MERGER ANTITRUST LAW

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Class 11 (October 6): H&R Block/TaxACT (Unit 9)[1]

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 with a way to justify the outcome you are advocating, consistent with the prevailing analytical paradigm and 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 her 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 within the prevailing judicial paradigm. 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: H&R Block/TaxAct. 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-

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

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 slightly 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. Shortly thereafter, TaxACT was acquired by InfoSpace.

While we will spend some time on the litigation aspects of the case, we will focus primarily on how Judge Beryl A. Howell of the District Court of the District of Columbia explained her decision that the transaction, if consummated, would violate Section 7 of the Clayton Act.

The institutional context. First, review the substantive elements of a Section 7 violation (slides 4-5). Then, look at 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. 4-6). You have seen these materials before in prior units, so you should not need to spend much time on them.

The PNB *presumption*. One of the most important aspects of horizontal merger law is the *Philadelphia National Bank* presumption. Recall that Section 7 prohibits mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly" (slide 4). In 1963, the Supreme Court in *Philadelphia National Bank*[2] created a presumption of anticompetitive effect based on the combined market share of the merging firms and the increase in market concentration resulting from the merger. While there is an academic debate over whether plaintiffs in horizontal merger cases must use the *PNB* presumption, I know of no horizontal merger case where the plaintiff has not used the presumption and no doubt courts expect to see it. While we will examine the presumption in more detail in Class 14, we need to become familiar with it now because it bears directly on the development of the tests for Section 7's market definition elements.

When the Supreme Court decided *PNB*, the dominant theory in industrial organization was the "structure-conduct-performance" (SCP) paradigm. The idea was that market structure would determine how firms in the market behave, which in turn would determine how competitively the market would perform. As a special case, the paradigm held that as markets become more concentrated with fewer firms (or more dominant firms), firms would compete less aggressively with one another, market equilibrium prices would increase, and the market would perform less competitively. This theory of oligopoly remains a mainstay in judicial antitrust opinions.[3]

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[2] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[3] *See, e.g.*, Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 432 (5th Cir. 2008); FTC v. H.J. Heinz Co., 246 F.3d 708, 71516 (D.C. Cir. 2001); FTC v. University Health, Inc., 938 F.2d 1206, 1218 n.24 (11th Cir. 1991) ("Significant market concentration makes it easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.") (quotation marks omitted); FTC v. Elders Grain, Inc., 868 F.2d 901, 905 (7th Cir. 1989); FTC v. PPG Indus., Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986) (explaining that "increased concentration raises a likelihood of interdependent anticompetitive conduct ... [based] upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels") (citations and quotation marks omitted); FTC. v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 60 (D.D.C. 2009); FTC v. Arch Coal, Inc.,

The *PNB* Court used this intuition to create a rebuttable presumption of the requisite anticompetitive effect in a Section 7 case whenever a horizontal transaction produces a firm with an "undue percentage" of the relevant market and results in a "significant increase" in market concentration:

> Specifically, we think that a merger which produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[4]

The Supreme Court explained that a merger with these characteristics "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[5] Once a relevant market has been established, the market shares and market concentration may be determined through the usual discovery tools, third-party statistics or market research reports, or regular course of business documents. Market shares do not have to be exact; a "reliable, reasonable, close approximation" of the relevant market share is sufficient for applying the *PNB* presumption.[6]

So what does this have to do with market definition? If the *PNB* presumption is to be economically meaningful, then the market must be defined in ways that permit an inference of anticompetitive effect in the context of the SCP paradigm. That is, the *PNB* presumption should apply when the combined firm's market share and the increase in market concentration surpass thresholds that make a price increase likely within the SCP model. As we will see, this is the reason for the reinterpretation of the judicial tests for market definition as well as the DOJ's creation of the "hypothetical monopolist test" in the 1982 Merger Guidelines—both of which remain mainstays of modern market definition law.

The class notes (slides 6-9) provide a quick overview, and the reading materials (pp. 8-16) provide more detail (including an interesting note on the involvement of one of Justice Brennan's clerks in the drafting of the *PNB* opinion)[7].

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329 F. Supp. 2d 109, 123 (D.D.C. 2004). The Horizontal Merger Guidelines have refined this theory into coordinated effects, which we will cover later in this unit.

4 *Philadelphia Nat'l Bank*, 374 U.S. at 363 (citing United States v. Koppers Co., 202 F. Supp. 437 (W.D. Pa. 1962)).

5 *Id*.; *accord* United States v. General Dynamics Corp., 415 U.S. 486, 497 (1974); United State v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 366 (1970); United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966); Polypore Int'l, Inc. v. FTC, 686 F.3d 1208, 1214 (11th Cir. 2012); United States v. Dairy Farmers of Am., Inc., 426 F.3d 850, 858 (6th Cir. 2005); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1074 (N.D. Ill. 2012); FTC v. ProMedica Health Sys., Inc., 2011 WL 1219281, at *53 (N.D. Ohio 2011); FTC v. Lab. Corp. of Am., 2011 WL 3100372, at *14 (C.D. Cal. 2011).

6 United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011) (citing FTC v. PPG Indus., Inc., 798 F.2d 1500, 1505 (D.C. Cir. 1986)).

7 I may have gotten a bit carried away in giving you more detail than you need on *Philadephia National Bank* and the *PNB* presumption for this unit on market definition. But the material is essential to merger antitrust law and you might as well learn it now.

Allocation of the burdens of proof under Baker-Hughes. A fundamental question in merger antitrust law is the quantum of evidence the merging parties must 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]

Notwithstanding this indication that the presumption was rebuttable, as a practical matter the lower courts quickly treated the presumption as if it was conclusive (as you saw on pp. 14-15). In 1974, the Supreme Court in United States v. General Dynamics Corp.[9] firmly reestablished that the *PNB* presumption was rebuttable. Still, despite some implicit skepticism of the *PNB* "clear showing" language, the Court did not explicitly overrule 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 instead adopted a three-step burden-shifting approach to the allocation of the burdens of proof in a horizontal merger antitrust case:

1. The plaintiff bears the burden of proof in market definition, market shares, and market concentration within the relevant market sufficient to trigger the *PNB* presumption and thereby prove a prima facie Section 7 violation (essentially a burden of production).
2. If the plaintiff satisfies this burden, the *burden of production* shifts to the defendant to adduce evidence sufficient to rebut the *PNB* presumption by raising 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 plaintiff has 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 *Philadelphia National Bank's* "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.

The class notes provide a quick summary (slides 10-11), and the reading materials give more detail (pp. 17-25). When you read the excerpt from *Baker Hughes* (pp. 17-21), pay attention 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. 21-25) provides a deeper dive into burdens on the parties at each of the three steps. In my experience, most practitioners and even

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[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).

[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.

judges do not really understand the *Baker Hughes* approach, and a thorough understanding will enable you to make better arguments and write better briefs.[12]

H&R Block/TaxAct. 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. 28-29). On May 23, 2011, seven months after the announcement and following the completion of its HSR merger review, the DOJ issued a news release (pp. 30-32) and filed a complaint seeking a permanent injunction to block the transaction (pp. 33-55), to which the parties filed an answer denying any violation a little over a month later (pp. 36-51). After the parties' unsuccessful motion to transfer venue and the completion of discovery, the court's minute order of August 4, 2011, set a hearing date of September 6, 2011, and the parameters for trial (p. 72). 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 will be our only time to look at some pretrial papers other than the complaint. 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. 73-74) and released a public version of the memorandum opinion in support of the order on November 10, 2011. Read the opinion up to the expert opinion section on market definition (pp. 75-105). Pay particular attention to the organization of the opinion as set out in the table of contents (p. 77).

The early sections of the opinion address the parties to the deal, the history of TaxACT and the transaction, and the deal rationale (pp. 78-84). They also discuss tax preparation products and the role of free products (pp. 84-87). In light of these facts, think about the transaction's antitrust risk 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 briefly discuss the steps in the litigation before trial (pp. 80-81). The standard of review (pp. 87-89), including the discussion of the *Baker Hughes* burden-shifting approach, is particularly important.

Market definition. With that behind us, it is time to look at the merits. Historically, merger antitrust opinions address market definition first. The class notes provide a quick introduction to market definition (slides 12-19). As you know, an essential element of every Section 7 violation is the finding of a *relevant product market*, which identifies 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. The geographic market was not an issue in H&R

[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.

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 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. The emerging judicial practice appears to use the Brown Shoe factors first to define the relevant product market and then use the HMT to confirm it.

The Brown Shoe *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 different from markets and regard the *Brown Shoe* "practical indicia" as factors probative of reasonable interchangeability of use and high cross-elasticity of demand required for markets.

Read the excerpt from *Brown Shoe* in the reading materials (pp. 191) and then read the class notes on the *Brown Shoe* tests (slides 20-27). Now would also be a good time to reread Section 4 of the 2010 DOJ/FTC Horizontal Merger Guidelines on market definition (pp. 192-201). Then read *H&R Block's* application of the *Brown Shoe* factors to the facts of the case (pp. 89-105).

Note that the Merger Guidelines define markets strictly from a demand-side point of view. The idea is that the constraints on the merged firm in increasing prices come from the loss of sales and accompanying profits to demand-side substitutes within the market. But courts recognize that supply-side factors can also play a significant role in constraining prices. The idea here is that other firms in the market can expand production and "hill the hole" in aggregate output created by the merged firm (acting alone or tacitly with others) and so mitigate or defeat a price increase. The Merger Guidelines are not oblivious to supply-side factors but account for them

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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).

not in the definition of the market but rather in the identities and shares of the market participants. Read the class notes on supply-side substitutability for a quick treatment (slides 28-37).

The hypothetical monopolist test. 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 use their own judgments. No meaningful test emerged in the lower courts, and instead the courts generally deferred to the market definitions alleged by the antitrust enforcement agencies. If the government gets to define the market, it can ensure that the market shares will trigger the *PNB* presumption of anticompetitive effect. For this reason, Justice Potter Stewart, in his dissent in *Von's Grocery*,[16] famously observed: "The sole consistency that I can find is that in litigation under § 7, the Government always wins."[17] Unfortunately, this approach also resulted in enormous confusion, flawed analysis, and bad decisions.

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 sense and analytical rigor into market definition. The HMT is built around the notion of a hypothetical monopolist of a product group called the *candidate market*—think of all of the firms producing products in the candidate market merging into a single firm. The HMT deems the candidate market a relevant market if the hypothetical monopolist could profitably raise the prices in the candidate market 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 could not profitably raise its prices, then a fortiori the merged firm—either individually or tacitly with other firms in the market—could not raise prices in the candidate market as a result of the merger. This means that the combined firm's market share and the change in concentration in the candidate market say nothing about the ability or likelihood of the merger resulting in a price increase in the candidate market and so should not predicate the *PNB* presumption. Candidate markets that satisfy the HMT at least satisfy a necessary condition for the merger to have an anticompetitive price effect. The class notes provide an introduction to the HMT (slides 38-45).

A recurring question for the HMT is whether the the SSNIP was profitable for the hypothetical monopolist (the profitability or breakeven test) or whether the hypothetical monopolist's profit-maximizing price is equal to or greater than the SSNIP (the profit-maximization test)? The practice under the 1982 and 1992 Merger Guidelines in the agency and the courts was to use the profitability test After the 2010 Merger Guidelines were released, some economists began to argue the profit-maximization test as the proper one in economic analysis as well as the one prescribed by the language of the auidelines. While there is a good argument that the literal interpretation of the 2010 guidelines employ the profit-maximization test, the courts delvoped their precedent after the earlier guidelines using the profitability test. Today, although courts will occasionally use the profit-maximization test, most courts follow precedent and use the profitability test. In practice, as the class notes show, in most cases the markets will be the same under either test (see slides 46-51). Indeed, the use of the profit-maximization may risk

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

[17] *Id*. at 301.

introducing the *Cellophane* fallacy into market definition in close-to-monopolized markets (slides 52-53).

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

1. Originally, market definition (using the hypothetical monopolist test) was an essential element of every horizontal merger case and was the point of departure for horizontal merger analysis. The 2010 Merger Guidelines, however, relegates market definition to one of several tools useful in merger antitrust analysis. The 2010 guidelines hold that market definition may not be necessary or even helpful in all cases.
2. 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.
3. 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 first change has had absolutely no traction with the courts. All courts to date have considered market definition to be an essential element of the plainitff's prima facie case under the language of Section 7. The courts, however, are increasingly adopting the second two modifications. In particular, modern courts are using the one-product SSNIP test to define markets.[18] We will examine one-product SSNIP tests in Class 13.

In Classes 12 and 13, 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.

We will 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.

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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).