Class 25 slides

Unit 16: Wilton Grocery Store Merger

Professor Dale Collins
Merger Antitrust Law
Georgetown University Law Center

November 22, 2024

Grading philosophy

- My approach
  1. I read all answers twice and blind grade them each time with a letter grade
  2. If the grades for an answer differ significantly between the first and second reads, I read the answer for a third time and reconcile the differences
  3. I rank order the exams by letter grade in descending order and apply the prescribed curve for the course
  4. UNLESS the quality of the exams does not break significantly at a change in the grading curve, in which case I include the exam in question in the group to which it is most comparable (and fight with the Dean if required)

I grade an answer on the proper application of legal precedent and economic principles and its logic, completeness, and persuasiveness, not whether you approached the problem the same way I did or reached the same conclusion

I do not expect anyone to spot and properly analyze all issues in the hypothetical

Grading philosophy

- My approach—A little more detail

I grade exams along three dimensions.

1. *Professional quality*. I evaluate each exam as if I were a law firm partner or mid-level agency official receiving the memorandum. A high raw grade goes to memoranda that are well organized, address all major issues and most minor ones, and provide tight analysis supporting their conclusions—essentially, work that would need minimal revision before sending to a client or senior official. Conversely, a low raw grade goes to memoranda that miss major issues, contain flawed analysis of identified issues, reach poorly supported conclusions, and would require major reworking before professional use.
2. *Horizontal equity*. I aim for horizontal equity across the class, so that memoranda of similar quality submitted by different students this year receive the same grade.
3. *Vertical equity*. I seek to preserve vertical equity across years, so that a grade (say, an A-) indicates the same quality of work as in previous years.

With these factors in mind, I apply the law school's curve to generate the exam letter grades that were posted.

Aside: Exam writing and reading

When I create exams, I start with a specific answer in mind. After drafting the hypothetical, I outline my response based on the facts provided in the scenario. During this process, I may add or modify details in the hypothetical to align with the answer I originally envisioned. Once I have fully synchronized the revised hypothetical and my outline with my intended answer, I finalize the exam question.

Over time, I have come to appreciate that my hypotheticals can sometimes allow for reasonable alternative interpretations that I did not foresee while writing. This oversight is likely influenced by confirmation bias—I naturally interpret the hypothetical in a way that supports my intended answer, which may cause me to overlook other plausible interpretations.

When evaluating a response that interprets the hypothetical differently than I intended, I consider whether the alternative interpretation is reasonable in the context of the entire hypothetical. If it is reasonable, I evaluate the response based on its completeness and persuasiveness under that interpretation and grade it accordingly.

Preparing to Write

Suggestion: How to approach the problem

1. Ask the setup questions
2. Read the hypothetical straight through quickly to spot the major issues
3. Read the hypothetical again more slowly
   Annotate the hypothetical in the margin
4. Outline an answer—pay attention to your intuitions!
5. Start writing

Another suggestion:

DISTINGUISH BETWEEN PRIMARY AND SECONDARY ISSUES!!

Be sure you address all the major issues. If you do not think you are going to have time to do everything, spot the secondary issues in your answer and leave the detailed analysis until later. Since you will be typing the exam in Word, it is easy to insert additional material if you have the time after you finish the important topics.

1. Ask the setup questions

1. Who are you/what role are you being asked to play?
2. What is the transaction?
3. What is the form of the work product?
4. What questions are you being asked to address?
5. What statutes(s) apply?
6. What are the worlds premerger, postmerger, and without the merger?

1. Ask the setup questions

1. Who are you/what role are you being asked to play?
   - From the hypothetical:

> **You are an attorney in the Antitrust Section of the Connecticut Attorney General's Office.** The Section has completed its review of HarvestMart's pending $6 million acquisition of Sam's Market, two traditional supermarkets in Wilton, CT.

   - Notes
     - State AGs are more willing to accept behavioral relief than the DOJ or FTC (even when the DOJ and FTC were very open to consent settlements)

1. Ask the setup questions

2. What is the transaction?
   - From the hypothetical:

> You are an attorney in the Antitrust Section of the Connecticut Attorney General's Office. **The Section has completed its review of HarvestMart's pending $6 million acquisition of Sam's Market, two traditional supermarkets in Wilton, CT.**

   - Notes
     - HarvestMart and Sam's Market are both currently operating supermarkets in Wilton, CT, so this is a horizontal transaction

1. Ask the setup questions

3. What is the form of the work product?
   - From the hypothetical:

> Joyce Davenport, the section chief, has asked you to draft a **memorandum of law** analyzing the likelihood of success if the Attorney General files a complaint in federal district court alleging that the acquisition, if consummated, would violate Section 7 of the Clayton Act.

You are being asked to write a **reasoned memorandum of law** with a recommendation

Every question I have asked on an exam to date calls for a reasoned memorandum of law

1. Ask the setup questions

4. What questions are you being asked to address?
   - From the hypothetical:

> Joyce Davenport, the section chief, has asked you to draft a memorandum of law analyzing the likelihood of success if the Attorney General files a complaint in federal district court alleging that the acquisition, if consummated, would violate Section 7 of the Clayton Act. In particular, Ms. Davenport wants your analysis to address how **[1] the state might present its case most persuasively**, **[2] anticipate and respond to defenses the merging parties might raise**, **[3] discuss the type of injunction the state should seek in its complaint**, and **[4] give your conclusion of how the court would rule**.

   - Notes
     - The memorandum must address all four questions regardless of your conclusion on the merits of the Section 7 claim

BE SURE THAT YOU ADDRESS EACH QUESTION!!

1. Ask the setup questions

4. What questions are you being asked to address?
   - From the hypothetical:

> If you conclude that the Section 7 claim is likely to be upheld by the court, Ms. Davenport also would like you to address **[5] whether the Attorney General should exercise his prosecutorial discretion and not challenge the acquisition or settle the matter with a consent decree**. **[6] If you recommend a consent decree, your memorandum should include a detailed proposal of the specific terms and conditions that the Attorney General should demand to address the competitive concerns raised by the acquisition**.

   - Notes
     - The memorandum must address the first contingent question if you conclude that a court will uphold the Section 7 claim
     - The memorandum must address the second contingent question if you recommend that the Attorney General should settle the investigation with a consent decree

BE SURE THAT YOU ADDRESS THE TWO CONTINGENT QUESTIONS (IF NECESSARY)!!

1. Ask the setup questions

5. What law(s) apply?
   - From the hypothetical:
     - *Substantive violation*: Clayton Act § 7
     - *Cause of action*: Clayton Act § 16
       - States sue in federal district court under the private right of action section in the Clayton Act
     - *Allocation of the burden of proof*: *Baker Hughes*

1. Ask the setup questions

6. What are the worlds premerger, postmerger, and without the merger?
   - *Remember*: Merger antitrust law compares the consumer welfare implications of the world with the merger to the world without the merger

Changes in Market Structure

Premerger
1 HarvestMart 1 Nature's Pantry 1 Sam's Market
1 MaxMart
4 Ridgefield stores

1. Ask the setup questions

6. What are the worlds premerger, postmerger, and without the merger?
   - *Remember*: Merger antitrust law compares the consumer welfare implications of the world with the merger to the world without the merger

Changes in Market Structure

	Premerger	One Year Later: With merger
	1 HarvestMart 1 Nature's Pantry 1 Sam's Market	2 HarvestMarts 1 Nature's Pantry
No change	1 MaxMart	1 MaxMart
No change	4 Ridgefield stores	4 Ridgefield stores
No change		

1. Ask the setup questions

6. What are the worlds premerger, postmerger, and without the merger?
   - *Remember*: Merger antitrust law compares the consumer welfare implications of the world with the merger to the world without the merger

Changes in Market Structure

	One Year Later	
Premerger	With merger	Without merger
1 HarvestMart 1 Nature's Pantry 1 Sam's Market	2 HarvestMarts 1 Nature's Pantry	1 HarvestMart 1 Nature's Pantry 1 Old Mill* 1 Urban Furnishing
1 MaxMart	1 MaxMart	1 MaxMart
4 Ridgefield stores	4 Ridgefield stores	4 Ridgefield stores
		If Urban Furnishing follows through and purchases Sam's Market

No change

* Actually, two year later

1. Ask the setup questions

6. What are the worlds premerger, postmerger, and without the merger?
   - *Remember*: Merger antitrust law compares the consumer welfare implications of the world with the merger to the world without the merger

Changes in Market Structure

	One Year Later		
Premerger	With merger	Without merger	Without merger
1 HarvestMart 1 Nature's Pantry 1 Sam's Market	2 HarvestMarts 1 Nature's Pantry	1 HarvestMart 1 Nature's Pantry 1 Old Mill* 1 Urban Furnishing	1 HarvestMart 1 Nature's Pantry 1 Sam's Market
1 MaxMart	1 MaxMart	1 MaxMart	1 MaxMart
4 Ridgefield stores	4 Ridgefield stores	4 Ridgefield stores	4 Ridgefield stores
		If Urban Furnishing follows through and purchases Sam's Market	If Urban Furnishing fails to purchase Sam's Market

No change

Likely the consumer welfare-maximizing market structure

Extra credit for spotting possibility

* Actually, two year later

2. Quick read to spot the issues

- The problem will have multiple issues
- Some issues may be substantively more important than others
- DO NOT get hung up spending too much time on the small issues at the cost of not adequately addressing the major issues
- ALLSO, as a general rule, you will earn more credit for identifying and briefly analyzing multiple issues than for providing a detailed analysis of only a few while overlooking others

So what do I need to spot?

Typical structure of a formal merger analysis

- Part 1: The prima facie case (of gross anticompetitive effect)
  1. Relevant product market
     - *Brown Shoe* "outer boundaries" and "practical indicia" for the product market
     - Merger Guidelines hypothetical monopolist test
       - *Homogeneous products*: Critical loss implementations
       - *Differentiated products*: One-product/uniform SSNIP recapture implementations
  2. Relevant geographic market
     - "Commercial realities" test
     - Merger Guidelines hypothetical monopolist test
  3. *PNB* presumption
     - Market participants and market shares
     - Applicability of the *PNB* presumption
       - Judicial precedent support
       - Merger Guidelines support
  4. Explicit theories of anticompetitive effect
     - Unilateral effects (may include GUPPI/2 merger simulation)
     - Coordinated effects
     - Elimination of a maverick
     - As hoc theories
     - [Elimination of actual or perceived potential competition or of a nascent competitor]
     - [Foreclosure/raising rivals' costs for vertical transactions]

> Some courts are also citing *PNB* itself when the challenged merger's market share and concentration statistics are larger than those in *PNB*.

Typical structure of a formal merger analysis

- Part 2: Defendants' rebuttal
  - Direct challenges to prima facie case (no upward pressing pressure)
  - Traditional defenses (offsetting downward pricing pressure)
    - Entry/expansion/repositioning
    - Efficiencies
    - Countervailing buyer power ("power buyers")
    - Failing company/division
    - Other ad hoc defenses

To show sufficient offsetting procompetitive pressure to create a genuine issue of fact on the merger's net competitive effect

- Part 3: Weighing evidence to resolve any genuine factual disputes
  - Alternatively, you can integrate the resolution into the discussion of each disputed issue [probably a better way in most cases]
- Conclusion on merits
- [If appropriate] Discussion of relief in court

Typical structure of a formal merger analysis

- Contingent questions
  1. If you conclude that the Section 7 claim is likely to be upheld by the court—
     - Whether the Attorney General should exercise his prosecutorial discretion and not challenge the acquisition or settle the matter with a consent decree
  2. If you recommend a consent decree—
     - A detailed proposal of the specific terms and conditions that the Attorney General should demand to address the competitive concerns raised by the acquisition

Typical structure of a formal merger analysis

- *Works in many cases*: When writing, resolve each genuinely disputed issue as it arises
  - Resolve direct challenges to the prima facie in Part 1
  - Resolve challenges raised by traditional defenses in Part 2
  - Resolve genuine disputed issues in Part 2
- *Works better in some cases*:
  - Discuss and resolve all defenses—including direct challenges to the prima facie case—in a separate section

Do not follow Baker-Hughes *in organizing your writing, but keep the allocations of the burden in mind when resolving disputed issues as they arise*

Be sure to state your conclusions on all genuine issues when you resolve them. Also, summarize your conclusions (with no analysis) in a summary in the introduction as well as at the end of the memorandum

3. Annotate/Outline

- Some facts to note:
  - HarvestMart is acquiring Sam's Market—both traditional supermarkets located in the same town
  - Two types of grocery stores: Supermarkets and club stores
    - *Query*: Should supermarkets be further subdivided into traditional and premium stores?
    - Appears to be limited diversions from supermarkets to club stores
  - Three geographic areas of interest: Wilton, Ridgefield, and in-between Wilton and Ridgefield
    - Appears to be low diversions from Wilton supermarkets to Ridgefield supermarkets from one-product SSNIPs
  - Grocery stores are cluster markets
    - Use trips as "quantities" and average prices as "prices" in formulas (from footnote 3)
  - Supermarkets are differentiated in price and other attributes
    - Think one-product/uniform SSNIP tests/unilateral effects
  - Premerger, Wilton is highly concentrated with only three (traditional) supermarkets
    - *HarvestMart* : Suffers from overcrowding due to attractive prices and good products
    - *Nature's Pantry*: Comparable to HarvestMart but a larger store with somewhat higher prices → Takes some of the excess demand for HarvestMart that diverts because of overcrowding
    - *Sam's Market*: Seriously declining customer demand, highest prices, in need to renovation
  - Competition in Wilton driven largely by competition between HarvestMart and Nature's Pantry
    - Low to no diversion to Sam's Market, MaxMart, and Ridgefield stores in response to one-product SSNIPs
    - High diversion ratios between HarvestMart and Nature's Pantry → Suggests substantial competition between the two supermarkets
      - BUT HarvestMart is constrained by overcrowding → Has excess demand that spills over to Nature's Pantry
    - Nature's Pantry has tried to lead prices increases → HarvestMart has resisted to preserve chain reputation

3. Annotate/Outline

- Some facts to note (con't):
  - Sam's Market is being sold: Aggressively marketed, but only two bids
    - *Urban Furnishing*: Would convert Sam's Market to a home furnishings store
    - *HarvestMart*: Would retain Sam's Market as a supermarket, but promises to renovate it, rebanner it as a HarvestMart, and lower the prices to the level of the existing HarvestMart store
      - NB: No current legal obligation to do the things HarvestMart promises or maintain the premerger prices of the existing HarvestMart
  - Defenses
    - *Entry/repositioning/expansion*: No facts to support
    - *Countervailing buyer power*: No facts to support
      - Traditional supermarkets charge rack prices uniformly to all customers
      - All customers are small with presumably no buyer power

    Worth a footnote, but no discussion necessary in the text given the assignment

    - *Efficiencies*: Some efficiencies would result from the merger
      - Integrating rebannered Sam's Market into HarvestMart would decrease COGS in that store by 22%
      - Fixed cost savings of 3%
      - HarvestMart promises to pass efficiencies on to customers by lowering prices for comparable products at Sam's Market by 10% to the level of the existing HarvestMart store
      - Also, some efficiencies from alleviating overcrowding
    - *Failing firm*: Likely to be raised as a defense, but facts do not support
      - Sam's Market is currently profitable, although earning a low level of profits
      - In the absence of a sale, there is no indication that Sam's Market would be closed in the next few years

3. Annotate/Outline

- Some facts to note (con't):
  - Old Mill
    - Committed to build a new premium supermarket but only IF HarvestMart does NOT acquire Sam's Market
      - That is, if Sam's is sold to Urban Furnishing or if Sam's is not sold at all
      - NB: IF HarvestMart purchases Sam's Market, Old Mill ill NOT Wilton → "but for" causation (proximate causation?)
    - Would have significantly higher prices than HarvestMart and Nature's Pantry
    - BUT still would attract 30% of Wilton's households currently shopping at Wilton supermarkets (but in unknown proportions from each existing supermarket)
      - And 20% of the Wilton customers who now shop in Ridgefield
    - To the extent customers switch from HarvestMart to Old Mill, customers who now shop at Nature's Pantry because of HM's overcrowding would fill the gap at HM
    - No change expected in HarvestMart's and Nature's Pantry's prices with Old Mill's entry
  - Consumer welfare implications: No merger compared to with the merger—
    - Sam's Market ceases to exist in either case
    - 30% of local Wilton grocery shoppers who switch to Old Mill from HarvestMart of Nature's Pantry would be better off
      - NB: For an intra-market efficiency, Old Mill will have to be in the relevant market
    - Nature's Pantry customers who switch to HarvestMart would be better off
    - Nature's Pantry customers who do not switch would not be materially affected
    - Wilton grocery shoppers who switch from Ridgefield stores to Old Mill would be better off
    - Wilton grocery shoppers who stay with a Ridgefield store would not be affected

"No merger" yields higher consumer welfare than "merger"

3. Annotate/Outline

- Outline
  - Assignment
  - Conclusion (for introduction)
    - State is likely to win and should bring the case
    - Should seek a blocking permanent injunction
    - Should not settle with a consent decree
      - No consent decree could make Wilton consumers as well off as no merger
  - The prima face case
    - *Relevant market*: The sale of products by Wilton supermarkets to Wilton customers
    - *Horizontal transaction*: Both HarvestMart and Sam's Market currently complete in the relevant market
    - *PNB presumption*: Triggered—Compare the market concentration and deltas going forward with and without the transaction
    - *Explicit theories of anticompetitive harm*
      1. Acquisition would exclude Old Mill and result in a two-firm duopoly (a 3-to-2 merger)
      2. Coordinated effects
      3. Ad hoc unilateral effects
         - BUT not recapture unilateral effects (Sam's Market will exit)
      4. Elimination of a maverick
         - No evidence in the traditional sense
         - BUT HarvestMart's expanded size with the merger may give it more of an incentive to accommodate Nature's Pantry's price increases postmerger

3. Annotate/Outline

- Outline (con't)
  - Defenses to be raised
    1. *Relevant market*: The sale of products by Wilton supermarkets not a proper relevant market
    2. *Failing firm*: Sam's Market is a failing firm
    3. *Zero HHI delta*: The HHI delta should be calculated based on combining the shares of HarvestMart and Sam's Market, which will be zero since Sam's Market will cease operations whether the merger goes forward or not—A transaction with zero delta cannot trigger the *PNB* presumption
    4. *Old Mill causation*: If the acquisition proceeds, Old Mill's abandonment of its plans to enter Wilton would not be legally caused by the acquisition and hence not a cognizable Section 7 harm
    5. *Speculative benefits from blocking the merger*: The benefits of blocking the acquisition are speculative and too distant in time to be cognizable
    6. *HarvestMart's pricing*: HarvestMart will not increase prices anticompetitively postmerger
    7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers

    Notes
    - Defense 4 is most formidable and needs a rigorous rebuttal argument
    - Defense 7 is the second most formidable and requires a careful rebuttal argument
    - Other defenses are relatively straightforward to defeat

3. Annotate/Outline

- Outline (con't)
  - Conclusion on the merits
    - The State is likely to prevail on its Section 7 claim
  - Recommended enforcement action
    - The State should challenge the acquisition in federal district court and seek a permanent blocking injunction
    - The State should not exercise prosecutorial discretion to—
      - Decline to challenge the deal and allow the original deal to go forward, or
      - Accept a consent decree and allow a restructured deal to go forward
    - Benefits of blocking the acquisition
      - Benefits to the residents of Wilton in blocking the acquisition and thereby preserving Old Mill's entry into the market are both certain and substantial
      - Old Mill's entry would—
        - significantly deconcentrate the market, and also
        - introduce a premium supermarket option

        providing Wilton residents with a premium selection of grocery products—a selection that a significant portion of the community would like to purchase but is currently unavailable and not likely to be offered in the foreseeable future without Old Mill's entry
      - Furthermore, no consent decree—
        - could preserve Old Mill's entry if the acquisition proceeds
        - nor could it replicate the consumer benefits that Old Mill's entry would bring

4. Write

- Be organized

> *Exam instructions*:
>
> Present your analysis in a well-organized, linear, and concise manner. Think about your answers before writing. ***Remember Pascal's apology*: "I am sorry that this was such a long letter, but I did not have the time to write you a short one."** Clarity of thinking and exposition are much more important than throwing in the kitchen sink. Penalties will be levied for excessive length, verbosity, or lack of organization.

4. Write

- Structure your analysis of an issue using “IRAC”
  - The components
    - *Issue*: Identify the legal issue
    - *Rule*: State the governing law clearly
    - *Application*: Apply rule to facts in the hypothetical
    - *Conclusion*: State your answer clearly and explicitly
  - Some common pitfalls to avoid
    - Failure to state the issue
      - For example, applying *Brown Shoe* factors to exclude club stores from a market with superstores but failing to state at the beginning this is what you are analyzing
        - *Do NOT force the reader to infer what you are about to analyze*
    - Failure to analyze separate issues separately
      - For example, separate out the analysis of the relevant product market from the relevant geographic market when applying the judicial tests
      - However, you may analyze the product and geographic dimensions of the relevant market together when you are applying the hypothetical monopolist test
    - Failure to collect ALL the supporting facts before drawing your conclusion
      - *Do NOT write like you are selling Ginsu knives on TV: "But wait, there's more!“*
      - *Do NOT leave probative facts on the table—Use all the relevant facts*
    - Failure to draw a clear line from the rule to the facts to the conclusion
    - Failure to state the conclusion at the end

4. Write

- Structure your analysis of an issue using “IRAC”

Remember: *Clear organization helps readers follow your reasoning and makes your memorandum more persuasive*

All other things being equal, the difference between a well-organized paper and one not so well-organized can be one-third of grade

4. Write

- Final caution

Do not cite facts that are not in the hypothetical unless the problem cannot be answered without them

- Exam Instruction 3:

> This exam is final. No clarifications or corrections will be provided. If you are convinced that there is an error, inconsistency, or omission in the exam, please identify the problem, give your reasons why you believe there was a mistake, provide what you believe the correct information should be, and write your answer accordingly. If you have good reasons for believing there was a mistake in the problem (even if I disagree) and provide a sensible correction in the context of the hypothetical as a whole, I will accept the correction and grade your paper accordingly.

The Memorandum

4. Organizing the memorandum

- The introduction
  - Assignment
  - Short conclusion
  - Roadmap
- Applicable statutes
  - Section 7 (substantive violation)
  - Section 16 (cause of action)
  - *Baker Hughes* (allocations of burden of proof)
- Analysis
- Conclusion on merits
- Recommended enforcement action

4. Organizing the memorandum

- The roadmap
  - Instructor's organization

I will develop the analysis under the usual judicial framework for horizontal mergers:

1. Applicable statutes
2. The prima facie Section 7 case
   a. The relevant product market
   b. The relevant geographic market
   c. Market shares, concentration, and the *PNB* presumption
   d. Explicit theories of anticompetitive harm
   e. Inapplicable theories
3. The defendants' rebuttal arguments
   a. Market definition
   b. Failing firm
   c. Zero HHI delta
   d. Proximate causation
   e. Speculative benefits of blocking the acquisition
   f. HarvestMart will not increase prices
   g. Efficiencies
4. Conclusion on the merits
5. Recommended enforcement action

Decided to address all defenses in one section

4. The prima facie case

- The relevant product market: Supermarkets
  - The strategy:
    1. Show supermarkets are in the relevant market through *Brown Shoe* factors
    2. Show that club stores are not in the relevant market through *Brown Shoe* factors
    3. Use the hypothetical monopolist test to provide further support to supermarkets as the relevant product markets

This is how Judge Howell approached product market definition in H&R Block/TaxACT

4. The prima facie case

- The relevant product market: Supermarkets
  1. Supermarkets are in the relevant market
     a. *Brown Shoe* “outer boundaries” and “practical indicia” (test and application): High cross-elasticity and reasonable interchangeability of use as shown by—
        i. Industry or public recognition
           - Supermarkets are widely recognized as the primary grocery shopping destination capable of fulfilling most or all of a shopper’s food and household needs in a single trip
        ii. Similar product characteristics
           - Offer a broad product selection across food and household goods, with 30,000 to 50,000 stock-keeping units (SKUs) across numerous product types, package sizes, and brands
           - Core grocery offerings are nearly identical across stores
           - Satisfy convenience-oriented, one-stop shopping needs
           - Offer a variety of specialized service departments, such as in-store bakeries, butcher counters, delis, prepared meal sections, and floral departments
        iii. Similar service characteristics
           - Emphasize enhanced customer service, which may include personalized assistance, loyalty programs, or community-oriented initiatives.
        iv. Similar facilities
           - Large retail stores averaging 38,000 square feet
           - Designed to provide a convenient one-stop shopping experience
           - Designed to facilitate convenience and make shopping enjoyable

4. The prima facie case

- The relevant product market: Supermarkets
  1. Supermarkets are in the relevant market (con't)
     a. *Brown Shoe* "outer boundaries" and "practical indicia" (test and application): High cross-elasticity and reasonable interchangeability of use as shown by—
        v. Consistent pricing and margins
           - Price data shows similar average spend per trip across supermarkets in Wilton
           - Supermarkets maintain comparable gross margins (30-35%)

        vi. High diversion to other supermarkets
           - Individual supermarkets in Wilton experience high diversion to other local supermarkets when prices increase

4. The prima facie case

- The relevant product market: Supermarkets
  2. Club stores are not in the same relevant market as supermarkets
     a. *Brown Shoe* “outer boundaries” and “practical indicia” (test and application): Low cross-elasticity and reasonable interchangeability of use with supermarkets as shown by—
        i. Industry or public recognition
           - Club stores are recognized as distinct due to their focus on bulk purchasing with a focus on cost savings and limited variety.
        ii. Dissimilar product characteristics
           - Club stores have a narrower selection with fewer SKUs, customers large quantities of high-turnover items
           - Do not satisfy one-stop shopping needs
           - Do not offer a variety of specialized service departments, such as in-store bakeries, butcher counters, delis, prepared meal sections, and floral departments
        iii. Dissimilar service characteristics
           - Operate with a no-frills, self-service approach and require membership fees for access.
        iv. Dissimilar facilities
           - Large, warehouse-style layouts with wide aisles and high shelves, optimizing for bulk storage rather than shopper convenience
        v. Lower pricing and margins
           - Offer lower prices per unit than supermarkets, although they require larger quantity purchases
           - Operate with lower gross margins around 15%, focusing on high-volume, low-margin sales strategies
        vi. Low diversion from supermarkets to club stores

4. The prima facie case

- The relevant product market: Supermarkets
  3. The hypothetical monopolist test confirms that supermarkets are a relevant product market
     - Approach
       - Supermarkets are differentiated → Use a recapture test
       - Have one-product SSNIP diversion ration → Use a one-product SSNIP recapture test
       - Apply the one-product SSNIP recapture test on two supermarkets in Wilton that have the largest diversion (recapture) ratios with one another
       - If the two-product candidate market satisfies the test, use the "superset theorem" to expand the product market to all three Wilton supermarkets
     - Alternatives
       - Use a "sufficiency" test
       - Use "brute force" accounting

Do not get lost in the details. Think about what your intuitions tell you are the correct relevant markets. When you do the details (especially the HMT), if you are getting an answer different from your intuitions, double check your work!

4. The prima facie case

- The relevant product market: Supermarkets
  3. The hypothetical monopolist test confirms that supermarkets are a relevant product market—Setting up the tests
     - Supermarkets are a cluster market
       - Offer a broad product selection across food and household goods, with 30,000 to 50,000 stock-keeping units (SKUs) across numerous product types, package sizes, and brands
       - Core grocery offerings are nearly identical across stores
       - Satisfy grocery shoppers' preference for one-stop grocery shopping
     - Competitive analysis for cluster markets
       - Focuses on the aggregated set of products and services offered by a store, making the overall shopping trip the relevant unit of analysis
     - Can use number of annual shopping trip as "quantities" and average purchase price per trip as "price" in the HMT formulas
       - The problem says you can (see footnote 3 in the hypothetical)
       - Separately, the approach is consistent with analyzing competitive effects at the shopping trip level rather than individual product level
         - An alternative would be to explicitly analyze a basket of specific goods (a "composite product")
       - In this hypothetical, we have the data for quantities and average prices for shopping trips but not for any basket of specific goods, so we are constrained to use the former
         - The former is probably better anyway since grocery shopping (in this hypothetical) requires a trip to the grocery store but does not require the shopper to purchase any basket of specific goods on each trip

This is all you need

4. The prima facie case

- The relevant product market: Supermarkets
  3. The hypothetical monopolist test confirms that supermarkets are a relevant product market
     a. HavestMart/Nature's Pantry two-product candidate market + "superset theorem"
        - Test 1: HarvestMart as Firm 1
          - δ: 5%
          - p_1: $142.50
          - p_2: $150.00
          - $\%m_2$: 30%

$$R^1_{Critical} = \frac{\$SSNIP_1}{\$m_2} = \frac{\delta p_1}{\%m_2 p_2} = \frac{(0.05)(142.50)}{(0.30)(150.00)} = 15.83\%.$$

          - Actual $R^1 = D_{12} = 86.03\%$

Since $R^1 > R^1_{Critical}$, the HMT is satisfied

          - Use the "superset theorem" to expand the market to include Sam's Pantry

4. The prima facie case

- The relevant product market: Supermarkets
  3. The hypothetical monopolist test confirms that supermarkets are a relevant product market
     b. One-product SSNIP "sufficiency" recapture test $\left(R^1_{Suff}\right)$
        - Test 1: HarvestMart as Firm 1
          - δ: 5% — $\$SSNIP_1 = \delta \times p_1 = \$7.13$
          - p_1: \$142.50
          - p_2: \$150.00 — p_3: \$157.50
          - $\%m_2$: 30% — $\$m_2 = \%m_2 \times p_2 = \$45.00$
          - $\%m_3$: 25% — $\$m_3 = \%m_3 \times p_3 = \$39.38 = \$m_{Min}$

Remember: $\$m_{RAve} \geq \$m_{Min}$, so using $\$m_{Min}$ in the denominator will produce a R^1_{Suff} as large or larger than $R^1_{Critical}$.

$$R^1_{Critical} = \frac{\$SSNIP_1}{\$m_{RAve}} \leq \frac{\$SSNIP_1}{\$m_{Min}} = \frac{7.13}{39.38} = 18.11\% = R^1_{Suff}.$$

So if $R^1 > R^1_{Suff}$, then R^1 necessarily will be greater than $R^1_{Critical}$

- Actual $R^1 = D_{12} + D_{13} = 100.00\%$

Since $R_1 > R^1_{Suff} \geq R^1_{Critical}$, the HMT is satisfied

- Notes
  - A 100% recapture rate is not sufficient to ensure that the HMT is satisfied
  - For example, consider a 100% recapture rate from a high dollar margin good to a low dollar margin good

4. The prima facie case

- The relevant product market: Supermarkets
  3. The hypothetical monopolist test confirms that supermarkets are a relevant product market
     c. “Brute force” accounting

HarvestMart (Firm 1)			Nature's Pantry			Sam's Market		
Original units	280,702	Table 1						
%Loss	14.29%	Table 2						
Inframarginal sales	240,589	Calculated	Diversion ratio	86.03%	Table 2	Diversion ratio	13.97%	Table 2
Marginal sales	40,112	Calculated	Total units recaptured	34,509	Calculated	Total units recaptured	5,604	Calculated
HM price	$142.50	Table 1	NP price	$150.00	Table 1	SM price	$157.50	Table 1
%HM margin	35.00%	Table 1	%NP margin	30.00%	Table 1	%SM margin	25.00%	Table 1
$HM margin	$49.88	Calculated	$NP margin	$45.00	Calculated	$SM margin	$39.38	
%SSNIP	5.00%	Hypo						
$SSNIP	$7.13	Calculated						
Gain on inframarginal sales								
$SSNIP	$7.13							
Inframarginal sales	240,589							
GROSS GAIN	$1,714,200							
Loss on marginal sales								
$HM margin	$49.88		*Gain on recaptured sales*					
Marginal sales	$40,112							
GROSS LOSS	$2,000,600		N	$1,552,887		SM	$220,645	
Net gain	-$286,400		HM + NP	$1,266,487		HM + NP +SM	$1,487,132	
			HMT	PASSES		HMT	PASSES	

4. The prima facie case

- The relevant geographic market: Wilton
  - Judicial considerations
    - The relevant geographic market is "where . . . the effect of the merger on competition will be direct and immediate."[1]
      - Must correspond to the commercial realities of the industry and be economically significant[2]
    - "Courts generally measure a market's geographic scope, the area of effective competition, by determining the areas in which the seller operates and where consumers can turn, as a practical matter, for supply of the relevant product."[3]
      - Look for high substitutability within the market and low substitutability across the market boundary
      - Must contain the sellers or producers who are able to "deprive each other of significant levels of business" and is where the merger's effect on competition will be "direct and immediate"[4]
    - Does not need to include all of the firm's competitors; it needs to include the competitors that would "substantially constrain [the firm's] price-increasing ability"[5]
    - Price differences
      - Differences in prices of the same products in different areas indicate that the areas are not in the same geographic market
      - BUT price differences are not a requirement—ice cream cones sold to consumers in New York and Los Angeles may be the same, but they are not in the same geographic markets
    - Often specified by a political boundary (e.g., a town, country, MSAs, state)

[1] United States v. Philadelphia Nat. Bank, 374 U.S. 321, 357 (1963).
[2] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 336-37 (1962) (footnote omitted).
[3] Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 227 (2d Cir. 2006) (citations and internal quotation marks omitted).
[4] FTC v. Advoc. Health Care Network, 841 F.3d 460, 468 (7th Cir. 2016).
[5] *Id*. at 469.

4. The prima facie case

- The relevant geographic market: Wilton
  - Judicial considerations—Applied
    - Wilton is recognized by the public as a grocery shopping area distinct from Ridgefield
    - Ridgefield is located about 8 miles from Wilton's town center, which translates to a 15−minute drive under normal traffic conditions
    - Less than 5% of Wilton residents' grocery spending occurs at Ridgefield supermarkets
    - When any single Wilton supermarket increases its price by 5%, none of its customers divert to Ridgefield

4. The prima facie case

- The relevant geographic market: Wilton
  - Hypothetical monopolist test
    - The HMT for the relevant product market also applies to Wilton as the relevant geographic market
      - Showed that a hypothetical monopolist of Wilton supermarkets could profitably increase the price for at least one supermarket by 5%

*No more than this is necessary!**

* Or, at least, that is what I told you in class. As I was working on this problem, it occurred to me that the one-product SSNIP recaptured tests define a market for the purpose of determining whether anticompetitive unilateral effects could result from the merger, but they are not sufficient to establish that anticompetitive coordinated effects could result. For that, I think you need to apply some form of uniform SSNIP test. Still, given the class discussion, you will get full credit for the above answer.

4. The prima facie case

- The relevant geographic market: Wilton
  - Hypothetical monopolist test
    - Alternative HMT for a uniform price increase by Wilton supermarkets
      - To show: A hypothetical monopolist could profitably increase prices uniformly by 5% in all Wilton supermarkets
      - Apply a "brute force" critical loss sufficiency test
        - Hypothetical: A uniform price increase of 5% by all three Wilton supermarkets would cause them collectively to lose 10% of their customers to Ridgefield supermarkets
        - Loss of customers is equivalent to loss of trips
          - Wilton supermarkets collectively account for 674,353 trips annually
          - Loss of 10% = 67,345 trips
        - In the worst case, all the lost sales come from the supermarket with the highest dollar margin loss per trip
        - Some data:

	Trips	Annual Spend/Trip	Percentage Gross Margin	Dollar Margin	
HarvestMart	280,702	$142.50	35.00%	$49.88	← Highest $margin
Nature's Pantry	266,667	$150.00	30.00%	$45.00	
Sam's Market	126,984	$157.50	25.00%	$39.38	
Total Wilton trips	674,353				
%trips lost to Ridgefield	10.00%				
Trips lost to Ridgefield	67,435				
%SSNIP	5.00%				

4. The prima facie case

- The relevant geographic market: Wilton
  - Hypothetical monopolist test
    - Alternative HMT for a uniform price increase by Wilton supermarkets (con't)
      - Brute force calculation
        - Increase the price to all Wilton supermarkets by 5%
        - Decrease HarvestMart's trips by 67,435 (accounting for 100% of the lost trips)
        - Keep the sales of Nature's Pantry and Sam's Market constant

	HarvestMart	Nature's Pantry	Sam's Market
Incremental gain on inframarginal and recaptured sales			
Initial trips	280,702	266,667	126,984
Trips lost to Ridgefield	67,435	0	0
Inframarginal sales	213,266	266,667	126,984
Original price	$142.50	$150.00	$157.50
$SSNIP	$7.13	$7.50	$7.88
Incremental gain (by firm)	$1,519,524	$2,000,000	$1,000,000
Incremental loss on marginal sales			
Marginal sales	67,435		
$margin	$49.88		
Incremental loss (by firm)	$3,363,333		
Net gain (by firm)	-$1,843,810	$2,000,000	$1,000,000
Hypothetical monopolist net gain:	$1,156,190		

So the hypothetical monopolist could profitably increase prices by 5% in all Wilton supermarkets

4. The prima facie case

- Market shares, concentration, and the *PNB* presumption
  - *PNB* presumption (boilerplate for judicial presumption and Merger Guidelines)
  - Use revenues for market shares
    - Supermarkets are differentiated
  - Calculate the premerger and postmerger HHIs:
    - HarvestMart and Nature's Pantry will be the only supermarkets in the relevant market
    - Assume that neither loses trips when Sam's closes
    - Scenarios (comparing postmerger with premerger):

HHI	Delta	Scenario
3600	—	
5000	1400	Minimum HHI (equal shares postmerger)
5183	1583	HarvestMart captures Sam's Market's customers
5187	1587	Nature's Pantry captures Sam's Market's customers
5762	2162	HarvestMart captures Sam's Market + 25% of Nature's Pantry

So the postmerger HHI and delta will be at least 5000 and 1400, respectively, and probably materially larger

4. The prima facie case

- Market shares, concentration, and the *PNB* presumption
  - Illustrative calculations (HHIs calculated using revenue shares*)
    - Premerger

	Trips	Revenues	Share	HHI
HarvestMart	281,000	$40,000,000	40.00%	1600
Nature's Pantry	265,000	$40,000,000	40.00%	1600
Sam's Market	130,000	$20,000,000	20.00%	400
TOTAL	676,000	$100,000,000	100.00%	3600

The HHI is minimized when the shares are equal

- Postmerger:

	HarvestMart Absorbs All of Sam's Market's Customers					**Minimum HHI**	
	Trips	Price	Revenues	Share	HHI	Share	HHI
HarvestMart	411,000	$142.50	$58,567,500	59.57%	3549	50.00%	2500
Nature's Pantry	265,000	$150.00	$39,750,000	40.43%	1635	50.00%	2500
Sam's Market							
TOTAL	676,000		$98,317,500	100.00%	5183	100.00%	5000

* In this hypothetical, revenue shares and trip shares are sufficiently close to one another that, the HHIs and deltas will differ by only a small amount and the outcome of the analysis will be the same.

4. The prima facie case

- Market shares, concentration, and the *PNB* presumption
  - Comparing HHIs with and without the acquisition
    - Typically, the postmerger HHI without the acquisition will be the same as the HHI premerger
    - In this case, however, assuming Sam's Market exits, the HHI without the merger with differs from the premerger HHI
    - Scenarios going forward with and without the acquisition (compared to premerger)
      - To find the delta between with and without the acquisition, subtract the HHI shown with the acquisition from the HHI shown without the acquisition

HHI	Delta	Scenario
		Premerger
3600	—	
		Scenarios without the acquisition:
3387	-213	Old Mill enters with resulting shares shown in Table 3
3335	-265	Old Mill 30%, HarvestMart 35%, Nature's Pantry 35%
		Scenarios with the acquisition:
5000	1400	Minimum HHI (equal shares)
5183	1583	HarvestMart Absorbs Sam's Market
5187	1587	Nature's Pantry Absorbs Sam's Market
5762	2162	HarvestMart Absorbs Sam's Market +25% of Nature's Pantry
		HHIs with the acquisition compared to without the acquisition:
5762	2412	Maximum
5000	1613	Minimum

4. The prima facie case

- Market shares, concentration, and the *PNB* presumption
  - Illustrative calculations (HHIs calculated using revenue shares*)
    - Without acquisition

	Table 3 Shares			Min HHI with 30% Old Mill	
	Revenue	Revenue Share	HHI	Revenue Share	HHI
HarvestMart	$40,042,500	37.95%	1440	35.00%	1225
Nature's Pantry	$29,250,000	27.72%	768	35.00%	1225
Sam's Market					
Old Mill	$36,225,000	34.33%	1179	30.00%	900
TOTAL	$105,517,500	100.00%	3387	100.00%	3350
Premerger HHI			3600		3600
Postmerger HHI			3387		3350
Delta (compared to premerger)			-213		-250

* In this hypothetical, revenue shares and trip shares are sufficiently close to one another that, the HHIs and deltas will differ by only a small amount and the outcome of the analysis will be the same.

4. The prima facie case

- The *PNB* presumption in the Wilton supermarket market
  - Second, support the *PNB* presumption with judicial precedent
    - Since the investigating agency is the Connecticut Attorney's Office, the Merger Guidelines are less significant than the judicial precedent, so I put them first
    - "The postmerger HHI of 5183 and delta of 1583 triggers the *PNB* presumption under modern judicial precedent."
      - *See, e.g.*, United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1 (D.D.C. Nov. 15, 2022) (postmerger HHI of 3111 and delta of 891)
      - FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160 (3d Cir. 2022) (postmerger HHI of 2835 and delta of 841)
      - FTC v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016) (postmerger HHI of 3517 and delta of 1423)
      - United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011) (postmerger HHI of 4691 delta of 400).

There is nothing magic in these four cases. Any case applying the PNB presumption with lower a lower HHI and delta works.

4. The prima facie case

- The *PNB* presumption in the Wilton supermarket market
  - Third, support the *PNB* presumption with the Merger Guidelines
    - "Moreover, these HHI statistics trigger a presumption of Section 7 anticompetitive effect under the 2010 and 2023 Merger Guidelines."
      - The 2010 Merger Guidelines, which were effective when much of the judicial precedent was created and have been cited by multiple courts, presumes an anticompetitive effect when the postmerger HHI over 2500 and the delta is at least 200.
      - The 2023 Merger Guidelines lowered these thresholds to 1800 and 100.

If the mergers triggers the PNB presumption under both sets of Guidelines, I would cite them both

4. The prima facie case

- Additional evidence supporting the prima facie case
  - Coordinated effects—Applies
    - State the test (prepared in advance)
      1. Premerger, the market is susceptible to tacit coordination
      2. The merger will increase the likelihood or effectiveness of tacit coordination
    - Apply the test
      1. The Wilton supermarket market is susceptible to tacit coordination premerger
         a. Only three firms with an HHI of 3600 (a highly concentrated market)
         b. One firm (Sam's Market) is declining, so that most price competition takes place between HarvestMart and Nature's Pantry
         c. Grocery products are largely standardized and prices are transparent, facilitating monitoring
         d. Attempted efforts by Nature's Pantry to increase prices (although resisted by HarvestMart) demonstrates a willingness of one of the two firms to tacitly coordinate
         e. High barriers to entry
            i. Limited land available in Wilton Town Center zoned for a supermarket
            ii. Existing stores provide sufficient capacity for current demand and projected demand
            iii. Strong customer loyalty to current suppliers limits the willingness of customers to switch absent a compelling reason (e.g., significant price reductions)
            iv. [Presumably] Significant construction costs
      2. Merger will increase the probability, stability, and effectiveness of tacit coordination
         a. Merger reduces the number of firms from three to two
         b. HarvestMart's significant expected increase in sales will increase its incentive to tacitly coordinate (larger returns due to larger base of inframarginal customers)—possibly eliminating its incentive to resist Nature's Pantry's price leadership now or in the future

4. The prima facie case

- Additional evidence supporting the prima facie case
  - Unilateral effects on price
    - Test (prepared in advance)
      1. The products of the merging firm must be differentiated and have different dollar margins (premerger, postmerger, or both)
      2. The products of the merging parties must be close substitutes for one another
         - That is, they have high cross-elasticities of demand or diversion ratios with one another
      3. The products of (most) other firms must be much more distant substitutes
         - That is, they have low cross-elasticities of demand or low diversion ratios with the products of the merging firms
      4. Repositioning into the products of the merging firms must be difficult
         - That is, other incumbent firms and new entrants in the market cannot easily change their product's attributes or introduce a new product that would be a close substitute to the products of the merged firm
    - Recapture unilateral effects—Does not apply
      - HarvestMart will close Sam's Market, renovate and rebanner it as a HarvestMart store, and carry the same products and charge the same prices in both stores
      - Premerger, although Sam's Market charges a higher price than HarvestMart, HavestMart has a larger dollar margin → HarvestMart gains more by diverting more former Sam's Market's customers to its store postmerger at premerger prices and increasing prices and losing more of Sam's Market's customers (and its own marginal customers) to Nature's Pantry
    - Auction unilateral effects—Does not apply
      - Products are sold to all customers at a displayed price—there are no auctions involved in supermarket sales

4. The prima facie case

- Additional evidence supporting the prima facie case
  - Unilateral effects on price
    - However, an ad hoc unilateral effects theory likely applies
      - Postmerger, HarvestMart will operate two locations, alleviating overcrowding and attracting customers who previously avoided HarvestMart due to congestion
      - Those Nature's Pantry customers who prefer HarvestMart's lower prices but shopped elsewhere due to overcrowding, are likely to switch to HarvestMart postmerger
      - Some Sam's Market customers, accustomed to higher prices, may choose to shop at Nature's Pantry or switch to HarvestMart for the improved shopping experience and lower prices
      - Customers who divert from Nature's Pantry and Sam's Market, all of whom paid higher prices at their previous store, are less likely to be sensitive to small price increases by HarvestMart than HarvestMart's pre-existing customers
      - Consequently, the percentage HarvestMart's customers who are inframarginal will be larger postmerger than premerger
      - This increase in the percentage of inframarginal customers creates a profit-maximizing incentive for HarvestMart unilaterally to increase it price postmerger even if Nature's Pantry maintains its premerger prices
        - That is, premerger HarvestMart's incremental profit gain from a SSNIP on its inframarginal customers was just equal to its incremental loss on its marginal customers (the first-order condition for profit-maximization)
        - Postmerger, however, with a greater percentage of inframarginal customers, HarvestMart's incremental profit gain from a SSNIP on its inframarginal customers was be greater than its incremental loss on its marginal customers
        - Accordingly, HarvestMart has an incentive to increase its prices, thereby decreasing the percentage of inframarginal customers and increasing the number of marginal customers until the first-order condition is reestablished

We did not cover this in class, so I did not expect anyone to spot this theory

This is the unilateral effect

4. The prima facie case

- Additional evidence supporting the prima facie case
  - Elimination of a maverick—Likely applies
    - Premerger, HarvestMart can be considered a “maverick” since it has resisted Nature’s Pantry’s efforts at price leadership notwithstanding the susceptibility of the market to tacit coordination
    - Postmerger, however, HarvestMart has an increased incentive to unilaterally increase its prices for the reason just discussed
      - This adds to the whatever incentive HarvestMart had premerger to tacitly coordinate with Nature’s Pantry (an incentive HarvestMart resisted)
    - According, HarvestMart also has an increased incentive postmerger to accommodate Nature’s Pantry price increases
  - Another second theory
    - In class, we discussed that even when the maverick’s management controls the merged firm, it has an incentive to cease being a maverick because postmerger it has more inframarginal customers on which it would lose profits if it lowered its price
    - **If you applied this argument here, you received full credit on this issue**
    - However, as the ad hoc unilateral analysis above shows, the analysis is more subtle
      - The incentive to continue or cease being a maverick depends on the how, if at all, the split between inframarginal and marginal customers changes between premerger and postmerger
      - I need to fix this for next year’s class.

4. Defendants' rebuttal arguments

- First, make sure you know what defenses need to be addressed:
  1. *Relevant market*: The sale of products by Wilton supermarkets not a proper relevant market
  2. *Failing firm*: Sam's Market is a failing firm
  3. *Zero HHI delta*: The HHI delta should be calculated based on combining the shares of HarvestMart and Sam's Market, which will be zero since Sam's Market will cease operations whether the merger goes forward or not—A transaction with zero delta cannot trigger the *PNB* presumption
  4. *Old Mill causation*: If the acquisition proceeds, Old Mill's abandonment of its plans to enter Wilton would not be legally caused by the acquisition and hence not a cognizable Section 7 harm
  5. *Speculative benefits from blocking the merger*: The benefits of blocking the acquisition are speculative and too distant in time to be cognizable
  6. *HarvestMart's pricing*: HarvestMart will not increase prices anticompetitively postmerger
  7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers

4. Defendants' rebuttal arguments

1. *Relevant market*: The sale of products by Wilton supermarkets not a proper relevant market
   - Likely arguments
     - All grocery stores (including MaxMart) should be included in the relevant product market
       - MaxMart sells $20 million of groceries to Wilton residents
       - MaxMart accounts for 250,000 annual shopping trips by Wilton residents
     - All Ridgefield stores should be included in the relevant geographic market
       - Ridgefield is only eight miles away—a 15-minute drive—from Wilton
       - Some Wilton residents buy their groceries in Ridgefield

4. Defendants' rebuttal arguments

1. *Relevant market*: The sale of products by Wilton supermarkets not a proper relevant market
   - Response
     - Overall
       - Well-established judicial precedent holds that proof of an anticompetitive effect in any one relevant market is sufficient to find a Section 7 violation
       - The sale of products by Wilton supermarkets as a proper relevant market is supported by judicial factors and the hypothetical monopolist test
       - It is irrelevant that larger markets may also be relevant markets
     - MaxMart should not be included in the relevant market with the Wilton supermarkets
       - Exhibits almost no cross-elasticity with Wilton supermarkets—no diversion from Wilton supermarkets to MaxMart either from a one-product or uniform SSNIP
       - Including MaxMart in the relevant product market would not change the result—the *PNB* presumption would still be triggered
     - The Ridgefield supermarkets should not be included in the relevant market with the Wilton supermarkets
       - A 15-minute drive—30 minutes round trip—is a significant burden on a shopper when three supermarkets are available in Wilton
       - Exhibit no diversion from Wilton supermarkets in response to a one-product 5% SSNIP
       - Although 10% of Wilton customers would divert to Ridgefield in response to a uniform 5% SSNIP in Wilton, this diversion is insufficient to make a 5% price increase in all Wilton stores unprofitable
         → Indicates minimal price-constraining effect by Ridgefield supermarkets on Wilton supermarkets

Conclusion: The defense fails

4. Defendants' rebuttal arguments

2. *Failing firm*: Sam's Market is a failing firm
   - Likely argument
     - Sam's Market is declining rapidly, and Sam Easten is committed to selling the supermarket
   - Response
     - Requirements for the failing company defense: The allegedly failing firm—
       1. would be unable to meet its financial obligations in the near future
       2. would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act, and
       3. has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger
     - Even assuming arguendo requirements 2 and 3 are satisfied, Sam's Market fails requirement 1
       - Courts are generally hostile to the failing company defense and apply its requirements strictly
       - Sam's Market remains profitable and able to meet its financial obligations for at least several more years if it stays in operation
       - Easten's decision to sell Sam's Market because of the supermarket's declining profitability is irrelevant to the defense

Conclusion: The defense fails

4. Defendants’ rebuttal arguments

3. *Zero HHI delta*
   - Likely arguments
     - The HHI delta should be calculated based on combining the shares of HarvestMart and Sam’s Market, which will be zero since Sam’s Market will cease operations whether the merger goes forward or not
     - A transaction with zero HHI delta cannot trigger the *PNB* presumption

4. Defendants' rebuttal arguments

3. *Zero HHI delta*
   - Response
     - This argument misunderstands the HHI delta
       - The HHI delta is the difference on a going forward basis between the HHI in the market with the merger and the HHI in the market without the merger
       - In the absence of the acquisition, Sam's Market will continue to operate for at least several years if Urban Furnishing does not acquire it
       - The fact that Sam's Market will cease to exist going forward with or without the merger is irrelevant
         - All Sam's Market's Wilton customers will continue to shop for groceries and most if not all these customers are likely to switch to another Wilton supermarket
       - With the acquisition, the only two supermarkets in Wilton will be HarvestMart and Nature's Pantry
         - Old Mill will not enter and HarvestMart and Nature's Pantry collectively will have 100% of the Wilton supermarket market
         - As shown above, the resulting postmerger HHI will be at least 5000 with a delta of at least 1400 and probably materially higher

Conclusion: The defense fails

4. Defendants' rebuttal arguments

4. *Old Mill causation*: HarvestMart's acquisition of Sam's Market cannot legally be attributed to Old Mill's decision not to build in Wilton
   - Likely argument
     - The decision to abandon Wilton would be made independently by Old Mill
     - Nothing in the acquisition precluded Old Mill from building in Wilton
     - Old Mill's premium offerings typically attract a distinct customer segment less price-sensitive to traditional supermarket competition, suggesting it could still succeed even with the acquisition
   - Response
     - Prior to the announcement of the acquisition, Old Mill was committed to open a store in Wilton
       - Part of Old Mill's business plan
       - Had conducted extensive market research on Wilton
       - Had an option on land in Wilton Town Center zoned for a supermarket
       - Had announced plans to build a new 35,000 square foot store on this property within three years
       - Expected to open within two years
     - Wilton was attractive to Old Mill because of—
       - Its demographics
       - Sam's Market's decline
       - Wilton's projected population growth

4. Defendants' rebuttal arguments

4. *Old Mill causation*: HarvestMart's acquisition of Sam's Market cannot legally be attributed to Old Mill's decision not to build in Wilton
   - Response (con't)
     - Sam's Market's decline presumably was important because it would—
       - Reduce the number of supermarkets operating in Wilton from 3 to 2
       - Remove significant supermarket capacity from Wilton
       - Increase crowding in the two remaining Wilton supermarket
     - HarvestMart's acquisition, renovation, and rebannering of Sam's Market would—
       - Preserve if not increase supermarket capacity in Wilton
       - Alleviate crowding in Wilton supermarkets
     - In any event, Old Mill—
       - Suspended its plans to build in Wilton because of changed conditions due to the prospect of HarvestMart acquiring Sam's Market
       - Announced it would resume building and open in Wilton with two years if HarvestMart did not make the acquisition and Sam's Market was sold to Urban Furnishings instead
     - Presumably, Old Mill representatives would be prepared to testify at trial to their original plans, the impact of the acquisition on these plans, and their intent to proceed if the acquisition does not go forward
     - *Bottom line*: The acquisition would create conditions that made Old Mill's opening in Wilton unattractive and therefore would be the proximate cause of Old Mill's decision not to build in Wilton

Conclusion: The defense fails

4. Defendants' rebuttal arguments

5. *Speculative benefits from blocking the merger*: The benefits of blocking the acquisition are speculative and too distant in time to be cognizable
   - Likely argument
     - Old Mill's entry relies on uncertain market conditions over the next two to three years, making benefits from blocking the merger speculative
     - Even if the benefits are not speculative, by its own projections Old Mill would not open in Wilton for two to three years, which is too distant in time for benefits to be consider in the analysis
   - Response
     - The evidence shows that Old Mill has the ability, incentive, and commitment to enter Wilton if the acquisition does not go forward
     - The evidence shows that the benefits to Wilton consumers are very substantive and not speculative—

Improves consumer welfare

- Old Mill's opening would provide a premium grocery option currently unavailable to Wilton consumers—Old Mill's research shows that 30% of Wilton households would choose if it became available
- The shift of 30% of Wilton households to Old Mill would alleviate the current overcrowding conditions at HarvestMart, allowing those current Nature's Pantry customers who prefer HarvestMart if not overcrowded to switch to HarvestMart

Causes no harm

- The evidence indicates that prices at HarvestMart and Nature's Pantry would not be affected by the opening of Old Mill, so that current customers who remained at these stores would not be worse without the acquisition than with it

Conclusion: The defense fails

4. Defendants' rebuttal arguments

6. *HarvestMart's pricing*: HarvestMart will not increase prices anticompetitively postmerger
   - Likely argument
     - Has a reputation as a chain providing "good value at good prices"
     - Is the lowest price supermarket currently operating in Wilton, with prices 5% lower than Nature's Pantry and 10% lower than Sam's Market
     - Has resisted Nature's Pantry efforts in the past to increase prices
   - Response
     - Merger antitrust law operates on market structure and not on the good intentions of firms
     - Conditions—or management—can change over time, and good intentions today may become less than good intentions tomorrow
     - Consequently, if a merger creates (or enhances) the ability or incentive of firms to act anticompetitively to the harm of consumers—as the evidence shows it does here—the law will block the merger notwithstanding the firm's sincere promises not to act anticompetitively

Conclusion: The defense fails

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition
   - Likely argument
     - Significant cost savings: Integrating Sam's Market into HarvestMart's operations will reduce Sam's Market's costs of goods sold by approximately 22%, achieved through:
       - 10% savings by eliminating wholesaler markups
       - 7% savings from better supplier terms due to HarvestMart's greater purchasing power
       - 5% savings through distribution efficiencies from HarvestMart's network
     - Improved operational efficiency
       - HarvestMart expects additional savings of 3% at the acquired location through shared management, combined advertising, and optimized staffing
     - Pass-on to customers
       - These cost savings will allow HarvestMart to reduce prices at the newly renovated store by 10%, matching the pricing structure of its current location while maintaining a 35% gross margin
     - Improved consumer experience
       - The acquisition resolves overcrowding at HarvestMart's current store, reducing congestion, improving inventory availability, and enhancing customer satisfaction
     - Net increase in employment
       - HarvestMart plans to hire 65 to 70 full-time employees at the renovated location, compared to the current 45 employees at Sam's Market, resulting in a net employment gain

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition
   - Response
     - Requirements for an efficiencies defense: The claimed efficiencies must be—
       1. Merger specific
       2. Verifiable
       3. Sufficient to negate the likely anticompetitive effect
       4. Not anticompetitive
     - Leaving aside the other requirements, the claimed efficiencies taken at face value are not sufficient to negate the likely anticompetitive effect of the transaction
       - In other words, the efficiencies would have to improve consumer welfare to the level that would have been attained in the absence of the transaction
       - NB: HarvestMart's plan to lower the prices in the rebannered store to the level of its existing store, does not benefit the customers at the existing store and improves the welfare of any customers who switch to HarvestMart only to same extent as would alleviating overcrowding
     - Even with the claimed efficiencies, consumer welfare is lower with the acquisition than without

Let's examine the welfare effects on Wilton shoppers with and without the acquisition

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition
   - Response (con't)
     - Shoppers who would switch to Old Mill if available
       - *No acquisition*: 30% of shoppers at Wilton supermarkets, and 20% of Wilton shoppers at Ridgefield supermarkets, would shift to Old Mill, which would provide a premium grocery option distinct from HarvestMart and Nature's Pantry. Prices at HarvestMart and Nature's Pantry would likely remain unchanged due to their limited competition with Old Mill.
       - *Acquisition:* Old Mill would not enter, leaving these shoppers without their preferred premium option. Moreover, these shoppers would be harmed if prices at HarvestMart and Nature's Pantry increased as a result of the acquisition, as indicated by the prima facie case

This group's welfare would be harmed by the acquisition

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition
   - Response (con't)
     - Shoppers who would switch from Nature's Pantry to HarvestMart if not overcrowded
       - *No acquisition:* Old Mill's entry would alleviate overcrowding at HarvestMart by shifting 30% of Wilton shoppers to Old Mill. HarvestMart and Nature's Pantry would likely remain unchanged due to their limited competition with Old Mill.
       - *Acquisition:* Renovating and rebannering Sam's Market as a HarvestMart store would alleviate overcrowding directly. However, these shoppers would be harmed if prices at HarvestMart and Nature's Pantry increased as a result of the acquisition, as indicated by the prima facie case.

This group's welfare would not be helped but could be harmed by the acquisition

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition
   - Response (con't)
     - Shoppers who would remain at their original store with or without the acquisition
       - *No acquisition*: With the entry of Old Mill drawing off 30% of Wilton shoppers and relieving overcrowding at HarvestMart, prices at HarvestMart and Nature's Pantry would likely remain unchanged due to their limited competition with Old Mill.
       - *Acquisition*: Renovating and rebannering Sam's Market as a HarvestMart store would alleviate overcrowding directly. However, these shoppers would be harmed if prices at HarvestMart and Nature's Pantry increased as a result of the acquisition, as indicated by the prima facie case.

This group's welfare would not be helped but could be harmed by the acquisition

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition
   - Response (con't)
     - Employment (to the extent considered)
       - *No acquisition*: Old Mill's entry would create new employment opportunities in Wilton. The investigation did not obtain specific figures, a high-priced premium supermarket with 35,000 square feet are not provided, it is likely that the store would require at least as many employees as the rebannered HarvestMart store.
       - *Acquisition*: Employment in the rebannered HarvestMart store will increase to 65-70 from 45, resulting in a net employment gain of 20-25 employees

This group's welfare would not likely be different with or without the acquisition

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition
   - Response (con't)
     - Urban Furnishings
       - *No acquisition*: Urban Furnishings would buy Sam's Market and convert it to a large furniture store. Wilton residents would benefit from the greater choice and perhaps greater competition in furniture resulting from the opening of this store.
       - *Acquisition*: Urban Furnishing would not open a store in Wilton.

*This group's welfare would be harmed by the acquisition (but since the benefit is not in the relevant market, it may not be cognizable as consumer benefit in the merger antitrust analysis)**

** Still, the State should make this point since it may influence the judge's "heart" when making her decision, even if not technically cognizable*

Conclusion: No consumer group benefits from the merger, one group will be harmed, and the other groups may be harmed

The defense fails

4. Conclusion on merits

You can use some boilerplate here—but be sure to customize it to the problem!

4. Enforcement action

- The State should seek a permanent blocking injunction
  - Available under Clayton Act § 16
  - Four requirements
    1. The plaintiff has demonstrated a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue
       - Satisfied by showing an impending violation of Section 7 on the merits if the pending acquisition does forward
       - The requisite threat of injury is the competition that would likely be substantially lessened by the acquisition in the relevant market

       Satisfied

    2. Remedies available at law, such as monetary damages, are inadequate to compensate for that injury
       - The case law holds that money damages are inadequate to compensate a state for an injury to its general economy resulting from an antitrust violation

       Satisfied

4. Enforcement action

- The State should seek a permanent blocking injunction
  - Requirements (con't)
    3. Considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted
       - If the acquisition goes forward, the State and the public will be harmed by a likely lessening of competition in the relevant market
       - If the acquisition foes forward, Wilton grocery shoppers, in particular, will be harmed by Old Mill's cancellation of its plans to build a much-desired premium supermarket in Wilton as well as by possibly higher prices
       - If the acquisition goes forward, Urban Furnishing will not buy Sam's Market and convert it into a new large furniture store, depriving Wilton residents of the additional choice and greater competition in home furniture the opening of the new store would create
         - Even if not cognizable as a benefit in the merger analysis, this factor should be cognizable in the hardship analysis
       - If the acquisition is blocked, no Wilton grocery shopper is likely to be harmed
       - If the acquisition blocked, HarvestMart is deprived on the profits it would have made from an expanded operation

       Satisfied

    4. The public interest would not be disserved by a permanent injunction
       - The State has an compelling interest in protecting its economy and residents from antitrust violations
       - There is no public interest in allowing an acquisition that violates the antitrust laws to proceed

       Satisfied

5. Conclusion

5. Conclusion
For the reasons stated above, the State should prevail in Section 7 claim for a permanent injunction under Section 16 of the Clayton Act blocking HarvestMart's acquisition of Sam's Market.

- No need to be elaborate if the conclusion paragraph in the introduction answers the specific questions asked