

MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 11:10 am – 1:10 pm
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Class 16 (October 24): U.S. Sugar/Imperial Sugar (Unit 10)

On Tuesday, after we finish unilateral effects and what remains of *H&R Block*, we will return to a critique of the performance of the parties in *U.S. Sugar*. We will start with the most important reason why the merging parties won the case (think "hearts," not "minds"), then turn to what the DOJ did wrong, and end with what the merging parties did right. This will be an interactive class, so be thinking about your critique.

This is our first case study dealing with supply-side switching and geographic market definition, so you might want to start by reviewing the relevant sections of the class notes on market definition (slides 28-38 and 76-94, respectively).

You can skim the press release announcing the U.S. Sugar/Imperial Sugar transaction (pp.4-6) and the DOJ's press release and complaint challenging the deal. Rather, spend your time on the district court's Memorandum Opinion (pp.38-97). Judge Maryellen Noreika of the District Court of the District of Delaware rendered judgment for the merging parties and denied the DOJ's request for a permanent injunction.

The DOJ indicated that it would appeal and sought an injunction pending appeal from the district court. Read Rule 62(d) of the Federal Rules of Civil Procedure for injunctions by the district court pending appeal (p. 196). As is often the case, the district court denied the DOJ Rule 62(d) motion (pp. 102-04).

Having filed its Notice of Appeal (NOA) (p. 98) and following the denial of its Rule 62(d) motion by the district court, the DOJ filed an emergency motion seeking an injunction pending appeal under Rule 8 of the Federal Rules of Appellate Procedure. Read Rule 8 (p. 196). The DOJ's motion also sought an administrative injunction pending the resolution of the Rule 8 motion (pp. 106-32). You can skim most of the DOJ's motion, but be sure to read the standards for entering a rule 8(a) motion with more care (pp. 112-13). Indeed, you may find it helpful to read all of the motion up to p. 113. There is no need to read the opposition brief (pp. 162-172) and the DOJ's reply (162-72), but they are short and somewhat interesting. Read the Third Circuit's order denying the DOJ's motion (pp. 173-74), which allowed the parties to close the deal even while the appeal was pending (pp. 175). The Third Circuit ultimately affirmed the district court (pp. 76-94), which you do not need to read unless you are especially interested.

We will do class a little differently. While I have slides and will show some of them to get us started, I intend to spend most of the class discussing what the DOJ did wrong in the litigation. I will be soliciting your views, so be prepared!

As you prepare for this class, take a look at the excerpts from the 2010 Horizontal Merger Guidelines, the 2023 Draft Merger Guidelines, and *Sanford Health, Advocate*, and *Tronox* on geographic market definition. As with the earlier excerpts, these excerpts will help you solidify

your knowledge of geographic market definition. I hope you especially enjoy the Tronox excerpt since you should now know enough to understand what the FTC's expert was doing in applying the hypothetical monopolist test using a critical loss implementation.

Finally, although there is no homework assignment for this class, I have posted an advance copy of the assignment for Classes 19-20. This assignment asks you to prepare an outline of the elements of prosecuting and defending a horizontal merger in litigation. If experience is any guide, this outline will be invaluable as you prepare for the exam. While you cannot fill out the outline completely because there are a number of topics we have yet to cover, I know that some of you want to get a head start. To help you get started, I have provided you with my basic 3-level outline. You need to fill in the next level(s) as appropriate. *NB: There will be no instructor's answer for this assignment, but you should feel free to work in groups to make as complete an outline as you would like.*

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

P.S. We will not have time in class to go through the background of the case, so I have posted the relevant portions of the class slides I would have used if we had the time. You do not need this if you read the opinion carefully, but I pass it along for whatever it is worth.