

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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READING GUIDANCE

Class 5 (September 8): Sanford Health/Mid Dakota Clinic (Unit 3)

Today is the second of four classes on Sanford Health's proposed acquisition of Mid Dakota Clinic, P.C. In this class, we will cover market definition, taking up both the relevant product market and the relevant geographic market. In Class 6, we will turn to anticompetitive effect, covering the *Philadelphia National Bank* (PNB) presumption, coordinated effects, and recapture unilateral effects. In Class 7, we will complete the explicit theories of anticompetitive harm and then turn to the defenses.

Market definition as an element of a Section 7 claim. Section 7 of the Clayton Act prohibits mergers and acquisitions “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”¹ By its terms, Section 7 requires the plaintiff to prove the dimensions of the “line of commerce” (*relevant product market*) and the “section of the country” (*relevant geographic market*) in which the likely anticompetitive effect of the challenged transaction is alleged to appear. These product and geographic boundaries, taken together, are called the *relevant market*. See Unit 3C slides 3-11.

Market definition is a threshold requirement in proving a Section 7 claim, reflecting both the statutory mandate and the practical reality that the competitive effects of a merger cannot be assessed in a vacuum. Determining the relevant product and geographic boundaries provides the essential analytical foundation for the entire merger antitrust inquiry, identifying the substitute products, rival firms, and potential entrants that could constrain the merged entity's ability to exercise market power. This exercise serves a dual function: it fulfills the statute's requirement to specify the “line of commerce” and “section of the country,” and it supplies the economic framework for evaluating whether the transaction “may substantially lessen competition.” An unduly narrow market may exaggerate the merged firm's potential market power, while an overly broad market may mask genuine anticompetitive effects. In practice, market definition disputes are often among the hardest-fought issues in merger enforcement, and their resolution is frequently outcome determinative.

The enforcement agencies and the courts apply related but distinct tests for product and geographic market definition. We begin with product market definition and then turn to geographic market definition later in this class. In applying these concepts to *Sanford Health*, keep in mind that the alleged product markets are not “healthcare,” “outpatient care,” or even “physician services” generally. The FTC alleged separate markets for adult primary care physician services, pediatric services, OB/GYN services, and general surgery physician services. That framing reflects both patient-side medical realities and payer-side network realities. Patients needing pediatric care do not regard an adult primary care physician as an adequate substitute;

¹ 15 U.S.C. § 18.

patients needing OB/GYN services do not regard a general surgeon as an adequate substitute; and commercial insurers assembling provider networks must offer access to the particular physician specialties their members require. Thus, even though the FTC described the services as sold to commercial insurers, the product market analysis depends on the interaction between patient substitution, physician specialty lines, and insurers' need to assemble commercially acceptable provider networks.

Product market tests. There are two complementary approaches to product market definition: (1) the *Brown Shoe* “outer boundaries” and “practical indicia” criteria, and (2) the hypothetical monopolist test. The Supreme Court developed the *Brown Shoe* test in the early 1960s,² and the 1982 DOJ Merger Guidelines introduced the hypothetical monopolist test.³ The DOJ and FTC, not surprisingly, look primarily to the hypothetical monopolist test when making prosecutorial decisions. Still, if they have to prove their case in court, they will also invoke the *Brown Shoe* criteria. In writing opinions, modern courts almost always employ both tests. See Unit 3C slides 12-14.

Under *Brown Shoe*, the “outer boundaries” of the relevant product market “are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”⁴ The idea is that products within the relevant market must exhibit high cross-elasticity of demand and interchangeability of use with other products in the market and comparatively low cross-elasticity of demand and interchangeability of use with products outside the market. Moreover,

within this broad market, well-defined *submarkets* may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.⁵

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

It is important to know these concepts and be able to use them in analyzing market definition. *Reasonable interchangeability of use* exists when consumers view two products as close substitutes, such that it would not take much in the way of a relative improvement in one product—whether in price, quality, service, or other competitive dimension—for consumers, in practice, to switch to it from their originally preferred product, or a deterioration in their preferred product causes them to switch to the alternative. *Cross-elasticity of demand* is closely related but focuses directly on price-driven substitution. Formally, the cross-elasticity of demand between product *i* and product *j* is the percentage change in the quantity demanded of product *i* divided by the percentage change in the price of product *j* (holding the price of *i* constant and

² *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

³ U.S. Dep't of Justice, Merger Guidelines § II n.6 (rev. June 14, 1982).

⁴ *Brown Shoe*, 370 U.S. at 325.

⁵ *Brown Shoe*, 370 U.S. at 325 (internal citations omitted).

evaluated at current prices and quantities), with positive values indicating substitutes and negative values indicating complements. The mathematical notation is easier to understand:

$$\varepsilon_{ij} = \frac{\text{Percentage change in quantity } i}{\text{Percentage change in price } j} = \frac{\% \Delta q_i}{\% \Delta p_j}$$

where ε_{ij} is the standard notation for the cross-elasticity of product i given a price increase in the price of product j , and Δ is the operator indicating a change in a variable (here, price or quantity).⁶ For example, suppose the price of Hertz rentals (j) increases by 10% and, holding Avis prices constant, Avis rentals (i) see a 6% increase in quantity demanded. The cross-elasticity of demand for Avis with respect to Hertz's price is $\varepsilon_{ij} = 6\%/10\% = 0.6$, indicating a relatively high cross-elasticity and significant substitutability. By contrast, if a 10% increase in the price of Timex watches leads to only a 0.1% increase in the quantity demanded of Rolex watches, the cross-elasticity is 0.01, indicating very low cross-elasticity and negligible substitutability.

Note that if products substitute one-for-one (e.g., a red car for a blue car), then the increase in demand for product i in the definition is equivalent to a decrease in demand for product j due to substitution from j to i . A high cross-elasticity of product i with respect to the price of product j then implies that product i can significantly constrain product j 's price. In other words, product i exerts *downward-pricing pressure* on product j . This relationship explains why products exhibiting high cross-elasticity of demand with the products of the merging firms are generally included in the relevant market, while those with low or negligible cross-elasticity are excluded. Although cross-elasticity can sometimes be estimated quantitatively, reliable data are often unavailable. Significantly, neither the courts nor the agencies have adopted numerical thresholds for the *Brown Shoe* framework and instead rely on qualitative, fact-driven evidence of substitution in response to changes in price, availability, or quality.

With this background, read the class notes on the *Brown Shoe* tests (Unit 3C slides 15-29).

While the *Brown Shoe* criteria remain central to litigation and continue to guide judicial market definition analysis, their inherently qualitative nature and lack of clear quantitative thresholds have posed persistent analytical and evidentiary challenges. Specifically, the Supreme Court provided no threshold for cross-elasticity or reasonable interchangeability of use, nor did it instruct lower courts how to weigh the various practical indicia against one another. This lack of concrete guidance left courts to exercise individual judgment without meaningful standards. In the absence of a meaningful test, the lower courts generally deferred to the market definitions alleged by the antitrust enforcement agencies. This deference proved problematic because when the government defines the market, it can effectively ensure that the resulting market shares will trigger the Philadelphia National Bank structural presumption of anticompetitive effect. As Justice Potter Stewart famously observed in his *Von's Grocery*⁷ dissent: "The sole consistency that I can find is that in litigation under § 7, the Government always wins."⁸ This deferential

⁶ Mathematicians and economists love to use Greek letters: ε (small epsilon) and Δ (capital delta) are among the favorites.

⁷ *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) (Stewart, J., dissenting).

⁸ *Id.* at 301.

approach ultimately resulted in considerable confusion, flawed analysis, and misguided judicial decisions.

The *hypothetical monopolist test* (HMT), originally introduced in the 1982 Merger Guidelines and now adopted in one form or another by the courts, was designed to bring economic discipline and analytical rigor to market definition. Under the HMT, a candidate product grouping constitutes a relevant market if a hypothetical monopolist controlling all products in that group could profitably impose a “small but significant and nontransitory increase in price” (SSNIP), usually taken to be 5 percent for a period of one year, over existing premerger levels. The rationale is straightforward: if even a hypothetical monopolist controlling all products in the candidate group could not profitably impose the SSNIP, then the candidate group is too narrow because products outside the group impose sufficient competitive discipline. The market definition exercise must then be expanded to include the next-best substitutes until the hypothetical monopolist could profitably impose the SSNIP.

For example, suppose the current price of a case of “CrystalPure” bottled water is \$10, and a hypothetical monopolist controlling all bottled water sales considers raising the price by 5% to \$10.50 for one year. If enough customers switch to substitutes—such as sports drinks, flavored sparkling water, or filtered tap water—so that the lost sales make the price increase unprofitable, bottled water alone would not form a relevant market under the HMT. In that case, the candidate market would need to be expanded iteratively to include the next closest substitutes to bottled water until the hypothetical monopolist could profitably impose the SSNIP.

To illustrate this with numbers, assume bottled water has a variable cost of \$6 per case and current annual sales of 1,000 cases, so profit at the current price is $$(10 - 6) \times 1,000 = \$4,000$. If the price rose to \$10.50 and sales fell to 960 cases because some customers switched to substitutes, profit would be $$(10.50 - 6) \times 960 = \$4,320$ — an increase of \$320 — so the SSNIP would be profitable and bottled water would constitute a relevant market under the HMT. But if sales fell to 880 cases, profit would drop to $$(10.50 - 6) \times 880 = \$3,960$, making the SSNIP unprofitable and requiring the candidate market to be expanded to include additional close substitutes.

One caution: the HMT usually asks whether a hypothetical monopolist could profitably impose a SSNIP over prevailing premerger prices. That approach works well when prevailing prices are reasonably competitive. But if prices already reflect the exercise of market power, then using current prices can make distant substitutes appear closer than they really are because consumers may already have been pushed toward substitutes by supracompetitive prices. This problem is often called the *Cellophane fallacy*. In merger cases, the issue is usually less severe than in monopolization cases because the relevant question is normally whether the merger will worsen competitive conditions from the premerger baseline, but the baseline price problem is still worth keeping in mind.

Important: When you encounter an HMT example in the reading guidance or the class notes, be sure you can replicate the analysis and the conclusion. This ensures you understand the underlying economic logic and can apply the test independently to new fact patterns, which you will be required to do on the graded homework assignment and the final exam.

The 2010 Guidelines modified the hypothetical monopolist test in two important ways, and the 2023 Guidelines added a third refinement:

1. Under the original HMT, only the smallest product grouping that satisfied the test (the *smallest market principle*) qualified as the relevant market. While the 2010 Guidelines still prefer this approach, they allow the enforcement agencies to adopt a larger market when necessary to reflect commercial realities, and courts have accepted this approach in appropriate cases.
2. The original HMT required a hypothetical monopolist to increase the prices of all products in the candidate market by the same percentage. The 2010 Guidelines permit selective pricing—allowing the hypothetical monopolist to raise the price of one or more products while leaving others unchanged. This *one-product SSNIP* test requires only that a monopolist could profitably raise the price of at least one product in the group for the group to qualify as a relevant market.

The 2023 Guidelines add a third refinement by extending the concept from a SSNIP to a SSNIPT—a worsening of price or other terms. In the years following the 2010 Guidelines, courts adopted both 2010 refinements, and the 2023 Guidelines retained them. Today, it is common for courts to use the HMT without requiring a single uniquely correct market and to apply one-product SSNIP tests in their analyses.⁹ We will examine these changes in some detail in the H&R Block/TaxACT case study (Unit 5).

In practice, however, the role of market definition differs sharply between prosecutorial decision-making and litigation. In deciding whether to investigate or challenge a transaction, the agencies usually do not begin with market definition as the central analytical question. Instead, they often focus first on direct evidence of likely competitive effects: whether the merging firms are close competitors, whether customers view the transaction as harmful, whether ordinary-course documents show head-to-head competition, whether diversion is significant, whether margins are high, and whether entry, expansion, or repositioning would defeat any attempted price increase. Market definition remains relevant to this analysis, but it is usually not the driver of the agency’s prosecutorial judgment.

The posture changes in court. In litigation, market definition becomes a major issue because Section 7 requires proof of a “line of commerce” and a “section of the country,” and because the *Philadelphia National Bank* presumption depends on market shares and concentration levels calculated in a properly defined relevant market. Courts, therefore, routinely apply both the *Brown Shoe* tests and the hypothetical monopolist test. It is not always clear which framework drives the ultimate decision, but judicial opinions frequently give equal or greater attention to *Brown Shoe*’s “outer boundaries” and “practical indicia” factors than to the HMT. One reason may be that the HMT, when applied quantitatively, is vulnerable to challenges over the reliability of the underlying data. In contrast, the *Brown Shoe*’s factors are inherently more qualitative and thus harder to attack directly.

Now read the class notes on the hypothetical monopolist test (Unit 3C slides 30-42) and the introductory note on the HMT (pp. 200-03). Then read *Brown Shoe* (p. 162) and *Sanford Health*

⁹ See, e.g., *FTC v. Sanford Health*, 926 F.3d 959, 963 (8th Cir. 2019); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 293 (D.D.C. 2020); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 46 (D.D.C. 2018); *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 203 (D.D.C. 2018); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 198 (D.D.C. 2017); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 20 (D.D.C. 2017); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 121 (D.D.C. 2016); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 33 (D.D.C. 2015); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 51-52 (D.D.C. 2011).

(pp. 163-64) on product market definition. Read the 2010 and 2023 Merger Guidelines excerpts (pp. 167-87). Finally, read *Meta Platforms* (pp. 188-99).

Own-elasticity of demand. Another key concept in market definition and market power analysis is *own-elasticity of demand*, sometimes simply called *price elasticity of demand*. The own-elasticity measures the percentage change in the quantity demanded of a product divided by the percentage change in its price. For example, if price increases by 5% and demand decreases by 10%, the own-elasticity is -2 ($-10\% \div 5\%$). Although own-elasticities are technically negative (reflecting the downward slope of the demand curve), economists often drop the negative sign and use the absolute value to indicate the degree of price sensitivity, so that higher absolute values indicate greater price sensitivity (greater percentage quantity changes for a given percentage price change).

Own-elasticities are closely related to cross-elasticities. Technically, in the point-elasticity relationship used in the class notes, a product's own-elasticity is related to its cross-elasticities with substitute products, weighted by their revenue market shares. The more customers can and will substitute to other products in response to a price increase, the more elastic demand for the product will be. The more (and closer) the substitutes, the greater the own-elasticity in absolute value. Conversely, as cross-elasticities with other products decrease, the product's demand becomes more inelastic (lower absolute value), giving the seller greater ability to raise prices without losing many sales.

Economists classify demand as *inelastic* (absolute value less than one), *unit elastic* (equal to one), and *elastic* (greater than one). Inelastic demand means that price changes lead to proportionally smaller changes in quantity demanded—characteristic of products like gasoline in the short run. Elastic demand means that price changes lead to proportionally larger changes in quantity demanded—characteristic of products like leisure air travel in the long run.

Estimates of own-elasticity vary widely across products and time horizons. For example, short-run own-elasticities are typically more inelastic because consumers have fewer immediate substitution options (e.g., short-run gasoline elasticity of -0.2 to -0.4), whereas long-run elasticities tend to be more elastic as consumers can adjust their behavior (e.g., long-run gasoline elasticity of about -0.7). Other examples include milk (-0.65), coffee (-0.25), soft drinks (-1.2), clothing (-0.9 to -1.1), and airline tickets (-0.1 short-run vs. -2.4 long-run). Do not confuse own-elasticity with the slope of the inverse residual demand curve; elasticity also depends on price and quantity and is unit-free.

Finally, own-elasticity connects directly to a firm's pricing power through the *Lerner condition*. For a single-product profit-maximizing firm choosing its price while taking competitors' prices as given, the percentage price-cost margin, $(p - MC)/p$, equals the reciprocal of the absolute value of the firm's own-elasticity of residual demand. Thus, a 50% price-cost margin implies an own-elasticity of 2. This provides a way to infer price sensitivity from margin data when direct demand estimation is unavailable. The margin must be based on marginal or economically meaningful incremental cost, not an accounting gross margin.

Now read the class notes on own-elasticity (Unit 3C slides 66-76).

Geographic Market Definition

A relevant geographic market is also an essential element of every Section 7 violation. As with product markets, courts and enforcement agencies use two complementary tests to

determine whether a geographic area qualifies as a relevant geographic market for purposes of merger antitrust analysis under Section 7: (1) the judicial “area of effective competition” test, reflected in *Brown Shoe* and later cases, and (2) the hypothetical monopolist test (HMT) set out in the Merger Guidelines. In practice, courts often reference both approaches and may blend elements of each in their analysis. The purpose of geographic market definition is to identify the area within which the firms in the market compete for customers and to which customers could practically turn for alternative sources of supply in response to a change in competitive conditions.

Brown Shoe provides important principles for geographic market definition. The Court observed that the criteria for determining the relevant geographic market are essentially similar to those used to test the boundaries of a relevant product market,¹⁰ and that the submarket concept applies equally to both.¹¹ The Court emphasized that a “pragmatic, factual approach,” rather than a “formal, legalistic one,” must be used and that the relevant geographic market must both “correspond to the commercial realities” of the industry and be “economically significant.”¹² The Supreme Court later summarized the relevant geographic market as “the area of effective competition . . . in which the seller operates, and to which the purchaser can practically turn for supplies.”¹³ The Court also observed that an element of “fuzziness would seem inherent in any attempt to delineate the relevant geographic market”¹⁴ and that the market need not be defined by “metes and bounds as a surveyor would lay off a plot of ground.”¹⁵ Even so, to sustain a relevant geographic market, there must be sufficient evidence—qualitative and quantitative—to conclude that the market boundaries adequately capture the material competitive forces.

¹⁰ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962) (citing S. Rep. No. 1775, 81st Cong., 2d Sess 5-6 (1950)); *United States v. E. I. Du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957).

¹¹ See *Brown Shoe*, 370 U.S. at 336; see also *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 501 (6th Cir. 1983) (Sherman Act).

¹² *Brown Shoe*, 370 U.S. at 336-37.

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

¹⁴ *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 360 n.37 (1963), see *United States v. Connecticut Nat’l Bank*, 418 U.S. 656, 669 (1974) (geographic markets “need not—indeed cannot—be defined with scientific precision”).

¹⁵ *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966).

While the *Brown Shoe* criteria remain central in litigation over geographic market definition, they share the same limitations as in the product market context—most notably, their qualitative nature and lack of quantitative thresholds. These shortcomings have led courts and agencies to supplement *Brown Shoe* with the hypothetical monopolist test (HMT). The HMT for geographic markets is analytically identical to the product market version, except that the candidate grouping consists of locations rather than products. In the geographic setting, the HMT asks whether a hypothetical monopolist of sales of the relevant product in a proposed geographic area could profitably impose a small but significant nontransitory increase in price (SSNIP) on at least one product. The candidate geographic market may be defined by supplier locations or customer locations. The key question is whether enough business would shift outside the candidate market—through customers traveling elsewhere or outside suppliers serving customers in the area—to make the price increase unprofitable. In some markets, customers travel to the seller (as in most consumer retail markets), while in others the seller travels to the customer (as with plumbers, food distribution services, or industrial chemical deliveries). The structure of the HMT is the same in both cases, but the evidence used to evaluate substitution patterns will differ, as illustrated in the examples below. *Sanford Health* is mostly a customer-travels-to-seller example, because patients ordinarily travel to physicians for care. Still, the payer-side network context means the court must also consider whether insurers could practically substitute more distant physicians into commercially acceptable local networks.

The distinction between the two geographic HMT paradigms is important. When customers travel to suppliers, the question is how far customers would travel to avoid an adverse change in price or other terms at suppliers in the candidate area. When suppliers travel or ship to customers, the question is whether suppliers outside the candidate area could practically serve those customers and thereby defeat the attempted worsening of terms.

The 2010 modifications to the HMT—permitting a one-product SSNIP test and allowing markets larger than the smallest one that satisfies the test when needed to reflect commercial realities—apply equally to geographic markets. In litigation and agency practice, this means a candidate geographic market can be found relevant if a hypothetical monopolist within it could profitably raise the price of just one product, even if other products' prices remain unchanged, and that courts may adopt a larger geographic area than the strict smallest-market principle would dictate when doing so better reflects the competitive dynamics in the industry. The 2023 Guidelines further extend the test from a SSNIP to a SSNIPT, allowing the hypothetical monopolist to worsen price or other terms.

It is also important to note that courts and agencies often define relevant geographic markets using political or other commonly understood boundaries—such as cities, counties, metropolitan statistical areas, or ZIP code clusters—when those boundaries serve as reasonable proxies for the markets identified through the *Brown Shoe* and HMT analyses. The key is that the boundary must align with the commercial realities of competition: under *Brown Shoe*, buyers and sellers must primarily interact within the area, and under the HMT, a hypothetical monopolist of sales in the candidate geographic market—whether defined by supplier or customer locations—must be able to impose a SSNIP profitably without losing too much business outside the candidate market. When evidence such as customer travel patterns, shipping or service radii, or insurer network configurations shows that competitive forces are largely contained within the boundary, courts will accept it as the relevant geographic market. In these cases, the political or familiar boundary is not a substitute for economic analysis but rather the outcome of it—serving as a

shorthand for the area of effective competition established through *Brown Shoe*'s commercial realities framework and confirmed by the HMT.

Geographic markets may be national, regional, or local. Transportation costs, network competition, indirect downstream substitution, and other commercial realities can be important in determining the appropriate geographic scope; courts will also reject geographic markets that are implausibly narrow.

In applying these principles to *Sanford Health*, keep in mind that the relevant geographic market analysis has both patient-side and payer-side dimensions. Patients generally prefer convenient access to physicians, especially for primary care, pediatric, OB/GYN, and routine general surgery consultations. At the same time, commercial insurers must assemble provider networks that are commercially acceptable to employers and covered employees in the area. A health plan that lacks adequate access to physicians in the Bismarck-Mandan area may not be a viable product for local employers, even if physicians are available in more distant North Dakota cities. Thus, the geographic market inquiry asks not only where some patients could theoretically travel, but also whether providers outside the area would meaningfully constrain the merged firm's bargaining leverage with commercial insurers serving Bismarck-Mandan customers.

With this as background, read the class notes on geographic market definition (Unit 3C slides 43-65). Then read the *Sanford Health* excerpt on geographic market definition in the reading materials (pp. 165-66).

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The Unit 3C class notes contain more material than we will be able to discuss in class. You are responsible for the entire Unit 3C class notes, including the material on cross-elasticity, the refinements to the hypothetical monopolist test, and own-elasticity of demand, even though we will not display or discuss every slide in class. The classroom discussion will concentrate on the concepts most important to applying market definition in the case studies.

If you have any questions or comments, please email me. I look forward to seeing you in class.

Dale Collins