

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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CLASS 12 WRITTEN ASSIGNMENT—INSTRUCTOR'S ANSWER

Instructions

Submit by email by 3:30 pm on Tuesday, September 30

Send to wdc30@georgetown.edu

Subject line: Merger Antitrust Law: Assignment for Class 12

Calls for a detailed hierarchical outline that addresses each theory of harm and each defense the court considered. Use numbered headings and subheadings (e.g., I./A./1./a.).

Examine each theory of anticompetitive harm and defenses addressed in the *H&R Block* opinion. Take the court's finding of the relevant market as given. For each theory:

1. Identify each theory in the first-level heading (e.g., Coordinated Effects, Entry Defense).
2. Give a general description of the theory (this can be a short paragraph).
3. Identify the specific legal elements or tests the *H&R Block* court considered for the theory to apply.
4. Apply the theory to the *H&R Block* facts by summarizing the court's key factual findings and explaining how the court applied the legal requirements to these specific facts. Where the opinion provides numbers, include them (e.g., pre/post-merger HHI and Δ HHI; firm shares; predicted percentage price effects; diversion ranges).
5. State the court's conclusion as to whether the theory was established or the defense was successful, summarizing the court's reasoning, and noting any evidence the court found particularly persuasive or unpersuasive.
6. State whether the analysis the *H&R Block* court performed follows the modern analysis a court would perform today. If not, contrast the analysis in *H&R Block* with what the modern analysis would be. Use the formulations in the Unit 3D class notes for the elements of the modern approach of each theory of harm and defense.

In each section of each theory, add the statutes, cases, Merger Guidelines, or other authority the court cited in support. Include a parenthetical if helpful to understand the authority's applicability. Use the Bluebook citation format for each authority.

At the end of the outline, summarize the court's findings, conclusions, and dispositions of the case.

If you have any questions, please let me know.

Outline of Anticompetitive Effects and Defenses in H&R Block/TaxACT

I. Entry/expansion/repositioning defense¹

- A. Defendants can rebut a prima facie case by showing that rivals will enter, expand, or reposition in a way that neutralizes any merger-induced harm.
- B. Elements of the defense:
 - 1. To the defense to apply, the court required that the entry be “timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.” Op. at 53 (quoting 2010 Horizontal Merger Guidelines § 9 and citing supporting cases).
 - 2. “Since the government has established its prima facie case, the defendants carry the burden to show that ease of expansion is sufficient ‘to fill the competitive void that will result if [defendants are] permitted to purchase’ their acquisition target.” Op. at 54 (quoting *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000)).
 - 3. “Determining whether there is ease of entry hinges upon an analysis of barriers to new firms entering the market or existing firms expanding into new regions of the market.” Op. at 54 (citing *CCC Holdings Inc. v. FTC*, 605 F. Supp. 2d 26, 47 (D.D.C. 2009)).
- C. Application to the facts
 - 1. Defense argument
 - a. Defendants argued that eighteen companies offered DDIY products through the Free File Alliance and that any of them could expand to mimic TaxACT postmerger (although the defense probably could not identify any particular firm that would so expand)
 - b. Defendants identified TaxSlayer (2.7% market share) and TaxHawk (3.2% market share) as the most viable expansion candidates, and the court focused on them.
 - 2. TaxHawk
 - a. Dane Kimber, TaxHawk’s vice president and co-founder, testified at trial that TaxHawk had the technical infrastructure to grow by five to seven times its number of customers in any given year.
 - b. However, it had been in business for 10 years and never grew beyond 3.2% by the time of trial.
 - c. Moreover, it was functionally more limited than the Big Three:
 - i. Did not service all federal tax forms
 - ii. Excluded two states’ forms in their entirety
 - iii. Did not service major cities with income taxes (e.g., NYC)

¹ In this outline, I will use “entry” to mean entry, expansion, or repositioning.

- d. Kimber also testified that it would take another decade for the TaxHawk to support all forms
 - i. Reason: TaxHawk is a “lifestyle” company—owners and employees do not like to work too hard
 - ii. Owners run TaxACT to “deliver a sufficient income stream to sustain its owners’ comfortable lifestyle, without requiring maximal effort on their part.”
- 3. TaxSlayer
 - a. While more ambitious than TaxHawk, TaxSlayer showed concerning limitations:
 - i. Market share remained essentially flat (2.5% in 2006 to 2.7% in 2010) despite significant marketing spending
 - ii. Growth came from “maintaining the same slice of an expanding pie” rather than gaining market share
 - iii. Heavy reliance on sports sponsorships (Gator Bowl, NASCAR) for marketing—not scalable
- 4. Key general barriers
 - a. *Brand and reputation requirements*: Tax preparation requires consumer trust given the “highly personal documents that carry significant financial and legal consequences.” Building consumer confidence requires substantial time and money.
 - b. *Marketing cost barriers*: The Big Three collectively spent “over \$100 million” on marketing in 2009, while TaxSlayer and TaxHawk spent “significantly smaller amounts.” TaxACT’s strategy explicitly acknowledged it “cannot outspend Intuit and HRB on marketing.”
 - c. *Customer switching costs*: “Stickiness” exists because customers cannot easily import prior-year tax data across DDIY brands, creating switching barriers.
 - d. *Market maturation*: The pool of pen-and-paper customers has “dwindled,” meaning “low hanging fruit” of customer acquisition may be “plucked,” with only “two or three years of continued mid-teens category growth” remaining.

D. Conclusion: Rejected defense

- 1. The court rejected the entry defense, concluding that “expansion is [not] likely to avert anticompetitive effects from the transaction.” The court found that while TaxSlayer and TaxHawk possessed some capabilities, neither showed realistic potential for timely, likely, and sufficient expansion to replace TaxACT’s competitive constraint.
- 2. Particularly persuasive evidence:
 - a. TaxHawk’s explicit “lifestyle company” philosophy and ten-year timeline for product completion
 - b. TaxSlayer’s flat market share despite heavy marketing investment

- c. The massive marketing spending disparity between incumbents and potential entrants
 - d. Evidence of customer switching costs and market maturation
- E. Contrast with modern analysis
- 1. The *H&R Block* court’s analysis generally aligns with modern merger analysis.
 - 2. Exception:
 - a. “For entry to be considered timely, it typically must occur within approximately two years post-merger.” Op. at 54 n.28 (citing Commentary on the Horizontal Merger Guidelines (2006) at 45-46 (discussing prior Merger Guidelines § 3.2, which specified that timely entry should occur within two years)).
 - b. The 2023 Merger Guidelines—and the likely direction the courts will take if confronted with the issue—provide:

To show that no substantial lessening of competition is threatened by a merger, entry must be rapid enough to replace lost competition before any effect from the loss of competition due to the merger may occur.

2023 Merger Guidelines § 3.2. The modern approach gives no “grace period” for an anticompetitive effect to persist.

II. Coordinated effects

- A. Merger law “rests 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.” Op. at 60 (quoting *CCC Holdings Inc. v. FTC*, 605 F. Supp. 2d 26, 60 (D.D.C. 2009)).
- B. Elements of the theory
 - 1. “Whether a merger will make coordinated interaction more likely depends on whether market conditions, on the whole, are conducive to reaching terms of coordination and detecting and punishing deviations from those terms.” *Id.*
 - 2. “Since the government has established its prima facie case, the burden is on the defendants to produce evidence of ‘structural market barriers to collusion’ specific to this industry that would defeat the ‘ordinary presumption of collusion’ that attaches to a merger in a highly concentrated market.” *Id.*
- C. Application to the facts
 - 1. FTC’s argument
 - a. *Core argument*: Elimination of TaxACT (one of the “Big 3” Digital DIY firms) will facilitate tacit coordination between Intuit and HRB.
 - b. Irrelevancy of fringe firms: Fringe firms are too insignificant to disrupt coordination among the “Big Three” - merger would reduce the “collusive group” from 3 to 2

- c. *Form of coordination*: Mutual recognition that neither firm has an interest in “race to free” where high-quality tax software is provided for free/very low prices.
 - d. *Expected effect*: Firms may reduce the quality of free offerings and maintain higher prices for paid products
- 2. Defense argument
 - a. Intuit will have no incentive to compete any less vigorously post-merger
 - b. Intuit has no incentive to reduce the competitiveness of its free product because it views its free product as a critical driver of new customers
- 3. Intuit “war games” evidence
 - a. *Defendants’ evidence*: Documents/testimony showing Intuit conducted “war games” to anticipate HRB competitive threats post-merger
 - b. Other Intuit documents indicated it anticipated the combined firm would “pull some of its punches” if Intuit was willing to go along and not compete aggressively against it
 - b. *Court*: Evidence shows continued competition but “not necessarily inconsistent with some coordination”
 - c. *Key document*: Intuit outline indicating HRB strategy to “not escalate free war: Make free the starting point not the end point for customers”
- 4. Historical cooperation between HRB and Intuit
 - a. *Joint lobbying*: HRB, Intuit, and others successfully lobbied the IRS for limitations on the free offer scope through FFA after TaxACT launched a free-for-all offer.
 - b. *Court’s analysis*: Shows pricing incentives of HRB/Intuit differ from TaxACT and demonstrates the capability for coordinated action
- 5. Market conditions
 - a. Price and feature transparency
 - i. *Defendants’ argument*: The DDIY market has low price transparency due to differentiated products
 - ii. *Court’s rejection*: Players are well aware of competitors’ prices and features; products are marketed broadly via the Internet, enabling easy monitoring
 - b. *Transaction characteristics*: Small, numerous transactions among the mass of individual consumers with low bargaining power
 - c. *Pricing flexibility*: Prices can be changed quickly and easily
 - d. *Switching barriers*: “Stickiness” of DDIY products (from learning curve and difficulties of historical data transfers) creates barriers to switching
 - e. *Coordination mechanisms*: Companies can observe and coordinate on attributes of “free” products, not just pricing

D. Conclusion: Rebuttal rejected

1. “[T]he defendants have not rebutted the presumption that anticompetitive coordinated effects would result from the merger. To the contrary, the preponderance of the evidence suggests the acquisition is reasonably likely to cause such effects.” Op. at 67.
2. Particularly persuasive evidence:
 - a. Highly concentrated market
 - b. History of cooperation (joint lobbying to limit FFA free offers)
 - c. Intuit war games document showing HRB strategy to “not escalate free war”
 - d. Market characteristics facilitating coordination
3. Specifically, Intuit and HRB could tacitly coordinate on lowering the quality of “free” products, causing marginal customers to switch to paid software, rather than eliminating free products entirely (which remain useful as marketing devices)

E. Contrast with modern analysis

1. Elements of the theory
 - a. *H&R Block*: Following *CCC Holdings*, the court adopted the 1992 Horizontal Merger Guidelines elements (what I call the “Stigler conditions”): Market conditions must be—
 - i. Conducive to firms (tacitly) reaching terms of coordination that are individually profitable to the firms involved
 - ii. Conducive to firms detecting deviations from the tacit terms of coordination
 - iii. Conducive to firms punishing deviations from the tacit terms of coordination1992 Merger Guidelines § 2.1.
 - b. Modern approach
 - i. Courts (and most attorneys) could not understand the showing that the third element (punishment) required, so the theory fell out of use.
 - ii. It was revitalized by the 2010 Merger Guidelines, which replaced the Stigler conditions with a much more understandable two-element test:
 - (1) *Susceptibility*: Premerger, the market must be susceptible to coordinated interaction
 - (2) *Effectiveness*: Postmerger, the merger must increase the likelihood, effectiveness, or stability of coordinated interaction among enough firms in the market (the “collusive group”) to affect market conditions and harm consumer welfare

- iii. The 2023 Merger Guidelines collapsed the test to a single condition: Does the merger increase the “likelihood, stability, or effectiveness of coordination” in the relevant market? 2023 Merger Guidelines § 2.3.²
 - 2. Departure from the modern application of *Baker-Hughes*
 - a. *H&R Block*: Presumed coordinated effects from *PNB* presumption; placed burden (of persuasion?) on the merging parties to show why coordinated effects were not a likely consequence of the merger
 - b. *Modern approach*:
 - i. The plaintiff has to adduce affirmative evidence making out a prima facie case of coordinated effects in Step 1 of *Baker Hughes*.
 - ii. The merging firms’ burden in rebuttal in Step 2 is one of production, not persuasion.
 - iii. Even if some courts may continue to presume a prima facie case of coordinated effects from the *PNB* presumption, the burden of persuasion in a disputed case should be on the plaintiff under Step 3 of *Baker Hughes*

III. Elimination of a “maverick”

A. The concept

- 1. A “maverick” is a firm that disrupts coordinated interaction among the other, more accommodating competitors that would occur in the absence of the maverick
- 2. When an accommodating competitor acquires a maverick, the maverick’s disruptive conduct is suppressed, and the market performs less competitively to the harm of consumers

B. Elements of the theory

- 1. The market is conducive to a materially higher degree of coordinated interaction than it exhibits premerger
- 2. The disruptive conduct of the merger target is a material contributor to the inability of the market to achieve this higher degree of coordinated interaction
- 3. The acquisition of the merger target is likely to result in the discontinuance of the disruptive conduct; and
- 4. The discontinuance of the merger target’s disruptive activity is likely to result in a materially higher degree of coordinated interaction in the market to the harm of consumers

² The 2023 Merger Guidelines also explicitly recognized that coordinated interaction can occur across multiple dimensions of competition in addition to price, including product features, customer segmentation, output, innovation, and (on the input side) labor market conditions such as wages and benefits. 2023 Merger Guidelines § 2.3. I expect that the major focus in cases will continue to be on price unless the evidence in a particular case is materially probative of likely coordination on other dimensions.

5. *Overall question*: “Does TaxACT consistently play a role within the competitive structure of this market that constrains prices?” Op. at 65.

C. Application to the facts

1. FTC’s argument:
 - a. TaxACT meets the maverick definition through its disruptive market behavior
 - b. Recent disruption includes entering the boxed retail software segment
 - c. TaxACT had a history of innovative competition
2. Price-constraining behavior:
 - a. Bucked prevailing pricing norms by introducing the free-for-all offer, which others later matched
 - b. Remained the only competitor with a significant market share to embrace a business strategy that relies primarily on offering high-quality, full-featured products for free, with associated products at low prices
3. Post-merger incentive changes:
 - a. *Warren-Boulton testimony*: Merged firm’s “opportunity cost for offering free or very low-priced products will increase as compared to TaxACT now (because of additional cannibalization of HRB consumer base)
 - b. Merged firm will have “greater incentive to migrate customers into its higher-priced offerings.” Op. at 66.

D. Conclusion: Rejected rebuttal

1. “The Court finds that TaxACT’s competition does play a special role in this market that constrains prices. Not only did TaxACT buck prevailing pricing norms by introducing the free-for-all offer, which others later matched, it has remained the only competitor with significant market share to embrace a business strategy that relies primarily on offering high-quality, full-featured products for free with associated products at low prices.” Op. at 65.

E. Contrast with modern analysis

1. The *H&R Block* court’s treatment of mavericks is consistent with the state of the art.

IV. Unilateral effects

A. The concept

1. A merger is likely to have unilateral anticompetitive effects if the acquiring firm will have the incentive and ability to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms. Op. at 67.

B. Elements of the theory

1. The products must be differentiated
2. The products controlled by the merging firms must be close substitutes

3. Other products must be sufficiently different from the products offered by the merging firms that a merger would make a small but significant and non-transitory price increase in one of the merging products profitable for the merging firm
4. Repositioning must be unlikely.

Op. at 67 (quoting *CCC Holdings*, 605 F. Supp. at 68).

C. Application to the facts

1. Elimination of direct competition between the merging parties
 - a. The FTC's evidence
 - i. HRB has lowered its DDIY prices to better compete with free online products pioneered by TaxACT
 - ii. HRB directly considered TaxACT's prices in setting its own prices
 - iii. HRB determined the nature of its free offerings in response to TaxACT's competitive activity
 - iv. HRB documents acknowledging TaxACT put "downward pressure on HRB's pricing ability" and TaxACT's association with "commoditization of online space"
 - b. The merging parties' rebuttal arguments
 - i. Price maintenance pledge:
 - (1) Defendants pledged to maintain TaxACT's current prices for three years
 - (2) *Court*: Rejected defense: "[T]his type of guarantee cannot rebut a likelihood of anticompetitive effects in this case." Op. at 69 (citing *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 64 (D.D.C. 1998)). The merged firm could accomplish a price increase through other means, including limiting TaxACT functionality, reserving features for higher-priced HRB products, marketing TaxACT less aggressively, or removing TaxACT from the IRS Free File Alliance website.
 - ii. Value versus premium market segments:
 - (1) Defendants' arguments
 - (a) HRB and TaxACT compete in distinct segments: HRB in the "premium" segment, TaxACT in the "value" segment.
 - (b) Both firms are closer competitors to Intuit than to each other
 - (2) *Court*: Rejected defense:
 - (a) Evidence of direct price and feature competition "negates the conclusion that they operate in separate value and premium segments." Op. at 71.
 - (b) Court found TaxACT competes by "offering high-quality products at substantially lower prices" rather than operating in a separate segment. Op. at 71.

- (c) Court noted that merging parties need not be the closest rivals for unilateral effects: “A merger may produce significant unilateral effects even though a non-merging product is the ‘closest’ substitute for every merging product.” Op. at 71.
- iii. Combined market share threshold
 - (1) Defendants’ arguments
 - (a) Unilateral effects cannot be demonstrated where the combined firm’s market share does not surpass a certain threshold (citing Oracle’s 35% threshold)
 - (2) *Court*: Rejected defense:
 - (a) Declined to impose market share threshold. Op. at 72 (citing *FTC v. Whole Foods Market*, 548 F.3d 1028, 1036 (D.C. Cir. 2008), that market definition may not be required for unilateral effects claims)
 - (b) Noted “impermissible price increases . . . can be achieved on far lower market shares” than *Oracle*’s standard requires. Op. at 72.
- iv. Postmerger dual brand strategy
 - (1) Defendants’ arguments
 - (a) HRB’s plan: maintain both HRB and TaxACT brands, with HRB-brand focusing on higher-priced products and TaxACT on lower-priced products.
 - (2) *Court*: Rejected defense:
 - (a) Found defendants “have never convincingly explained how this two-brand strategy would work in practice.” Op. at 73.
 - (b) “HRB can still ensure that TaxACT’s value proposition does not get ‘too good’ and undermine the paid HRB products with the highest profit margins.” Op. at 74.
 - (c) Post-merger incentive change: “TaxACT will not have the same incentives it has today to develop robust free and low-cost offerings that can compete with the functionality offered by HRB and Intuit.” Op. at 74.
- v. Merger simulation analysis estimating unilateral price effect
 - (1) FTC’s evidence
 - (a) Warren-Boulton’s methodology: Estimated diversion ratios from two sources: market share data (12% TaxACT to HRB, 14% HRB to TaxACT) and IRS switching data (12% both directions after corrections) and estimated price-cost margins (“high” but numerical values redacted from opinion). Using market shares from the relative share method, calculated that TaxACT’s price would increase by 12.2% and HRB’s by 2.5%. Using “adjusted” IRS switching data

diversion ratios, TaxACT's price would increase by 10.5% and HRB's by 2.2%

(2) Defendants' arguments

- (a) Switching data is an inappropriate proxy for diversion data
- (b) Imprecise discounting of DDIY-to-assisted switching rates
- (c) The model always predicts a price increase with positive diversion and fails to account for innovation, marketing, and free products

(3) *Court*: Rejected defense

- (a) Found Dr. Warren-Boulton's discounting "appears imprecise," but noted the model "still predicts significant unilateral harm when non-discounted switching rates are used." Op. at 77.
- (b) Court found simulation "an imprecise tool, but nonetheless has some probative value in predicting the likelihood of a potential price increase." Op. at 78.

vi. Repositioning analysis

(1) Defendants' arguments

- (a) Repositioning by incumbent firms would negate any anticompetitive effect of the merger.

(2) *Court*: Rejected defense

- (a) Repositioning by smaller competitors is unlikely for the same reasons as entry defense (high barriers to entry and expansion).
- b. Repositioning by Intuit is unlikely due to coordinated effects incentives.
- c. Court acknowledged unilateral effects finding "not strictly 'unilateral'" because it considers coordination, but noted repositioning inquiry "necessarily entails a consideration of the likely actions of other competitors." Op. at 79.

D. Conclusion: Rejected rebuttal/Unilateral effects established

1. "On balance, and considering the evidence as a whole, the Court finds that, absent efficiencies, the plaintiff has demonstrated a reasonable likelihood of unilateral effects by a preponderance of the evidence." Op. at 79.
2. Relied on precedents finding anticompetitive effects where the merger eliminates "primary direct competitors" and "head-to-head competition between the two lowest cost and lowest priced firms in the . . . market." Op. at 79.

E. Contrast with modern analysis

1. The *H&R Block* court's analysis generally aligns with modern unilateral effects analysis under the 2010 and 2023 Merger Guidelines and more recent court decisions.
2. The 1992 Merger Guidelines were generally read to require that the merging products be each other's closest competitors and that the combined firm have a share of at least

35%. *See* 1992 Horizontal Merger Guidelines § 2.211. The 2010 Merger Guidelines eliminated any suggestion that either condition was necessary for the theory to apply.

V. Efficiencies

A. The concept

1. “One of the key benefits of a merger to the economy is its potential to generate efficiencies. As the Merger Guidelines recognize, merger-generated efficiencies can ‘enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.’ Courts have recognized that a showing of sufficient efficiencies may rebut the government’s showing of likely anticompetitive effects.” Op. at 80 (quoting 2010 Merger Guidelines § 10).
2. “High market concentration levels require ‘proof of extraordinary efficiencies,’ however, and courts ‘generally have found inadequate proof of efficiencies to sustain a rebuttal of the government’s case.’” Op. at 80 (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001)).

B. Elements of the defense

1. Generally

- a. “Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.” Op. at 80 (quoting Merger Guidelines § 10).
- b. “Efficiencies are inherently ‘difficult to verify and quantify’ and ‘it is incumbent upon the merging firms to substantiate efficiency claims’ so that it is possible to ‘verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm’s ability and incentive to compete, and why each would be merger-specific.’” Op. at 80 (quoting Merger Guidelines § 10).
- c. “In other words, a ‘cognizable’ efficiency claim must represent a type of cost saving that could not be achieved without the merger and the estimate of the predicted saving must be reasonably verifiable by an independent party.” Op. at 80-81.
- d. “High market concentration levels require ‘proof of extraordinary efficiencies,’ however, and courts ‘generally have found inadequate proof of efficiencies to sustain a rebuttal of the government’s case.’” Op. at 80 (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001)).

2. Specific elements

- a. *Merger-specificity*: If a party can achieve a saving standing alone, it is not merger-specific. Op. 81-82.
- b. *Verifiability*: Claimed efficiencies need to be verified by a qualified independent third-party and not based solely on management judgment. Op. 84-85.

- c. *Pass-on*: Otherwise, qualifying efficiencies are cognizable only to the extent they are passed on to consumers. Op. at 85 n.44.

C. Application to the facts

1. Defendants' arguments

- a. "H&R Block's primary motivation for the TaxACT acquisition is to achieve significant synergies that will enable H&R Block to provide better products at a lower price and to compete more effectively." Op. at 81 (quoting Defendants' Post-Trial Memorandum at 24).
- b. Predicted over {redacted} million annually across ten areas (IT/platform consolidation; bank/financial processing; website; software IT; download fulfillment; several redacted items).

2. Merger specificity

a. Cost efficiencies

i. Defendant's claims

- (1) TaxACT has lower labor costs in Cedar Rapids than HRB has in Kansas City
- (2) TaxACT is simply more cost conscious

ii. *Court*: Most cost-efficiency claims were not merger-specific

- (1) "Plainly, then, HRB could therefore achieve at least some of the {redacted} cost savings on its own – by relocating {redacted} and taking a more cost conscious attitude toward them. Likewise, the efficiencies related to bringing HRB's outsourced {redacted} functions in-house are unlikely to be wholly merger-specific." Op. at 83

b. IT-related efficiencies

i. Defendant's claims

- (1) Savings from two types of IT consolidation

ii. *Court*: Rejected

- (1) "Yet the claimed IT efficiency is not discounted for whatever savings HRB could obtain by {performing the first consolidation} on its own—an option the company considered in the past but did not adopt—and the defendants did not present evidence explaining why, as a technical matter, {performing the first consolidation} would not be feasible or, in fact, would not be more feasible than {the double consolidation}." Op. at 83-84.
- (2) "The IT efficiencies also apparently account for cost reductions associated with TaxACT's more cost-conscious culture and practices." Op. at 84.

3. Verifiability: Rejected

a. TaxACT

- i. Based its cost savings on management judgments rather than a detailed analysis of historical accounting data by an independent third party. Op. at 84
 - ii. *Court*: “While reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable by the Court.” Op. at 84
 - b. HRB
 - i. By contrast, HRB’s internal costs rested on ordinary-course accounting/ planning documents
 - ii. *Court*: But HRB’s track record of predicting efficiencies in its RedGear acquisition undercuts its credibility. In this smaller 2006 acquisition, HRB projected {redacted} in efficiencies over three years but failed to achieve them. “While HRB has attempted to learn from the mistakes of the RedGear acquisition, the Court finds that this history only underscores the need for any claimed efficiencies to be independently verifiable in order to constitute evidence that can rebut the government’s presumption of anticompetitive effects.” Op. at 85 (record citation omitted).
- 4. Pass-on to consumers: Rejected
 - a. *Court*: Defendants did not address how much of the claimed savings would be passed through to consumers
- D. Conclusion: Rejected rebuttal
 - 1. “Considering all of the evidence regarding efficiencies,” the court found most claimed efficiencies are not cognizable because defendants failed to show they were merger-specific, verifiable, or passed on to consumers.
 - 2. Implicitly, the court held that, to the extent there were cognizable efficiencies, they were too small in magnitude to constitute the “proof of extraordinary efficiencies” necessary to rebut the government’s prima facie case against a merger with “high concentration levels.” See Op. at 80.
- E. Contrast with modern analysis
 - 1. Modern standards require efficiencies to be merger-specific, verifiable, and passed on to consumers, as did the *H&R Block*. *H&R Block*’s analysis of each of these elements would have passed muster under modern standards.
 - 2. Sufficiency
 - a. Modern standards also require that the efficiencies be *sufficient*, that is, the claimed efficiencies must occur in time and with sufficient magnitude to offset the anticompetitive effects of the merger that would be likely to occur in the absence of the efficiencies.
 - b. Although not explicitly addressed in *H&R Block*, this requirement was implicit in the opinion.
 - 3. Not a result of an anticompetitive effect of the merger

- a. The Merger Guidelines also require that the claimed efficiencies do not result from an anticompetitive aspect of the mergers, such as an anticompetitive reduction in output.
- b. Opinions often ignore this element if the plaintiffs did not raise it as an objection to the efficiencies. Probably, the *H&R Block* court was aware of this requirement, but since there was no dispute on this element in the case, the court ignored it.