

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
Fall 2026

Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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CLASS 15 WRITTEN ASSIGNMENT—INSTRUCTOR’S ANSWER

Instructions

Submit by email by 3:30 pm on Thursday, October 15¹
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 15
Assignment: Calls for a memorandum of law.

INSTRUCTIONS

This is an untimed, ungraded homework assignment. Submit it by email to me before the deadline, as you would do for any other homework assignment.

You may consult any written source, including, without limitation, the class notes, cases, outlines (commercial or otherwise), books, treatises, the Internet, Westlaw, and Lexis-Nexis.² If this were an exam question, you would have to do your own work and not talk about the problem with any student or other person until after the return date. But since this is only a practice exam question, feel free to discuss the problem with others in the class. The idea here is to learn how to write an answer to this type of hypothetical, so do whatever works best for you.

Present your analysis in a well-organized, linear, and concise manner. Think about your answer 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. Do not, for example, tell me things you know are not relevant to the answer; it will just cost you time and obscure the analysis. In a graded assignment, excessive length, verbosity, or lack of organization can adversely affect your grade.

The “facts” in the hypothetical should be complete in that they present what is known at the time the analysis is requested. As in life, some information you would like to have may simply not be available. Analyze the facts as they are presented in the question. Do *not* make up additional facts.

It should go without saying that, outside of this assignment, you should not believe anything in the statement of any hypothetical fact situation. I have taken considerable liberties in fashioning the problems and have ignored reality whenever it was convenient.

¹ I will distribute the instructor’s answer/feedback memorandum after 5:00 pm on Wednesday. I appreciate that this is before the return date for the assignment, but I would like you to have an opportunity to look at the instructor’s answer before class.

² For the graded homework assignment and the final exam, you may not use any AI or LLM tools, including AI features embedded in software. I have not placed this restriction on this assignment, but use such tools with caution. In my testing, these systems frequently hallucinate and misanalyze legal issues.

This homework assignment is final. Do not expect any clarifications or corrections. If you believe there is an error or inconsistency in the problem, please state your assumptions about the issue in your discussion of that issue. You may email me if you wish, but I will either not respond or respond to the class as a whole. *For this reason, and more importantly, because we will continue working on cases that may further illuminate concepts relevant to the homework assignment, I suggest you wait until shortly before the due time to submit your answer.*

You should assume that all demand, inverse demand, and residual demand curves are linear, that marginal costs are constant, and that all firms maximize their profits given their residual demand curves and marginal costs. Treat each demand finding in the hypothetical as a separate empirical result; you need not reconcile them with one another.

Ice Cream Merger

You are an attorney at the FTC, and your group is reviewing Clare's pending acquisition of Benny's, two manufacturers of ice cream. The acquisition is for all cash, and Clare's is paying a 40% premium for Benny's stock. Melissa Brown, your section chief, has asked you to prepare a memorandum recommending whether the FTC should sue in federal district court to permanently enjoin the transaction. Consistent with the Commission's current approach to litigated merger challenges, the FTC would try the merits of its Section 7 claim in the district court rather than in an administrative proceeding. In particular, Ms. Brown is seeking your analysis of how strong the FTC's prima facie case of a Section 7 violation is likely to be and whether the FTC can defeat the defenses the merging parties advanced during the investigation. Clare's and Benny's have not said whether they would agree to defer closing until the court decides the merits, but they have told the staff that they will terminate their transaction if the court enters a preliminary or permanent injunction. Ms. Brown therefore also would like you to address whether the FTC could obtain a permanent injunction and, if the parties will not agree to defer closing until the court decides the merits, a preliminary injunction under Section 13(b) of the FTC Act.

Ms. Brown instructed you to assume that the acquisition of stock or assets and interstate commerce requirements are satisfied and outside the scope of your analysis. Your Section 7 analysis should address only the relevant product market, the relevant geographic market, and the transaction's reasonably probable competitive effects.

The FTC's investigation has revealed the following facts.

The industry recognizes two types of ice cream: premium ice cream and regular ice cream. Premium ice cream has more butterfat content, less overrun (that is, less air, which makes it more creamy), and more calories than regular ice cream. Premium and regular ice cream are made on the same machines. Switching is gallon-for-gallon, can be accomplished within hours, and involves negligible switching costs. The marginal costs of producing premium and regular ice cream, however, differ because of the difference in the cost of ingredients. The marginal cost of producing premium ice cream is \$2.80 per gallon, while the cost of producing regular ice cream is \$2.40 per gallon. Marginal costs, which are constant, have not changed in recent years and are not expected to change in the future.

Notwithstanding this ease of switching on the production equipment, Clare's, which entered into the manufacture of premium ice cream three years ago, is the only regular ice cream manufacturer that has begun new production of premium ice cream over the last ten years. A second firm, Dino's, entered into the manufacture of premium ice cream four years ago, but Dino's did not produce regular ice cream and entered the market de novo.

The staff found that expenditures needed to establish a premium brand's reputation are sunk. No other firm has concrete plans to enter premium ice cream, and a new premium brand would require at least three years to obtain material consumer acceptance. Dino's has available production capacity, but it has not provided a specific expansion schedule or projected the sales it would gain beyond the growth it would achieve without the merger.

Ice cream products are differentiated by content and brand. Within each segment, brands are differentiated from one another. While prices can and have varied among brands within both premium and regular ice cream, actual prices charged by manufacturers during the investigation have converged—with no sign of collusion—throughout the country to \$4.00 per gallon for premium ice cream and \$3.00 per gallon for regular ice cream.³

Each named manufacturer sells its brand-name products throughout the United States at the stated nationwide price. The ten store brands have equal sales, with each accounting for one-tenth of the aggregate store-brand gallons and revenues shown in the table. The following chart gives sales for ice cream manufacturers:

Ice Cream											
Manufacturer	Premium Ice Cream				Regular Ice Cream				All Ice Cream		
	Gallons	Revenues	Profits	Revenue Share	Gallons	Revenues	Profits	Revenue Share	Total Revenues	Revenue Share	Total Profits
Clare's	43.8	\$175	\$53	5.0%	1,608.3	\$4,825	\$965	31.7%	\$5,000	26.7%	\$1,018
Breyers	8.8	\$35	\$11	1.0%	1,588.3	\$4,765	\$953	31.3%	\$4,800	25.6%	\$964
Al's	393.8	\$1,575	\$473	45.0%	808.3	\$2,425	\$485	15.9%	\$4,000	21.4%	\$958
Benny's	350.0	\$1,400	\$420	40.0%	0.0	\$0	\$0	0.0%	\$1,400	7.5%	\$420
Turkey Hill	0.0	\$0	\$0	0.0%	300.0	\$900	\$180	5.9%	\$900	4.8%	\$180
Blue Bell	8.8	\$35	\$11	1.0%	205.0	\$615	\$123	4.0%	\$650	3.5%	\$134
Izzy's	8.8	\$35	\$11	1.0%	138.3	\$415	\$83	2.7%	\$450	2.4%	\$94
Wells	8.8	\$35	\$11	1.0%	88.3	\$265	\$53	1.7%	\$300	1.6%	\$64
Dino's	43.8	\$175	\$53	5.0%	0.0	\$0	\$0	0.0%	\$175	0.9%	\$53
Eddy's	8.8	\$35	\$11	1.0%	0.0	\$0	\$0	0.0%	\$35	0.2%	\$11
Store brands (10)	0.0	\$0	\$0	0.0%	338.3	\$1,015	\$203	6.7%	\$1,015	5.4%	\$203
	875.0	\$3,500	\$1,050	100.0%	5,075.0	\$15,225	\$3,045	100.0%	\$18,725	100.0%	\$4,095

³ I appreciate that this is a very counterfactual assumption. I could make the problem more realistic by introducing different prices for different products, but then you would have to deal with some arithmetical complications in applying the hypothetical monopolist test that I am sure you would rather avoid.

Note: Gallons, revenues, contribution margins, and cost savings are in millions. The amounts labeled 'Profits' are contribution margins equal to revenues minus the stated marginal costs; they do not deduct fixed costs.

There are high cross-elasticities of demand between brands within each ice cream segment and low cross-elasticities between individual products across these two segments. So, for example, if one premium ice cream manufacturer were to increase its price by 5% while the other premium ice cream manufacturers held their prices constant, the higher-priced manufacturer would experience a total unit sales loss of one-sixth (about 16.7%). All of those lost sales would shift to other premium brands, with none shifting to regular ice cream or non-ice-cream products. The same pattern holds for regular ice cream brands: if one regular brand were to increase its price by 5% while the others held their prices constant, it would lose 25% of its unit sales, all to other regular brands. The investigation did not find empirical estimates of diversion between particular pairs of premium brands, including between Clare's and Benny's.

For a 5% uniform increase in the price across all brands of premium ice cream, however, each premium brand would lose 8% of its unit sales to regular ice cream and none to other brands of premium ice cream or non-ice cream products. For a 5% uniform increase in the price of all brands of regular ice cream, each regular brand would lose 7.5% of its unit sales to premium ice cream and none to other brands of regular ice cream or non-ice cream products. When the price of all brands of ice cream (premium and regular) is increased by 5%, there would be no switching between premium and regular brands of ice cream, but each brand of premium ice cream would lose 3% of its unit sales to non-ice cream alternatives, while each brand of regular ice cream would lose 5% of its unit sales to non-ice cream alternatives.

Clare's (the buyer) is the largest manufacturer of regular ice cream and, tied with Dino's, the third largest manufacturer of premium ice cream. Benny's (the target) is the second-largest manufacturer of premium ice cream but manufactures no regular ice cream. In its meetings with the staff, Clare's discussed its deal rationale and made five arguments in defense of the transaction:

Clare's deal rationale:

1. Clare's is buying Benny's to become a more significant player in premium ice cream. Clare's began manufacturing and selling premium ice cream only three years ago. While Clare's has invested almost all of its premium ice cream profits in advertising its premium brands, it has only achieved a market share of 5%. This rate of growth is too slow for Clare's management. Clare's believes its inability to gain market share more quickly is primarily due to its reputation as a regular ice cream manufacturer, where Clare's is known as a large but undistinguished producer with little of the "flair" associated with premium ice cream brands. Following the merger, Clare's plans to drop Clare's premium brand name and consolidate all its premium operations into Benny's brand, one of the best brands in the premium ice cream business.
2. Clare's plans to invest its savings from the acquisition in the premium ice cream business, aggressively take on Al's, the premium ice cream market leader, and grow the merged firm's volume and market share.
3. Since entering the premium ice cream space, Clare's has introduced many new premium ice cream flavors, some of which have become quite popular. Before Clare's entry, the other premium ice cream manufacturers only rarely introduced a

new flavor. After Clare's entry, Al's and Benny's introduced new flavors to match Clare's flavors that became popular. The investigation identified several such responses but did not identify overlapping future flavor-development projects among Clare's, Benny's, and Al's. Clare's says that it will bring its spirit of innovation to the management of Benny's. The investigation, however, did not produce a reliable quantitative estimate of the merger's likely effect on the number, timing, quality, or commercial success of new flavors.

4. The merged firm can save \$60 million in annually recurring overhead costs by consolidating management, back office, and sales operations and eliminating almost all of Benny's corresponding operations. The staff does not dispute the amount or that these savings could not be achieved through a practical alternative with less anticompetitive effects than the proposed acquisition. This consolidation will not change the per-gallon marginal cost of either premium or regular ice cream.
5. The merged firm can save another \$30 million in operating costs by consolidating production. Clare's smallest plant makes 200 million gallons of regular ice cream and currently makes no premium ice cream. The merged firm can close this plant and move the production into Benny's single plant, which is new and currently has 350 million gallons of excess capacity. The staff does not dispute the amount or that these savings could not be achieved through a practical alternative with less anticompetitive effects than the proposed acquisition. This consolidation will not change the per-gallon marginal cost of either premium or regular ice cream. Clare's does not have sufficient excess capacity in its remaining plants to obtain these production savings without the acquisition.

Clare's antitrust arguments:

1. The relevant market in which to analyze the transaction is the manufacture and sale of all ice cream in the United States.⁴ The characteristics, interchangeability of use, and supply-side substitutability are sufficient under judicial precedent to make all ice cream the relevant market. This market also satisfies the hypothetical monopolist test under the Merger Guidelines. Within this relevant market, the merger is too small to create a competitive problem.
2. Even if the market is technically defined as premium ice cream, the HHIs based on actual sales are not all that high. The shares are even lower when, under the Merger Guidelines, regular ice cream manufacturers are considered participants in the market even if they do not currently make premium ice cream. When the participation of these manufacturers is properly attributed with market shares of premium ice cream due to the ease of supply-side switching, the transaction does not trigger the *PNB* presumption under either judicial precedent or the Merger Guidelines.
3. Dino's, which entered four years ago and today has the same share as Clare's in premium ice cream, has also been trying to grow in premium ice cream (primarily by investing in advertising). The staff has confirmed this. Moreover, in an interview with the staff, Dino's said it would continue to aggressively invest in its brand name reputation whether or not Clare's and Benny's merge. Clare's submits that Dino's

⁴ The staff agrees that the relevant geographic market is the United States.

continuing efforts to grow will ensure that the market remains competitive postmerger.

4. In addition to its innovation in new flavors, Clare's has successfully built its premium ice cream market share by holding the line on price increases when other manufacturers were attempting to institute price increases. Clare's says that it will bring the same philosophy of holding the line on price increases and innovating to the management of the merged firm. The staff confirmed that Al's has sought to lead a price increase for premium ice cream on many occasions, including before Clare's entry. All of the other premium ice cream manufacturers followed Al's lead. When Clare's entered, however, Clare's resisted following some of Al's price increases. Al's continued to raise prices periodically, but at a much lower magnitude than before Clare's entered into the premium ice cream business, and all of the other premium ice cream manufacturers except Clare's followed all of Al's price increases. Clare's resistance has kept the price of premium ice cream lower than it would have been had Clare's followed all of Al's increases. It is also undisputed that Clare's is a leader in creating new flavors of premium ice cream and that Al's and Benny's both responded to Clare's successful innovations with matching innovations of their own. Nationwide manufacturer price changes are publicly announced and readily observable to rivals.
5. The merger will produce substantial efficiencies that will offset any possible anticompetitive effect of the transaction.