

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
Fall 2024

Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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CLASS 20 WRITTEN ASSIGNMENT

Instructions

Submit by email by 3:30 pm on Tuesday, November 5—You have one week for this assignment
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Classes 19-20

Assignment: Calls for an outline

Submit an outline of the elements of prosecuting and defending a horizontal merger in litigation. For each element, include any legal or economic tests used to determine whether the element is satisfied. If there are various implications of the test—as, for example, there are for the hypothetical monopolist test—include all of the variations. Include as much or as little detail as you like, but be sure to at least name the tests.

To help you get started, here is my basic outline. You need to fill in the next level(s) as appropriate.

0. Governing statutes, premerger reporting, and case law
 - a. Clayton Act § 7
 - b. HSR premerger reportability
 - c. Standards for preliminary injunction relief
 - i. Modified *Winter* standard (DOJ under Clayton Act § 15)
 - ii. FTC Act § 13(b) (FTC)
 - d. Standard for permanent injunction relief
 - e. *Baker-Hughes* three-step burden-shifting
1. Proof of the prima facie case (gross upward pricing pressure)
 - a. Market definition
 - i. Relevant product market
 - ii. Relevant geographic market
 - b. Market participants, market shares, and market concentration
 - c. Application of the *PNB* presumption
 - d. Additional evidence of anticompetitive effect to strengthen the prima facie case
 - a. Unilateral effects
 - b. Coordinated effects
 - c. Elimination of a maverick
 - d. Other theories (see the 2023 Merger Guidelines)
2. Defendants' rebuttal (gross downward pricing pressure)
 - a. Entry/expansion/repositioning
 - b. Efficiencies

- c. Countervailing buyer power
- d. Failing company/division
- e. Other defenses (e.g., investment exception)
- 3. Conclusion on legality (balancing)
- 4. Weighing of the equities (if appropriate)
- 6. Antitrust outcomes
 - a. Types of antitrust outcomes
 - b. Consent decrees
 - i. Standards
 - ii. DOJ practice
 - iii. FTC practice
 - iv. State AG practice
 - c. Fix-it-first
 - d. “Litigate the fix”
 - e. Voluntary termination of the transaction

Any exam question involving a horizontal merger will call into play many of these topics, which you might consider when preparing your boilerplate “cheat” sheet. There will not be an assignment for potential competition, vertical, or conglomerate mergers. You are on your own to create those outlines.

There will not be an instructor’s answer for this assignment.

If you have any questions, send me an email. See you in class.