 of the Clayton Act by threatening to lessen competition in the provision of adult primary care physician, pediatric, OB/GYN, and general surgery physician services (each a separate relevant product market) to commercial insurers in the Bismarck-Mandan area of North Dakota.[4] For relief, the FTC sought a temporary restraining order and a preliminary

[1] The homework assignment will help you develop this understanding.

[2] An integrated healthcare system is one comprised of both hospital services and physician services and which sometimes also includes insurance companies and research and education components.

[3] A hospitalist is a dedicated in-patient physician who works exclusively in a hospital.

[4] The FTC, as is its practice, also alleged that the entry into the merger agreement violated Section 5 of the FTC Act.

injunction to enjoin the consummation of the Sanford Heath/MDC merger pending a resolution of the merits in an FTC administrative proceeding.[5] The State of North Dakota joined the complaint as a plaintiff alleging a violation of Section 7 and seeking similar relief under Section 16 of the Clayton Act. North Dakota also alleged a violation of North Dakota Century Code § 5108.1, the state's analog to the Sherman Act, and sought state law remedies.

To get your bearings, read the FTC's press release announcing the action (pp. 6-7) and the complaint (pp. 8-41). The introduction and Section I of the complaint give a good summary of the theory of the case and is worth some attention (pp. 8-12). Section IIA provides the jurisdictional allegations, sets forth the causes of action, and gives you a good refresher of some of the material we covered in Unit 4 (pp. 12-14). Section IIB describes the parties to the action (pp. 14-16), while Section IIC summarizes the transaction and the investigation (pp. 16-17). Section III contains the allegations on the various relevant markets in the case (pp. 18-21). You will recall that the relevant market (defined by its product and geographic dimensions) in which the alleged anticompetitive effects are likely to occur is an essential element of a Section 7 prima facie case and so must be sufficiently pleaded in the complaint. Section V contains the allegations on market structure and invokes a rebuttable presumption (which we will later learn is called the *Philadelphia National Bank* presumption) that maps market shares and changes in market concentration into the requisite anticompetitive effect (pp. 21-23). Section VI provides more allegations in support of the anticompetitive nature of the transaction to add weight to the presumption (pp. 24-32). Section VII contains allegations to strengthen the presumption further and preempt an "ease of entry" defense (pp. 32-35). Likewise, Section VIII contains allegations to preempt an "efficiencies" defense (pp. 35-36). Finally, Section IX contains allegations regarding the propriety of injunctive relief under Sections 13(b) and 16 and the prayer for relief (pp. 36-38).

The complaint is more extensive than many of the complaints we have seen that were filed simultaneously with a proposed consent decree. It is not necessary for the complaint to do anything more than allege a prima facie case to withstand a motion to dismiss. Still, since the FTC knows what defenses the merging parties will advance from the investigation, it decided to include allegations to preempt the defenses to set the stage in its favor before the judge (who will read the complaint before any of the other papers). The complaint is the FTC's first opportunity to capture the "heart" of the judge with well-developed and compelling factual allegations.

The parties stipulated to a TRO enjoining the transaction's closing for five business days after the court ruled on the preliminary injunction. The court "so ordered" the stip, making it a judicial order. (pp. 43-49). After a four-day evidentiary hearing with 16 witnesses, the district court found that the plaintiffs were likely to succeed in proving each of the four alleged relevant product markets and the relevant geographic market alleged in the complaint. The court also found that the transaction would result in the merged firm controlling an undue percentage share of each relevant market and would create a significant increase in concentration in each market, thus entitling the plaintiffs to a rebuttable presumption of the requisite anticompetitive effect

[5] The FTC voted on June 22, 2017, to authorize the staff to seek a preliminary injunction in federal district court, and the staff filed the papers the next day. At the same meeting, the FTC also voted to issue an administrative complaint. *See* Complaint, *In re* Stanford Health, No. 9376 (F.T.C. issued June 22, 2017); News Release, Fed. Trade Comm'n, FTC and State Attorney General Challenge Physician Group Acquisition in North Dakota (June 22, 2017).

under *United States v. Philadelphia National Bank*.[6] After reviewing additional evidence presented by the plaintiffs on the likely competitive effect of the transaction and rejecting the various defenses advanced by the parties, the court concluded that the FTC was likely to succeed in ultimately proving on the merits that the proposed transaction may substantially lessen competition in each of the four relevant physician service lines sold to commercial insurers in the Bismarck-Mandan area and that the public equities favored preliminarily enjoining the proposed transaction. Consequently, the court entered a preliminary injunction blocking the closing until the merits had been adjudicated (p. 49).[7] The same day, the merging parties filed a notice of appeal, terminating the district court's jurisdiction and transferring jurisdiction to the court of appeals (p. 50).

My suggestion is that you read the Eighth Circuit's opinion (pp. 54-63) straight through and then do the homework assignment. This will give you a good sense of the opinion's analytical structure. Be sure you understand the gravamen of the complaint, the relief that the plaintiffs were seeking, what the district court decided and why, and what errors the merging parties asserted on appeal that the district court had committed.

Once you have completed the homework assignment, go through the opinion again. This time also use the class notes and the other materials in the required reading.

The institutional context. Start by reviewing Section 7 of the Clayton Act and Section 5 of the FTC Act (p. 77), the elements of a violation of Section 7 of the Clayton Act in the class notes (slide 4), and the corresponding portion of the opinion (p. 56). Then review the typical paradigms for merger antitrust litigation before closing (slide 9).

Stanford Health is an appeal of the grant of a preliminary injunction by the district court (pp. 56-57), so review Section 13(b) of the FTC Act and Section 16 of the Clayton Act (pp. 77-78) together with the purpose and standards for the grant of a preliminary injunction (slides 11-12). Note that there are two plaintiffs in this case, both seeking a preliminary injunction. What gave each plaintiff a right of action to seek a preliminary injunction in federal district court (slides 13-14)? Are the governing statutes and the preliminary injunction standards the same for both plaintiffs? What gave the Eighth Circuit appellate jurisdiction to review the district court's grant of a preliminary injunction (slide 16)? What was the appellate standard of review (slide 17)?

Allocation of the burdens of proof under Baker-Hughes. Read the class notes to refresh your recollection on proving a prima facie case (slides 5-6). One of the most important questions in merger antitrust law is the quantum of evidence the merging parties are required to adduce to defeat the plaintiff's prima facie case. *Philadelphia National Bank* stated once the plaintiff had made out its prima facie case, the transaction "must be enjoined in the absence of evidence *clearly showing* that the merger is not likely to have such anticompetitive effects."[8]

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[6] 374 U.S. 321 (1963). *Philadelphia National Bank* said that the presumption was rebuttable only by a "clear showing."

[7] I did not include the district court's supporting memorandum in the materials. If you are interested in it, see Memorandum of Decision, Findings of Fact, Conclusions of Law, and Order, FTC v. Sanford Health, No. 1:17-cv-00133-ARS (D.N.D. Dec. 15, 2017), in the supporting materials.

[8] *Philadelphia Nat'l Bank*, 374 U.S. at 363; *accord* United States v. Phillipsburg Nat'l Bank & Tr. Co., 399 U.S. 350, 366 (1970).

Notwithstanding this indication that the presumption was rebuttable, as a practical matter, the lower courts quickly treated the presumption as if it was conclusive. In 1974, the Supreme Court in United States v. General Dynamics Corp.[9] firmly reestablished that the *PNB* presumption was rebuttable, but despite some implicit skepticism of the "clear showing" standard, the Court did not explicitly change it. As a result, the "clear showing" standard continued to be invariably invoked by the DOJ and FTC in their merger antitrust litigations. As a general rule, courts did not push back too hard until the D.C. Circuit's 1990 opinion in *Baker Hughes*.[10] In that case, the court of appeals explicitly rejected the "clear showing" standard and adopted instead a three-step burden-shifting approach to the allocation of the burden of proof in a horizontal merger antitrust case:

1. The plaintiff bears the burden of proof in market definition and in market shares and market concentration within the relevant market sufficient to trigger the *PNB* presumption and thereby prove a prima facie Section 7 violation.
2. If the plaintiff satisfies this burden, the *burden of production* shifts to defendants to adduce evidence sufficient to rebut *PNB* presumption and raise a factual question for the trier of fact as to the likely competitive effects of the transaction.
3. If the defendant satisfies its burden of production, then the plaintiffs have the *burden of persuasion* 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.[11]

The *Baker Hughes* court of appeals directly confronted the *Philadelphia National Bank* "clear showing" language and concluded that *General Dynamics* and other cases had implicitly changed the standard. The three-step burden-shifting approach became the law of the circuit in the District of Columbia where most merger antitrust cases are brought. It was also quickly adopted by other courts. The *Baker Hughes* approach now appears well-entrenched in law, especially since its author (Clarence Thomas) and another panel member (Ruth Bader Ginsburg) became long-serving Supreme Court justices. See the class notes for a summary (slide 7).

When you read the excerpt from *Baker Hughes* (pp. 80-83), pay attention both to the articulation of the three-step burden-shifting approach and to the panel's rejection of the *PNB* "clear showing" rule. The note on *Baker Hughes* (pp. 83-87) provides a deeper dive into burdens on the parties at each of the three steps. In my experience, most practitioners and even judges do not really understand the *Baker Hughes* approach, and a thorough understanding will enable you to make much better arguments and write much better briefs.[12]

Relevant product markets. Turning to the merits, the Eighth Circuit first looked at the district court's factual findings regarding the relevant product market (pp. 58-60). As you know from the

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[9] 415 U.S. 486 (1974).

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

[11] *Id.* at 982-83.

[12] As you will read, Thomas based his three-step burden-shifting approach on *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-56 (1981), a civil rights case. Consequently, the *Baker Hughes* approach has application beyond antitrust cases. For those of you who have taken the basic antitrust course, think about how the Barker-Hughes three-step burden-shifting approach to mergers compares with the allocations of the burdens of proof in rule of reason cases under Section 1.

early part of the course, finding a *relevant product market* is an essential element of every Section 7 violation. There are two complementary judicial "tests" for whether a product grouping is a relevant product market in merger antitrust analysis under Section 7: (1) the "outer boundaries" and "practical indicia" criteria set forth by the Supreme Court in *Brown Shoe Co. v. United States*,[13] and (2) the "hypothetical monopolist test" under the Merger Guidelines.[14] The DOJ and FTC, not surprisingly, look primarily to the hypothetical monopolist test when making prosecutorial decisions, but if they have to prove their case in court, they will also invoke the *Brown Shoe* criteria. In writing opinions, modern courts almost always employ both tests.

Under *Brown Shoe*, the "outer boundaries" of the relevant product market "are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. The idea is that products within the relevant market must exhibit high cross-elasticity of demand and interchangeability of use with other products in the market and comparatively low cross-elasticity of demand and interchangeability of use with products outside the market. Moreover,

> "within this broad market, well-defined *submarkets* may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[15]

The original purpose of the *Brown Shoe* "practical indicia" was to enable the finding of relevant (sub)markets within larger markets defined by the "outer boundaries" test. Modern courts, however, do not view submarkets as analytically any different from markets and regard the *Brown Shoe* "practical indicia" as factors probative of reasonable interchangeability of use and high cross-elasticity of demand.

The *Brown Shoe* tests are problematic. The problem is that the Supreme Court did not indicate any threshold for cross-elasticity or reasonable interchangeability of use or tell the lower courts how to weigh the various practical indicia. The upshot was that courts were left to their own individual judgment. In the absence of a meaningful test, the lower courts generally deferred to the market definitions alleged by the antitrust enforcement agencies. If the government gets to define the market, it essentially can ensure that the market shares will trigger the *PNB* presumption of anticompetitive effect. In his dissent in *Von's Grocery*,[16] Justice Potter Stewart famously observed: "The sole consistency that I can find is that in litigation under § 7, the Government always wins."[17] This approach also resulted in an enormous amount of confusion, flawed analysis, and bad decisions.

Second, the "hypothetical monopolist test," originally introduced by the 1982 Merger Guidelines and now adopted in one form or another by the courts, was designed to introduce some economic

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[13] 370 U.S. 294, 325 (1962).

[14] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (rev. Aug. 19, 2010).

[15] *Id*. (internal citations and footnotes omitted; emphasis added).

[16] United States v. Von's Grocery Store, 384 U.S. 270 (1966) (Stewart, J., dissenting).

[17] *Id*. at 301.

sense and analytical rigor into market definition. The HMT deems a product grouping as a relevant market if a hypothetical monopolist of all products in the product group could profitably raise the prices in the product grouping over premerger levels by "a small but significant nontransitory increase in price" (SSNIP), usually taken to be 5% for a period of one year. The idea is that if a hypothetical monopolist of a group of products could not profitably raise their prices, then a fortiori the merged firm—either individually or tacitly with other firms in the market—could not raise prices as a result of the merger.

The current 2010 Merger Guidelines have modified the hypothetical monopolist test in two significant ways:

1. Originally, the hypothetical monopolist test deemed only the *smallest product grouping* that satisfied the test to be a relevant market (the "smallest market principle"). However, under the 2010 Merger Guidelines, while the smallest market principle remains the preferred approach, the enforcement agencies and the courts can use a larger market if necessary to reflect the economic realities.
2. Originally, the hypothetical monopolist test required the hypothetical monopolist to increase the prices of all of the products in the candidate market by a uniform percentage. The 2010 Merger Guidelines, however, allows the hypothetical monopolist to raise the prices of one or more products selectively while leaving the prices of the other products constant. Under this change, the hypothetical monopolist test requires only that the hypothetical monopolist be able to profitably *raise the price of a single product* in the product group for the product grouping to be a relevant market.

The courts are increasingly adopting these modifications. In particular, modern courts are using the one-product SSNIP test to define markets.[18]

With this background, read the excerpt from *Brown Shoe* on the "outer boundaries" and "practical indicia" criteria (p. 89), the class notes (slides 18-35), and the portion of the 2010 Horizontal Merger Guidelines that deal with product market definition (pp. 90-97).[19] Then reread the product market allegations in the FTC's complaint (pp. 18-20) to see how the FTC set up its product market definition, the excerpt from the district court's opinion in *Sanford Health* to see how the court analyzed product market definition (pp. 100-01), and the Eighth Circuit's review of the district court's product market findings (pp. 58-60). The district court employed the three-step burden-shifting approach of *Baker Hughes,* and the Eighth Circuit appears to have done the same (p. 57-58).

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18 *See, e.g.*, FTC v. Sanford Health, 926 F.3d 959, 963 (8th Cir. 2019); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 293 (D.D.C. 2020); FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 46 (D.D.C. 2018); *FTC v. Tronox Ltd*., 332 F. Supp. 3d 187, 203 (D.D.C. 2018); United States v. Anthem, Inc., 236 F. Supp. 3d 171, 198 (D.D.C. 2017); United States v. Aetna Inc., 240 F. Supp. 3d 1, 20 (D.D.C. 2017); FTC v. Staples, Inc., 190 F. Supp. 3d 100, 121 (D.D.C. 2016); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 33 (D.D.C. 2015); United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 51-52 (D.D.C. 2011).

19 The example in the class notes applying the hypothetical monopolist test to a set group of products (slides 26-30) is especially important. The HMT is a special case of the firm's profit-maximization problem that we studied in Unit 7. If you do not understand the example after studying it for ten minutes, stop studying it. We will cover this in class in some detail.

The merging parties argued on appeal that the district court improperly shifted the burden of persuasion to them. The Eighth Circuit addressed this contention in its discussion of the relevant product market. Think about whether this is in the correct place in the opinion. Whatever you decide, be sure you understand the reasoning behind the Eighth Circuit's finding that the district committed no error here.

Geographic market definition. A relevant geographic market is also an essential element of every Section 7 violation. As with product markets, there are two complementary judicial "tests" for whether a geographic area is a relevant product market for the purpose of merger antitrust analysis under Section 7: (1) a judicial "commercial realities" test developed in *Brown Shoe*, and (2) the Merger Guidelines hypothetical monopolist test.

Brown Shoe is the leading case on geographic market definition. The Court observed that the criteria for determining the relevant geographic market are essentially similar to those used to test the boundaries of a relevant product market.[20] The *Brown Shoe* Court also stated that the submarket concept applies equally to geographic markets and product markets.[21] In determining the boundaries of the relevant geographic market, the Court emphasized that a "pragmatic, factual approach," rather than a "formal, legalistic one," must be used and that the relevant geographic market must both "correspond to the commercial realities" of the industry and be "economically significant."[22] The Court, employing a level of generality similar to that it used in describing the outer boundaries of product markets, has defined the relevant geographic market to be "the area of effective competition . . . in which the seller operates, and to which the purchaser can practically turn for supplies."[23] The Court also observed that an element of

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[20] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 336 (1962) (citing S Rep No 1775, 81st Cong, 2d Sess 5-6 (1950)); United States v. E. I. Du Pont de Nemours & Co., 353 U.S. 586, 593 (1957).

[21] *See Brown Shoe*, 370 U.S. at 336; *see also* White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 501 (6th Cir. 1983) (Sherman Act).

[22] *Brown Shoe*, 370 U.S. at 336-37.

[23] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 359 (1963) (emphasis removed) (quoting Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961) (Sherman Act § 2)). For applications, see, for example, FTC v. Advocate Health Care Network, 841 F.3d 460, 476 (7th Cir. 2016); Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 (9th Cir. 2015); FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1052 (8th Cir. 1999); FTC v. Freeman Hosp., 69 F.3d 260, 268-69 (8th Cir. 1995); Morgenstern v. Wilson, 29 F.3d 1291, 1296 (8th Cir. 1994); White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 501 (6th Cir. 1983) (Sherman Act); New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 203 (S.D.N.Y. 2020); FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 308 (D.D.C. 2020); United States v. Bazaarvoice, Inc., No. 13-CV-00133-WHO, 2014 WL 203966, at *27 (N.D. Cal. Jan. 8, 2014); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1076 (N.D. Ill. 2012); Malaney v. UAL Corp., 2010 WL 3790296, at *6 (N.D. Cal. 2010) (not for publication), *aff'd*, 434 F. App'x 620 (9th Cir. 2011) (unpublished); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 123 (D.D.C. 2004); FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 45 (D.D.C. 2002); California v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1120 (N.D. Cal. 2001); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 49 (D.D.C. 1998); FTC v. Staples, Inc., 970 F. Supp. 1066, 1073 (D.D.C. 1997); United States v. Mercy Health Servs., 902 F. Supp. 968, 978 (N.D. Iowa 1995); FTC v. Butterworth Health Corp., 946 F. Supp. 1285, 1290, (W.D. Mich. 1996); United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 675 (D. Minn. 1990); *see also* FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 37 (D.D.C. 2009) ("The 'relevant geographic market' identifies the geographic area in which the defendants compete in marketing their products or services."); *accord* United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 50 n.7 (D.D.C. 2011).

“fuzziness would seem inherent in any attempt to delineate the relevant geographic market”[24] and that the market need not be defined by “metes and bounds as a surveyor would lay off a plot of ground.”[25] Even so, to sustain a relevant geographic market, there must be sufficient evidence to conclude that the market boundaries adequately capture the material competitive forces.

The hypothetical monopolist in geographic market definition is analytically identical to that used in product market definition: a candidate geographic market is a relevant market if a hypothetical monopolist controlling all firms in the area profitably raise the price of at least one product in the relevant product by a small but significant nontransitory increase in price (SSNIP), usually taken to be 5% for a period of one year.

Although plaintiffs cannot rely simply on political boundaries (such as towns, counties, or states) to establish the boundaries of a relevant geographic market without providing evidence of the competitive forces within these boundaries, if the operative competitive forces are roughly contained within a political boundary, courts will typically find the market to be the political boundary.

Read the class notes (slides 39-42) and the portion of the 2010 Horizontal Merger Guidelines that deal with geographic market definition (pp. 97-99). Then reread the geographic market allegations in the FTC’s complaint (pp. 20-21) to see how the FTC set up its geographic market definition and the excerpt from the district court’s opinion in *Sanford Health* to see how the court analyzed the geographic market (pp. 102-103). It does not appear that the merging parties argued that the district court erred in finding the relevant geographic market to be the Bismarck, ND Metropolitan Statistical Area, which includes Burleigh, Morton, Oliver, and Sioux countries.

That will do it for Class 11. We will pick with the *PNB* presumption and defenses in Class 12. Enjoy the reading. Email me if you have any questions. See you in class.

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24 United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 360 n.37 (1963), *see* United States v. Connecticut Nat’l Bank, 418 U.S. 656, 669 (1974) (geographic markets “need not—indeed cannot—be defined with scientific precision”).

25 United States v. Pabst Brewing Co., 384 U.S. 546, 549 (1966).