Cumulative Class Slides (2026)

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Merger Antitrust Law
Georgetown University Law Center

Unit 1: TransDigm/Takata

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TRANSDIGM GROUP INC.

SCHROTH

The Parties

Who was the buyer?

- TransDigm Group Incorporated
  - Leading supplier of highly engineered airplane components
  - Delaware corporation
  - Headquarters: Cleveland, OH
  - Revenues (2016): $3.1 billion

Who was the buyer?

- TransDigm's AmSafe subsidiary
  - World's dominant supplier of restraint systems (seatbelts) used on commercial airplanes

  - Global revenues (2016): $198 million
  - Headquarters: Phoenix, AZ

Who was the seller?

- Takata Corporation
  - Global manufacturer of automotive safety systems and products for automakers worldwide
    - Also diversified into aviation systems
  - Headquartered in Japan
  - Production facilities on four continents

  - Manufacturer of the airbags subject to the massive recalls
    - U.S. recall of more than 42 million cars (Nov. 2014)
  - Bankruptcy
    - June 2017: Filed for bankruptcy protection in Japan
    - April 2018: Takata was acquired by Key Safety System

TAKATA

What was the seller going to sell?

- The SCHROTH passenger restraint systems business
  - Designs and manufactures advanced safety systems for aviation, racing, and military ground vehicles throughout the world
  - History
    - Founded in 1946
    - Built the world's first seat-belt in 1954
    - Entered the aviation business in 1991
    - Acquired by Takata in 2012
  - Facilities in three locations
    - Arnsberg, Germany
    - Pompano Beach, Florida
    - Orlando, Florida
  - Operations
    - Employees: 260
    - Revenues (2016): $37 million
    - Profits: Don't know, but probably between $5 - $10 million annually

SCHROTH®

Safety Through Technology

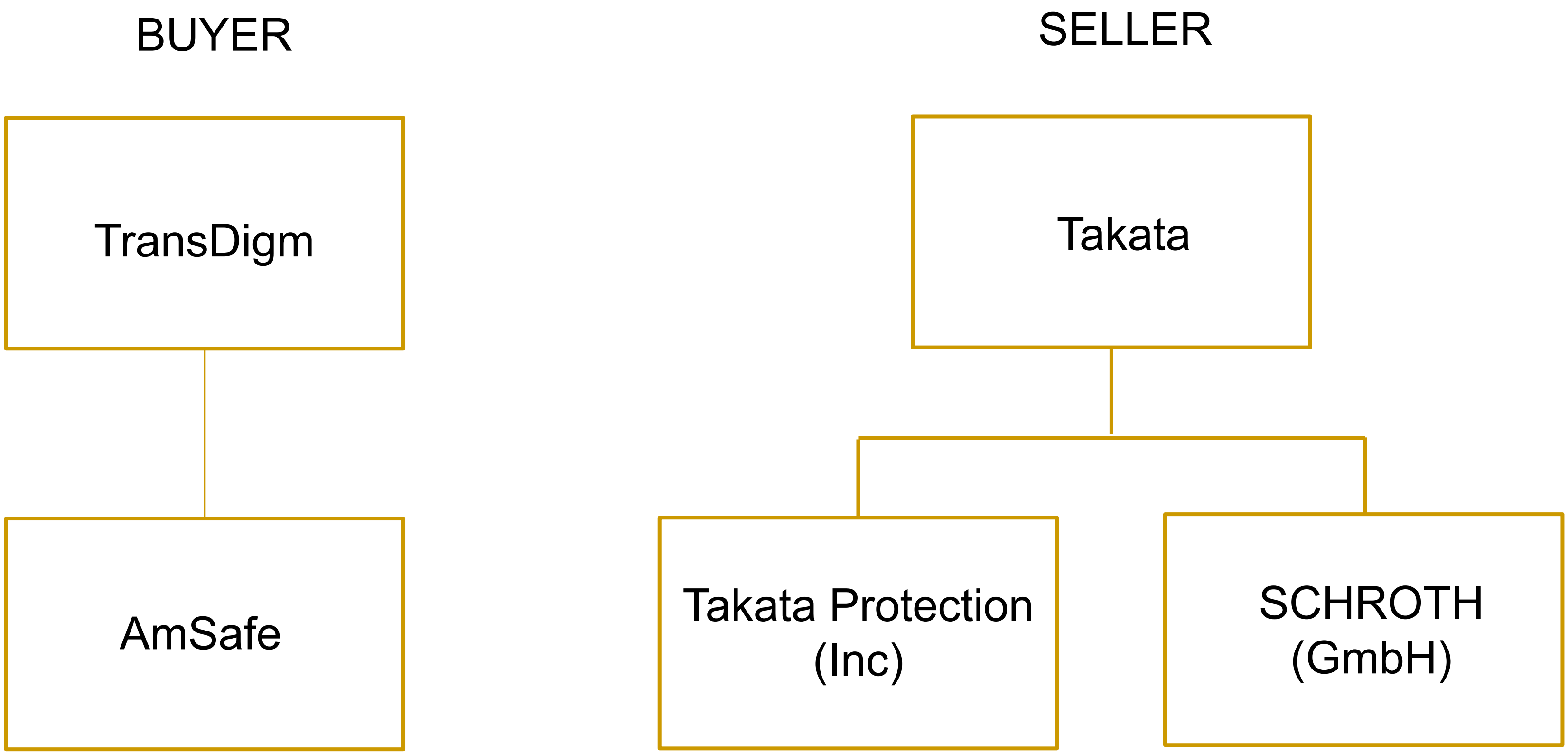
The Transaction

What was the transaction?

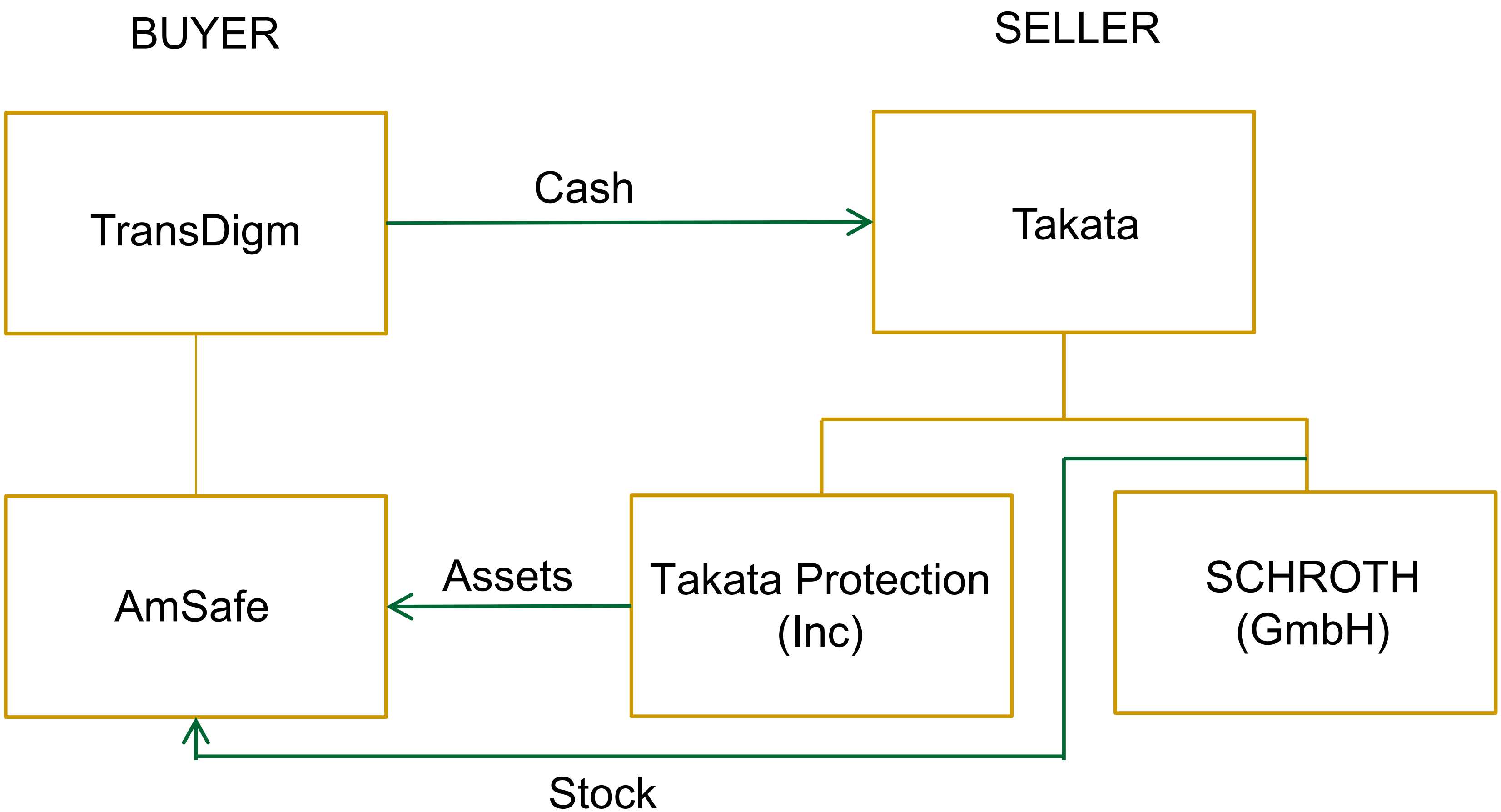
- TransDigm Group to acquire—
  1. Stock of SCHROTH Safety Products GmbH, *and*
  2. Assets of Takata Protection Systems, Inc.

  from Takata Corporation
- Purchase price: $90 million
- Transaction closed: February 22, 2017
  - Five years after being acquired by Takata

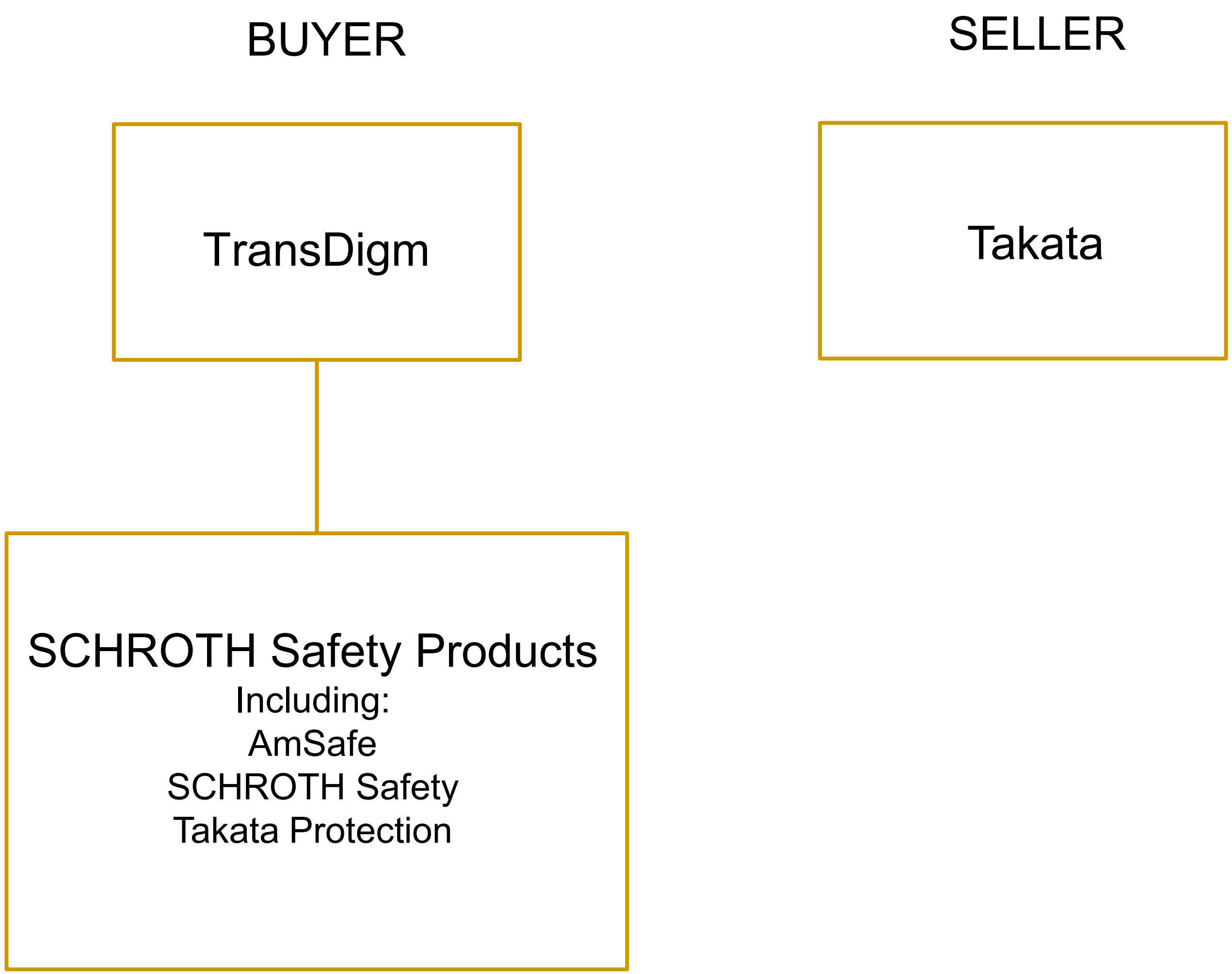
Summary of the deal structure: Before



Summary of the deal structure: Deal

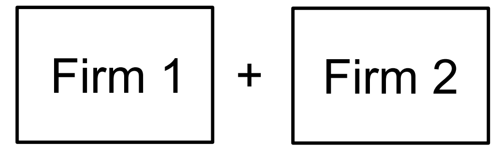


Summary of the deal structure: After

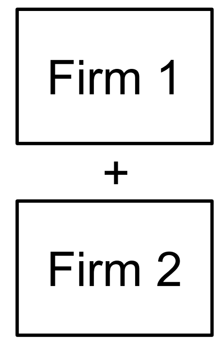


Is this a horizontal transaction?

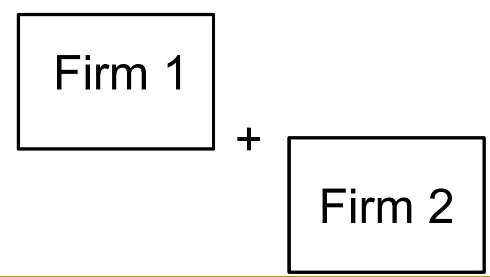
- Yes
- Horizontal transactions:
  - Combine two competitors
  - Sell *substitute* products



- Vertical transactions:
  - Combine two firms at different levels in the chain of manufacture and distribution
  - May be extended to two firms that sell *complementary* products



- Conglomerate transactions
  - Mergers that are neither horizontal nor vertical



The Business Rationale

Why did the parties do the transaction?

- TO MAKE MONEY

Parties do not do deals out of the goodness of their heart

Firms act with the goal of maximizing profit

To make money, the buyer must value the target at more than the target's going concern value

To make money, the seller must value the purchase price at more than the target's going concern value

- Some definitions
  - *Synergies* (a business term)
    - Benefits to the company from the transaction that lower the combined firms' costs or increase its revenues
  - *Efficiencies*
    - The term used in antitrust analysis for synergies that benefit consumers

How can buyers profit from a horizontal deal?

- Cost-saving efficiencies
  - Eliminate duplicative facilities
  - Consolidate corporate functions
  - Rationalize workforce
  - Run the business more efficiently
- Customer value-enhancing efficiencies
    - “Shift the demand curve to the right”
    - Improve the *customer value proposition*
  - Make existing products better or cheaper
  - Create new or improved products better, cheaper, or faster
  - Enhance customer service or support quality

These synergies are procompetitive *because they tend to improve consumer welfare*

How can buyers profit from a horizontal deal?

- Exploit customers
  - Increase prices by reducing competition on price, quality, or service
  - Reduce costs by degrading product quality, service, or other aspects of customer value
- Harm competitors (primarily vertical deals)
  - Gain the incentive and ability to withhold essential products or services from competitors, thereby weakening or excluding rivals and enabling higher prices

These synergies are anticompetitive *because they tend to harm consumer welfare*

Why did Takata buy SCHROTH in 2012?

- TO MAKE MONEY
- How?
  - Conglomerate transaction ("product extension" merger)
    - Saw AmSafe as essentially a monopolist
    - Only SCHROTH and one other company—both small—were in the market for restraint systems
    - Probably making significant profit margins
  - Takata probably thought it could capture more share and make more profits with SCHROTH than had SCHROTH's current owner
  - BUT Takata's strategy required some initial investment in—
    - Aggressive pricing
    - Innovation

  to gain reputation and market share

Why did TransDigm want to buy SCHROTH?

- TO MAKE MONEY
- How?
  1. Could eliminate competition from an aggressive “new” competitor
  2. Could reduce innovation competition and R&D expenditures
  3. Perhaps achieve cost savings

Why did Takata want to sell SCHROTH?

- TO MAKE MONEY
- How?
  - Purchase price more valuable than keeping the business
  - Why might that be the case?
    - SCHROTH needed to compete aggressively to attract customers from TransDigm:
      - Cost money to operate business and conduct R&D
      - Had to price aggressively
      - Probably not making much in profits
    - Had been at it for five years (Compl. ¶ 3)
    - May also have been an effort to obtain cash to stave off bankruptcy in light of the airbag litigations
      - Sale closed in February 2017, three months before Takata's bankruptcy filing

The Law

Statutes

- What federal antitrust statutes could apply to the TransDigm/SCHROTH transaction?
  - Clayton Act § 7
  - Sherman Act § 1
  - Sherman Act § 2
  - FTC Act § 5

Clayton Act § 7

- Provides the U.S. antitrust standard for mergers

> **No person** engaged in commerce or in any activity affecting commerce **shall acquire**, directly or indirectly, the whole or any part of the **stock** or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the **assets** of another person engaged also in commerce or in any activity affecting commerce, **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]

- *Simple summary*: Prohibits transactions that—
  - "may substantially lessen competition or tend to create a monopoly"
  - "in any line of commerce" (product market)
  - "in any part of the country" (geographic market)

Called the *anticompetitive effects test*

Called the *relevant market*

[1] 15 U.S.C. § 18 (remainder of section omitted)

Section 7 is the binding constraint

- The Sherman Act and FTC Act, as applied to mergers, are either coextensive or less restrictive than Section 7 of the Clayton Act

*Section 7 provides the antitrust test for all mergers**

* There is arguably an exception for acquisitions of "nascent" competitors (where Section 2 *might* be more restrictive—we will be looking for a test case)

- Consequently:
  - Invocation of the Sherman Act or the FTC Act is usually superfluous
  - Plaintiffs—including the DOJ and FTC—typically allege only a Section 7 violation in connection with the transaction
    - BUT the FTC alleges that the *signing* of the merger agreement violates Section 5
- State antitrust law
  - Not preempted by federal law
  - But no state has enacted a statute stricter than Section 7

Section 7 and the Consumer Welfare Standard

Some history

- Until recently, modern antitrust law has focused on anticompetitive effects in downstream markets
  - *Downstream markets* are markets in which the firms of interest sell their products or services
  - *Upstream markets* are markets in which the firms of interest buy the inputs to manufacture their products or create their services

In TransDigm, only competitive effects in downstream markets were in issue

Downstream anticompetitive effects

- How do the DOJ/FTC decide whether a merger is anticompetitive in a downstream market?
  - *Rule*: Modern antitrust law looks to the *consumer welfare standard* to determine whether a merger is likely to substantially lessen competition
  - *Rule*: A merger will have a Section 7 anticompetitive effect if, when compared to the "but for" world without the merger, the world with the merger is likely to harm customers in the market through—
    - Increased prices
    - Reduced market output
    - Reduced product or service quality
    - Reduced rate of technological innovation or product improvement
    - [Maybe] reduced product variety[1]

These are called *anticompetitive effects*

A firm that has the power to produce or strengthen an anticompetitive effect is said to have *market power*

[1] Reduced product variety may or may not have an anticompetitive effect. It can lower costs and benefit consumers if the savings result in lower prices or better products. But it may harm consumers if it limits meaningful choices without offsetting gains. The impact depends on whether consumers are better or worse off after considering both.

Downstream anticompetitive effects

- The anticompetitive effects analysis is *forward looking*
  - Compares the postmerger outcomes with and without the deal
    - Does NOT compare premerger outcomes with postmerger outcomes
    - Requires the investigating agency and the courts to do a *predictive analysis*
      - In the most common situation where the merger has not yet been consummated, the agencies and the courts will have to predict future market outcomes in BOTH the world with the merger and the "but for" world without the merger
  - *Example*: Suppose a merger occurs in a market where prices are decreasing over time
    - The merger is anticompetitive if reduces how fast prices will decrease in the future with the merger compared to what would have happened in the "but for" world without the merger
    - The fact the postmerger prices will be lower than premerger prices is irrelevant to the Section 7 anticompetitive effects analysis
  - Can view potential competitors today as future competitors tomorrow

Downstream anticompetitive effects

- Some observations
  - Economic models to predict product quality or the rate and direction of technological innovation—
    - Have found little traction in the economics profession, and
    - Are not credited with any material probative value by the agencies or the courts

      The result is that merger antitrust analysis focuses primarily on the merger's effects on prices and output

    - It is not, as some critics maintain, that the consumer welfare standard focuses narrowly on price
      - The consumer welfare standard recognizes all dimensions on which consumers can be harmed
      - So evidence of anticompetitive harm on nonprice dimensions must come from admissions in the merging parties' documents or statements by executives—evidence that rarely exists (especially in well-counselled companies)

      The upshot is that the agencies rarely, if ever, have challenged a merger primarily on nonprice grounds

Downstream anticompetitive effects

- Four important rules
  1. Absent compelling evidence of significant customer harm on other dimensions, only ***price increases*** count
  2. The merger is anticompetitive if it is likely to result in a price increase or other competitive harm to ***any identifiable customer group***
  3. The agencies believe that ***no customer group is too small*** to deserve antitrust protection
  4. *Corollary*: ***No deal is too small*** to be challenged

The DOJ Investigation

Timing

- Did the DOJ investigation start before or after consummation?
  - After
    - Transaction closed Feb. 22, 2017
    - Complaint filed ten months later on December 21, 2017
- Important distinction
  - Mergers challenged after closing (postconsummation mergers)
  - Merger challenged before closing (preconsummation mergers)

Why is this distinction important?

Timing

- Why didn't the DOJ investigate and challenge the transaction before closing?
  - Probably did not know about it, *or*
  - Was aware of the transaction but not aware of its likely effect on competition
- Didn't the HSR Act filings alert the DOJ to the transaction before closing?
  - No. Apparently not reportable under the Hart-Scott-Rodino Act[1]

[1] Clayton Act § 7A, 15 U.S.C. § 18a.

Hart-Scott-Rodino Act

- Mergers and acquisitions that—
  1. Meet certain size thresholds *and*
  2. Are not exempt

  Must—
  1. File a *premerger notification report* with the DOJ and FTC, *and*
  2. Observe a *statutorily prescribed waiting period* before closing the transaction

  This permits the agencies to investigate and challenge the deal before closing

  - Much more effective and efficient to block or fix an anticompetitive deal before closing than to try to remediate it after closing
- Not jurisdictional
  - Not a prerequisite to a Section 7 investigation or challenge

We will cover the HSR Act in detail in Class 3

DOJ investigation

- How did the DOJ find out about this transaction?
  - Someone probably called the agencies and complained
  - Maybe Boeing complained
    - Largest U.S. passenger airline manufacturer
    - Probably the biggest beneficiary of SCHROTH's competition with AmSafe

    But why would Boeing wait until after the acquisition to complain?

  - Maybe it was a Tier 1 seat manufacturer supplying Boeing (e.g., Safran, RECARO, Zodiac Aerospace, and Adient Aerospace)

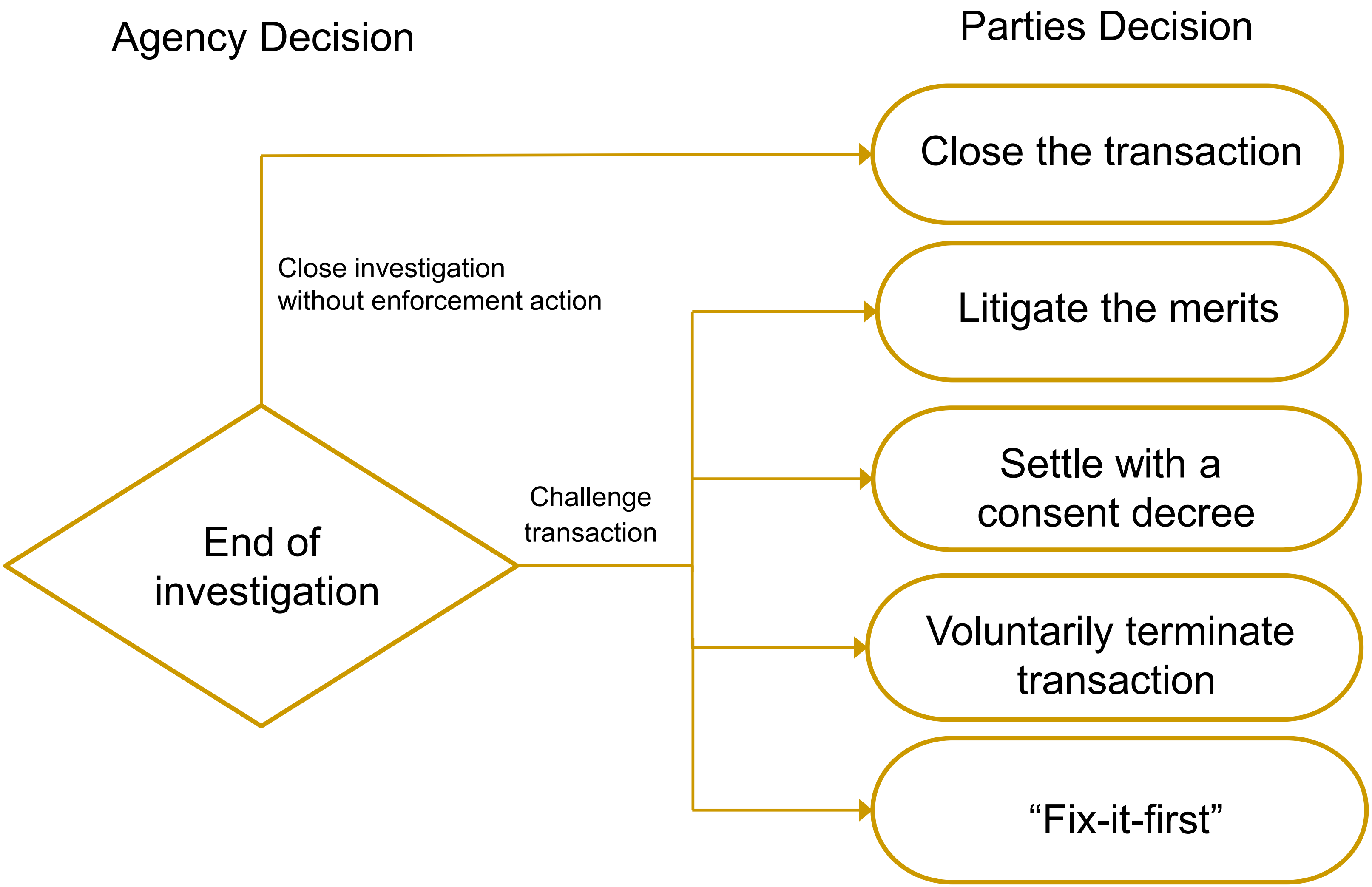
    But why would they wait until after the acquisition to complain?

  - Maybe it was a disgruntled current or former TransDigm or Schroth employee
  - But probably not a third-party competitor (WHY NOT?)

DOJ investigation

- How did the DOJ obtain testimony, documents, and data on which to base its antitrust analysis?
  - Typically would obtain from the parties pursuant to a *second request* under the HSR Act
    - BUT this transaction was not HSR reportable
  - But DOJ also has the power to issue *civil investigative demands* (CIDs)
    - Essentially precomplaint subpoenas
    - Can include document requests, narrative interrogatories, and data interrogatories
    - Is not quite compulsory process (i.e., not self-executing)
      - DOJ must first obtain a court order compelling compliance
    - May be issued any time during the course of an investigation
    - May be issued to both the merging parties and to third parties
    - Often ask for the same documents and data as a second request
    - Multiple CIDs may be issued in the course of an investigation to the same person

What were the possible investigation outcomes?



What happened here?

- What did the DOJ do?
  1. Decided that TransDigm’s acquisition of SCHROTH violated Section 7 of the Clayton Act, *and*
  2. Told TransDigm that absent an acceptable settlement, the DOJ would file a Section 7 complaint against TransDigm seeking divestiture of the SCHROTH business to a third party

If the FTC had investigated and challenged the acquisition in 2017, the procedure would have been different (but the outcome would have been the same)

What Was the Problem?

Anticompetitive Effects

- What were the anticompetitive effects of the acquisition alleged in the complaint?
  1. Increased prices
     - Prior to the acquisition, customers could and did “play off” the companies against each other to obtain better prices (Compl. ¶ 32)
     - Postmerger, the next closest competitor will not be as price-competitive with the combined firm as SCHROTH was to AmSafe
  2. Reduced innovation
     - Companies also competed against each other through R&D to develop new and better products (Compl. ¶ 32)
     - Could save significant money by curtailing R&D activities postmerger
  3. Significantly increased market concentration
     - Combined the only two significant players in the markets (Compl. ¶ 31)
     - Not itself an anticompetitive effect under the prevailing consumer welfare interpretation, but structural evidence from which likely anticompetitive effects may be inferred
       - But the Supreme Court in the 1950s-1960s regarded it as the primary anticompetitive effect—included because of that precedent

All downstream

Two-point lapbelts

1. Two-point lapbelts used on commercial airlines

- Only three competitors premerger (Compl. ¶ 24)
  1. AmSafe was by far the largest
  2. Small, privately held firm that had been in the market for years but had gained little share → little or no competitive significance
  3. SCHROTH, which entered the market with a new, innovative lightweight two-point lapbelt (“Airlite”), which it aggressively marketed to the major international airlines
- *Competitive effects implications*:
  - When three competitors are reduced to two, the remaining competitors are more likely to engage in oligopolistic coordination, which would result in a higher equilibrium market price and reduced rates of innovation
  - If the smallest firm is ignored → “Merger to monopoly” → higher prices

Three-point shoulder belts

2. Three-point shoulder belts used on commercial airlines

- Factual allegations
    1. Only two meaningful competitors premerger (Compl. ¶ 26)
    2. AmSafe was by far the largest
    3. “SCHROTH was aggressively seeking to grow its business at AmSafe’s expense”
    4. May indicate that SCHROTH’s current share remained limited but that its expansion efforts already constrained AmSafe’s pricing
- *Competitive effects implications*:
    - “Merger to monopoly” → higher prices

Technical restraints

3. Technical restraints used on commercial airlines

- Only three significant suppliers premerger (Compl. ¶ 28)
    1. AmSafe (“leading supplier”)
    2. SCHROTH (“aggressively seeking to grow”)
    3. (Unnamed) international aerospace equipment manufacturer
- *Competitive effects implications*:
    - “3-to-2 merger,” resulting in higher equilibrium market prices

Inflatable restraint systems

4. Inflatable restraint systems used on commercial airplanes

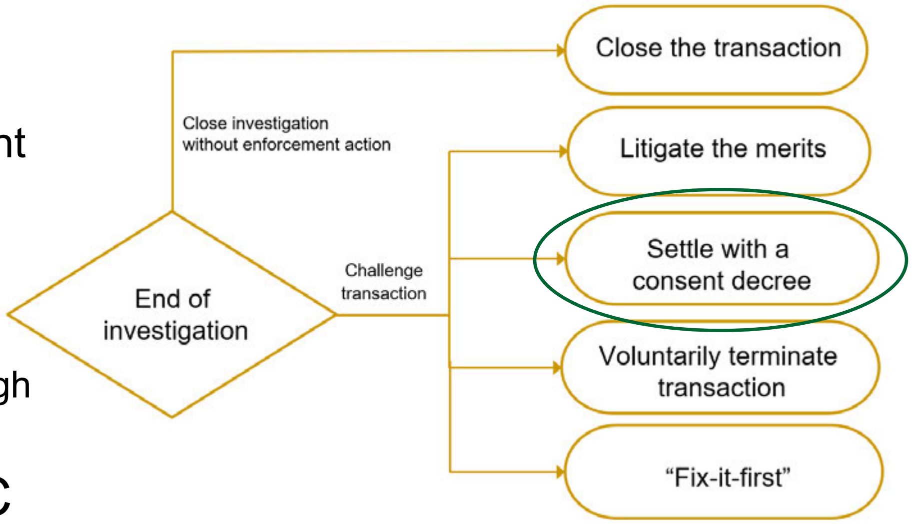
- Only two competitors premerger (Compl. ¶ 30)
  1. AmSafe (which developed technology—offers both inflatable lapbelts and structural mounted airbags)
  2. SCHROTH (offers only structural mounted airbags)
  3. "In recent years, SCHROTH had emerged as a strong competitor to AmSafe in the *development* of inflatable restraint technologies"
     - Only allegation of innovation competition—Not sales competition

Why did the DOJ include this claim?

What Did TransDigm Do?

What happened here?

- What did TransDigm do?
  - Agreed to divest SCHROTH pursuant to a consent decree
    - To get the DOJ's agreement, TransDigm agreed to give the DOJ essentially the relief it sought from a litigation of the merits
      - To obtain the DOJ's agreement, TransDigm accepted relief that the DOJ concluded would fully restore the competition lost through the acquisition
  - Historically, the DOJ and FTC have always required divestiture relief in horizontal merger cases



What is a consent decree?

- A *consent decree* is a final judgment in a case entered by consent of the litigating parties rather than an adjudication of the merits
  - A consent decree is, in substance, a negotiated permanent injunction
- Sanctions for breach
  - A consent decree is a *judicial order*
  - Enforceable through civil and criminal contempt sanctions

What did the consent settlement require?

- Divestiture requirements
  1. Within 30 days after regulatory clearances or entry of the Hold-Separate Order,
  2. TransDigm *must divest the entire acquired SCHROTH business* (including the Takata Protection assets) to—
     - Perusa Partners Fund 2 and SSP MEP Beteiligungs KG *or*
     - another buyer acceptable to DOJ

These are *upfront buyers*—divestiture buyers that, prior to the agency's agreement to the consent decree, have signed a definitive divestiture acquisition agreement, and are acceptable to the investigating agency

What did the consent settlement require?

- What assets must be divested?
  1. All tangible and intangible assets necessary to operate the divested business as an independent and effective competitor
     - Facilities and equipment
     - Intellectual property and know-how
     - Contracts, customer relationships, and business records
     - Personnel and organizational capabilities
  2. The divestiture must preserve the business as a viable going concern, without material interruption in—
     - Production
     - Customer service and relationships
     - Product development
     - Competitive operations
  3. Any transition services supplied by TransDigm must—
     - be limited in duration and scope and
     - must not leave the divestiture buyer dependent on TransDigm for competitively significant capabilities

What did the consent settlement require?

- What makes an acceptable divestiture buyer?
  1. The buyer must have the incentive and ability to operate the divested business as an effective, independent competitor
  2. The buyer must possess, or credibly be able to obtain—
     - Operational and managerial capabilities
     - Technical and industry expertise
     - Adequate financial resources
     - Personnel and other capabilities necessary to execute its business plan
  3. The acquisition by the divestiture buyer must not itself create a competitive problem
  4. The buyer must present a credible plan for operating and developing the divested business on a long-term basis

Today, the agencies demand that the divestiture buyer be able to "step into the shoes" of the divestiture seller on Day 1 and operate immediately with the same competitive force postmerger as the divestiture seller did premerger

What did the consent settlement require?

- Agency approval and preservation of the remedy
  1. The DOJ must approve—
     - The divestiture buyer
     - The divestiture agreement
     - Any transition-services or related agreements
  2. The DOJ and FTC ordinarily require a buyer upfront
     - The buyer is identified before the agency accepts the settlement
     - The parties have signed a definitive divestiture agreement
     - The buyer and agreement have been reviewed by the agency
  3. Until the divestiture closes, TransDigm must—
     - Hold the SCHROTH business separate
     - Preserve its assets, personnel, viability, and competitiveness
     - Prevent integration or deterioration that could impair the remedy

Business rationale for divestiture

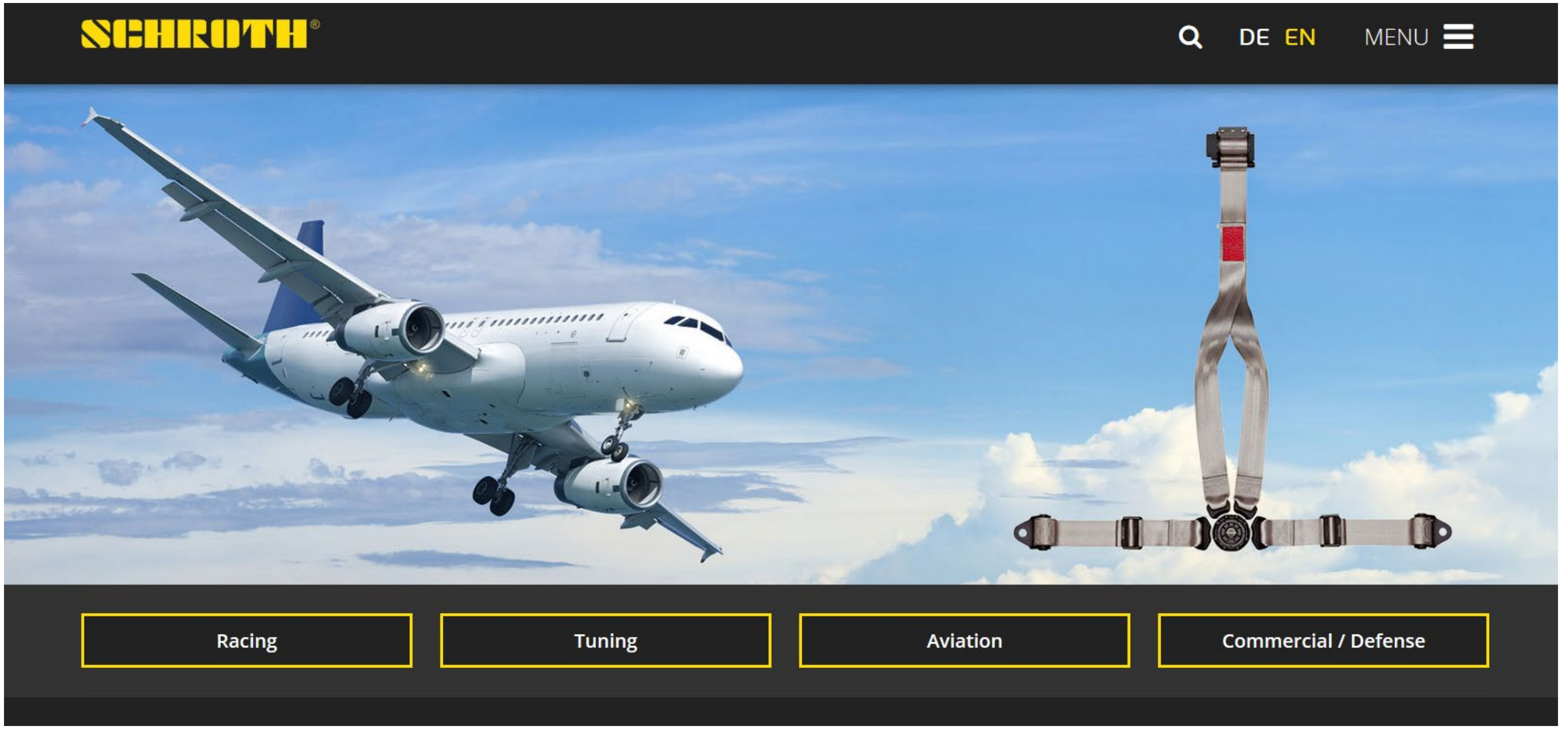
- Why did TransDigm agree to divest SCHROTH?
  - What were TransDigm's alternatives?
    1. Continue the litigation
    2. Settle with a consent decree acceptable to the DOJ
  - Why did TransDigm agree to settle?
    - Almost surely the least costly alternative
    - DOJ had a strong case: TransDigm was very likely to lose the litigation, and the DOJ would have obtained a litigated permanent injunction ordering the same divestiture
  - When did TransDigm agree to settle?
    - In the course of the investigation—Prior to litigation
    - Complaint and proposed consent decree were filed simultaneously with the court
      - Has the advantage that the consent decree can be drafted after the terms of the settlement have been reached
      - Means that the theories that appear in the complaint can all be negated by the negotiated settlment

The divestiture buyer

- To whom did TransDigm sell SCHROTH?
  - A management buyout (MBO)
    - Business unit's management + a private equity investor (Perusa GmbH)
  - Why sell to management?
    - The DOJ almost surely wanted a "buyer upfront"
    - An MBO was probably both—
      - The quickest solution, *and*
      - Offered the greatest return
  - Did the MBO get a good purchase price?
    - Almost certainly
    - Consent decree solutions almost always involve a "fire sale" of the divestiture assets
      - TransDigm paid $90 million to acquire SCHROTH (February 22, 2017)
      - The MBO paid $61.4 million[1] (proposed consent judgment filed December 21, 2017)
      - For a loss of $38.6 million (over 43% of the original purchase price 10 months later)

[1] TransDigm Form 8-K, Jan. 26, 2018, at 3.

SCHROTH today



- Reportedly:
  - Approximately 250 employees globally
  - Sales volume around $50-55 million

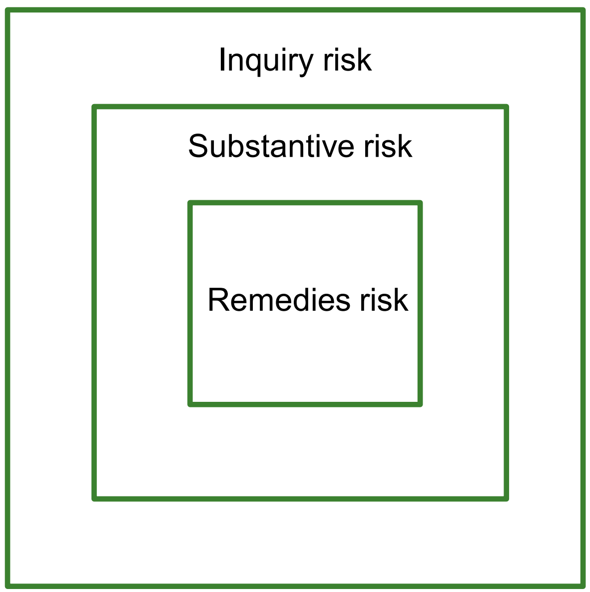
Thinking Systematically about Antitrust Risk

Three types of antitrust risks

- *Inquiry risk*: The risk that the legality of the transaction will be put in issue
  - Who has standing to investigate or challenge the transaction?
  - What is the probability that one of these entities will act?
- *Substantive risk*: The risk that the transaction is anticompetitive and hence unlawful
  - When is a merger anticompetitive?
  - How can we practically assess antitrust risk?
- *Remedies risk*: The risk that the transaction will be blocked or restructured
  - What are the outcomes of an antitrust challenge?
  - Will the transaction be blocked in its entirety?
  - Can the transaction be "fixed" to alleviate the agency's concerns and if so how?

Three types of antitrust risks

- The three risks are nested
  - The substantive risk does not arise unless there is an inquiry
  - The remedies risk does not arise unless the transaction is found to be anticompetitive



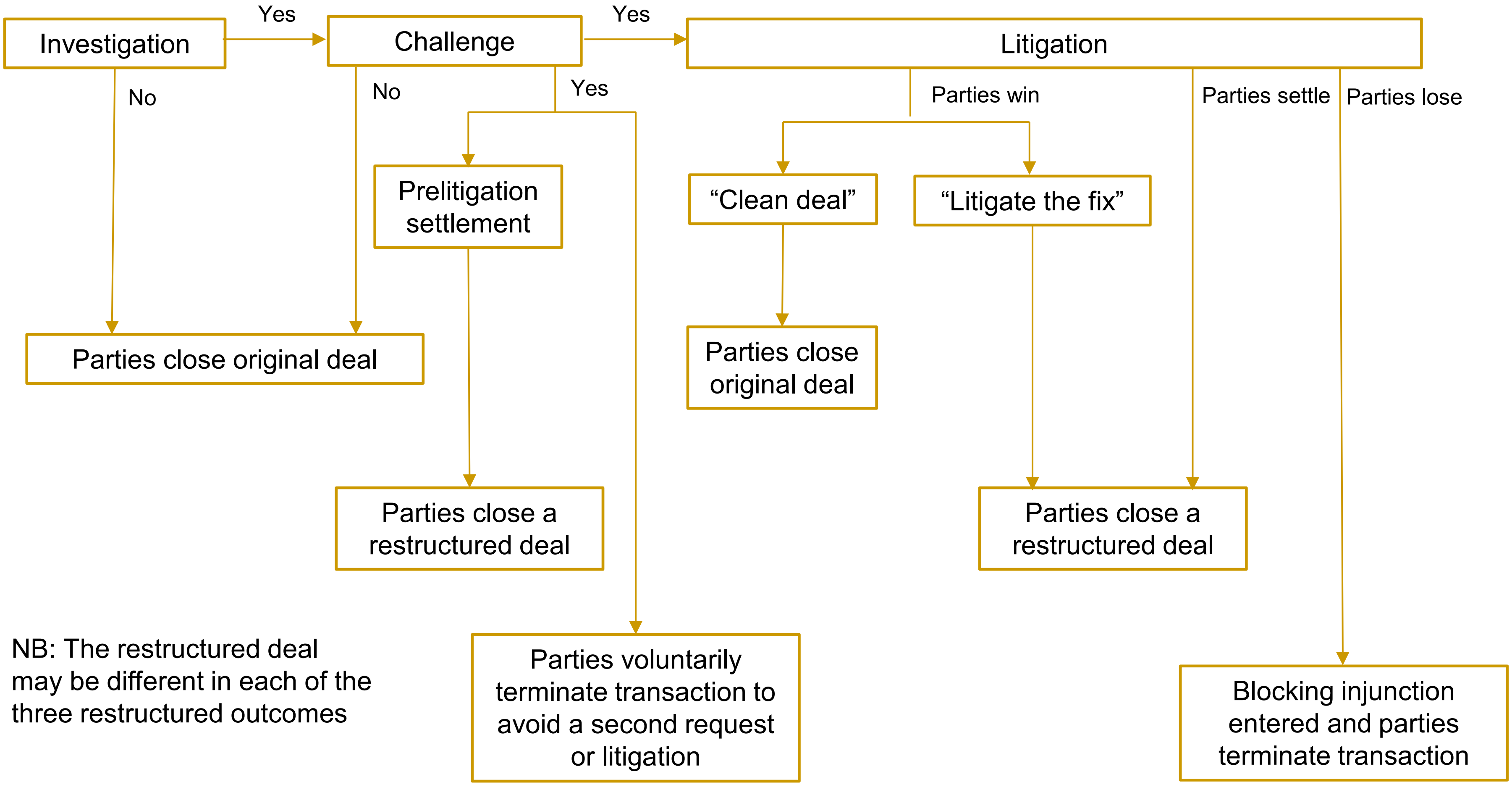
Because the inquiry risk is dependent on the likelihood that the transaction violates the antitrust law, we will examine substantive risk first

Possible outcomes of merger investigations

- Four possible ultimate outcomes:
  1. "*Clearance*": The investigating agency clears transaction on the merits without taking enforcement action
  2. *Fix*: The parties restructure ("fix") the deal to eliminate the substantive antitrust concern, typically through a divestiture of a line of business
     a. Post-closing "fix" under a judicial consent decree (DOJ) or an FTC consent order
     b. Restructure the deal preclosing to avoid a consent decree ("fix-it-first")
  3. *Litigate*: The investigating agency initiates litigation and either—
     a. The agency wins on the merits, the court issues an injunction blocking the closing, and the parties subsequently terminate their purchase agreement;
     b. The termination ("drop dead") date in the merger agreement occurs during the pendency of the litigation and one of the merging parties exercises its unilateral right to terminate the transaction;
     c. The agency and the parties settle the litigation through a consent decree; *or*
     d. The parties win on the merits and subsequently close their deal
  4. *Terminate*: The parties voluntarily terminate the deal rather than settle or litigate

Merger antitrust risk analysis

- Antitrust risk and outcomes from a process perspective in a preclosing transaction



NB: The restructured deal may be different in each of the three restructured outcomes

Pre-Signing Counseling

It is September 2016. Nicholas Howley, the CEO of TransDigm, is considering making an acquisition of the SCHROTH commercial airlines safety restraint business. He is asking you for a preliminary antitrust risk analysis of this deal. You know no facts, but Mr. Howley is happy to answer your questions at the meeting. He is also skeptical that the deal presents any material antitrust risk.

The setup

- You are counsel to TransDigm
  - Prior to signing the purchase agreement, TransDigm's management seeks your advice on—
    1. *Inquiry risk*: Whether the antitrust authorities will investigate the transaction
    2. *Substantive risk*:
       a. Whether the DOJ or FTC is likely to conclude that the transaction is anticompetitive and challenge it?
       b. If challenged, whether the merging parties can successfully defend the transaction on the merits?
    3. *Remedies risk*: If the agency challenges the transaction—
       a. What are our options?
       b. What are the likely outcomes under each option?
       c. What, if anything, can we do to improve our chances of closing the deal?

These are the fundamental questions every client asks at the beginning of a deal

Before the meeting: Learn what you can

1. Look at the websites of both companies
   - Learn about their businesses
   - Try to determine whether there are any product overlaps
2. Search the Internet and newspaper archives using "TransDigm and SCHROTH" as the search request

Assume that you find from this research that—

- *The deal involves a horizontal overlap in safety restraints for commercial airlines*
- *TransDigm is the dominant firm in the business*
- *SCHROTH is a small but aggressively expanding competitor*
- *There are few if any other firms in the business*

But no other meaningful information

Goals of the meeting

1. *Teach* the client the operational test for Section 7 illegality
2. *Ask* the client the most important factual questions
3. *Communicate* your view of the antitrust risk in a way that the client understands
4. *Provide* any strategic advice as to how the client might minimize antitrust risk

We will go through each goal in detail

Teach the client the operational test

- Why begin with the operational test?
  - The client must understand how the antitrust agency will analyze the transaction
  - Understanding the test will help the client provide more complete and meaningful answers to counsel’s factual questions
  - The client can continue to identify and communicate additional relevant facts after the meeting
  - The client must understand the antitrust implications of—
    - internal documents
    - public and customer communications
    - presentations and testimony to the investigating agency
  - Legal advice is useful only if the client understands—and is persuaded by—the reasoning supporting it

Teach the client the operational test

- Start with Clayton Act § 7
  - Governing merger antitrust statute
  - Other statutes may apply, but they will not be more restrictive than Section 7
  - Section 7 prohibits transactions that "may substantially lessen competition"
- But what does this mean *operationally*?
  - A transaction "may substantially lessen competition" when it is likely to harm an identifiable group of customers by—
    1. Increasing prices
    2. Reducing market output
    3. Reducing product or service quality
    4. Reducing the rate of technological innovation or product improvement
    5. [Maybe] reducing product variety

Clients can grasp the operational test immediately

Teach the client the operational test

- Tell the client how the investigating agency is going to find the facts about the likely competitive effect
  - HSR reportability and merger review process
    - Time to ask questions to find out if the deal is likely to be reportable
  - If the investigating agency opens an investigation, it will—
    1. Entertain a presentation from the parties on the deal
    2. Interview relevant executives and employees
       - Can also obtain testimony under oath in formal depositions
    3. Obtain massive amounts of the documents and data from both companies
    4. Interview customers and competitors (and maybe obtain documents and data from them)
       - Can also obtain testimony under oath in formal depositions and compel the production of documents
    5. Analyze win-loss records of the companies in bidding for projects
    6. Use economists to assist in analyzing the likely competitive effects of the transaction
    7. Ask questions of the parties throughout the investigation

Teach the client the operational test

- Bottom line
  - The agency's conclusion on the likely effect on customers will determine the outcome of the investigation
    - NB: It is the *agency's conclusion*, not necessarily the truth, that counts
  - The best defense is a good offense
    - Can we argue that the deal is a "win-win" for the merging parties *and* the customers?
    - Companies do not do deals out of the goodness of their heart—*they do deals to make money*
    - Do we have a story consistent with the business model for the transaction, the documents and other company evidence, and the likely customer responses in staff interviews that the deal will be good for customers?

Best story*: The transaction will enable the combined company to reduce costs and make better products faster in ways that benefit customers while creating value for shareholders*

Ask the client questions

- Deal rationale and documents
  - What is the deal rationale?
  - How will TransDigm make money from the transaction?
  - What synergies or efficiencies does management expect?
  - What do the board materials, valuation analyses, and other transaction documents say?
  - Are those documents consistent with management’s explanation of the source of gains from the merger?
  - What are the implications of the business model for customers and consumer welfare?

Ask the client questions

- Competition and customers
  - Where do AmSafe and SCHROTH compete?
  - How close are they as competitors?
  - What will company documents say about competition between the two companies?
  - Who are the customers, and what will they say when interviewed by the agency?
  - Do customers have practical alternatives?
  - Do we have a credible customer value proposition?
  - Will customers accept it?
  - If a customer wanted to torpedo the deal, what would it tell the agency about the likely effects of the merger?

Ask the client questions

- Defenses and remedies
  - Could entry, expansion, or repositioning replace the competition lost?
    - Can we identify firms that we believe would be likely to enter?
    - If asked by the agency, will they say that they would enter the market if prices increased by, say, 5%, as a result of the merger?
    - How long will these companies say it would take to enter the market and become an effective competitor after the merger
  - What synergies from the deal will benefit customers?
    - What is the profit-maximizing incentive of the merged firm to pass on any synergies to customers as opposed to keeping them for shareholders?
  - Can the problematic overlap be separated from the remainder of the transaction?
  - What would the agency likely require TransDigm to divest?
  - Would the transaction remain economically attractive after the likely remedy?

Communicate the antitrust risk

- *Answer the client's question*: Based on what you learned in the meeting, what is the antitrust risk presented by the deal?
  - Forming a view of the risk is not enough
  - Counsel must communicate both—
    - the bottom-line assessment, and
    - the reasoning supporting it
  - The advice must be presented in a form the client can understand and use in making business decisions
    - If the client does not understand the advice, the client cannot act on it
    - If the client is not persuaded by the analysis, the client is unlikely to act on it

What should counsel communicate?

- Inquiry risk
  - Likelihood and likely scope of an investigation
- Substantive risk
  - Likelihood the agency will challenge
  - Likelihood the parties can prevail if challenged
- Remedies risk
  - Available options
  - Likely outcome under each option
  - Effect on the ability to close and on the value of the transaction
- Basis for the assessment
  - Key facts and assumptions
  - Important unknowns or uncertainties
  - Recommended next steps

Provide strategic advice: Documents

1. Emphasize the need for care in drafting documents
   - "Bad" documents alone can kill a deal
   - Avoid careless, exaggerated, or inaccurate language suggesting that the transaction will reduce competition or harm customers
   - Do not omit or conceal material adverse facts when the omission would make the document inaccurate or misleading
2. State the genuine business rationale accurately and consistently
   - Where relevant, explain the expected efficiencies and customer benefits
   - Make sure those statements are supported by the actual business plan
   - Do not manufacture a business rationale or claim benefits that the business does not genuinely expect to achieve and cannot support

Provide strategic advice: Documents

3. If there is a genuine and supportable procompetitive business rationale, include it accurately and consistently in as many relevant transaction and business documents as possible
   - Counsel cannot know which documents agency staff ultimately will select and emphasize—or which documents will become evidence in litigation
   - Repetition increases the likelihood that the procompetitive rationale will appear in documents the agency reviews or that become evidence in court
   - Consistent articulation helps business personnel understand and internalize the rationale, making their later interviews, investigational testimony, and depositions more accurate and persuasive
   - BUT do not exaggerate anticipated benefits or state propositions that the business does not genuinely believe and cannot support

Provide strategic advice: Customer outreach

1. Develop a compelling and supportable sales pitch for the transaction to customers of both companies
   - Explain concretely how the transaction is expected to benefit customers
   - Ensure that the customer case is consistent with the genuine business rationale, the business plan, and the expected postmerger conduct
   - Help the relevant business personnel decide when and how to communicate that case
   - Think about mocking up a company website focus on the benefits the deal will produce for customers

Provide strategic advice: Customer outreach

2. Focus especially on the target company's customers
   - They are often the most difficult customers to persuade
   - They may fear losing the target as an independent competitive alternative
   - Work with the target company to understand and address their concerns
   - Do not assume that customers will accept management's assessment of the transaction

Provide strategic advice: HSR reportability

3. Consider whether the transaction can lawfully be structured to make it not HSR-reportable and thereby reduce inquiry risk
   - Nonreportability reduces—but does eliminate—the likelihood that the transaction will come to the agencies' attention before closing
   - It may also permit the parties to close without an HSR waiting period
   - But nonreportability does not reduce the transaction's substantive Section 7 risk
   - Nor does it prevent a postclosing investigation or challenge—as TransDigm itself illustrates

Final thoughts

1. Caution the client that this advice is only preliminary and depends on what the client has told you in the meeting
2. Explain that additional factual development is necessary
   - Would like to send the client a *preliminary information request* for easily obtainable documents and data
   - When confidentiality considerations permit, would like to set up a *meeting with knowledgeable employees* to develop the facts and potential arguments further

Final thoughts

3. Tell the client that documents prepared at counsel's request for the purpose of seeking or providing legal advice should carry the following prominent legend:

PRIVILEGED AND CONFIDENTIAL
Prepared at the request of counsel

- Whenever possible, make this legend *machine readable*
- The legend facilitates privilege review but does not itself make an otherwise unprivileged document privileged

Do NOT forget this!!!

Aggressively labeling nonprivileged documents as privileged can cost the parties significant goodwill loss at the agency and the court

Final thoughts

4. Bring the target company into the antitrust planning and defense effort
   - The target's evidence and customer-outreach program may be equally or more important to the outcome of the merger review than the client's
   - Enter into appropriate common-interest and confidentiality arrangements before sharing privileged legal advice
   - The common interest doctrine preserves the privileged status of otherwise privileged communications shared to advance the parties' common legal interest; it does not independently make ordinary business communications privileged
   - The parties must continue to operate as independent competitors before closing and should use appropriate safeguards when sharing competitively sensitive information

Final thoughts

5. Expect the target to negotiate contractual protections against antitrust risk
   - Provisions designed to reduce the risk of deal failure
   - Provisions allocating responsibility for obtaining regulatory approval and accepting remedies
   - Compensation to the target for closing risk that cannot be eliminated

CLASS 3 SLIDES

Unit 2. The DOJ/FTC Merger Review Process

Professor Dale Collins
Merger Antitrust Law
Georgetown University Law Center

September 1, 2026

Topics

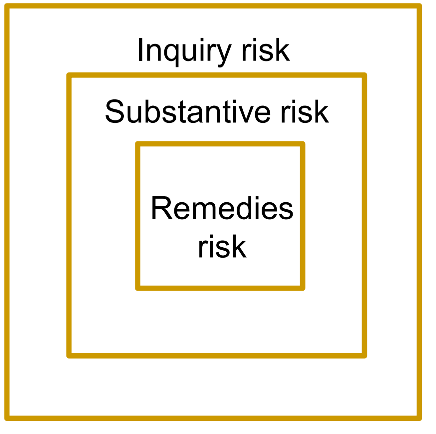
- Inquiry risk: HSR Act merger reviews
- Premerger notification
- Preparing for an investigation
- Initial waiting period investigations
- Second request investigations
- DOJ/FTC merger review outcomes

Inquiry Risk: HSR Merger Reviews

Recall the three types of antitrust risks

1. Inquiry risk
   - The risk that legality of the transaction will be put in issue
2. Substantive risk
   - The risk that the transaction is anticompetitive and hence unlawful
3. Remedies risk
   - The risk that the transaction will be blocked or restructured

Risks are nested



Framing inquiry risk

- There are two factors to consider in assessing inquiry risk—
  1. Does the putative challenger have the ***means*** to initiate an inquiry?
  2. Does the putative challenger have the ***incentive*** to initiate an inquiry?

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1. The means: Two potential means—
   a. The ability to initiate a precomplaint investigation
   b. The ability to initiate litigation
2. The incentive calculus: Three questions—
   a. What is the reward/payoff to success?
   b. What is the probability of success?
   c. What is the cost of raising the issue?

Federal enforcement agencies

- Ability: Causes of action and forums
  - DOJ
    - Causes of action
      - Preliminary and permanent injunctive relief under Clayton Act § 15 in federal district court
      - Treble damages under Clayton Act § 4A in federal district court for injuries (overcharges) to federal agencies
    - The practice
      - Sue in federal court—consolidate the preliminary injunction hearing with a trial on the merits under Federal Rule of Civil Procedure 65(a)(2) or, more commonly today, a stipulated TRO
  - FTC
    - Causes of action
      - Preliminary and permanent injunctive relief in federal district court under FTC Act § 13(b)
      - Permanent injunctive relief under Clayton Act § 11 in an FTC administrative adjudicative proceeding
    - The practice
      - Historically, sought—
        - Preliminary injunctive relief in federal district court under Section 13(b)—the FTC has no power to issue interim relief
        - Permanent injunctive relief under Clayton Act § 11 in an FTC administrative adjudicative proceeding
      - Trump 2.0
        - Announced a policy to seek both preliminary and permanent injunctive relief in federal district court and forego administrative adjudication of the merits
        - Only one challenge brought so far—and the merging parties agreed to a “standstill” on the acquisition pending a decision on the merits

Federal enforcement agencies

- *Incentive*: The DOJ/FTC are by far the most likely challengers
  - Both charged with enforcing Section 7 of the Clayton Act
  - Are large, experienced in merger antitrust enforcement, and reasonably well-funded
  - Have the benefit of the HSR Act—
    - Premerger reporting
    - Waiting period before the merger can be consummated
    - Precomplaint investigation tools (second requests, CIDs)
  - Have litigation experience (and young attorneys eager to litigate)

The Premerger Notification Process

HSR Act

- Hart-Scott-Rodino Act[1]
  - Enacted in 1976 and implemented in 1978
  - Applies to large mergers, acquisitions and joint ventures
  - Imposes reporting and waiting period requirements
    1. *Preclosing reporting* to both DOJ and FTC by each transacting party
    2. *Post-filing waiting period* before parties can consummate transaction
  - Authorizes investigating agency to obtain additional information and documents from parties during waiting period through a *second request*
  - Designed to alert DOJ/FTC to pending transactions to permit them to investigate—and, if necessary, challenge—a transaction prior to closing
    - *Idea*: Much more effective and efficient to block or fix anticompetitive deal prior to closing than to try to remediate it after closing
  - Not jurisdictional: Agencies can review and challenge transactions—
    - Falling below reporting thresholds,
    - Exempt from HSR reporting requirements, *or*
    - "Cleared" in a HSR merger review—no immunity attaches to a transaction that has successfully gone through a HSR merger review

[1] Clayton Act § 7A, 15 U.S.C. § 18a.

Basic prohibition

- Section 7A(a)

> [N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) **file notification** . . . and the **waiting period** . . . has expired . . . .

- A reportable transaction is one that—
  1. Involves the ***acquisition*** of ***voting securities*** or ***assets***
  2. Satisfies the ***dollar thresholds*** for ***prima facie reportability***
  3. Does not fall into one of the ***exemptions*** provided by the HSR Act or implemented by the HSR Rules
- Dollar thresholds adjusted annually for inflation

Prima facie reportability[1]

Size of transaction*	Prima Facie Reportability
Up to and including $133.9 million	Not reportable
Above $133.9 million up to and including $535.5 million	Reportable if: (1) satisfies the "size of person" test, and (2) no exemption applies Size of person test *Acquiring person* / *Acquired person* $267.8 million (in total assets or annual net sales) **and** $26.8 million (in total assets or annual net sales of a person engaged in manufacturing) *Or* $267.8 million (in total assets or annual net sales) **and** $26.8 million (in total assets of a person not engaged in manufacturing) *Or* $26.8 million (in total assets or annual net sales) **and** $267.8 million (in total assets or annual net sales)
In excess of $535.5 million	Reportable absent an exemption

TOO MUCH TO REMEMBER

* Based on the value of voting securities and assets the acquiring person will hold as a result of the acquisition, including the value of any previously acquired voting securities.

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 91 Fed. Reg. 2133 (Jan. 16, 2026) (effective Feb. 17, 2026).

Prima facie reportability

- Simple rule (in 2026)

> If the acquiring person will hold more than ***$133.9 million*** of the voting securities or assets of the acquired person, then the acquisition is likely reportable absent an exemption

  - A transaction that satisfies the dollar thresholds is called ***prima facie reportable***
  - NB: Every year the dollar threshold will be adjusted for inflation

Selected exemptions

- Intraperson
  - Acquiring and acquired person are the same
- Investment
  - Hold no more than 10% of target's outstanding voting securities
    - 15% for certain institutional Investors
  - Acquirer must have a purely passive investment intention
    - Any membership on the board of directors or other involvement in the management of the company (other than voting shares) voids exemption
- Convertible voting securities
  - Acquired securities have no present voting rights
- Acquisitions of non-U.S. assets
  - Must not generate sales in or into the U.S. of more than $133.9 million
- Acquisitions of non-U.S. voting securities by non-U.S. persons that either
  - Do not confer control over the target, or
  - Do not involve assets in the U.S. or sales in or into the U.S., over $133.9 million

Notification thresholds

- An otherwise reportable transaction is not subject to the reporting and waiting period requirements of the HSR Act if—
  1. The parties previously filed HSR notifications for an acquisition of voting securities of the same issuer;
  2. Within one year after the prior waiting period expired or was terminated, the acquiring person met or exceeded the notification threshold identified in that filing;
  3. The reporting and waiting period requirements were satisfied within the last five years for a prior acquisition, *and*
  4. The pending acquisition will not cause the acquiring person to cross a notification threshold

Notification thresholds for voting securities[1]
$133.9 million
$267.8 million
$1.339 billion
25% of the voting securities if their value exceeds $2.678 billion
50% of the voting securities if their value exceeds $133.9 million

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 91 Fed. Reg. 2133 (Jan. 16, 2026) (effective Feb. 17, 2026).

Filing fees

2022		2026[2]	
Value of Transaction[1]	Filing Fee	Value of Transaction[1]	**Filing Fee**
≤ $101.0 million	No filing required	≤ $133.9 million	No filing required
> $101.0 million but < $202.0 million	$45,000	>$133.9 million - <$189.6 million	$35,000
≥ $202.0 million but < $1.0098 billion	$125,000	≥$189.6 million - <$586.9 million	$110,000
≥ $1.0098 billion	$280,000	≥$586.9 million - <$1.174 billion	$275,000
		≥$1.174 billion - <$2.347 billion	$440,000
		≥$2.347 billion - <$5.869 billion	$875,000
		$5.869 billion or more	$2,460,000

- Paid by the purchaser, unless the parties agree to a different arrangement (e.g., split the fee)

[1] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 3541 (Jan. 24, 2022) (effective Feb. 23, 2022).
[2] *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 91 Fed. Reg. 2133 (Jan. 16, 2026) (effective Feb. 17, 2026). Congress changed the baseline of the filing fees in the Merger Filing Fee Modernization Act of 2022, contained in the Consolidated Appropriations Act of 2023, Public Law 117–328, Div. GG, 136 Stat. 4459, 5967 (Dec. 29, 2022).

HSR Act filing: The current form

- Both the acquiring and acquired persons must submit their own filing on a form prescribed by the FTC's regulations
- Key information required:
  1. Transaction documents (e.g., stock purchase agreement)
  2. Annual reports and financial statements
  3. Revenues by North American Industry Classification System (NAICS) codes
  4. Corporate structure information
     - Majority-owned subsidiaries
     - Significant minority shareholders
     - Significant minority shareholdings
  5. "4(c)" and "4(d)" documents

These are the only parts of the filing that really matter

- Uses a prescribed form: Requires no—
  - Market definition
  - Calculation of market shares or market concentration statistics
  - Presentation of any antitrust analysis or defense

HSR Act filing: The current form

- 4(c) and 4(d) documents
  - 4(c) documents: four requirements—
    1. Studies, surveys, analyses or reports
    2. Prepared by or for officers or directors of the company (or any entities it controls)
    3. That analyze the transaction
    4. With respect to markets, market shares, competition, competitors, potential for sales growth, or expansion into product or geographic markets
  - 4(d) documents: three types—
    1. Confidential Information Memoranda (“CIM”)
    2. Third-party advisor documents
    3. Synergy and efficiency documents
  - Failure to provide all 4(c) and 4(d) documents
    - Makes the HSR filing ineffective, so that the waiting period never started
      - Usually discovered by investigating agency in the document production in a second request
      - Agencies have required parties to refile and go through the entire process (including a second second request)
    - Subjects the parties to daily civil penalties (fines) from the time they close their transaction until they make a corrective filing and observe the required waiting period

Statutory waiting periods

- General rules
  - Cannot close a reportable transaction until the waiting period is over
  - The duration of the waiting period is prescribed by the HSR Act and cannot be extended by agreement of the parties
  - Investigating agency can grant *early termination* at any point in the waiting period
- Initial waiting period
  - 30 calendar days generally
  - 15 calendar days in the case of—
    - a cash tender offer, *or*
    - acquisitions under § 363(b) of bankruptcy code
- Extension of waiting period
  - Waiting period extended by the issuance of a second request in the initial waiting period
  - Waiting period extends through—
    - "Compliance" by all parties with their respective second requests
    - PLUS *final waiting period* of 30 calendar days
      - 10 calendar days in case of a cash tender offer

HSR Act violations

- HSR Act prohibition

> "[N]o person shall acquire, directly or indirectly, any voting securities or assets of any other person" in a reportable transaction without observing the filing and waiting period requirements[1]

  - Recall that the HSR regulations provide that a person holds voting securities or assets when it has a "beneficial interest" in them[2]

- Two basic types of violations
  1. *Failure to file* a reportable transaction and nonetheless closing the transaction
  2. "*Gun jumping*": Acquiring a beneficial interest in the target's assets or voting securities prior to the expiration of the HSR Act waiting period

- Violations can be expensive
  - As of 2026, $53,088 per day for every day of the violation—Equals $19.4 million per year[3]
  - Also can put the violator on the radar screen of the agencies for future acquisitions

[1] 15 U.S.C. § 18a(a).
[2] 16 C.F.R. § 801.1(c).
[3] Fed. Trade Comm'n, Adjustments to Civil Penalty Amounts, 90 Fed. Reg. 5580 (Jan. 17, 2025) (increasing civil penalty from $51,744 to $53,088 per day effective January 17, 2025, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 599 (2015) (requiring a catch-up CPI inflation adjustment from the date of the statute's enactment)). No adjustment in 2026.

Preparing for an Investigation

Build your complete defense

- Need to do this prior to the first contact with the investigating staff
  1. Want to make the strongest defense possible at the first substantive encounter with the investigating staff
  2. Do not want to be surprised later by a new fact that undermines the defense
  3. Need buy-in from the client
     - They will eventually have to make the defense themselves before the staff, in depositions, and perhaps ultimately in court
  4. Need buy-in from the merger partner
     - They too will eventually have to make the defense themselves
     - There needs to be a *common* defense—merging parties should not be making different, and perhaps inconsistent, arguments

Identify the "face of the deal"

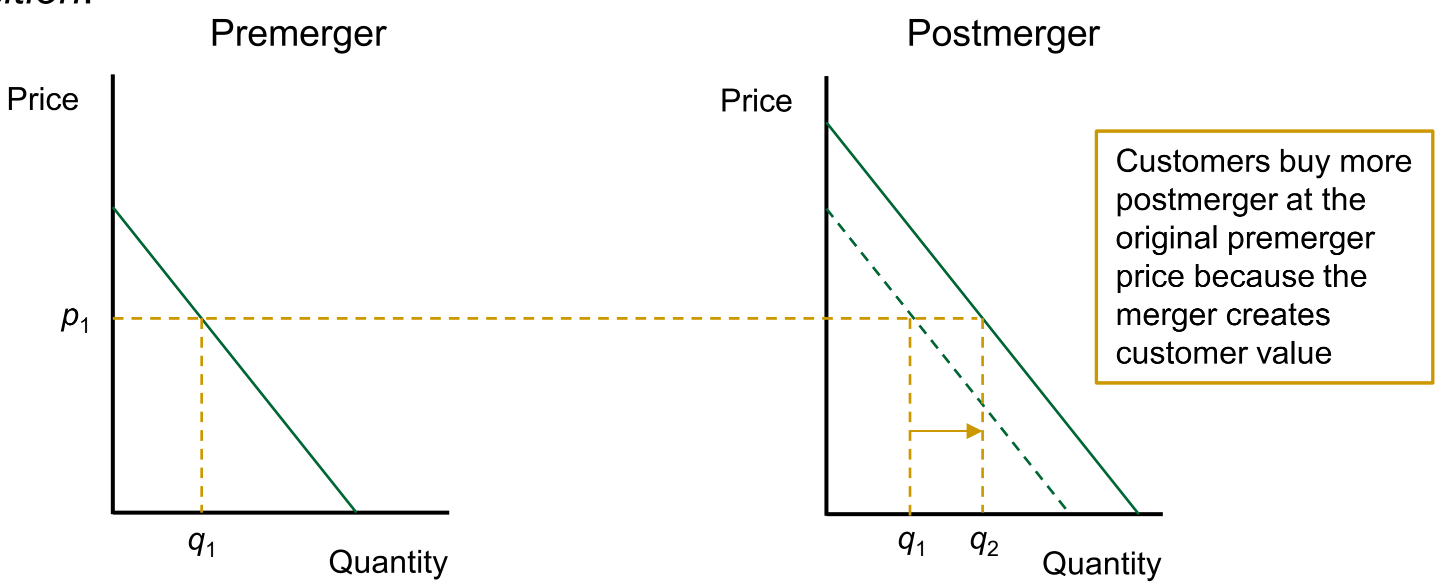
- Which business representative is going to be the most effective in—
  1. Marshalling resources—especially access within the company—to defend the deal?
  2. Leading the defense team within the client?
  3. Working with the merger partner in creating a strong, consistent defense?
  4. Advocating the defense of the deal before the agency?
- Start working with this individual as soon as possible
  - Have to teach them the operational principles of merger antitrust law
  - Need to be involved in every step of building the defense—they need to "own" the defense to be an effective advocate

Work with the merger partner

- Critical for three reasons—
  1. Need to understand the evidence that is in the hands of the merger partner
  2. Need to ensure that both merging parties are making consistent arguments in defense of the transaction ("singing from the same song sheet")
  3. Need to work with the merger partner on the rollout of the deal to neutralize customer opposition and gain customer support
- Agree in the purchase agreement that the parties will—
  1. Cooperate in the sharing of information
     - Highly confidential information may be shared on an "outside counsel only" basis
  2. Cooperate in the defense of the transaction
     - With the buyer usually taking the lead and making all final strategic decisions
  3. Attend each other's meetings with the investigating agency
- Agencies accept that joint defense meetings between merging parties are protected under the *"common interest" doctrine*
- Maneuver to get and begin to prepare the best witnesses from the merger partner

Prepare and implement a customer rollout

- Work with the merging parties to develop and implement a plan to reach out to customers to—
  - Neutralize customer complaints
  - Maximize customer support
- Create a “win-win” argument—
  1. The combined firm will make lots of money
  2. By *shifting the demand curve* to the right by creating a better *customer value proposition*:



Prepare and implement a customer rollout

- Argument must work for customers of both the buyer *and* the target
  - *Remember*: The seller's customers are usually the more difficult to convince that the deal will be good for them
    - They had the opportunity to purchase from the buyer but instead chose to purchase from the target
- Work with the client and the merger partner to find the best people within the company to make the sales pitch for the deal to customers

Prepare and implement a customer rollout

- Form of customer pitch:

"You probably have heard about our deal with Company X. We are very excited about it. We think that it is great for our company, great for our shareholders, and great for our customers. You are one of our most valued customers and we hope that you are as excited by the benefits the deal will provide to you as we are. Let me tell you why.

[FILL IN CUSTOMER BENEFITS]

Do you have any questions or concerns about the deal? We would really like to know what they are so that we can address them."

Initial Waiting Period Investigations

Preliminaries

- Parties must file their respective HSR forms with both the DOJ and the FTC
  - Separate forms are required for each reporting person
- FTC Premerger Notification Office (PNO) review of filings
  - Only for technical compliance on form—no review of substance
    - NB: The PNO is also responsible for providing informal interpretations of the HSR Act and implementing regulations
- Allocated to DOJ or FTC for review through the agency "clearance" process
- Responsible agency assigns transaction to a litigating section for substantive review

Initial contact by investigating staff

- Usually occurs 7-10 days after filing
- Three purposes
  1. Inform parties of the investigation and introduce the investigating staff
  2. Request that the parties provide certain information to the staff on a voluntary basis—
     a. Most recent strategic, marketing and business plans
     b. Internal and external market research reports for last 3 years
     c. Product lists and product descriptions
     d. (Perhaps) competitor lists and estimates of market shares
     e. Customer lists of the firm's top 10-20 customers (including a contact name and telephone number)
        - The agencies do not ask for customer lists in transactions at the retail level involving consumer goods, since retail customers are not considered sufficiently sophisticated and reliable in predicting the effect of a merger on them
  3. Invite the parties to make a presentation to the staff on the competitive merits of the transaction

Initial merits presentation

- Critical to do completely, coherently, and quickly
  1. Often a substantial “first mover” advantage in being the first to give the staff a systematic way to think about the transaction
  2. Well-prepared business people are the best to present
     - Agencies not impressed with “testifying” lawyers—especially outside counsel
  3. Need to anticipate and answer staff questions
     - Avoiding answers causes the staff to be more skeptical about the transaction and increases the probability of an in-depth investigation
  4. Need to be clear and compelling
     - Cannot win on an argument that the staff does not understand or finds ill-supported
  5. Need to anticipate and be consistent with what the staff is likely to see in the company documents and hear from customers
     - Staff will almost always accept the customer view in the event of an inconsistency
  6. Need to do the presentation quickly after the initial contact by the investigating staff
     - By the time you get the initial call from the staff, one-third of the initial waiting period will be over
     - Accordingly, must have the presentation “in the can” by the end of the first week of the initial waiting period—and preferably before the filing of the HSR forms

Initial merits presentation

- The best presentations—
  1. anticipate all the issues the staff will raise,
  2. provide answers that are supported by company documents and consistent with customer perceptions, *and*
  3. have all the facts right

Ideally, the rest of the investigation needs to do no more than defend the analysis in the first presentation

Initial merits presentation

- Ideal structure (when the facts fit)
  1. Provide an overview of the parties and the transaction
     - Identify other jurisdictions in which the transaction is reportable
  2. Provide an overview of the industry (if the staff is not familiar with the industry)
  3. Explain the business model driving the transaction—How will the buyer make money
     - The deal is procompetitive—a win-win for the company and the customers
     - “We make the most money by providing more value to customers, improving productive efficiency, and reducing costs without reducing product or service quality”
     - Essential to give a compelling reason for doing the deal that is not anticompetitive
  4. Identify the customer benefits implied by the business model
     - Customers will be better off with the transaction than without it
     - NB: Agencies give little or no credit in the competitive analysis to efficiencies or cost savings that are not passed along to customers
  5. Explain why market conditions would not allow the transaction to be anticompetitive in any event
     - “We could not raise price even if we wanted. Customers have alternatives to which they can turn to protect themselves in the event we try to raise price or otherwise harm them.”
     - Alternatives can be other current suppliers, firms in related lines of business that can expand their product lines, new entrants, or customer self-supply/vertical integration

Customer/competitor interviews by staff

- Occupies the bulk of the remaining time in the initial investigation
- Customer views are given great weight
  - *Theory*: The purpose of the antitrust laws is to protect customers from competitive harm, and sophisticated customers should have a good idea of whether they will be competitively harmed by the transaction under review
  - Staff will attempt to call all the contacts on the customer lists provided by the merging companies in response to the initial voluntary request
  - Staff often will uncritically accept customer complaints but question customer support
  - Customer reactions may differ depending on the position of the contact person
- Competitor conclusions on competitive effect are given little weight
  - *Theory*: Anticompetitive transactions are likely to benefit competitors, so competitor complaints are more likely the result of concerns about procompetitive efficiencies than anticompetitive effect
  - But competitor interviews can be useful in understanding more about the industry
    - Complaining competitors are often willing to spend considerable time educating the staff
    - Customers usually just want the staff to go away unless they strongly oppose the deal

Respond to staff questions

- Questions may arise as a result of customer and competitor interviews
- Need to anticipate and respond to these quickly
  - Likely hear from staff in the last week of the initial waiting period
  - A failure to negate any staff concerns will almost surely extend the investigation

Think of this as a serious game of Wack-A-Mole

End of the initial waiting period

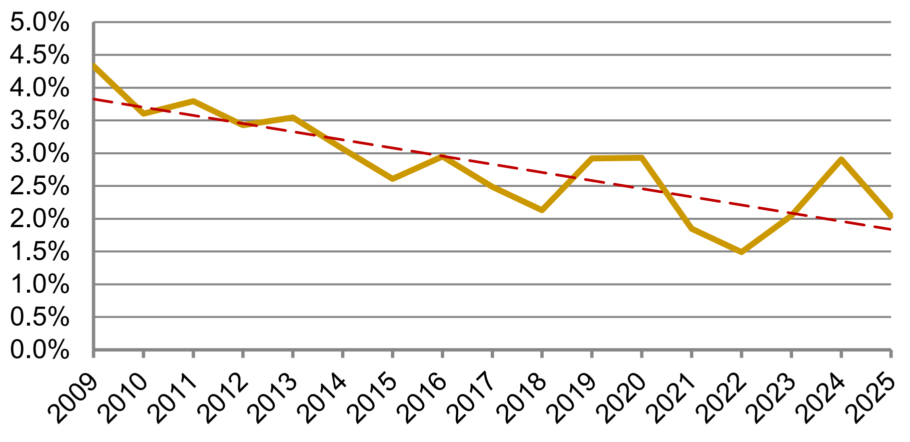
- Three options for the agency
  1. Close the investigation
  2. Issue a second request
  3. Convince the parties to “pull and refile” their HSR forms to restart the initial waiting period

Second Request Investigations

The second request

- HSR Act authorizes investigating agency to issue one request for additional information and documentary material (a "second request") during the initial waiting period to each reporting party
- Issuance of a second request extends waiting period until—
  - All parties comply with their respective second requests, *and*
  - Observe a final waiting period (usually 30 days) following compliance

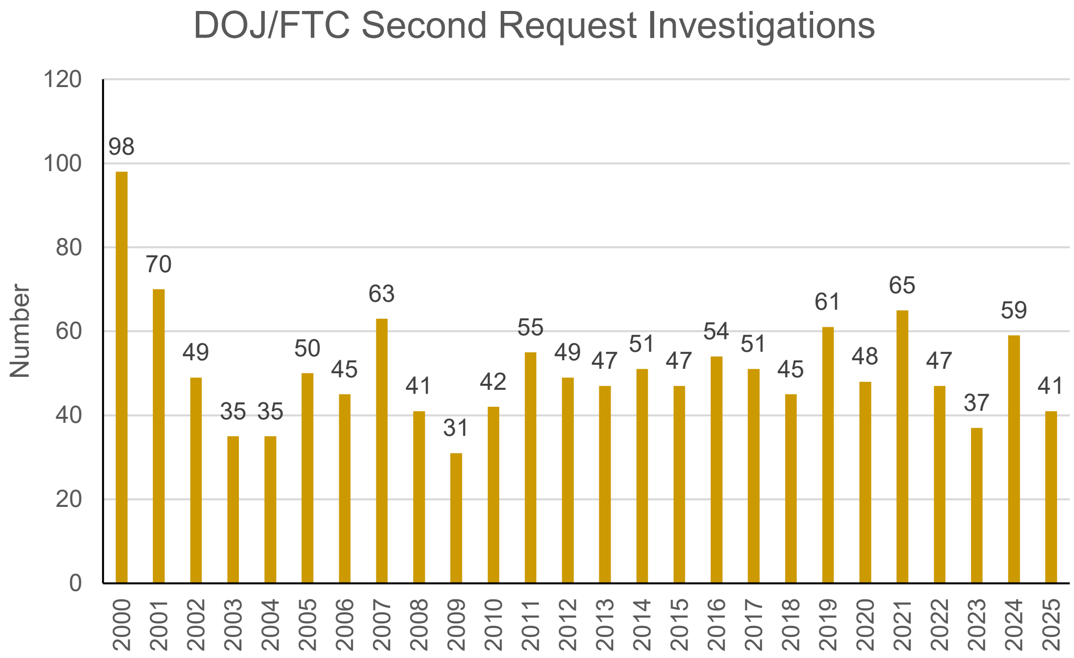
Percentage of Reportable Transactions Receiving Second Requests



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2025, at App. A (and prior annual reports)

Total number of second request investigations

- By year since 2000



Source: Fed. Trade Comm'n & U.S. Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2025, at App. A (and prior annual reports)

The second request

- Blunderbuss request
  - If you can only ask once, ask for everything
  - DOJ and FTC each have “model” second requests, but substantially customize with additional specifications for each investigation
  - Covers all company documents, including e-mail and other electronic documents

The second request

- Typically takes 4-8 months to comply
  - Can cover 60-120 custodians in large multiproduct deals
    - In the past, the agencies had made meaningful efforts to reduce this number, targeting 30-35 custodians
    - The DOJ is pursuing something along these lines today
    - BUT often condition limitations on a “timing agreement” and other commitments that effectively negate the benefits
  - Document requests, including—
    - Business, strategic and marketing plans
    - Pricing documents
    - Product and R&D plans
    - Documents addressing competition or competitors
    - Customer files and customer call reports
  - Data interrogatories, including—
    - Detailed production, sales, and price data
    - Bid and win/loss data
  - Narrative interrogatories, including—
    - Requirements for entry into the marketplace
    - Rationale for deal
  - Non-English language documents must be translated into English

The second request

- Typically takes 4-8 months to comply
  - Also need to prepare a *privilege log* listing any information withheld in whole or in part on a claim of privilege
  - The agencies require that privilege logs contain—
    - An identification of the information (including a Bates number of a document)
    - A brief description or summary of the contents of the document
    - The date of the document
    - The author(s) and recipient(s) of the document
    - The privilege asserted, *and*
    - How each element of the privilege is met

Second request investigations

- Depositions of business representatives of parties
  - Often 3-5 employees for each party
    - Typically includes the senior person knowledgeable about U.S. sales and competition for U.S. customers
    - Can include sales representatives for key accounts
    - R&D directors (if R&D is important to defense)
  - Location: Typically Washington
  - Attendance can be compelled
    - Civil Investigative Demand (CID) by the DOJ
    - Subpoena by the FTC
  - Transcribed and under oath (sometimes videotaped)
  - Typically, each lasts 6-8 hours (sometimes much longer)
- Documents and testimony from customers and competitors
  - Adverse testimony may be memorialized in a sworn declaration and perhaps videotaped deposition
- Expert economic analysis
  - By experts retained by the parties
  - By agency experts
    - Or, in investigations where litigation is foreseeable, by outside experts retained by agency

Final waiting period

- Timing
  - Begins when all parties have submitted proper second request responses
    - *Exception*: In open market transactions, timing depends only on when the acquiring person complies (to avoid delaying tactics by the target in hostile transactions)
  - Ends 30 calendar days later
    - 10 days in a cash tender offer
- The final waiting period is often too short to complete the investigation given the time it takes—
  - For the investigating staff to analyze information and documents submitted by the parties in response to their second requests
  - For the investigating staff to finalize its analysis and recommendation, *and*
  - For agency management to review the staff's recommendation and make a decision on the disposition of the investigation
  - *Conclusion*: The final waiting period provides too little time for the agency to make an informed decision

Timing agreements

- Timing agreements in second request investigations
  - The merging parties can—and typically do—voluntarily commit to give the agency additional time to complete the investigation by executing a contractual timing agreement
  - *Typical commitment*: An additional 30-60 days beyond the end of the HSR Act waiting period
  - BUT a timing commitment does not technically extend the statutory waiting period

The End of the Investigation

The final arguments

- Four formal meetings at the end of the investigation

	DOJ	FTC
1	Investigating staff	Investigating staff
2	Section Chief & staff	Assistant Director & staff
3	Deputy Assistant Attorneys General (legal and economics)	Directors meeting (Bureau of Competition/ Bureau of Economics)
4	Assistant Attorney General	FTC Commissioners (meet individually)

Note: The last meeting with the AAG or the Commissioners is sometimes inappropriately called a “last rites” meeting

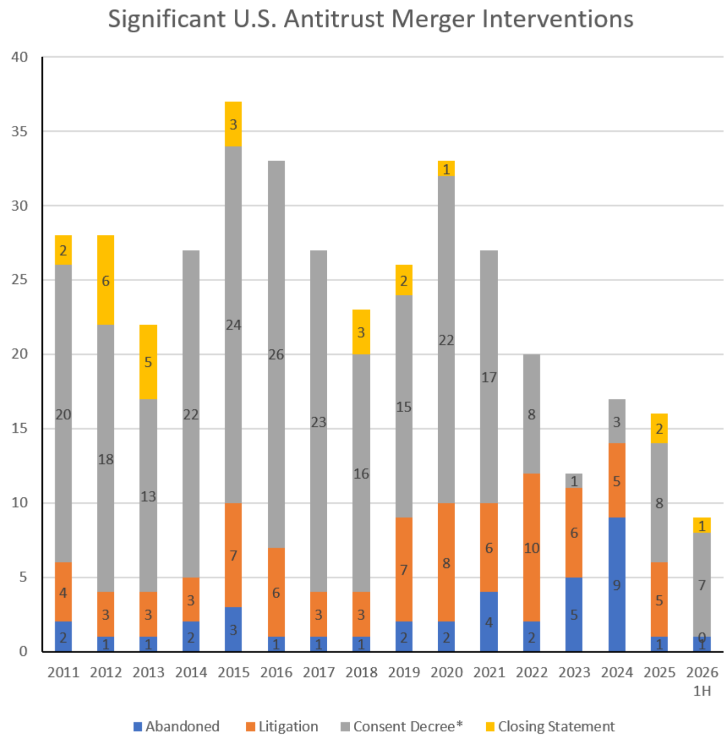
- Numerous informal meetings can occur up the chain at the end of the investigation
- *Critical question*: How much of its analysis will the investigating staff disclose to the parties?

Merger Review Outcomes

Outcomes in DOJ/FTC reviews

Close investigation	• Agency closes investigation without taking enforcement action • If the HSR Act waiting period has not expired, agency may grant early termination
Litigate	• DOJ: Seeks preliminary and permanent injunctive relief in federal district court • FTC: Currently, same as DOJ Historically, sought preliminary injunctive relief in federal district court and permanent injunctive relief in an administrative trial
Settle w/consent decree	• Typical resolution for problematic mergers • DOJ: Consent decree entered by federal district court • FTC: Consent order entered by FTC in administrative proceeding
Parties terminate transaction	• Parties will not settle at the agency's ask and will not litigate, or • Agency concludes that no settlement will resolve the agency's concerns and the parties will not litigate • Examples: AT&T/T-Mobile, NASDAQ/NYSE Euronext
"Fix it first"	• Merging parties restructure transaction to eliminate problematic overlap by narrowing assets to be purchased or selling assets to a third party • Merging parties may need to file new HSR notifications for the restructured transaction • When done to the agency's satisfaction, eliminates the need for a consent decree or other enforcement action

U.S. antitrust merger intervention outcomes



Year	Consent Decree*	Abandoned	Litigation	Closing Statement	Total
2011	20	2	4	2	28
2012	18	1	3	6	28
2013	13	1	3	5	22
2014	22	2	3		27
2015	24	3	7	3	37
2016	26	1	6		33
2017	23	1	3		27
2018	16	1	3	3	23
2019	15	2	7	2	26
2020	22	2	8	1	33
2021	17	4	6		27
2022	8	2	10		20
2023	1	5	6		12
2024	3	9	5		17
2025	8	1	5	2	16
2026 1H	7	1	0	1	9

* Includes two "fix it first" resolutions in 2012

Source: Dechert LLP, DAMITT Q2 2026: Merger Timelines Shorten and EU Updates Merger Guidance (July 30, 2026). Dechert LLP, DAMITT 2018 Year in Review (Jan. 24, 2019). Dechert defines a "significant" investigation as one that involves a deal that is HSR reportable for which the result of the investigation is a consent order, a complaint challenging the transaction, an official closing statement by the reviewing antitrust agency, or the abandonment of the transaction with the antitrust agency issuing a press release. It does not include an in-depth second request investigation in which the agency concludes there is no antitrust concern, so in this sense a significant investigation is the same as an intervention outcome. Dechert calculates the duration of an investigation from the date of announcement to the completion of the investigation (presumably including any time necessary to negotiate a consent decree).

Class 4

Unit 3: Sanford Health/Mid Dakota Clinic

Merger Antitrust Law

Georgetown University Law Center

Dale Collins

September 3, 2026

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The Mechanics of Merger Antitrust Litigation

Antitrust merger litigation generally

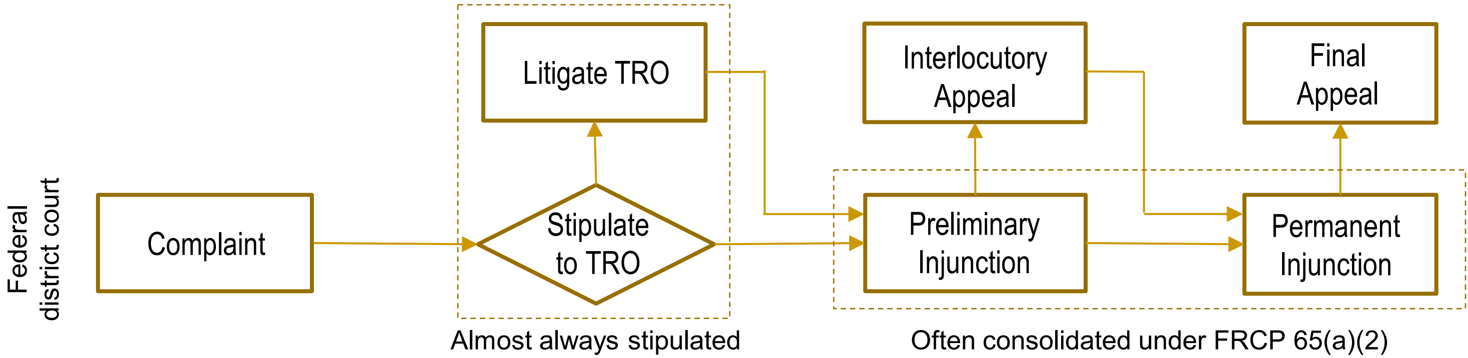
Plaintiff	Trial Forum	Appeal
DOJ	Federal district court	Court of appeals
FTC –Preliminary inj./ permanent inj. –Permanent inj.	Federal district court FTC administrative trial	Court of appeals Full commission, then any court of appeals with venue
State AGs*	Federal district court	Court of appeals
Private parties*	Federal district court	Court of appeals

* May bring state claims in state court or join state claims in federal court

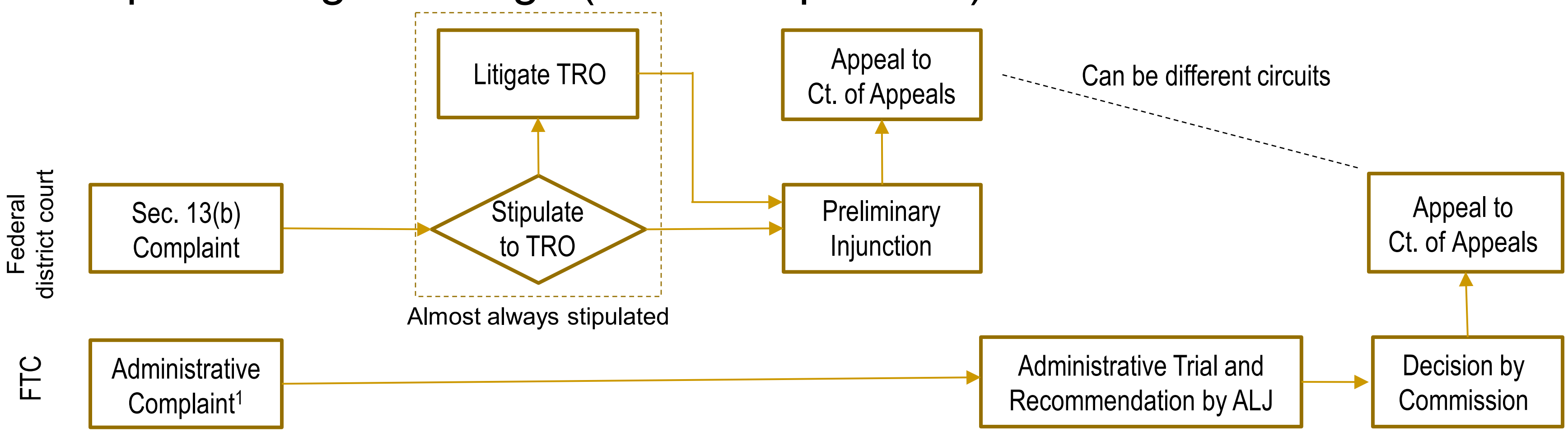
- Incentive to litigate
  - *By far the strongest*: DOJ and FTC
  - *Weak, but still see some challenges*: State AGs
  - *Almost nonexistent*: Private parties

Typical litigation paradigms

DOJ preclosing challenge



FTC preclosing challenge (historical practice)



[1] The FTC must issue its administrative complaint within 20 days of the entry of a preliminary injunction. FTC Act § 13(b). As a matter of practice, the FTC issues its administrative complaint before or on the date it seeks a preliminary injunction.

Typical litigation paradigms

DOJ postclosing challenge

FTC postclosing challenge (historical practice)

Trump 2.0 FTC litigation policy

- The Ferguson policy
  - In February 2026, Chairman Ferguson announced that the FTC would bring merger challenges directly in federal district court rather than use the traditional dual-track process[1]
  - Under the new approach, the FTC—
    - Foregoes an administrative complaint and adjudication of the merits
    - Seeks a final decision on the merits from an Article III district court
    - Proceeds under Section 13(b) of the FTC Act, rather than Section 15 of the Clayton Act, which authorizes DOJ actions
  - The FTC previewed the policy in *Henkel/Liquid Nails*[2]
    - Filed a Section 13(b) action seeking a stipulated TRO and permanent injunctive relief
    - Did not commence a parallel administrative adjudication[2]

[1] Andrew N. Ferguson, Chairman, Fed. Trade Comm'n, Remarks at the George Mason Law Review 29th Annual Antitrust Symposium (Feb. 20, 2026) (C-SPAN video at 40:40).
[2] Complaint for Permanent Injunction ¶¶ 13-18, FTC v. Henkel AG & Co. KGaA, No. 1:25-cv-10371-KPF (S.D.N.Y. filed Dec. 15, 2025); *see* Press Release, Fed. Trade Comm'n, FTC Sues to Stop Loctite, Liquid Nails Construction Adhesive Merger (Dec. 11, 2025). The major litigation filings in the case may be found here.

Litigation timing

- WDC views on timing for preclosing challenges

Proceeding	Plaintiff	Forum	Likely timing
Preliminary injunction	DOJ or FTC	Federal district court	6.5 months from filing of the complaint
Appeal from the grant or denial of a PI	DOJ or FTC	Federal court of appeals	Likely to be granted expedited treatment, in which case 6 months
Full trial on the merits	DOJ	Federal district court	Typically conducted with a stipulated TRO: 6.5 months from filing of the complaint
"Recommended decision" by the ALJ[1]	FTC	FTC administrative law judge (ALJ)	Within 1 year from issuance of administrative complaint
Decision by the Commission	FTC	Full FTC	At the Commission's discretion
Appeal from an FTC decision on the merits	FTC	Federal court of appeal	One year or more

This timing is critical to know in the negotiation of the termination date in the merger agreement

Types of injunctions in merger cases

Injunction type	Relief ordered	
Temporary restraining order (TRO)	Maintain status quo pending decision on a preliminary injunction	
Preliminary injunction	Premerger: Postmerger:	Blocking injunctions Hold separate/preserve assets for divestiture Rescission in appropriate cases
Permanent injunction	Premerger: Postmerger:	Blocking injunction Divestiture (rescission in one case)

NB: Since actions for injunctive relief sound in equity, they are tried to the court, not to a jury

Preliminary injunctions

- The enabling statutes

DOJ: Clayton Act § 15	FTC: FTC Act § 13(b)
"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute **proceedings in equity** to prevent and restrain such violations."	"Upon a proper showing that, [1] **weighing the equities** and [2] **considering the Commission's likelihood of ultimate success**, [3] such action would be in the **public interest**, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond"

Private parties: Clayton Act § 16
"Any person . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . ., **when and under the same conditions** and principles as injunctive relief against threatened conduct that will cause loss or damage **is granted by courts of equity** . . . ."

Winter v. Natural Res. Def. Council, Inc.[1]

- Seminal Supreme Court case on preliminary injunctions
- *Winter* test: "A [private] plaintiff seeking a preliminary injunction must establish
  - "[1] that he is likely to succeed on the merits,
  - "[2] that he is likely to suffer irreparable harm in the absence of preliminary relief,
  - "[3] that the balance of equities tips in his favor, and
  - "[4] that an injunction is in the public interest."[2]
- Applies to—
  - The DOJ under Clayton Act § 15
  - Private parties (including states) under Clayton Act § 16
- Does not apply to the FTC
  - FTC Act § 13(b) standard applies instead

Conventional wisdom—
But the Supreme Court has not addressed the issue

[1] 555 U.S. 7 (2008).
[2] *Id* at 20.

Comparison of injunctive relief standards

For North Dakota	For the FTC
***Winter* standard[1]**	**Section 13(b) standard**
A [private] plaintiff seeking a preliminary injunction must establish	A court must find, after
[1] that he is likely to succeed on the merits,	[1] considering the Commission's likelihood of ultimate success
[2] that he is likely to suffer irreparable harm in the absence of preliminary relief,	
[3] that the balance of equities tips in his favor, and	[2] weighing the equities
[4] that an injunction is in the public interest.	that entry of the preliminary injunction would be in the public interest

[1] Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

Antitrust preliminary injunction standard

- Debate over the Section 13(b) likelihood of success standard
  - The FTC often argues that Section 13(b) modifies the traditional equity standard for the entry of a preliminary injunction
  - Under this view, the FTC need only show—
    - "a fair and reasonable chance of ultimate success on the merits,"[1] *or*
    - more commonly cited by the courts, a "serious question":

> The issue is whether the Commission has demonstrated a likelihood of ultimate success. The Commission meets its burden if it "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."[2]

  - Almost all modern Section 13(b) opinions cite the "serious question" standard
  - BUT the debate is almost academic
    - Except for the articulation of the different standards, the opinions in DOJ Section 15 cases on a permanent injunction and FTC Section 13(b) cases for a preliminary injunction are indistinguishable and all finding for the agency show a certain or almost certain Section 7 violation

[1] *See* FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1090 (S.D.N.Y. 1977); *urged in* FTC v. IQVIA Holdings Inc., No. 23 CIV. 06188 (ER), 2024 WL 81232, at *7 (S.D.N.Y. Jan. 8, 2024).
[2] FTC v. Warner Commc'ns, 742 F.2d 1156, 1162 (9th Cir. 1984).

Winter v. Natural Res. Def. Council, Inc.

- DOJ/FTC challenges
  - Irreparable harm is presumed to result if the law is violated
    - Other cases hold that the element of irreparable harm is simply not part of the test when the government is the plaintiff and is seeking to prevent a violation of law
  - Balance of the equities
    - The public equities
      - The public interest in effectively enforcing the antitrust laws
      - The public interest in ensuring that effective relief may be ordered if the government succeeds at the trial on the merits (secondary)
    - Where there is a likelihood of success, the public equities have always outweighed the private equities, whatever they may be
      - I am unaware of any merger antitrust case where the court found the private equities outweighed the public equities if the agency demonstrated a likelihood of success on the merits

Therefore, the critical factor when the government seeks a preliminary injunction is the likelihood of success on the merits

- *Query*: Can the *Winter* requirements be balanced on a sliding scale?

Temporary restraining orders (TROs)

- Emergency interim relief a court may enter to maintain the status quo pending a fuller hearing on a motion for a preliminary injunction
- Can be entered ex parte when circumstances require[1]
- Duration[2]
  - Not to exceed 14 calendar days
  - May be extended for good cause by the court for an additional 14 calendar days
  - Short duration is the safeguard against the lack of higher standards
    - Absent consent, if of a longer duration, the TRO will be treated as a preliminary injunction and must conform to the more rigorous preliminary injunction standards
  - The parties may agree on a longer extension (stipulated TRO)
- Standard
  - The standard for issuing a temporary restraining order is the same as the standard for issuing a preliminary injunction
  - BUT the respective harms to the parties and the public interest will be assessed in light of the very limited duration of the TRO (as opposed through the end of the trial on the merits for a preliminary injunction)

[1] Fed. R. Civ. P. 65(b)(1).

[2] Fed. R. Civ. P. 65(b)(2).

Temporary restraining orders (TROs)

- Rarely litigated in modern merger antitrust practice
  - Judges strongly dislike the timing pressures of an adjudicated TRO and believe that the litigating parties should be able to agree on a scheduling order that will—
    1. Permit the merging parties to take all necessary discovery on an expedited basis before the preliminary injunction hearing, *and*
    2. Include a stipulation not to close the transaction until the motion for a preliminary injunction is decided
  - Since the same judge will decide preliminary injunction, usually unwise to be the party responsible for *not* reaching an agreement on a stipulated TRO

Permanent injunctions

- Identical to the preliminary injunction standard applicable to the case
  - EXCEPT that a permanent injunction requires *actual* success on the merits[1]
  - Success on the merits requires proof by the preponderance of the admissible evidence
- The preliminary injunction record
  - In many non-merger cases, the record for a decision on a permanent injunction will be more developed if additional discovery and briefing have occurred since the preliminary injunction hearing
  - *Not the case in merger antitrust challenges*: Lay and expert discovery will be completed, a full trial record will be presented, and the court will hold a multiday evidentiary hearing with live witnesses
  - Although expedited, merger antitrust preliminary injunction hearings are indistinguishable from a full trial on the merits
- Factual findings in the preliminary injunction hearing
  - Not binding in the permanent injunction trial (or even entitled to deference)
  - BUT unlikely to be overturned in the absence of new evidence

[1] Amoco Prod. Co. v. Vill. of Gambell, Alaska, 480 U.S. 531, 546 n.12 (1987).

FTC v. Sanford Health: The Deal

What was the transaction?

- Sanford Health to acquire MidDakota Clinic, P.C. (MDC)
  - Purchase the stock and clinic assets of MDC P.C.
  - Purchase the real estate and other assets owned by the Mid Dakota Medical Building Partnership that are leased by MDC
- Purchase price: Not given
  - But appears to be HSR reportable
    - Complaint alleges that “[a]bsent court action, Defendants will be free to close the Transaction after 11:59 pm EST on June 26, 2017”
- Term sheet dated August 22, 2016

Who was the buyer?

- Sanford Health
  - North Dakota not-for-profit corporation
  - Vertically integrated healthcare delivery system
    - Headquartered in Sioux Falls, SD
    - Operates in nine states
      - More than 40 hospitals
      - More than 250 clinics
    - Sells health insurance in four states

Who was the buyer?

- Sanford Health
  - Operates Sanford Bismarck
    - Wholly-owned subsidiary
    - Operates Sanford Bismarck Medical Center
      - 217-bed general acute care hospital and Level II trauma center
      - Employs 160 physicians who work in Bismarck or Mandan
      - Largest private employer in the Bismarck-Mandan area
    - Eight primary care clinics
    - Several specialty clinics

Who was the seller?

- Mid Dakota Clinic, P.C.
  - Not-for-profit, physician-owned professional corporation
  - Headquartered and operates in Bismarck, ND
  - Operates
    - Mid Dakota Clinic
    - Mid Dakota Center for Women
    - Ambulatory surgery center
  - Employs 61 physicians
    - 12th largest private employer in Bismarck

FTC v. Sanford Health: The FTC's Case

The complaint

- Who were the plaintiffs?
  - FTC
  - State of North Dakota
- Who were the defendants?
  - Sanford Health (and its subsidiary Sanford Bismarck)
  - Mid Dakota Clinic, P.C.
- Where was the complaint filed?
  - United States District Court for the District of North Dakota
- When was it filed?
  - June 23, 2017
- Was the complaint filed pre- or post-closing?
  - Preclosing

The complaint

- What statutes did the plaintiffs allege would be violated?
  - Clayton Act § 7
  - FTC Act § 5
  - North Dakota antitrust law
    - This is a little confusing
    - The district court cited—
      - Section 7 as the only substantive statute that was violated
      - North Dakota law only for remedies
    - But the North Dakota state remedies law should not apply to a federal Section 7 claim
    - In the complaint, however, North Dakota did allege a violation of North Dakota Century Code § 5108.1, the state's analog to the Sherman Act
      - North Dakota does not have an analog to Clayton Act § 7
    - On the other hand, the complaint's prayer for relief did not seek any remedy beyond that provided in Clayton Act § 16, so the North Dakota remedies statute was superfluous
      - Except that the North Dakota law also provides for the award of attorneys' fees when the state prevails in its action

The complaint

- Clayton Act § 7 provides the U.S. antitrust standard for mergers

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, 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]

- Essential elements of a Section 7 violation
  1. Acquisitions of stock or assets that,
  2. "in any line of commerce" (product market)
  3. "in any part of the country" (geographic market)
  4. The effect of the acquisition "may substantially lessen competition or tend to create a monopoly"[2]

Called the *relevant market*

Called the *anticompetitive effects test*

[1] 15 U.S.C. § 18 (emphasis added; remainder of section omitted).
[2] To be within federal subject matter jurisdiction, the parties and the transaction must have the requisite nexus to interstate commerce.

The complaint

- What was the gravamen of the complaint?
  - The acquisition by Sanford Health of Mid Dakota Clinic would violate Clayton Act § 7 by threatening to lessen competition in physician services "sold and provided to [1] commercial payers and [2] their insured members" in four separate relevant markets—
    1. Adult primary care physician services
    2. Pediatric services
    3. OB/GYN services, and
    4. General surgery physician services

    Relevant product markets

    in the Bismarck-Mandan area of North Dakota — Relevant geographic market

> The proposed Transaction will substantially lessen competition and cause significant harm to consumers. If Defendants consummate the Transaction, healthcare costs will rise, and the incentive to increase service offerings and improve the quality of healthcare will diminish.[1]

[1] Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act ¶ 2, FTC v. Sanford Health, No. 1:17-cv-00133-DLH-CSM (D.N.D. filed June 22, 2017).

The complaint

- What did the plaintiffs perceive as the source of the problem?
  - The acquisition would significantly increase concentration in each of the alleged relevant markets (creating monopolies or near-monopolies)

Physicians in the Bismarck-Mandan Region

	Sanford Bismarck	Mid Dakota	CHI St. Alexius	Others
Adult PCPs[1]	37	23	5	10
Pediatricians	5	6	0	1
OB/GYNs	8	8	0	1
General surgeons	4	5	0	0

[1] PCPs are primary care providers.

The complaint

- What relief did the plaintiffs seek?
  - *FTC*: Preliminary injunction under FTC Act § 13(b) enjoining the consummation of the transaction until a decision by the FTC on the merits
  - North Dakota:
    - Preliminary injunction under Clayton Act § 16 enjoining the consummation of the transaction until a decision by the FTC on the merits
    - Retain jurisdiction and maintain the *status quo* until the administrative proceeding that the Commission has initiated concludes
      - *Query*: Why ask for this?
    - Attorneys' fees

The complaint

- As to the likelihood of success on the merits, what did the FTC allege it would show?

Prima facie case

Preempt entry defense

Preempt efficiencies defense

> 68. The Commission has reason to believe that the Transaction would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. In particular, the Commission is likely to succeed in demonstrating, among other things, that:
>
> a. The Transaction would have anticompetitive effects in the adult PCP services, pediatric services, OB/GYN services, and general surgery physician services markets in the Bismarck-Mandan area;
>
> b. Substantial and effective entry or expansion into the relevant service and geographic markets is difficult and would not be timely, likely, or sufficient to offset the anticompetitive effects of the Transaction; and
>
> c. Any efficiencies that Defendants may assert as resulting from the Transaction are speculative, not merger-specific, and are, in any event, insufficient as a matter of law to justify the Transaction.[1]

[1] Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act ¶ 68, FTC v. Sanford Health, No. 1:17-cv-00133-DLH-CSM (D.N.D. filed June 22, 2017).

The complaint

- As to the balance of the equities and the public interest, what did the FTC allege it would show?

Difficulties in obtaining effective post-trial divestiture relief

69. Preliminary relief is warranted and necessary. The Commission voted unanimously to issue an administrative complaint. Should the Commission rule, after the full administrative trial, that the Transaction is unlawful, reestablishing the status quo ante of competition would be difficult, if not impossible, without preliminary injunctive relief from this Court. The integration of Sanford and MDC's operations, including the elimination or transfer of service lines, the implementation of higher prices, and potential staff reductions, would substantially impair any attempt to restore competition to pre-Transaction levels.

Interim harm from price increases and quality reductions

70. Moreover, in the absence of relief from this Court, substantial harm to competition could occur immediately, including [1] an increase in the costs that employers and their employees in the Bismarck-Mandan area incur for their healthcare and [2] a reduction in the quality of healthcare administered. Because any potential pro-competitive benefits of the Transaction do not outweigh the significant interim harm to competition and consumers, and should still be available pending the outcome of the administrative trial, the public equities weigh strongly in favor of Plaintiffs' request for preliminary injunctive relief.

[1] Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act ¶ 68, FTC v. Sanford Health, No. 1:17-cv-00133-DLH-CSM (D.N.D. filed June 22, 2017).

Proving the Prima Facie Case

Proving the prima facie case

- Three elements:
  1. *Product market definition*: Courts broadly look at two types of indicia in evaluating evidence on the relevant product market—
     a. The "*Brown Shoe* factors"
     b. The "hypothetical monopolist test"
  2. *Geographic market definition*: Courts broadly look at two types of indicia in evaluating evidence on the relevant geographic market—
     a. "The area of effective competition"
        i. The area where customers of the merging firms can practically turn to alternative suppliers (when customers travel to suppliers—think retail stores)
        ii. The area where alternative suppliers exist that can practically service the customers of the merging firm (when suppliers travel to customers—think plumbers)
     b. The "hypothetical monopolist test"
  3. *Gross anticompetitive effect*: Courts broadly look at two types of indicia in evaluating evidence on the relevant market
     a. The *Philadelphia National Bank* presumption
     b. Explicit theories and supporting direct and circumstantial evidence of likely anticompetitive harm resulting from the merger

Before turning to market definition, we need to examine the Philadelphia National Bank *presumption and* Baker Hughes *burden shifting*

The *PNB* presumption

- Establishes a rebuttable presumption of prima facie anticompetitive Section 7 harm:

> "This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which **produces a firm controlling an undue percentage share of the relevant market**, and **results in a significant increase in the concentration of firms** in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[1]

  - Requires—
    - The combined firm to pass some (unspecified) threshold of *market share*, *and*
    - The transaction to result in a *significant increase in market concentration*

    NB: The opinion was careful to note that it was not setting a lower bound and that some commentators had suggested 20% as a threshold of "undue" market share
  - Supposed to reflect the latest in economic thinking in the then-prevailing *structure-conduct-performance paradigm*
    - "[T] the test is fully consonant with economic theory."[2]
    - "[C]ompetition is greatest when there are many sellers, none of which has any significant share."[3]

[1] United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963).
[2] *Id*. (citing extensively to structure-conduct-performance literature).
[3] *Id*.

Baker-Hughes[1]

- Sets out a three-step burden-shifting approach: Step 1
  1. The plaintiff bears the burden of proof in market definition and in market shares and market concentration within the relevant market sufficient to trigger the *PNB* presumption and thereby prove a prima facie Section 7 violation
     - More generally, this should be the burden of proving a prima facie case (whether or not the *PNB* presumption or other evidence is invoked to show anticompetitive effect)
     - You can think of the burden here as the *burden of production*, that is, the plaintiff must adduce sufficient evidence to allow the trier of fact to find each and every (contested) essential element of a Section 7 violation
     - Essential elements
       1. The relevant product market
       2. The relevant geographic market
       3. The requisite gross anticompetitive effect in the relevant market

Also need to satisfy the interstate commerce element, but this is rarely contested

[1] United States v. Baker Hughes Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990).

Baker-Hughes

- Sets out a three-step burden-shifting approach: Step 2
  2. If the plaintiff satisfies its burden in Step 1, the *burden of production* shifts in Step 2 to the defendants to adduce evidence sufficient to rebut the plaintiff's prima facie case and create a genuine issue for the trier of fact
     a. Three avenues of rebuttal:
        i. Negate the plaintiff's market definition
        ii. Rebut the predicates of the *PNB* presumption and other evidence of (gross) prima facie anticompetitive effect
        iii. If applicable, provide evidence of one or more downward-pricing pressure defenses

Baker-Hughes

- Uses a three-step burden shifting approach: Step 3
   3. *The burden of persuasion* then returns to the plaintiff to prove, in light of all of the evidence in the record, that the merger is reasonably probable to have an anticompetitive effect in the relevant market
      - To the extent defendants have satisfied their burden in Step 2, in Step 3 plaintiffs must prove by the preponderance of the evidence—
         - The relevant product market
         - The relevant geographic market, and
         - The merger will cause a cognizable *net* anticompetitive effect with reasonable probability

Market Definition Generally

Relevant markets

- The language of Clayton Act § 7 requires proof of the product and geographic dimensions of a relevant market:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, 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]

[1] 15 U.S.C. § 18 (emphasis added; remainder of section omitted).

Some basic points

- Question of fact
  - The determination of the boundaries of the relevant market is a question of fact
- Burden of proof on the plaintiff
  - Bears the burden of proving a *prima facie* relevant market in Step 1 of *Baker Hughes*
    - Essentially a burden of production
  - Bears the *burden of persuasion* on relevant market in Step 3 of *Baker Hughes*
- Motion to dismiss: *Twombly* applies
  - The complaint must contain sufficient factual allegations to make the alleged market definition plausible under the market definition standards in the case law
  - The plaintiff's failure in a complaint to adequately plead the factual predicates of market definition will result in the complaint's dismissal under FRCP 12(b)(6)
  - However, *Twombly* challenges are typically not brought where—
    1. The defendants are not likely to ultimately challenge the plaintiff's definition of the relevant market, *or*
    2. It is easy for the plaintiff to replead the complaint and supply the missing factual allegations to support its alleged market definition
  - More generally, motions to dismiss are rare in preclosing merger antitrust challenges
    - Merging parties want to proceed to the merits as quickly as possible

Some basic points

- Forward looking
  - Since merger antitrust law is forward-looking—that is, it makes unlawful mergers and acquisitions that are likely to lessen competition substantially in the future as compared to what competitive conditions would have been absent the transaction—market definition equally must be forward-looking
  - Product market definition, for example, should account for new products that shortly will be released or old products that will soon be obsolete
  - Likewise, geographic market definition should account for the construction of new facilities, changing transportation modes or patterns, or new methods of purchasing or distribution
- Appeal: As a finding of fact—
  - District court findings on market definition are reviewed under the *clearly erroneous rule*
    - To set aside, requires the reviewing court, after considering the entire evidence, to have a definite and firm conviction that a mistake has been committed even though some evidence supports the finding
  - FTC findings are reviewed under the *substantial evidence rule*
    - Must uphold where the supporting evidence is "more than a mere scintilla" and a reasonable mind could accept it as adequate to support the finding

Step 1. The Prima Facie Case: Relevant Product Markets

Product market tests

- Two complementary tests in judicial analysis:
  1. The "outer boundaries" and "practical indicia" criteria of *Brown Shoe*[1]
  2. The hypothetical monopolist test of the Merger Guidelines

- Market definition and the Merger Guidelines
  - The 1982, 1992, and 2010 Merger Guidelines recognized only the hypothetical monopolist test for defining markets
  - BUT the 2023 Merger Guidelines provide four methods for defining markets:[2]
    1. Direct evidence of substantial competition between the merging parties
    2. Direct evidence of the exercise of market power
    3. The *Brown Shoe* "practical indicia"
    4. The hypothetical monopolist test

Show only that a market exists, but do not define market boundaries

Subject to problems to be discussed in the next section

[1] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).
[2] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 4.3 (rev. Dec. 18, 2023); *see* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (rev. Aug. 19, 2010).

The *Brown Shoe* Tests

Brown Shoe "outer boundaries" test

- *Brown Shoe*:

> The outer boundaries of a product market are determined by **the reasonable interchangeability of use** or the **cross-elasticity of demand** between the product itself and substitutes for it.[1]

  - This remains the prevailing definition of a relevant product market in the case law
- General idea
  - In a horizontal merger, the relevant product market should—
    1. *Start* with the overlapping products of the merging firms
    2. *Contain* all products that exhibit a reasonable interchangeability of use and a high cross-elasticity of demand with one another
    3. *Exclude* all products that lack reasonable interchangeability of use and have a low cross-elasticity of demand with products in the relevant product market

Designed to isolate all and only those products that exert significant price-constraining force on the overlapping products

- Modern usage
  - Reasonable interchangeability of use has largely come to mean high cross-elasticity of demand and is no longer a distinct "outer boundary" factor
  - Although these variables may be quantified, in practice they are almost always *qualitative* (making *Brown Shoe* market definition very subjective)

[1] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (emphasis added).

Brown Shoe "practical indicia" test

- Submarkets and "practical indicia" of relevant markets

> However, within this broad market [defined by reasonable interchangeability of use and high cross-elasticity of demand], 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
>
> [1] industry or public recognition of the submarket as a separate economic entity,
>
> [2] the product's peculiar characteristics and uses,
>
> [3] unique production facilities,
>
> [4] distinct customers,
>
> [5] distinct prices,
>
> [6] sensitivity to price changes, and
>
> [7] specialized vendors.[1]

[1] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

Brown Shoe "practical indicia" test

- Modern usage
  - Modern courts do not usually distinguish between markets and submarkets, and the practical indicia have become factors to consider in assessing reasonable interchangeability of use and cross-elasticity of demand
- The problem
  - There are no metrics for this variables and the Court did not provide any method for weighing them → Brown Shoe market definition became highly subjective
  - Courts tended to defer to the government's market definition
    - *Potter Stewart rule*: The sole consistency that I can find is that in litigation under [Section 7], the Government always wins.2

[1] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).
[2] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

Application in *Sanford Health*

- Product market definition in *Sanford Health* had two dimensions:
  1. A type of physician service
  2. The customers who paid for/consumed the service
- Physician services
  - The district court identified four types of physician services as separate relevant products:
    1. Adult primary care physician (PCP) services
    2. Pediatrician services
    3. OB/GYN physician services
    4. General surgeon services
  - *Key*: Substitutability considerations
    1. Physicians within a relevant service category were reasonably interchangeable with other physicians within the same group
       - Especially true for commercial insurers
       - True for insureds (but recognizing the physicians within a category can be differentiated in the minds of patients)
    2. Physicians outside a relevant service category were not reasonably interchangeable with physicians within the category
       - Equally true for commercial insurers and their insureds

Application in *Sanford Health*

Note: The *Sanford Health* court did not explicitly perform a *Brown Shoe* analysis, but we will see that the court's analysis easily fits within this framework

- Supporting *Brown Shoe* "practical indicia"
  - Industry or public recognition
    - Relied on testimony from commercial insurers (BCBSND, SHP, Medica), who uniformly testified that each physician service line (PCP, pediatrician, OB/GYN, general surgeon) is essential for a marketable network in the Bismarck-Mandan area
  - Peculiar characteristics and uses
    - Each service line involves distinct clinical roles, scopes of practice, and patient populations
  - Distinct customers
    - Commercial health insurers seeking a service provided by the physician group for their insureds
    - Patients insured by commercial health insurers
  - Distinct prices
    - While the court did not cite service-specific price levels, it found that insurers negotiate separate reimbursement rates for each service line
  - Specialized vendors
    - Providers are board-certified and licensed in distinct medical specialties
    - PCPs, pediatricians, OB/GYNs, and general surgeons cannot replace one another for insurance or clinical purposes
  - Not cited: Sensitivity to price changes (cross-elasticity of demand)
    - Although not framed in *Brown Shoe* terms, implicitly tested through the HMT

Would establish a prima facie case of market definition under Step 1 of Baker Hughes

Application in *Sanford Health*

- Defendants' substitution arguments
  - Defendants argued FTC's markets too narrow because they excluded close substitutes:
    - *PCPs*: Should include advanced practice providers (APPs), including nurse practitioners, physician assistants
      - APPs perform many of the same routine functions as PCPs
    - *Pediatricians*: Should include pediatric hospitalists
      - Pediatric hospitalists are board-certified pediatricians providing care in hospitals
    - *OB/GYNs*: Should include general surgeons
      - General surgeons and OB/GYNs share overlapping procedural skills
  - *Query*: What is the nature of the defense the merging firms were offering here?
    - Proof of the dimensions of the relevant market is an essential element of the plaintiffs' merits claim
    - The plaintiffs bear the burden of persuasion in Step 3 of *Baker Hughes* when market definition is disputed
    - If the merging firms can show that the relevant market includes health care providers that the plaintiffs failed to include in their alleged markets, the plaintiffs fail in Step 3 on an essential element of their claim

Arguably would create a genuine issue of fact of the dimensions of the product market and, if so, satisfy Step 2 of Baker Hughes

Application in *Sanford Health*

- Court's analysis of the substitution arguments
  - PCPs and APPs: Rejected
    - Insurers testified APPs not viewed as interchangeable with PCPs in insurance policy coverage
    - APPs require physician supervision; networks still need PCPs
  - Pediatricians and pediatric hospitalists: Rejected
    - Hospitalists limited to inpatient care; no outpatient or well-child services
    - Community-based pediatricians are essential for marketable networks
  - OB/GYNs and general surgeons: Rejected
    - Distinct training and scopes of practice
    - General surgeons cannot replace OB/GYNs for obstetric care or many gynecological procedures
  - *Bottom line*:
    - The Court rejected all substitution arguments
    - Each specialty alone is a separate relevant product market

Would provide the basis for the Court rejecting the merging firms' rebuttal of the plaintiffs' prima facie case of market definition and sustain a finding that the plaintiffs' alleged markets are relevant markets under Step 3 of Baker Hughes

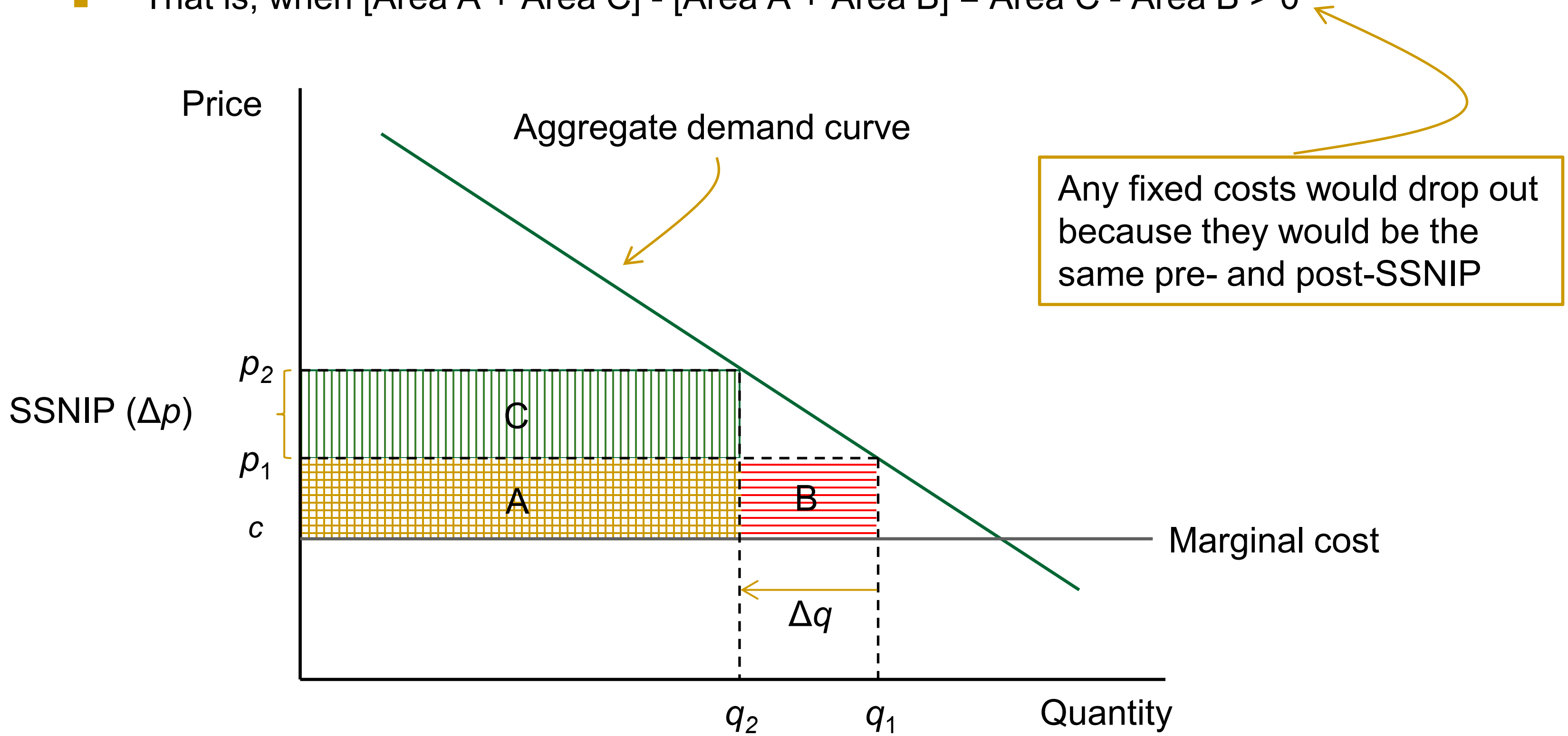
The Hypothetical Monopolist Test

Hypothetical monopolist test (HMT)

- The original idea
  - The relevant market should be—
    1. the *smallest group of products* containing the products of interest
    2. in which a hypothetical monopolist of those products *could raise prices profitably* above the current level
    3. by at least a "*small but significant nontransitory*" amount
  - Some background
    - Introduced in the 1982 DOJ Merger Guidelines
    - Designed to introduce some economic sense and analytical rigor into market definition
    - Continued in the subsequent merger guidelines (although with some important modifications)
    - "SSNIP" = "Small but significant nontransitory increase in price"
      - Under the Merger Guidelines, a SSNIP is usually taken to be a price increase of 5% for at least one year
  - General idea
    - If a hypothetical monopolist—effectively the merger of all firms in the candidate market—could not anticompetitively affect prices, then a fortiori a merger of only two firms in the candidate market could not affect prices
    - Accordingly, the candidate market should be accepted as a relevant market only if a hypothetical monopolist could raise prices profitably above prevailing levels

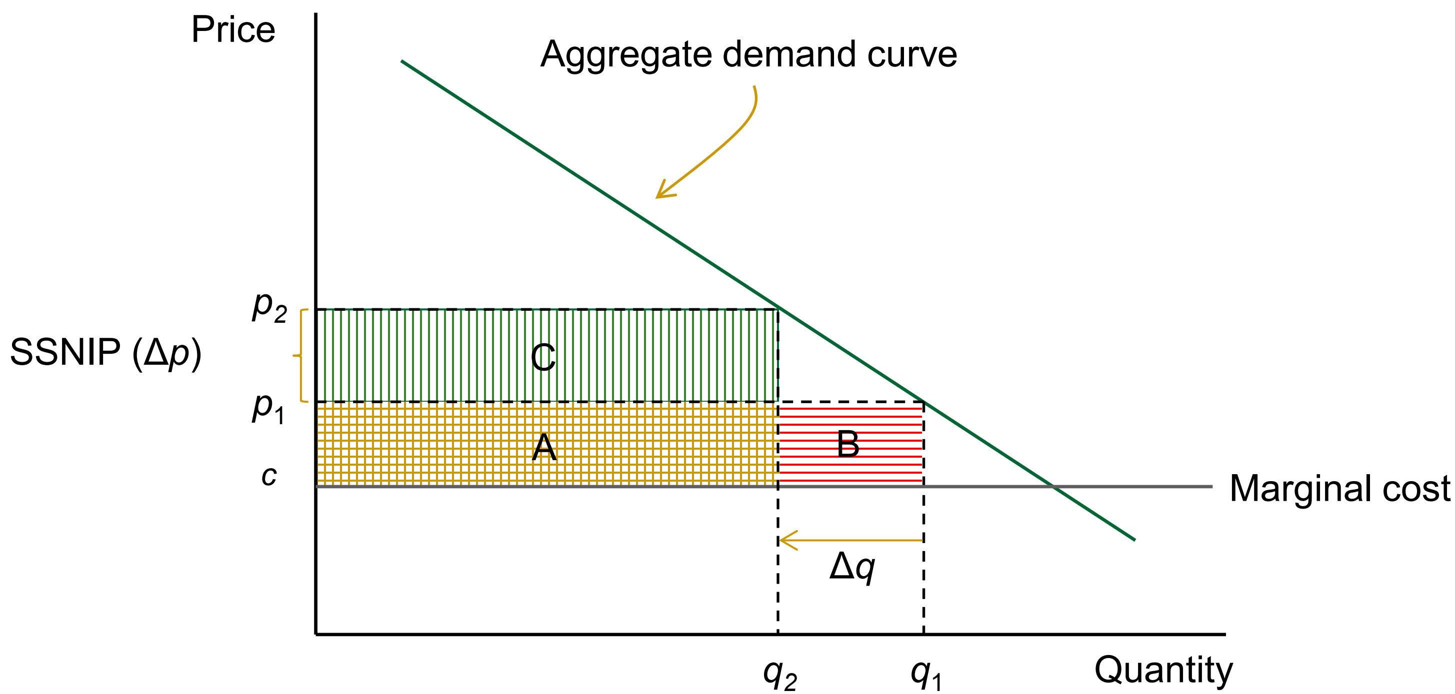
HMT: The mechanics

- The hypothetical monopolist test
  - In the diagram:
    - Pre-SSNIP profits = Area A + Area B
    - Post-SSNIP profits = Area A + Area C
  - The HMT is satisfied if the post-SSNIP profits exceed the pre-SSNIP profits
    - That is, when [Area A + Area C] - [Area A + Area B] = Area C - Area B > 0



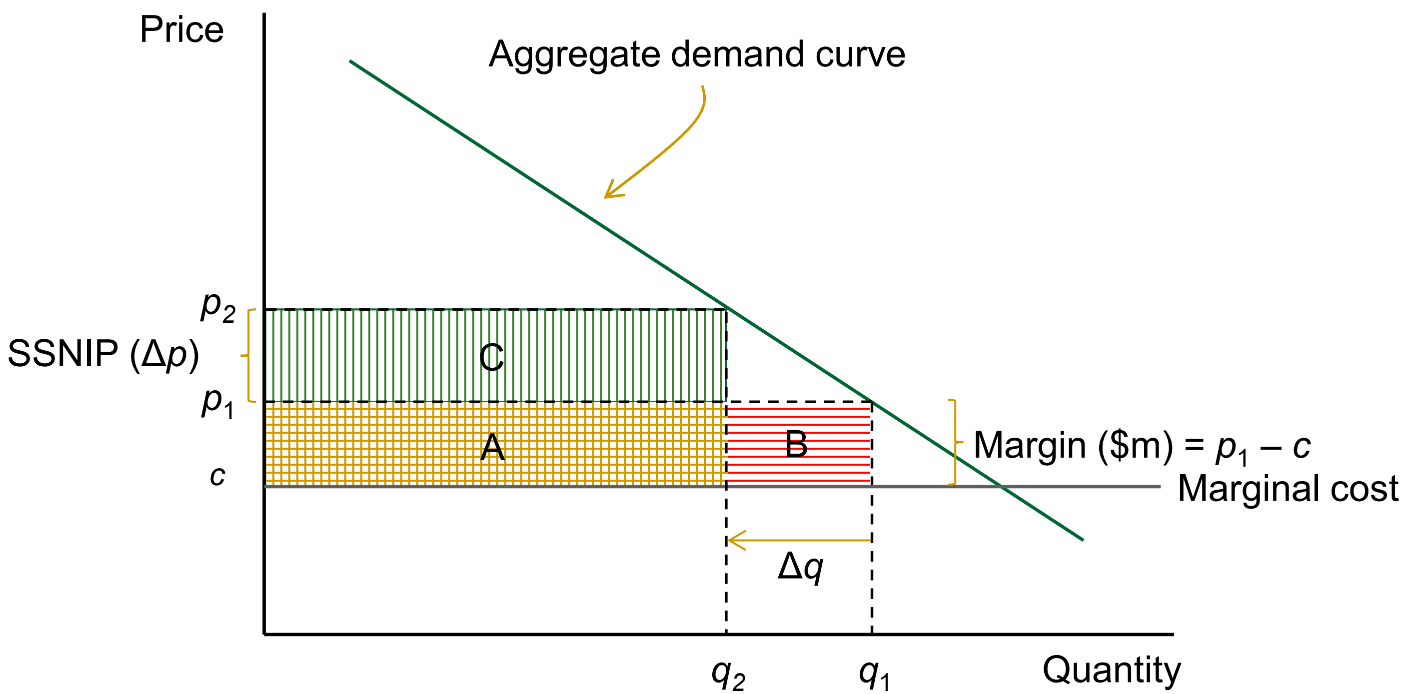
HMT: The mechanics

- The hypothetical monopolist test
  - Interpreting the areas
    - Area C is the *gross incremental profit gain* to the firm from continued sales to inframarginal customers
    - Area B is the *gross incremental profit loss* to the firm from the foregone sales to marginal customers who would have purchased at price p_1 but not at price p_2
    - So Area C – Area B is the *net incremental profit gain* to the firm (which may be positive or negative)



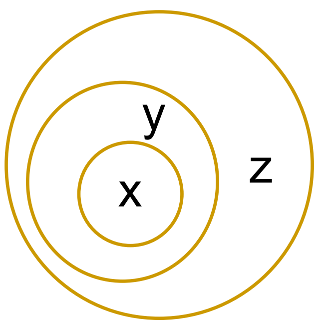
HMT: The mechanics

- The hypothetical monopolist test
  - Calculating the areas
    - Area C = $\Delta p \times q_2$ (gross incremental profit gain from inframarginal unit sales)
    - Area B = $\Delta q \times (p_1 - c) = \Delta q \times \$m$ (gross incremental profit loss from foregone marginal unit sales)
    - So net incremental profit $\Delta\pi = \underbrace{[\Delta p \times q2]}_{\text{Area C}} - \underbrace{[\Delta q \times \$m]}_{\text{Area B}}$



HMT: Original Merger Guidelines Algorithm[1]

1. Start with the product of a merging firm as the starting candidate market.
   - In practice (and in the courts), the starting market may include multiple products selected for reasons outside the HMT test (such as industry recognition)
2. Ask whether a hypothetical monopolist of the candidate market could profitably increase price by a SSNIP. If so, then that candidate market satisfies the HMT. If not, go to Step 3.
3. Expand the market to include the next closest substitute to the products in the prior candidate market and repeat Step 2.



1. Start with candidate market x. Apply HMT.
   If HMT is satisfied, this is the relevant market
   If HMT fails, expand market to y
2. Apply HMT to new candidate market
   If HMT is satisfied, this is the relevant market
   If HMT fails, expand market to z
3. Apply HMT to new candidate market
   If HMT is satisfied, this is the relevant market
   If HMT fails, expand market . . .

[1] 1992 Horizontal Merger Guidelines § 1.11.

HMT Homework Problem 1

TreeTop and AppleWay together sell 60 million bottles of apple juice annually—35 million by TreeTop and 25 million by AppleWay—out of 100 million bottles sold across all apple juice brands. TreeTop and AppleWay both sell for $2.50 per bottle and earn a gross margin of 40%. If a hypothetical monopolist controlling all apple juice brands raised prices by 5% to $2.625 per bottle, 13 million bottles would divert to other fruit juices such as orange, cranberry, or grape juice, whose prices remain unchanged. Does the candidate market of all apple juice satisfy the HMT?

Data			**Analysis**			**Result**		
Price (*p*)	$2.50	per bottle	**Loss on marginal sales**					
Percentage gross margin	40%		Δ*q*	13.00	million	**Net gain**	-$2.1250	million
$margin ($*m*)	$1.00	per bottle	$*m*	$1.00		HMT	FAILED	
%SSNIP (%Δ*p*)	5.00%		Gross loss	$13.00	million			
$SSNIP ($Δ*p*)	$0.1250	per bottle						
Quantity (*q*)	100	million	**Gain on inframarginal sales**					
Unit marginal loss (Δ*q*)	13.00	million	*q* - Δ*q*	87.00	million			
			$SSNIP	$0.1250				
			Gross gain	$10.88	million			

HMT: Recap

- The question
  - Can a hypothetical monopolist of a group of products (a *candidate market*) profitably increase the price of those products by a small but significant nontransitory amount (a *SSNIP*)?
- The test: If the incremental profits from the price increase are—
  - *Positive*: The price increase is profitable and the HMT is satisfied
  - *Negative*: The price increase is unprofitable and the HMT fails
- The accounting: Net incremental profits
  - = The gain from the increased margin (Δp) on the inframarginal sales (q_2) *minus* the dollar loss of margin ($p_1 - c$) on the marginal sales (Δq):

$$= \underbrace{\Delta p \times q_2}_{\text{Gain on inframarginal sales}} \quad - \quad \underbrace{(p_1 - c) \times \Delta q}_{\text{Loss on marginal sales}}$$

- The data
  - The statement of the problem will give you p_1, q_1, c, the SSNIP, and some indication of how demand changes with an increase in price
  - Those variables will permit you to calculate Δp, q_2, Δq, and net incremental profits

HMT: Application in *Sanford Health*

- Court explicitly applied the hypothetical monopolist test (HMT)
- *Candidate markets*: Four physician services in the Bismarck-Mandan area—
  - Adult primary care physician (PCP) services
  - Pediatric services
  - OB/GYN services
  - General surgeon services
- *Customers*: Commercial insurers and their insured members
  - *Query*: Why do we need this?
- Point of departure in the analysis:

Insurer testimony:

Insurance plans not marketable to employers without all four physician service lines

HMT: Application in *Sanford Health*

- Court explicitly applied the hypothetical monopolist test (HMT):

  Could a monopolist of each physician service line in Bismarck–Mandan profitably impose a 5% SSNIP?

- Considered whether insurers would drop or alter their provider networks in response to a SSNIP
- Court credited testimony from insurers (BCBSND, Sanford Health Plan, Medica) that—
  - Their health insurance plans could not be marketed to employers if they did not cover PCPs, pediatricians, OB/GYNs, and general surgeons
  - They would accept a SSNIP rather than sell a plan missing any of the four lines
- *Result*: Found the four distinct physician service markets satisfied the HMT
  - Application of the HMT here was *qualitative* and based on testimony about practical marketability and the commercial realities, not quantitative SSNIP incremental profitability calculations

Conclusion

The court found that plaintiffs established four distinct relevant product markets—adult PCP, pediatrics, OB/GYN, and general surgery—based implicitly on Brown Shoe *factors and explicitly on the HMT and commercial realities*

Step 1. The Prima Facie Case: Relevant Geographic Markets

Geographical markets generally

- Definition
  - For each relevant product market, there is one or more associated relevant geographic markets
  - Relation to the sales area of the merging parties
    - The relevant geographic market is not necessarily, and indeed frequently is not, congruent with the sales area of one or both of the merging parties
    - The boundaries of the relevant geographic market turn not on where customers have gone to purchase the relevant product, but rather where they practically could go to protect themselves in the event the merger or acquisition was in fact anticompetitive
  - A single firm may operate in a number of different geographic markets
    - For example, a dialysis firm operating in a retail dialysis product market can operate in multiple distinct geographic markets
    - Each market is analyzed separately for a Section 7 violation
    - A violation in any relevant market is sufficient grounds to enjoin the transaction in its entirety
      - When litigating, the agencies will seek a blocking injunction for the entire transaction, even if it could be readily fixed
      - The courts accede to this practice
      - If the merging parties want only a partial divestiture, they must either—
        - Negotiate a suitable consent decree, or
        - Litigate the fix

Relevant geographic markets

- Judicial tests: *Philadelphia National Bank*
  - Defined the relevant geographic market to be "the area of effective competition . . . in which the seller operates, and to which the purchaser can practically turn for supplies."[1]
  - The Court also observed that an element of "fuzziness would seem inherent in any attempt to delineate the relevant geographic market" and that the market need not be defined by "metes and bounds as a surveyor would lay off a plot of ground."[2]
  - Can be applied separately from the test for relevant product market definition
- Hypothetical monopolist test
  - Applied simultaneously to the candidate product market and the associated candidate geographic market
  - That is, you cannot apply the HMT to a product market without also delineating the area in which the products may be obtained

[1] 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).
[2] *Id*. at 360 n.37; *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").

Geographic markets: Judicial tests

- General rules
  - Actual sales and shipment patterns are most often used by courts to determine the dimensions of the geographic market
  - In many cases, the geographic boundaries of the relevant market are well understood and are often the subject of stipulations by the parties
  - Proponents cannot rely on political boundaries (such as towns, counties, or states) to establish the boundaries of a relevant geographic market without providing evidence of the competitive forces within these boundaries
    - However, courts often accept political boundaries (towns, counties, states) as relevant geographic markets when those boundaries reasonably approximate the area defined by judicial tests and the HMT

[1] Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 228 (2d Cir. 2006) (internal citations omitted).

Geographic markets: HMT

- Methodology
  - Analogy to product market definition
    - The merger guidelines define geographic markets using the same hypothetical monopolist test and substitution concepts as are used in product market definition
    - As in the case of product substitution, some geographic substitution may be expected in the event of a small price increase when sellers are geographically differentiated
    - Candidate geographic markets, prices, SSNIPs, and price discrimination markets are treated analogously to their treatment in product market definition
  - Factors identified in the 1992 guidelines to consider in assessing buyer reactions to a SSNIP:[1]
    - Evidence that buyers have shifted or have considered shifting purchases between different geographic locations in response to relative changes in price or other competitive variables
    - Evidence that sellers base business decisions on the prospect of buyer substitution between geographic locations in response to relative changes in price or other competitive variables
    - The influence of downstream competition faced by a buyer in their output markets
    - The timing and costs of switching suppliers
  - These factors are nonexclusive: Any evidence probative of buyer switching reactions may be considered

[1] 1992 Horizontal Merger Guidelines § 1.21.

Geographic markets: 2010 Merger Guidelines

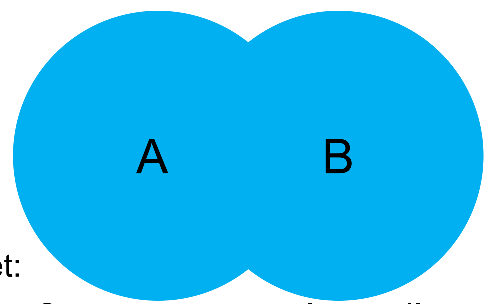
- 2010 Merger Guidelines revisions
  - As with product markets
    - Relegates geographic market definition to one of several tools useful to merger antitrust analysis and which may not be necessary in all cases
    - Abandons the “smallest market” principle and unique relevant markets
  - Two cases
    - Geographic market definition has been problematic in antitrust cases
    - The principal reason is that the law attempted to define relevant geographic markets using the same approach in two entirely distinct situations:
      1. where the merging firms operate in fixed locations to which customers travel to make their purchases, and
      2. where the merging firms operate central production facilities and ship their products to the customers
    - The 2010 Guidelines properly draw the distinction

Geographic markets: 2010 Merger Guidelines

- Geographic markets based on the locations of suppliers
  - Generally
    - Here, customers travel to the supplier's location, so the relevant question is to which supplier locations is the customer willing to travel if a hypothetical monopolist of the locations in the provisional market raises price
      - This is typically the case, for example, in consumer retail markets
    - In other words, how much farther would a customer be willing to travel to avoid a SSNIP?
  - Examples
    - Grocery stores and supermarkets
    - Shopping malls and department stores
    - Restaurants and cafes
    - Gas stations
    - Auto dealerships and car lots
    - Hardware stores
    - Banks and credit unions
    - Legal offices and law firms
    - Hospitals and medical centers
    - Dental offices
    - Veterinary clinics
    - Pharmacies
    - Physical therapy clinics
    - Gyms and fitness centers
    - Spas and salons
    - Movie theaters and cinemas
    - Amusement parks and theme parks
    - Golf courses and country clubs
    - Concert venues and theaters
    - Schools and universities
    - Dry cleaners and laundromats
    - Auto repair shops
    - Hair salons and barbershops

Geographic markets: 2010 Merger Guidelines

- Geographic markets based on the locations of suppliers (cont.)
  - Guidelines test
    - The relevant geographic market is then the region encompassing the seller locations from which sales are made where a hypothetical monopolist controlling these facilities could raise prices profitably at a SSNIP from at least one or more of these facilities, including at least one location of one of the merging firms
    - Notably, when the geographic market is defined based on supplier locations, sales made by suppliers located in the geographic market are counted, regardless of the location of the customer making the purchase
      - This results from the hypothetical monopolist being unable to price discriminate between customers who can reasonably substitute suppliers and customers who cannot



Relevant market:
A + B

Customers travel to sellers
(no discrimination among customers)

Geographic markets: 2010 Merger Guidelines

- Geographic markets based on the locations of suppliers (cont.)
  - Example: Wilton supermarkets (in prices and quantities)

> FreshMart and MarketChoice, two of the three supermarkets in Wilton, CT, propose to merge. Each of the three stores serves 2,000 households, and each household spends $5000 annually at their preferred supermarket. This yields a total of 6,000 households with $30 million in supermarket spending. The gross margin for supermarket sales is 25%. The evidence shows that if a hypothetical monopolist controlling all three Wilton supermarkets imposed a uniform 5% price increase, 10% of the Wilton households switch to supermarkets in Ridgefield, CT, 12 miles away. Does Wilton satisfy the HMT?

- NB: Here, we interpreted quantities to be in households and prices in annual supermarket spend per household. Part of formal antitrust analysis is setting up the problem so that it is workable

Data		Analysis			Result		
Price (p) per household	$5,000.00	**Loss on marginal sales**					
Percentage gross margin (%m)	25.00%	Δq	600		**Net gain**	$0.60	million
%SSNIP (%Δp)	5.00%	$\$m$	$1,250.00		HMT	PASSED	
$SSNIP ($\Δp) per household	$250.00	Gross loss	$0.75	million			
$margin ($\m)	$1,250.00						
Quantity (q)	6000	**Gain on inframarginal sales**					
Percentage marginal loss (%Δq	10.00%	$q - \Delta q$	5400				
Unit marginal loss (Δq)	600	$SSNIP	$250.00				
		Gross gain	$1.35	million			

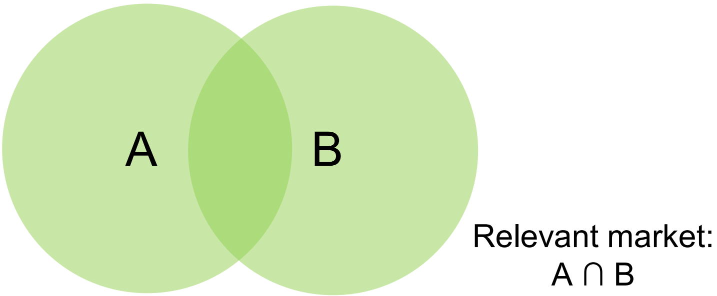
- The net profits from the SSNIP is positive, so Wilton satisfies the HMT

Geographic markets: 2010 Merger Guidelines

- Geographic markets based on the locations of customers
  - Generally
    - Here, suppliers deliver goods or services to the customer's location, so the relevant question is which suppliers are willing to compete for a customer at a given location in the event that a hypothetical monopolist of the suppliers in the candidate market raises price
      - The idea is that an increase in a local price increases the margin earned by a supplier, and a more distant supplier can use the additional margin to offset its shipping costs (that is, how much farther would a supplier be willing to ship in the event prices increased)
    - The relevant geographic market is then the region encompassing the *customer locations* to which sales are made where a hypothetical monopolist supplying that region could raise prices profitably at a SSNIP
      - This usually entails a straightforward calculation of the additional shipping distance that could be funded by a SSNIP (keeping in mind that the loading and unloading costs are already covered)
  - Examples
    - Vending machine service operators
    - Foodservice distributors
    - Ready-mix concrete suppliers
    - Lumber delivery to job sites
    - Plumbers and electricians
    - HVAC installation and repair
    - Waste collection and disposal
    - Commercial janitorial or cleaning services
    - Industrial gas delivery
    - Fuel oil or propane delivery
    - Bulk chemical delivery
    - Clinical laboratory (with pickup service)
    - Home healthcare services
    - Ambulance and non-emergency medical transport

Geographic markets: 2010 Merger Guidelines

- Geographic markets based on the locations of customers



Sellers travel to customers
(may permit discrimination among customers)

Geographic markets: 2010 Merger Guidelines

- Geographic markets based on the locations of customers (cont.)
  - Example: Foodservice distribution merger

> SysMeal and FreshPro are the only full-line foodservice distributors with distribution centers in Lancaster, Pennsylvania, and propose to merge. MetroServe, located 70 miles away in Allentown, serves a small number of Lancaster customers via long-distance delivery. The merging parties argue the relevant geographic market includes both Lancaster and Allentown; the FTC claims Lancaster is a distinct market. In Lancaster, SysMeal and FreshPro together serve 1,000 customer locations, each spending $50,000 annually, with a 30% gross margin. A 5% price increase would cause 5% of SysMeal and FreshPro's Lancaster customers to switch to suppliers outside Lancaster—60% to MetroServe and 40% to other options. Does Lancaster satisfy the HMT?

  - NB: The division in the lost sales to MetroServe and other options is irrelevant to the profitability of the SSNIP. It is relevant, however, to identifying MetroServe as the closest alternative supplier outside the candidate geographic market.

Data		Analysis		Result	
Price (p) per household	$50,000.00	**Loss on marginal sales**			
Percentage gross margin (%m)	30.00%	Δq	50	**Net gain**	$1.63 million
%SSNIP (%Δp)	5.00%	*$m*	$15,000.00	HMT	PASSED
$SSNIP ($$\Delta p$) per household	$2,500.00	Gross loss	$0.75 million		
$margin ($$m$)	$15,000.00				
Quantity (q)	1000	**Gain on inframarginal sales**			
Percentage marginal loss (%Δq	5.00%	$q - \Delta q$	950		
Unit marginal loss (Δq)	50	$SSNIP	$2,500.00		
		Gross gain	$2.38 million		

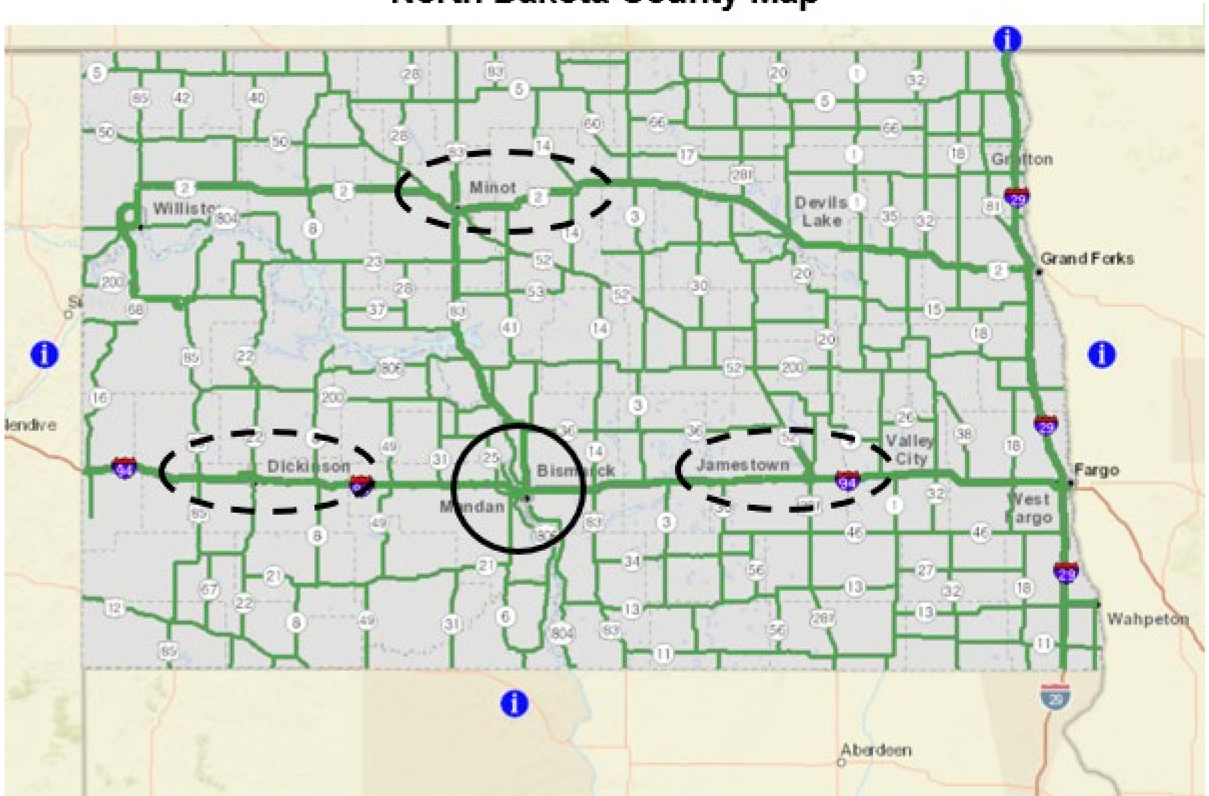
- The net incremental profit gain from the SSNIP is positive, so Lancaster satisfies the HMT

Geographic market: *Sanford Health*

- What did the Eighth Circuit say is the legal test of a relevant geographic market?
  - The "hypothetical monopolist test" governs geographic market definition
- What result did the district court find when it applied the HMT?
  - Commercial health insurers would accept a hypothetical monopolist's SSNIP rather than market a health insurance plan in the Bismarck-Mandan area that did not include Bismarck-Mandan area physicians providing adult PCP services, pediatrician services, OB/GYN services, and general surgeon services
- Observations
  - The district court relied only on the testimony of commercial insurers
  - Presumably, the FTC also submitted confirming evidence on how far patients were willing to drive to see a doctor or go to a hospital
    - Although they may have relied on regular course of business studies from insurers on this (rather than conduct a consumer survey)

Geographic market: Sanford Health

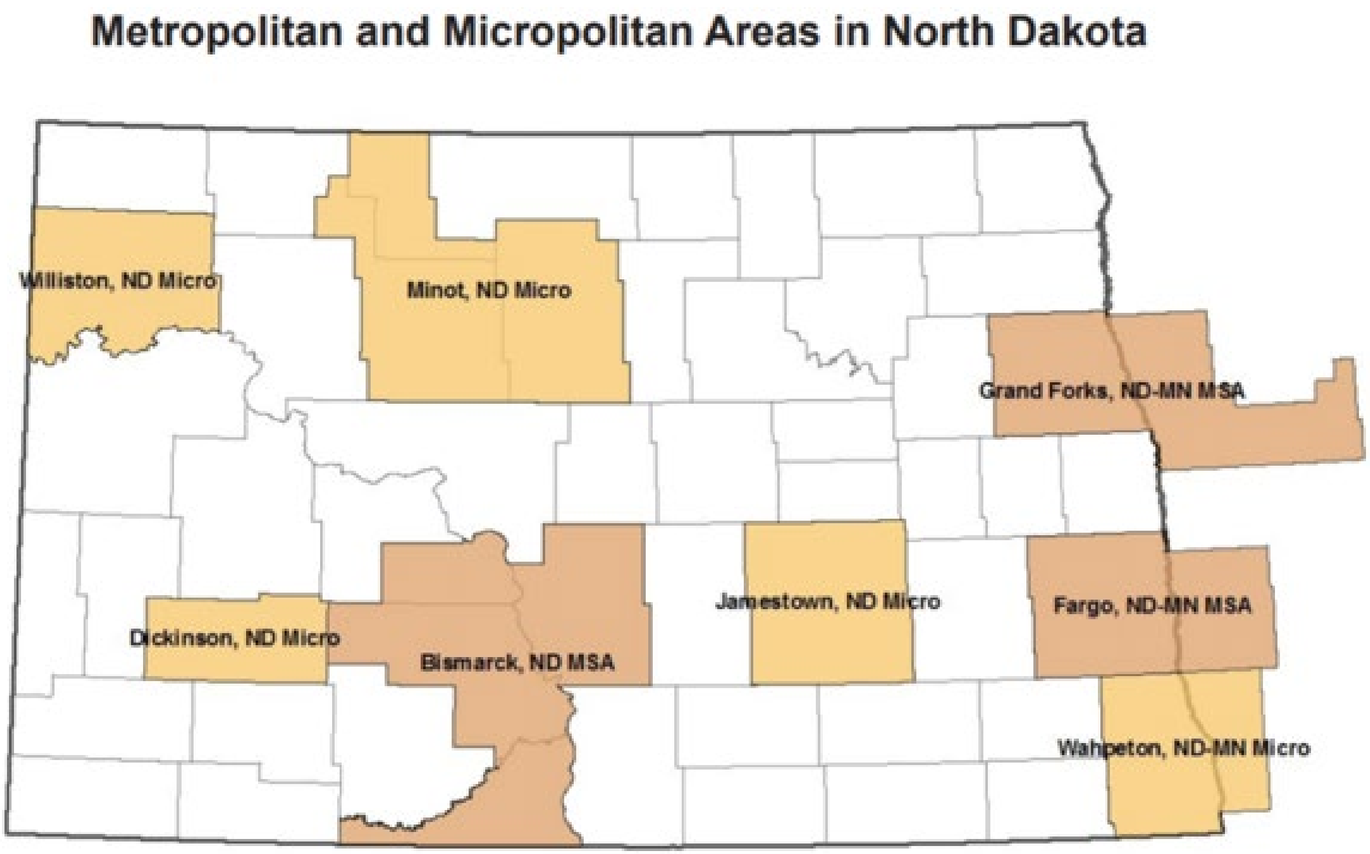
North Dakota County Map



Bismarck to Dickinson: 97.4 miles (1 hr., 22 min.)
Bismarck to Jamestown: 102 miles (1 hr., 31 min.)
Bismarck to Minot: 111 miles (1 hr., 46 min.)

Geographic market: *Sanford Health*

- What relevant geographic market did the district court find?
  - Four-county Bismarck-Mandan Metropolitan Statistical Area



Two final thoughts on market definition

1. The SSNIP is used *only* for the purpose of market definition.
   - It does NOT provide a safe harbor for a price increase resulting from a merger
     - Some incorrectly think that the common 5% SSNIP means that any price increase resulting from the merger below 5% is not actionable.
   - The agencies regard ANY merger-induced price increase attributable to reduced competition as an actionable anticompetitive effect
     - BUT whether the agencies will challenge a merger with only a projected low percentage price increase is a matter of prosecutorial discretion
     - Also, courts appear skeptical of whether the economic assumptions built into the estimating models and the accuracy of the input data is sufficient to be able to distinguish between a, say 1.7% price increase and a 0% price increase

Two final thoughts on market definition

2. Market definition is an essential element of the plaintiff's prima facie case of a Section 7 violation in Step 1 of *Baker Hughes*

- The merging firms have two avenues of rebuttal on market definition—
  1. Adduce evidence sufficient to create a genuine issue of fact on the product or geographic dimensions of the relevant market
  2. Adduce evidence to create a genuine issue of fact on—
     - The product or geographic dimensions of the relevant market AND
     - A "better" alternative for the market definition
       - "Better" in the sense of more conformity to the market definition tests and the commercial realities
- Both ways technically work, but the second method is *far* more persuasive
  - Judges are much more comfortable rejecting the agency's alleged relevant market when the merging firms show a superior alternative
  - BUT for the merging firms to win on the merits, they merging firms must also show within their alternative market the transaction is not anticompetitive
    - Usually by negating the predicates of the *PNB* presumption

Step 1. The Prima Facie Case: Anticompetitive Effect

Proving Prima Facie Anticompetitive Effect

- Two principal methods in horizontal merger cases:
  - The *Philadelphia National Bank* structural presumption
  - Explicit theories of anticompetitive harm
- *Today*: The *PNB* presumption; coordinated effects; recapture unilateral effects
- Class 7: Remaining explicit theories; defenses

Step 1. The Prima Facie Case: Anticompetitive Effect

The *PNB* Presumption

The *PNB* presumption

> "This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which **produces a firm controlling an undue percentage share of the relevant market**, and **results in a significant increase in the concentration of firms** in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[1]

- Requires—
  - The combined firm to pass some (unspecified) threshold of market share, *and*
  - The increase in market concentration caused by the transaction
- *PNB* held that a 30% combined market share was sufficient to constitute an "undue percentage" of the relevant market[2]
  - But expressly declined to specify a lower bound
- Supposed to reflect the latest in economic thinking in the then-prevailing *structure-conduct-performance paradigm*
  - "[T]he test is fully consonant with economic theory."[3]
  - "[C]ompetition is greatest when there are many sellers, none of which has any significant share."[4]

[1] United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963).
[2] *Id*. at 364 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").
[3] *Id*. at 363 & n.38 (citing to structure-conduct-performance literature). [4] *Id*.

The *PNB* presumption: Background

- Application in *Philadelphia National Bank*
  - Combined firm had at least a 30% share in the relevant market
    - Enough for an “undue market share”
  - Share of the two largest banks in the relevant market should increase from 44% to 59%:
    - Enough for a “significant increase” in market concentration
  - Therefore, the *PNB* presumption applied
  - Nothing in record to rebut presumption
    - *Supreme Court*: District court misplaced reliance on testimony that competition was vigorous and would continue to be vigorous (problem too complex; witnesses failed to give “concrete reasons” for conclusions)

The *PNB* presumption: Background

- The Supreme Court in the 1960s was very aggressive on the market share thresholds of the *PNB* presumption
- Some (infamous) early Supreme Court precedents
  - Brown Shoe/Kinney (1962)[1]
    - Combined share of as little as 5% in an unconcentrated market
  - Von’s Grocery/Shopping Bag Food Stores (1966)[2]
    - 4.7% (#3) + 4.2% (#6) → 8.9% (#2) in an unconcentrated market
  - Pabst Brewing/Blatz Brewing (1966)[3]
    - 3.02% (#10) + 1.47% (#18) → 4.49% (#5) in an unconcentrated market

Bottom line: Through the 1960s and into the 1970s, antitrust law prohibited most significant horizontal mergers and acquisitions

[1] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).
[2] United States v. Von's Grocery Co., 384 U.S. 270 (1966).
[3] United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

Problems with the *PNB* presumption

- Presumption depends critically on boundaries of the relevant market, but there was no economically sound test for market definition to use when applying the *PNB* presumption
- The "Potter Stewart rule"
  - In the absence of a test, courts generally defer to the government's alleged market definition
  - So if the government gets to define the market, it essentially can ensure that the market shares will trigger the *PNB* presumption of anticompetitive effect

> The sole consistency that I can find is that in litigation under § 7, the Government always wins.[1]

- Although originally created as a rebuttable presumption, soon treated by lower courts as a conclusive presumption—essentially recognized no defenses

[1] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

United States v. General Dynamics Corp.

- In the 1970s, the economy experienced a significant economic downturn
  - Significant inflation due to the debt financing of the Vietnam war and the Mideast oil shocks
  - Substantial concern about U.S. competitiveness in the world market
- General Dynamics (1974)[1]
  - DOJ action—Filed September 22, 1967
    - DOJ relied on *PNB* presumption
      - 1959: 15.1% (#1) + 8.1% (#5) → 23.2% (#1) (in the Illinois coal market)
      - 1967: 12.9% (#2) + 8.9% (#6) → 21.8% (#2) (in the Illinois coal market)
      - Increasing concentration
  - Supreme Court—No violation
    - Agreed that DOJ's evidence triggered *PNB* presumption
    - BUT defendants rebutted presumption
      - Since competition was manifested more in rivalry for new long-term contracts, and since the ability to compete for long-term contracts depended on available coal reserves, share of uncommitted reserves a better measure of future competitive significance
      - United Electric's uncommitted reserves very weak → DOJ's prima facie case rebutted

Returned *PNB* to a rebuttable presumption

  - There has been no significant merger antitrust case on the merits in the Supreme Court since *General Dynamics* in 1974

[1] United States v. General Dynamics Corp., 415 U.S. 486 (1974).

The Merger Guidelines approach

- Status of the *PNB* presumption as of the late 1970s
  - *General Dynamics* (1974) had returned *PNB* to a rebuttable presumption
  - BUT
    1. There was no meaningful test of market definition
    2. The market share triggers remained very low
    3. The evidence sufficient to rebut the presumption remained generally undefined
- 1982 DOJ Merger Guidelines: The start of modern merger antitrust law
  1. Provided an economically rigorous and sensible means of defining markets in which to ground the *PNB* presumption
  2. Introduced the HHI as the measure of market concentration
  3. Provided new market share/market concentration thresholds to be used by the DOJ in applying the *PNB* presumption
  4. Provided a catalog of defenses to rebut the presumption and show the transaction was not anticompetitive

The Merger Guidelines approach

- Beginning in 1982, maintained a *PNB*-like presumption to guide prosecution discretion, but with two significant changes:
  1. Measure of market concentration
     - The guidelines replaced the *n*-firm concentration ratio with the Herfindahl-Hirschman Index (HHI)
     - The HHI is defined as the sum of the squares of the market shares of the firms in the market of interest:

$$HHI = \sum_{i=1}^{n} s_i^2 = s_1^2 + s_2^2 + \cdots + s_n^2$$

       where there are n firms in the market, with firm i having a market share of s_i
  2. Thresholds
     - The guidelines use two variables to set the thresholds for triggering the presumption:
       - The *postmerger HHI* (that is, the HHI assuming the merger has closed)
       - The *change in the HHI* caused by the merger (known as the "delta" or "Δ")

Calculating the delta: Let a and b be the market shares of the merging companies.

Premerger contribution to the HHI:	$a^2 + b^2$
Postmerger contribution to the HHI:	$(a + b)^2 = a^2 + 2ab + b^2$
Difference (= HHI delta):	$2ab$ ← This is important to know

The Merger Guidelines approach

- Example: Firms 3 and 4 to merge

Firm	Market Share	Premerger HHI Contribution
1	45%	2025
2	26%	676
3	22%	484
4	5%	25
All others	2%	≈1
	100%	3211

$\left(= s_i^2\right)$

n = 5

$= \left(\frac{2}{5}\right)^2 \times 5 = 0.8$

HHI

  - Combined share: 22% + 5% = 27%
  - Premerger HHI: 3211
  - Delta (Δ = 2*ab*): 2 x 22 x 5 = 220
  - Postmerger HHI: 3211 + 220 = 3431

Merger Guidelines *PNB* thresholds

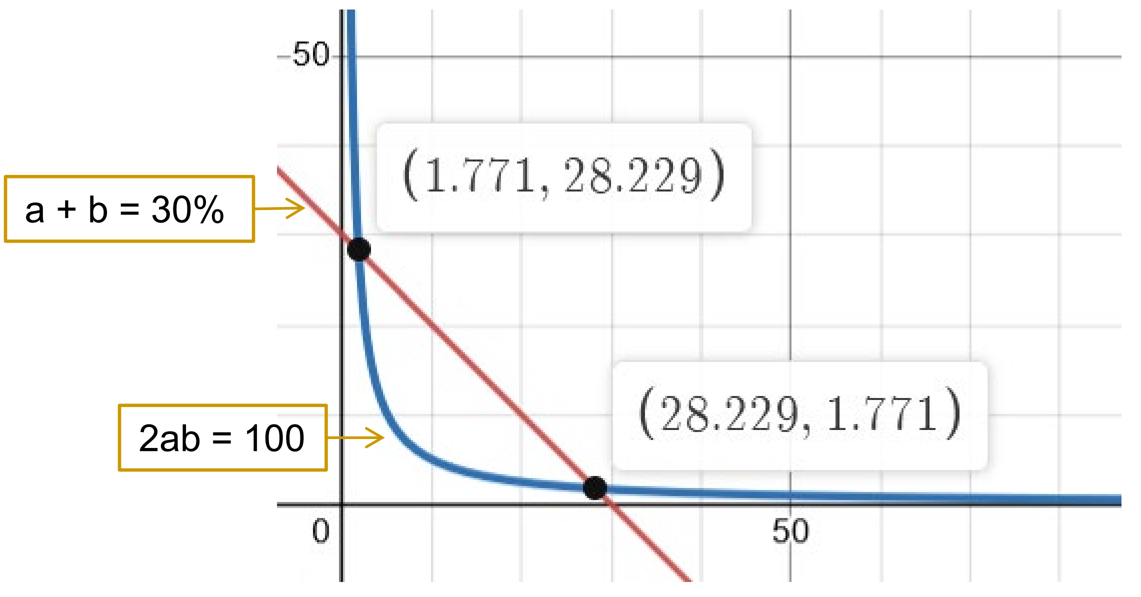
- Over the years

Threshold	1982 Guidelines	1992 Guidelines	2010 Guidelines	2023 Guidelines
Unconcentrated market	HHI < 1,000	HHI < 1,000	HHI < 1,500	No separate operative category
Moderately concentrated market	HHI 1,000-1,800	HHI 1,000-1,800	HHI 1,500-2,500	No separate operative category
Highly concentrated market	HHI > 1,800	HHI > 1,800	HHI > 2,500	HHI > 1,800
ΔHHI generally insufficient for concern	<100 if moderate; <50 if highly concentrated	<100 if moderate; <50 if highly concentrated	<100 regardless of concentration	No comparable safe-harbor statement
Intermediate concern in highly concentrated market	ΔHHI 50-100: case-specific	ΔHHI >50-100: potentially significant	ΔHHI >100-200: potentially significant	No separate intermediate category
Principal high-concentration challenge/presumption threshold	HHI >1,800 + ΔHHI ≥100: DOJ "likely to challenge"	HHI >1,800 + ΔHHI >100: presumption of market power	HHI >2,500 + ΔHHI >200: presumption of market power	HHI >1,800 + ΔHHI >100: presumption of illegality

- DOJ/FTC challenges have been limited to mergers passing the high concentration/ presumption thresholds
  - **1992:** >1,800 + >100
    2010: >2,500 + >200
    2023: >1,800 + >100 **OR** $\underbrace{\text{>30\% merged share + >100}}_{\text{Adopted directly from } PNB}$

The 2023 Merger Guidelines

- The new 30% threshold almost always triggers the *PNB* presumption whenever the two firms have a combined market share of over 30%
  - That is, the ΔHHI > 100 requirement only comes into play if one of the merging firms has a market share of less than 2%, and then not always (depending on the market share of the larger firm)



HHIs in Successful DOJ/FTC Challenges

- The DOJ and FTC have not brought "close" cases in alleged markets

Agency	Complaint	Defendant	Combined share[1]	PreHHI	PostHHI	Delta	Deal Status
FTC	2024	Tapestry	58.7	1449	3646	2197	Preclosing
FTC	2023	IQVIA	46	2538	3635	997	Preclosing
DOJ	2021	Bertelsmann	49	2220	3111	891	Preclosing
FTC	2020	Hackensack	≈50	1994	2835	841	Preclosing
FTC	2020	Peabody Energy	68	2707	4965	2258	Preclosing
FTC	2018	Wilhelmsen	84.7	3651	7214	3563	Preclosing
FTC	2017	Sanford Health	98.6[2]	5333	9726	4393	Preclosing
DOJ	2017	Energy Solutions	100	6040	10000	3960	Preclosing
DOJ	2016	Anthem	47	2463	3000	537	Preclosing
DOJ	2016	Aetna			>5000[3]		Preclosing
FTC	2016	Penn State Hershey	64	3402	5984	2582	Preclosing
FTC	2015	Advocate Heath	55	2094	3517	1423	Preclosing
FTC	2015	Staples	75[4]	3036	5836	2800	Preclosing

[1] When the complaint alleged multiple markets, the market with the most problematic highest HHIs is reported.
[2] Pediatricians market. The FTC alleged three other physician markets. The lowest problematic delta was in OB/GYN with a premerger HHI of 6211, a postmerger HHI of 7363, and a delta of 1152.
[3] The DOJ challenged Aetna's proposed acquisition of Humana in 17 geographic markets. The complaint did not provide HHI statistics for each market, although it noted that in 75% of the markets, the post-HHI would be greater than 5000.
[4] The FTC also challenged the transaction in 32 alleged relevant local geographic markets, with the smallest combined share being 51% and the largest being 100%.

HHIs in Successful DOJ/FTC Challenges

- The DOJ and FTC have not brought "close" cases in alleged markets

Agency	Complaint	Defendant	Combined Share[1]	PreHHI	PostHHI	Delta	Deal Status
FTC	2015	Sysco	71[2]	3153	5519	1966	Preclosing
DOJ	2015	Electrolux		3350[3]	5100	1750	Preclosing
DOJ	2013	Bazaarvoice	68	2674	3915	1241	Consummated
FTC	2013	Saint Alphonsus	57	4612	6129	1607	Consummated
DOJ	2013	US Airways	100[4]	5258	10000	4752	Preclosing
DOJ	2013	ABInbev	100	5114	10000	4886	Preclosing
FTC	2011	OSF Healthcare	59	3422	5179	1767	Preclosing
FTC	2011	ProMedica	58	3313	4391	1078	Preclosing
DOJ	2011	H&R Block	28	4291	4691	400	Preclosing
FTC	2009	CCC	65	4900	5460	545	Preclosing
FTC	2008	Polypore	100	8367	10000	1633	Consummated
FTC	2007	Whole Foods	100[5]		10000		Preclosing
FTC	2004	Evanston	35	2355	2739	384	Consummated
DOJ	2003	UPM-Kemmene	20	2800	2990	190	Preclosing

[1] When the complaint alleged multiple markets, the market with the most problematic highest HHIs is reported.
[2] The complaint alleged multiple markets in food distribution. The numbers given are for national broadline distribution.
[3] The complaint alleged three markets. The numbers given are for ranges. Cooktops and wall ovens were similar
[4] The complaint alleged 1043 markets.
[5] In some local geographic markets, this was a merger to monopoly in the FTC's alleged product market of premium, natural, and organic supermarkets.

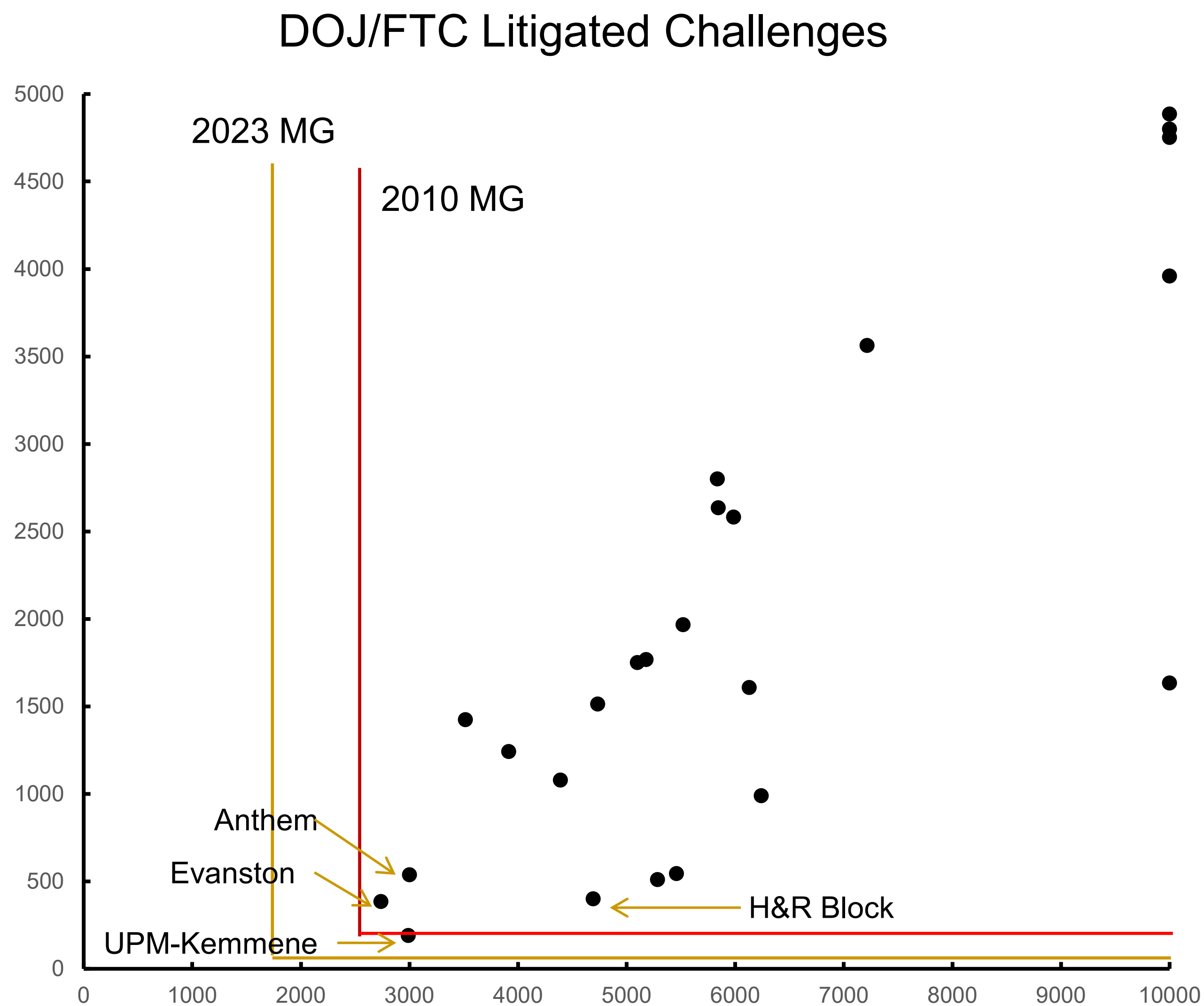
HHIs in Successful DOJ/FTC Challenges

- The DOJ and FTC have not brought "close" cases in alleged markets

Agency	Complaint	Defendant	Combined Share[1]	PreHHI	PostHHI	Delta	Deal Status
FTC	2002	Libbey	79	5251	6241	990	Preclosing
FTC	2001	Chicago Bridge	73	3210	5845	2635	Consummated
FTC	2000	Heinz	33	4775	5285	510	Preclosing
FTC	2000	Swedish Match	60	3219	4733	1514	Preclosing
DOJ	2000	Franklin Electric	100	5200	10000	4800	Preclosing

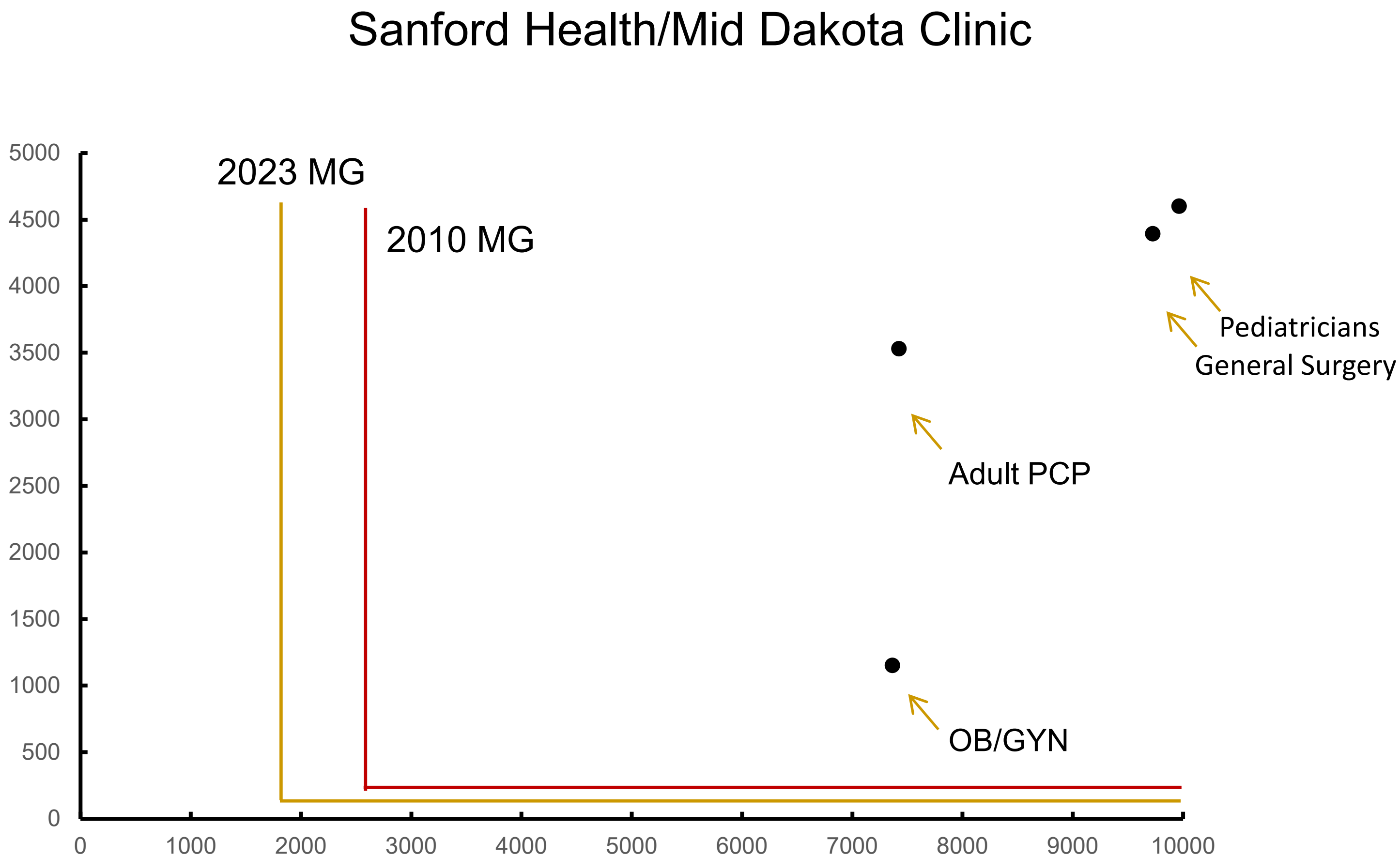
[1] When the complaint alleged multiple markets, the market with the most problematic highest HHIs is reported.

Sanford Health



Sanford Health

- District court findings



Sanford Health

- Giving each practitioner an equal market share:

The HHI contribution of a firm is the square of the firm's market share (s_i^2)

	Adult PCP		Pediatricians	
	Share	HHI	Share	HHI
Sanford	34.4%	1183	34.0%	1156
MDC	51.3%	2632	64.6%	4173
CHI	7.9%	62		
Others (2)	6.4%	20	1.4%	2
	100.0%	3898	100.0%	5331
Combined	85.7%		98.6%	
PreHHI		3898		5331
Delta		3529		4393
PostHHI		7427		9724

The "delta" is equal to $2s_1s_2$

The postmerger HHI is the sum of the premerger HHI plus the delta

There appear to have been two Adult PCPs, so each would have a share of 3.2%. Each then would have a contribution to the HHI of 10.24, so together they would contribute about 20 points to the premerger HHI

Sanford Health

Small differences with the opinion are probably due to rounding

- In the district court:

23.9% +75.1% -15.4%

	OB/GYN				General Surgery	
	Premerger		Postmerger			
	Share	HHI	Share	HHI	Share	HHI
Sanford	23.9%	571	84.6%	7157	36.1%	1303
MDC	75.1%	5640			63.7%	4058
CHI						
Others (1)			15.4%	237		
	99.0%	6211	100.0%	7394	99.8%	5361
Combined			84.6%		99.8%	
PreHHI				6211		5361
Delta				1183		4599
PostHHI				7394		9960

Use "brute force" to calculate

Note: One current MDC OB/GYN (representing a market share of 15.4%) would leave MDC to practice on her own postmerger. So she would be included in MDC's premerger share but subtracted out of the combined firm postmerger and made an independent firm.

Sanford Health

- Eighth Circuit:

> The district court next found that the government made a sufficient *prima facie* showing because "[t]he changes in [Herfindahl-Hirschman Index] in each of the four physician service lines are well above the Merger Guidelines' threshold for presumption that the proposed transaction is likely to enhance market power."[1]

- The district court—
  - Invoked the *Philadelphia National Bank* presumption to make out its prima facie case of the requisite anticompetitive harm in the four relevant markets
  - Used the Merger Guidelines to determine whether the threshold triggers for the presumption were satisfied
    - The district court also could have looked at the combined market share and the change in concentration resulting from the merger and compared these statistics to those in prior cases that triggered the *PNB* presumption (traditional judicial approach)

[1] FTC v. Sanford Health, 926 F.3d 959, 964 (8th Cir. 2019) (p. 59 in reading materials)

Sanford Health: Conclusion

- Eighth Circuit: No error in—
  - Relevant product markets
    1. Adult primary care physician services
    2. Pediatric services
    3. OB/GYN physician services
    4. General surgeon services
  - Relevant geographic market
    - Four-county Bismarck-Mandan MSA
  - Requisite anticompetitive effect
    - The postmerger HHIs and the deltas
    - Application of the *PNB* presumption
  - Prima facie case is very strong
    - Even though anticompetitive effect was established only through the *PNB* presumption
    - The higher the HHI statistics, the stronger the presumption
    - Could also have used additional non-market share evidence to further strengthen the presumption

The stronger the presumption, the stronger the evidence must be in Step 2 to raise a genuine issue of fact under the Baker Hughes sliding scale

One final thought on the *PNB* presumption

- How do you prove that the combined market share and change in market concentration predicate the *PNB* presumption?
  1. *Case law precedent:* Look for cases that have found the *PNB* presumption applied with lower HHI statistics
  2. *Merger Guidelines*: Although not legally binding on the courts, are often cited as “persuasive” authority
  3. *The PNB 30% combined share*: Although rarely cited by the agencies in their briefs and hence by the courts in their opinions between 1990 and the mid-2010s, the agencies started in the Biden administration to cite consistently in their briefs and many courts followed in their opinions

Step 1. The Prima Facie Case: Anticompetitive Effect

Explicit Theories of Anticompetitive Harm
Horizontal Mergers

Explicit theories of anticompetitive harm

- Some history
  - The 1992 DOJ/FTC Horizontal Merger Guidelines, the most economically sophisticated of any Guidelines, required agency staff to go beyond the *PNB* presumption by advancing one or more explicit theories of harm with supporting evidence
  - In effect, the Guidelines required the staff to tell a coherent story about how the merger would likely reduce consumer welfare or economic efficiency
- Three principal explicit theories of harm in horizontal mergers
  - The 1992 Guidelines detailed three explicit theories:
    - Coordinated effects
    - Elimination of a maverick
    - Unilateral effects
  - These three theories are firmly embedded in modern merger antitrust law
  - The Guidelines do not limit explicit theories to these three, but no other explicit theories have emerged
- Acceptance by the courts
  - Since the 1992 Guidelines, agencies have consistently supplemented their *PNB* with explicit theories in litigation—and courts now expect to see such theories developed with substantial evidence in both briefing and trial.

Coordinated effects

- The concept
  - *Coordinated effects* arise when a merger increases the probability, effectiveness, or stability of *tacit collusion*
    - Tacit collusion is the process by which firms in an oligopoly coordinate their behavior—such as pricing or output decisions—without any explicit agreement, relying instead on mutual recognition of interdependence and *accommodating responses* over time[1]

      Think of coordinated effects as rivals pulling their "competitive punches," resulting, for example, in higher prices

  - Introduced in the 1992 DOJ/FTC Horizontal Merger Guidelines
  - Well-accepted by the courts as a Section 7 theory of anticompetitive harm in horizontal mergers when the result is likely to be higher prices, lower market output, reduced market product or service quality, or a reduced rate of technological innovation or product improvement

[1] Theories of anticompetitive strategies that can be implemented postmerger by the merged firm alone, without accommodating conduct by rivals, are classified as *unilateral effects* (addressed below).

Coordinated effects

- The law
  - Two-element test:
    1. The relevant market must be susceptible to tacit coordination
    2. The merger must make tacit coordination more likely, more effective, or more stable
  - Requirement 1: Common types of probative evidence—

    Most important factors

    1. The market is highly concentrated
    2. Prior actual or attempted coordination (whether successful or unsuccessful, whether unlawful or lawful)
    3. Market transparency on the dimensions of competition that firms will allegedly coordinate (usually prices or output, but it can be other variables)
    4. Limited competitive responses from noncoordinating firms that would disrupt coordination (e.g., entry, expansion, or repositioning)
    5. Aligned incentives to coordinate
    6. Profitability or other advantages of coordination

    NB: Some courts presume that Requirement 1 is satisfied whenever the *PNB* presumption applies in the relevant market
  - Requirement 2: Common types of probative evidence—
    - If Requirement 1 is satisfied, most courts find that the elimination of a significant competitor through the merger makes out a prima facie showing of Requirement 2
  - *Burden of proof*: The plaintiff has the burden of proving a prima facie case of anticompetitive effects in its prima facie case

Coordinated effects

- Susceptibility: Generally accepted economic wisdom—

Poorly developed in the case law

  - *3 or fewer firms*: Tacit coordination is rebuttably presumed
  - *4 to 6 firms*: Tacit coordination is possible—feasibility depends importantly on symmetry, transparency, product homogeneity, and other market conditions
  - *7 or more firms*: Coordination is generally considered unstable or implausible absent explicit agreement or extraordinary conducive conditions
- Scope of coordination: The *collusive group*
  - Coordination need not involve every firm in the relevant market
  - A subset of firms (the *collusive group*) is sufficient if collectively they can materially influence market price, market output, or another competitive variable, even if others do not participate
  - Fringe firms nevertheless remain relevant to the extent that their expansion, repositioning, or other competitive responses could disrupt or constrain coordination
- Likely anticompetitive effect
  - It is not enough that a collusive group tacitly colludes to violate Section 7 (not per se)
  - The result of the tacit collusion must be a Section 7 anticompetitive effect

Coordinated effects in *Sanford Health*

- Proof requirements
  1. The relevant markets premerger were highly concentrated and susceptible to premerger tacit coordination in negotiations with insurers
  2. The acquisition would significantly increase concentration in all markets and likely increase the likelihood, effectiveness, or stability of tacit coordination postmerger
- The Court did not apply a coordinated effects theory
  - Focused instead on unilateral effects

Why?

Coordinated effects in *Sanford Health*

1. Premerger susceptibility to coordination
   - *Concentrated markets*:
     - Each market was highly concentrated, with only two or three significant firms premerger
     - BUT evidence showed rivalry between Sanford and MDC for “winner-take-all” for insurer contracts, producing vigorous head-to-head premerger competition rather than accommodation
   - *Market transparency*:
     - Physician affiliations and insurer network composition were widely known and easily monitored
     - BUT insurer reimbursement rates were negotiated privately and providers had incentives not to be accurate in disclosing one insurer’s proposed rates to a competitor insurer
   - *Few potentially disruptive fringe competitors*:
     - Smaller physician groups lack the necessary scale to replace a major player in an insurer network
   - *Aligned incentives*:
     - All firms relied on commercial insurers, with incentives to avoid aggressive discounting
     - BUT evidence showed vigorous premerger competition for insurer contracts, confirming rivalry rather than accommodation

Coordinated effects in *Sanford Health*

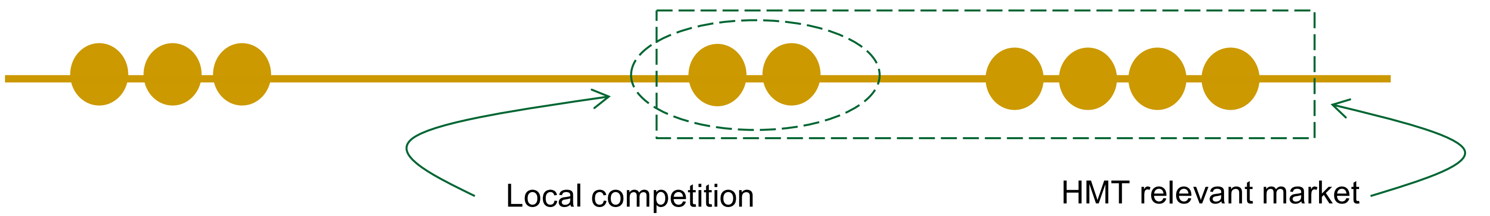
2. Effect of the merger
   - Increase in concentration
     - The acquisition would significantly increase market concentration
     - BUT
       - In three of the four markets the merger was tantamount to a “merger to monopoly” with only some fringe providers remaining
       - In the general surgeons’ market, Sanford would be the only provider postmerger, leaving no firms with which to coordinate

Takeaway: The analysis of both *premerger susceptibility and the effect of the merger highlights the head-to-head competition between Sanford and MDC and the lack of significant competition from other providers.*

This undermines postmerger coordinated effects as a theory of anticompetitive harm but powerfully reinforces unilateral effects, since the merged firm would internalize its closest rival and dominate negotiations with insurers.

Unilateral effects

- The idea
  - In markets where products are *differentiated*—for example, by product attributes, geographic locations, or reputation—a firm may compete intensely with a few competitors and less intensely with other competitors in the market
  - When two close rivals merge, the merged firm may profitably increase its prices even if other firms keep their prices constant



  - The agencies and the courts have recognized a reduction in “local competition” as an anticompetitive effect under Section 7 since the theory was introduced in the 1992 Merger Guidelines

In contrast to coordinated effects, unilateral effects does not depend on any accommodating conduct by other firms in the market

Unilateral effects

- Examples of close competitors
  - Two full-service supermarkets across the street from one another, compared to the next closest supermarkets five miles away
  - Coca-Cola and Pepsi, compared to other carbonated soft drinks such as Sprite or Mountain Dew
  - iPhone and Samsung Galaxy mobile phones, compared to lower-priced smartphones
  - Häagen-Dazs and Ben & Jerry's premium ice cream, compared to regular ice cream

In each example, a merger between the two close competitors would likely have a more substantial effect on competition than a merger between one of the named firms and a distant substitute

- Relation to diversion ratios
  - Close competitors have high diversion ratios
  - More distant competitors have lower diversion ratios

Diversion ratio D_{12} from Product 1 to Product 2 for a given Δp_1 $= \left.\dfrac{\Delta q_2}{\Delta q_1}\right|_{\Delta p_1}$

Unilateral effects

- Three theories of unilateral effects
  1. *Recapture unilateral effects*, which depends on the merged firm being able to increase prices in one product and "recapture" a large portion of the lost marginal sales through substitution to the other merging product (assuming no price increase in the second product)
  2. *Auction unilateral effects*, which depends on the merging firms being the likely number 1 and number 2 low bidders when sales are made in an auction process
  3. *Merger-to-monopoly*, a degenerate form of unilateral effects, since postmerger there are no other firms in the market with which the merged firm can tacitly coordinate

Recapture unilateral effects

- The mechanics
  - Premerger, each of the merging firms sets price to maximize its *individual profits*
    - If Firm 1 were to increase its price, it would lose its marginal sales and reduce its profits
  - Postmerger, the merged firm sets its prices to maximize its *joint profits*
    - Again, if the merged firm increased Product 1's prices, Product 1 would lose its marginal sales and reduce the profits it earns
    - BUT to the extent Product 2 "recaptures" some of Product 1's marginal sales because they now have become attractive at Product 2's (unchanged) price, Product 2 will increase its profits
  - *Bottom line*: The merged firm can increase its total profits by increasing Product 1's price if the recaptured profits in Product 2 are greater than the net lost profits in Product 1
    - True even if no other firm in the markets accommodates this price increase

Recapture unilateral effects

- Another way of thinking about the mechanics
  - Premerger, when Firm 1 lowers its price and takes sales—and therefore profits—away from Firm 2 (which holds its price constant), Firm 1 imposes a *negative externality* on Firm 2
    - But Firm 1 does not care what happens to the Firm 2's profits
  - Postmerger, the merged firm maximizes the combined profits
    - The merger *internalizes the externality*, which reduces the incentive of the merged firm to o lower Firm 1 prices

  - Now run this backwards:
    - Premerger, Firm 1 increases its prices and loses sales to Firm 2, increasing Firm 2 sales and profits and so creating a *positive externality* for Firm 2
      - But Firm 1 does not care what happens to the Firm 2's profits
    - Postmerger, the merged firm maximizes the combined profits
      - The merger *internalizes the externality*, which a increases the incentive of the merged firm to increase Firm 1's prices, regardless of whether other firms in the relevant market accommodate the price increase by increasing their own profits

Recapture unilateral effects

- Mathematically:
  - We can express this in terms of incremental profits:

$$\Delta\pi_M = \overset{(-)}{\Delta\pi_1} + \overset{(+)}{\Delta\pi_2}$$

$$= \underbrace{\left[\Delta p_1(q_1 - \Delta q_1) - \$m_1\Delta q_1\right]}_{\text{Incremental profit loss on Product 1*}} + \underbrace{D_{12}\Delta q_1 \$m_2}_{\text{Incremental profit gain on Product 2}}$$

If $\Delta\pi_M > 0$, the price increase is profitable
If $\Delta\pi_M < 0$, the price increase is unprofitable

where D_{12} is the *diversion (recapture) ratio* from Product 1 to Product 2

- That is, D_{12} is the percentage of the marginal unit sales lost by Product 1 that is recaptured by Product 2
  - *Example*: If the price increase causes Product 1 to lose 100 units and Product 2 recaptures 40 of those units, then the diversion ratio is 40/100 = 40%
- $D_{12}\Delta q_1$ is the diversion ratio times the lost marginal unit sales of Product 1, which are the unit sales recaptured by Product 2
  - *Example*: Using the numbers above, 40% x 100 = 40

* If Firm 1 was profit-maximizing premerger, then a price increase in Product 1 necessarily will result in reduced profits.

Recapture unilateral effects

- HW Problem 1

Two companies selling competing candy bars—CrispBite and CocoaSnap—plan to merge. Before the merger, each bar sells for $3.00 with $2.00 marginal cost. At the $3.00 price, CrispBite sells 800 bars per week. After the merger, the combined firm considers raising CrispBite's price by $0.15 to $3.15 while keeping CocoaSnap's price at $3.00. The price increase is expected to reduce CrispBite's sales by 120 bars per week; of those lost sales, 42 divert to CocoaSnap and 78 are lost to other products or not purchased. Does the merged firm have a profit-maximizing incentive to implement the contemplated price increase in CrispBite's price?

Data		Firm with the price increase CrispBite		Recapturing firm CocoaSnap	
Price (p_1 & p_2)	$3.00 per bar	**Loss on marginal sales**			
Marginal cost (c_1 & c_2)	$2.00 per bar	Δq_1	120		
Dollar margin ($\$m_1$ & $\$m_2$)	$1.00 per bar		$1.00		
Price increase (Δp_1)	$0.15	Gross loss	$120.00		
Quantity (q_1)	800 bars				
Marginal sales (Δq_1)	120 bars	**Gain on inframarginal sales**		**Gain on recaptured sales**	
		$q_1 - \Delta q_1$	680	Δq_2	42
Recapture unit sales (Δq_2)	42 bars	Δp_1	$0.15	$\$m_2$	$1.00
		Gross gain	$102.00	Gross gain	$42.00
		Net gain	-$18.00	**Net gain to merged firm**	
				$\Delta\pi_1 + \Delta\pi_2$	$24.00

Here, there is a profit gain of $24, so the merged firm would find it profitable to increase the price of CrispBite by $0.15 postmerger

Recapture unilateral effects

- HW Problem 3

The manufacturer of ReliefMax proposes to acquire its rival allergy-tablet AllerSure. Before the acquisition, ReliefMax sells a 24-tablet box for $12.00 with $7.00 marginal cost, while AllerSure sells a comparable box for $11.50 with $7.50 marginal cost. At the $12.00 price, ReliefMax sells 1,200 boxes per week. After the merger, the combined firm considers raising ReliefMax's price by $1.00 (to $13.00) while keeping AllerSure's price at $11.50. The increase is expected to reduce ReliefMax's sales by 240 boxes per week; of those lost sales, 84 divert to AllerSure and 156 are lost to other products or not purchased. Does the merged firm have a profit-maximizing incentive to implement this contemplated increase in ReliefMax's price?

Data			Firm with the price increase ReliefMax		Recapturing firm AllerSure	
Price (p_1)	$12.00	per box	Loss on marginal sales			
Marginal cost (c_1)	$7.00	per box	Δq_1	240		
Dollar margin ($\$m_1$)	$5.00	per box	$\$m_1$	$5.00		
Price increase (Δp_1)	$1.00		Gross loss	$1,200.00		
Quantity (q_1)	1200	boxes				
Marginal sales (Δq_1)	240	boxes	Gain on inframarginal sales		Gain on recaptured sales	
			$q_1 - \Delta q_1$	960	Δq_2	84
Price (p_2)	$11.50	per box	Δp_1	$1.00	$\$m_2$	$4.00
Marginal cost (c_2)	$7.50	per box	Gross gain	$960.00	Gross gain	$336.00
Dollar margin ($\$m_2$)	$4.00	per box				
Recapture unit sales (Δq_2)	84	boxes	Net gain	-$240.00	Net gain to merged firm	
					$\Delta\pi_1 + \Delta\pi_2$	$96.00

Here, the merged firm would achieve a profit gain of $96, so a postmerger $1.00 price increase in ReliefMax would be profitable

Recapture unilateral effects

- Two important questions
  1. What is the merged firm's profit-maximizing increase in the price of one product if it holds the price of the other product constant?
     - So far, we have only examined whether a given price increase is *profitable*
     - In unilateral effects analysis, we must focus on what the merged firm *is likely to do* in its profit-maximizing interest, not just what price increase might be profitable
     - We will cover this question when we examine H&R Block/TaxACT (Unit 5)
  2. Is the firm's profit-maximizing price increase sufficiently large so that it would "substantially" lessen competition within the meaning of Section 7 were it to occur postmerger?
     - The agencies' view is that any price increase, no matter how small, that the merger is likely to cause is anticompetitive in the absence of offsetting consumer benefits (e.g., quality improvements)
     - The courts have not answered this question, although there are indications that they will not credit projections of low single digit percentage increases as anticompetitive.
       - We will see this in Sysco/U.S. Food (Unit 8)

Recapture unilateral effects

- The law
  - In practice, modern courts generally require four *necessary* (but not sufficient) elements to prove "recapture" unilateral effects:
    1. *Differentiated products*: The merging firms' products must be sufficiently differentiated—pre- or postmerger—to permit meaningful diversion between them
       - Firms with differentiated products face downward-sloping residual demand curves, so that they can increase price and lose only some, but not all, of their sales
       - *Key*: The merging firms retain their inframarginal customers
    2. *Close substitutes*: The merging products must be close (but not necessarily the closest) substitutes
       - That is, the merging products must have a high diversion ratio from at least one merging product to the other merging product
       - It is not necessary for the diversion ratios to be high in both directions
    3. *Distant substitutes from other products*: Most rival firms' products must be poor substitutes
       - That is, the diversion ratio from the merging product whose price is expected to increase postmerger to most other substitute products should be low
       - This still allows a few products to have high diversion ratios: the merging products do not have to be uniquely close substitutes
    4. *Barriers to entry, expansion, or repositioning*: It must be difficult for rivals to offset the merged firm's price increase through timely and sufficient new entry, expansion, or repositioning
       - The merged firm must be able to increase price for at least one product without being disciplined by new competition

Recapture unilateral effects

- For any given price increase to be profitable under the unilateral effects theory, one more condition must be satisfied:

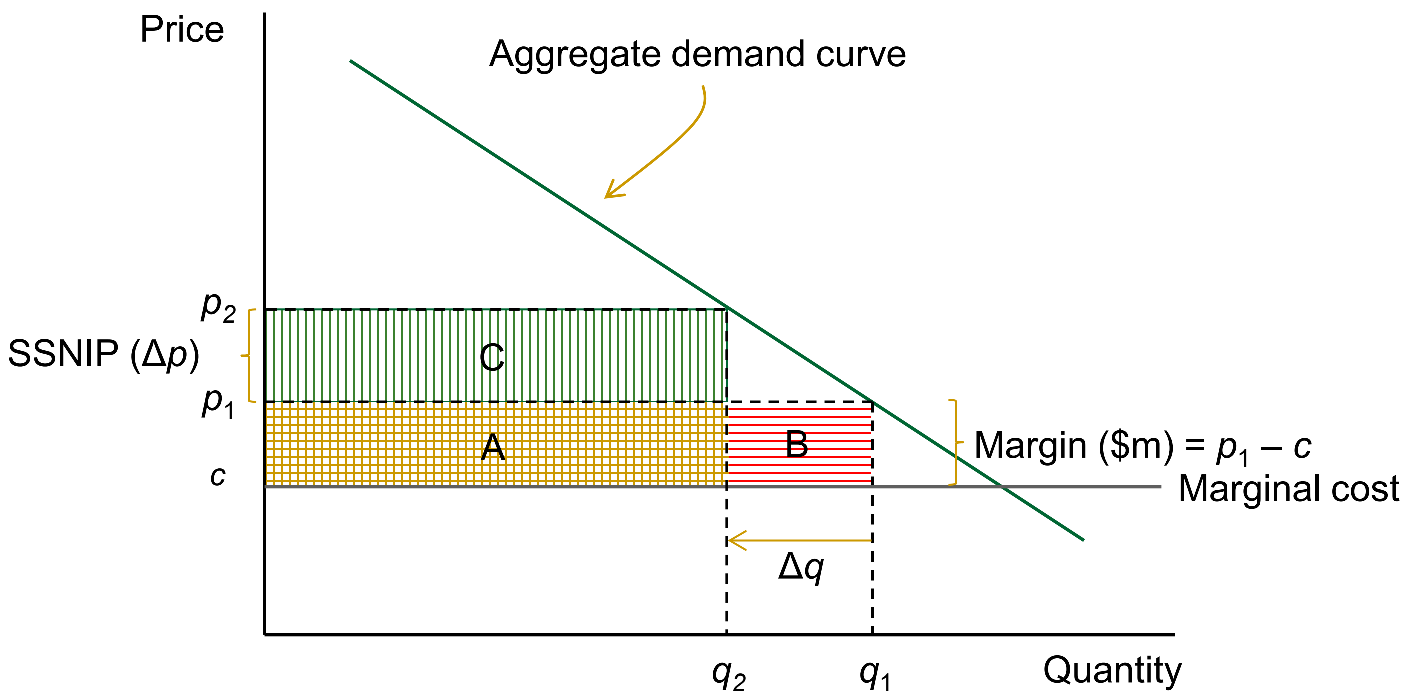
  The incremental profit gain on the sales recaptured by Product B must be greater than the incremental profit loss on the foregone marginal sales of Product A

  - In later classes, we will develop formulas to test whether this profitability condition holds
- NB: Small price increases
  - As a matter of economic theory, any positive recapture creates some "headroom" for a small profitable increase in Product A's price
  - The profit-maximizing increase, however, may be insignificant in magnitude and therefore may not amount to a "substantial lessening" of competition under Section 7

Appendix
The First-Order Condition

Remember this slide from Class 5

- The hypothetical monopolist test
  - Calculating the areas
    - Area C = $\Delta p \times q_2$ (gross incremental profit gain from inframarginal unit sales)
    - Area B = $\Delta q \times (p_1 - c) = \Delta q \times \$m$ (gross incremental profit loss from foregone marginal unit sales)
    - So net incremental profit $\Delta\pi = [\underbrace{\Delta p \times q2}_{\text{Area C}}] - [\underbrace{\Delta q \times \$m}_{\text{Area B}}]$



The first-order condition

- The first-order condition for profit maximization

Marginal revenue = Marginal cost

  - "Proof"
    - From the previous slide:

$$\Delta\pi = \underbrace{\Delta p \times (q - \Delta q)}_{\text{Gain on inframarginal sales}} - \underbrace{\Delta q \times (p - c)}_{\text{Loss on marginal sales}} = 0$$

    - Rearranging:

$$\Delta p \times (q - \Delta q) = \Delta q \times (p - c)$$

$$\frac{\Delta p (q - \Delta q)}{\Delta q} = p - c$$

$$p - \frac{\Delta p}{\Delta q}(q - \Delta q) = c.$$

The first-order condition

- Proof (cont.)
  - Now let's interpret the final equation: $p - \frac{\Delta p}{\Delta q}(q - \Delta q) = c$
    - c on the righthand side is marginal cost
    - p on the lefthand side is the starting price
    - $\Delta p/\Delta q$ is the price increase associated with each marginal sale lost
      - With price on the vertical axis and quantity on the horizontal axis, this is the absolute value of the slope of the inverse residual demand curve over the interval
    - $q - \Delta q$ is the number of inframarginal sales remaining after the price increase
    - Therefore,

$$\frac{\Delta p}{\Delta q}(q - \Delta q)$$

      is the incremental revenue gained on inframarginal sales per marginal sale lost
    - When the firm gives up a marginal sale, it loses the starting price p on that sale, but this loss is partially offset by the additional revenue earned from the higher price on its inframarginal sales
    - Consequently,

$$p - \frac{\Delta p}{\Delta q}(q - \Delta q)$$

The absolute value of the slope of the inverse demand curve

      is the net revenue lost per marginal sale lost—that is, marginal revenue
    - So the left-hand side is marginal revenue and the right-hand side is marginal cost. Hence the first-order condition: Marginal revenue = marginal cost

The first-order condition

- For the more mathematically inclined
  - You will see that the "proof" above involved more than a little handwaving at the end. That is a constant problem when trying to explain marginal concepts using when changes are finite.
  - The right way to do this is with calculus:

$$\text{Max } \pi = \text{Revenues - Costs}$$
$$= p(q)q - C(q),$$

where C is total costs and p and C are functions of q

  - At a maximum, the first order condition is that the derivative on the objective function is zero:

$$\frac{d\pi}{dq} = p + q\frac{dp}{dq} - \frac{dC}{dq} = 0$$

or

$$p + q\frac{dp}{dq} = \frac{dC}{dq}.$$

Remember, dp/dq is negative when the demand curve is downward sloping. This is why the sign changed compared to $\Delta p/\Delta q$ on the prior slide.

  - Here, the right-hand side is marginal cost and the left-hand side is marginal revenue (the original price adjusted for the revenue loss resulting from the price decrease necessary to effect an infinitesimal increase in output)

Class 7

Unit 3: Sanford Health/Mid Dakota Clinic

Merger Antitrust Law
Georgetown University Law Center
Dale Collins

September 15, 2026

Auction unilateral effects

- Example: Road salt merger

The City of Columbus, Ohio contracts annually for road salt to treat its streets in winter. Columbus awards the contract to a single supplier (winner-take-all) through a bidding process. Three suppliers can deliver to Columbus, with the following delivered costs per ton:

1. Lake Erie Salt Co., Cleveland, OH: $60/ton
2. Hoosier Mineral Logistics, Fort Wayne, IN: $65/ton
3. Motor City Minerals, Detroit, MI: $70/ton

Two of the suppliers are planning to merge. Will the merger likely result in an auction unilateral effect in Columbus?

Auction Unilateral Effects: Price Increase Simulation

Merger	Premerger outcome	Postmerger outcome	Effect on price
1 & 2	Supplier #1 wins; price ≈ $64 (just below #2 at $65)	Supplier #1 wins; price ≈ $74 (just below #3 at $75)	+ $10/ton
1 & 3	Supplier #1 wins; price ≈ $64 (just below #2)	Supplier #1 still disciplined by Supplier #2 at $65	No effect
2 & 3	Supplier #1 wins; price ≈ $64 (just below #2)	Supplier #1 still disciplined by Supplier #2 (now merged) at $65	No effect

- *Result*: Columbus is likely to experience an auction unilateral effects price increase only if Lake Erie Salt and Hoosier Mineral Logistics merge (#1 and #2)
  - NB: The merger could increase Columbus' price for other reasons (e.g., coordinated effects) in all three cases

Auction unilateral effects

- Conditions for application in the prima facie case
  1. The customer awards *winner-take-all contracts*
     - One supplier obtains the contract for 100% of the volume
     - This condition eliminates any inframarginal customers
  2. Prices are disciplined by the second-best alternative
     - The winning price sits just below the runner-up’s delivered cost
  3. The merging firms are the first- and second-lowest delivered-cost suppliers to the customer
  4. The third-best delivered cost is materially higher than the second-best alternative
  5. The seller can price discriminate by customer
     - There is no arbitrage across customers

We will examine auction unilateral effects in more detail when we study the Sysco/US Foods merger in Unit 8

Unilateral monopoly: Merger-to-monopoly

- The idea
  - The merger eliminates all competition and leaves only one firm in the market
    - Except perhaps some competitively insignificant fringe firms
  - Postmerger price is constrained only by demand and entry conditions, not by a competing supplier

Elimination of a “maverick”

- The concept
  - A *maverick* is a firm that disrupts tacit coordination in a way that materially benefits consumers, often through *aggressive pricing*, *innovation*, or *other competitive conduct*
    - The antitrust concern is that the merger would eliminate a uniquely disruptive firm whose conduct materially constrains premerger market pricing or behavior—either by deterring coordination or disciplining a rival—thus resulting in a less competitive postmerger equilibrium
  - Anticompetitive effect
    - *Coordinated effects*: Often arises as a special case of coordinated effects theory when the maverick is acquired by a firm that is more accommodating to its rivals and likely to suppress the maverick’s disruptive behavior
      - The theory can also apply if the maverick acquires a rival and the evidence shows that postmerger merged firm is likely to be more accommodating to rivals, degrading or eliminating the maverick’s premerger disruptive conduct
    - *Unilateral effects*: Can also arise as a special case of unilateral effects, when the maverick exerts a significant competitively disciplining influence on the acquiring firm, and the merger is likely to eliminate that discipline
      - The theory can similarly apply when the maverick is the acquiring firm, and the evidence shows that the merged firm is unlikely to maintain the maverick’s disruptive proconsumer strategy postmerger
  - Courts and the agencies recognize elimination of a maverick as a valid theory of Section 7 anticompetitive harm
    - But require strong evidence that the firm truly is, and will remain, a maverick absent the merger

Elimination of a "maverick"

- The law
  - *Coordinated effects*: The leading doctrinal framework comes from *H&R Block*,[1] which sets out a four-part test:
    1. The market must be conducive to a materially higher degree of coordinated interaction than it currently exhibits
    2. The disruptive conduct of the maverick must materially contribute to the market's current lower level of coordination
    3. The merger must make it likely that the disruptive conduct will be discontinued
    4. The loss of disruptive conduct must likely result in a materially higher degree of coordination that harms consumers

[1] United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 80 (D.D.C. 2011). H&R Block/TaxACT will be our case study in Unit 5.

Elimination of a "maverick"

- The law
  - *Unilateral effects*: There is no case law on the requirements, but they follow directly from the general theory of unilateral effects:
    1. The merging firms must be close substitutes, with most other products in the relevant market significantly more distant
    2. The maverick must be exerting a significant disciplining effect on the other merging firm, causing it to price more aggressively, innovate more, or otherwise behave more competitively than it otherwise would in the absence of the maverick
    3. The merged firm is unlikely to continue the maverick's premerger procompetitive strategy, resulting in a less competitive equilibrium and consumer harm that would not have occurred absent the merger
    4. Other firms must not be able to enter, expand, or reposition in a manner that is timely, likely, and sufficient to restore the competitive discipline lost with the maverick's elimination

Elimination of a "maverick"

- A central question: Why are "mavericks" mavericks?
  1. Mavericks are often smaller firms
     - Smaller firms have fewer inframarginal sales at risk and more to gain from aggressive pricing or innovation, making them more willing to disrupt coordination than larger firms
  2. Mavericks may be pursuing a long-term, growth-oriented business model
     - Firms prioritizing scale or customer acquisition may compete aggressively to expand their market position, even at the expense of short-term profits
  3. Mavericks may have lower marginal costs or unique cost advantages
     - Cost advantages can make it profitable to undercut rivals even when others would find such pricing unsustainable
  4. Maverick conduct may reflect the firm's internal culture or leadership incentives
     - Disruptive strategies may be driven by executives rewarded for risk-taking, innovation, or price competition
  5. Mavericks may not be aligned with industry norms or expectations
     - Structural differences or outsider status may lead the firm to disregard implicit coordination or industry conventions
  6. Mavericks may face limited risk of retaliation from rivals
     - Firms insulated by niche positions, geographic distance, or vertical integration may be less vulnerable to punishment for aggressive conduct

Elimination of a "maverick"

- Practical and evidentiary considerations
  - Courts and agencies are skeptical of labeling a firm a maverick without clear evidence of persistent, distinctive procompetitive conduct that constrains rivals premerger
  - Evidence must show that the firm's disruptive conduct is both material and likely to continue absent the merger
    - Past behavior alone may be insufficient if it is not durable or tied to structural features likely to persist
  - The theory fails if there is no reasonably likely postmerger pathway for the merger to proximately cause a Section 7 anticompetitive effect

Step 1. The Prima Facie Case: Summary

The prima facie case

1. Product market definition
   a. *Brown Shoe* “outer boundaries”/practical indicia tests
   b. Hypothetical monopolist test
2. Geographic market definition
   a. “Commercial realities” test
   b. Hypothetical monopolist test
3. Anticompetitive effect
   a. *PNB* presumption
      i. Supporting case law precedent
      ii. Merger Guidelines thresholds
      iii. PNB 30% threshold
   b. Explicit theories of anticompetitive harm
      i. Coordinated effects
      ii. Unilateral effects
         1) Recapture unilateral effects
         2) Auction unilateral effects
         3) Merger-to-monopoly
      iii. Elimination of a maverick
         1) Coordinated effects
         2) Unilateral effects

Step 2. Rebutting the Prima Facie Case

Defenses generally

- Two types of defense
  1. Defenses that rebut the predicates of the plaintiff's prima facie case
     - Rebut the factual predicates to the plaintiff's facie showing of relevant product market
     - Rebut the factual predicates to the plaintiff's prima facie showing of relevant geographic market
     - Rebut the factual predicates to the plaintiff's prima facie showing of anticompetitive effect
  2. Defenses that assume arguendo that the plaintiff has proved a prima facie case but show other facts or competitive forces that negate any likely anticompetitive effect from the merger:
     1. Entry/expansion/repositioning
     2. Power buyers
     3. Efficiencies
     4. Failing firm

     These three are the standard *downward-pricing pressure defenses.*

     The plaintiff does not have to anticipate these defenses in its complaint or proof of a prima facie case

- All standard merger antitrust defenses are *negative* defenses, not *affirmative* defenses
  - However, statutes of limitations, laches and other equitable defenses are affirmative defenses and must be pleaded as such in the answer under FRCP 8(c)

Step 2. Rebutting the prima facie case

- What defenses did the merging parties in *Sanford Health* advance to rebut the plaintiffs' prima facie case?
  1. *Entry*: Catholic Health was poised to enter the market to compete with Sanford Health after the merger and CH's entry would offset any anticompetitive effect of the merger
  2. *Power buyers*: Blue Cross has sufficient bargaining power to protect itself from any attempted anticompetitive price increase resulting from the merger
  3. *Efficiencies*: The merger would permit the merged firm to provide services and programs to patients that would improve their quality of health care that the one or both of the merging firms could not provide without the merger
  4. *Weakened competitor:*
     a. Given Mid Dakota's weakened condition, MDC would not be able to compete in the future in the absence of the merger with the same competitive force as it has had historically
     b. When this reduction in MDC's future competitiveness is taken into account, MDC's acquisition by Sanford Health would not be anticompetitive

Defense 1: Entry by Catholic Health

- Merging parties' argument:
  - Catholic Health is poised to enter the four relevant product markets in the Bismarck-Mandan MSA
  - Entry has already started—CH has already recruited a top physician in Bismarck
  - Catholic Health's entry would provide commercial insurers and patients with a suitable alternative to the merged firm and counteract any anticompetitive effects of the merger

Defense 1: Entry by Catholic Health

- The law
  1. *Timely*, that is, entry "must be rapid enough to make unprofitable overall" the output reduction in the relevant market that otherwise would have created the increase in prices
  2. *Likely*, that is, entry must be sufficiently profitable when compared to alternative courses of action by the third-party firms that the firms have a high probably of actually expanding their output if the merging firms (and any other tacitly coordinating firms) attempted to reduce output in the relevant market, *and*
  3. *Sufficient*, that is, the magnitude of the timely and likely output expansion by these third-party firms will be enough to "fill the hole" (the output reduction causing the gross anticompetitive effect)

- A fourth "requirement"
  - Although not explicit in the case law or the Merger Guidelines, a fourth requirement should be added:

    The entry/expansion/repositioning is the proximate result of the merger and would not occur otherwise

  - Under the Merger Guidelines, if the entry/expansion/repositioning would occur absent the merger, it should be taken into account as part of the future market structure in the "going forward" analysis
    - This requirement is typically ignored by the courts and to a lesser extent by the agencies

Defense 1: Entry by Catholic Health

- Almost impossible to make out in an agency investigation
  - The agency starts by insisting that the merging parties identify the potential entrants by name
  - The agency then calls the potential entrants and asks: “Would you enter this market if prices increased by 5% to 10%?”
  - The company almost always answers “no”
    - May be true
    - Even if the company was thinking of possibly entering, it would not want to get caught up in a government investigation by answering anything other than “no”
  - The government then shows through declarations of these putative “entrants” that they would not enter

This technique has consistently shut down the entry defense

  - Although there are no modern cases accepting an entry defense to defeat a prima facie case, there are instances when the investigating has not challenged a merger when significant new entry was certain to occur shortly after the merger under investigation

Defense 2: Blue Cross as a power buyer

- Merging parties' argument:
  - Blue Cross is the dominant commercial insurer in the area
  - There is no relationship between provider market concentration and provider prices in local markets (which is the premise of the *PNB* presumption), and Blue Cross is able to maintain a statewide pricing schedule regardless of provider concentration in local markets
  - Accordingly, Blue Cross will not change its statewide prices as a result of the merger and the merged firm will have to accept Blue Cross' rate schedule

Defense 2: Blue Cross as a power buyer

- Power buyer defense
  - The Blue Cross argument is essentially a power buyer argument
- The idea
  - "Power buyers" have enough bargaining power to be able to protect themselves from an anticompetitive price increase
  - If the merged firm cannot raise prices in the face of power buyers, the merger cannot be anticompetitive
- The requirements
  1. The buyer in question must be able to protect itself from an anticompetitive price increase
     - This requires proof of the *mechanism* through which each putative power buyer will be able to protect itself
  2. Every buyer in the market must be able to protect itself
     - Otherwise, the buyers that cannot protect themselves will be a targeted customer relevant market that is likely to sustain an anticompetitive effect

Defense 2: Blue Cross as a power buyer

- Power buyer defense: The practice
  - Requirement 1: Proof that a given buyer is able to protect itself
    - The mechanisms underlying a buyer power defense require a rigorous foundation
      - The foundation almost undoubtedly will be subject to intense scrutiny and cross-examination
      - The mere assertion that the buyer is large and therefore must be able to protect itself is not enough to demonstrate the required mechanism
    - A practically necessary (although not sufficient) condition is that the putative power buyer testify that it can protect itself and explain how
      - If the putative power buyer will not testify that it can protect itself, it is hard for the court to conclude that it can
    - Contrary evidence from "natural experiments" or buyer testimony can kill the defense (as was the case in *Sanford Health*)
  - Requirement 2: All buyers must be able to protect themselves
    - Almost impossible to prove—most markets contain small buyers that do not even arguably have sufficient buyer power to protect themselves from a price increase

Since the court found that Blue Cross was not a power buyer that could protect itself, there was no need to examine the second requirement

Defense 3: Efficiencies

- Merging parties' argument:
  - The merger would permit the *MDC* to provide services and programs to its patients that would improve their quality of health care that it could not provide without the merger:
    1. Imagenetics, a Sanford Health program integrating genetic medicine into primary care
    2. Behavioral health therapists embedded into primary care clinics
    3. Cancer care trials and cancer care outreach to communities outside the Bismarck-Mandan area
  - The merger would permit the *combined firm* to provide services and programs to its patients that would improve their quality of health care that it could not provide without the merger:
    1. A combined and customized electronic medical record system that would better integrate and coordinate patient care
    2. Recruitment of subspecialists to the area that could be supported by the merged firm

The idea is that the procompetitive benefit of these efficiencies would outweigh what residual gross anticompetitive harm after taking into account the offsetting effects of the other defenses

Defense 3: Efficiencies

- *Law*: To be cognizable as a defense, efficiencies must be—
  1. Verifiable
  2. Merger specific
  3. Sufficient in magnitude to offset the otherwise likely anticompetitive effect of the merger
  4. [Not the result of an anticompetitive aspect of the merger (such as a reduction in output)]

Defense 3: Efficiencies

1. Are the alleged efficiencies *verifiable*?
   - Have the efficiencies been rigorously demonstrated by the parties?
   - Can they be objectively ascertained by a third party?
     - The agencies usually regard this “third party” as an accountant or an economist, that is, someone without expertise in the industry in question—causes them to reject efficiencies that depend on expert industry judgment
     - Courts are trending this way as well
   - Most, if not almost all, efficiency defenses are rejected by the agencies and the courts for failure to meet the burden of production on verifiability
     - That is, a finding that the merging parties’ evidence was insufficient to raise a genuine issue of fact that the alleged efficiencies were verifiable

Defense 3: Efficiencies

1. Are the alleged efficiencies *merger specific*?
   - The alleged efficiencies must result from the merger
   - Two competing views:
     - *"Could" test*: Efficiencies are not merger specific if they *could* be achieved without the merger
       - Adopted by the agencies and most courts
     - *"Would"*: Efficiencies are merger specific if, in business reality, they *would not* be achieved absent the merger even if theoretically possible

Defense 3: Efficiencies

1. Are the alleged efficiencies *merger specific*?
   - The “could” test in practice
     - Invites speculation into hypothetical alternatives, such as—
       - Internal improvements by one or both firms (e.g., developing better technology, reorganizing operations, closing excess capacity)
       - Bilateral contracts or limited joint ventures with third parties (including the merger partner)
       - Industry-wide collaborations or licensing agreements that, in theory, could replicate the cost savings
       - Strategic alliances or supply agreements with alternative partners that could deliver partial efficiencies
     - Alternatives are considered regardless of their *cost*, *difficulty*, *likelihood of success*, the *time required to achieve them,* or the *attractiveness of alternative investment opportunities*
       - *Example:* Proprietary know-how transferred postmerger is dismissed as non–merger specific because the other firm could develop the technology itself—even if the transferee firm has already spent a decade and millions of dollars unsuccessfully trying to do so
     - In practice, the burden falls on the merging parties to prove that these alternative means are not even theoretically possible
       - *Query*: How do the merging parties show that the transferee firm cannot develop the technology in the future if would just keep trying?

Defense 3: Efficiencies

2. Are the alleged efficiencies *merger specific*?
   - The "would" test in practice
     - More consistent with the "going forward" focus of merger antitrust law
       - The central question is whether consumers will be customers would be better or worse off with the merger than without it
       - This requires a prediction of what is likely to be the market outcomes in the two scenarios, not what the theoretically possible outcomes could be
     - More consistent with the *Baker Hughes* allocation of the burdens of proof
       - Step 2 places only the burden of production on the merging parties
         - The burden of production on this element requires the merging parties only to adduce evidence sufficient to support a finding of fact that the claimed efficiency would result from the merger
         - Under Step 3, the plaintiff then has the burden of persuasion of showing, by a preponderance of the evidence, that the claimed efficiency—
           - Would not likely result from the merger, or
           - Would likely be achieved absent the merger, but only at such cost or after such delay that, in light of the merger's anticompetitive effects, consumers would still be worse off with the merger than without it

Defense 3: Efficiencies

3. Are the alleged efficiencies *timely and sufficient*?
   - Efficiencies must materialize quickly enough to fully offset any likely anticompetitive effects from the merger

     Key question: *Assuming verifiability and merger specificity, will consumers be better off with the merger than without it?*

   - Timeliness
     - Under the 2010 and 2023 Merger Guidelines, there is no grace period for anticompetitive effects to occur—the efficiencies must occur in time to completely offset *any* likely anticompetitive effect from the merger
       - By contrast, the 1982 and 1992 Guidelines allowed a two-year grace period for efficiencies to "catch up" and offset the merger's otherwise anticompetitive tendencies
     - Courts have also been skeptical of efficiencies that are not demonstrably near-term, though they have not gone as far as the agencies in requiring immediate offset

Defense 3: Efficiencies

3. Are the alleged efficiencies *timely and sufficient*?
   - Sufficiency
     - Efficiencies must be large enough to prevent the merger from being anticompetitive
       - Efficiencies that only partially mitigate the merger's likely anticompetitive effects are not sufficient in themselves as a defense
     - The agencies and courts treat efficiencies as cognizable only to the extent they are *passed through to consumers*
       - When efficiencies related to costs or revenues are achieved, a firm facing a downward-sloping residual demand curve has an incentive to withhold passing on at least some of the benefits to its customers
         - Efficiencies that are retained by the firm or distributed to shareholders are not cognizable efficiencies
       - Fixed-cost efficiencies are generally not cognizable absent strong evidence of pass-through
         - Fixed cost efficiencies raise the merged firm's profit curve, but in static economic models they do not change the firm's profit-maximizing price → Impose no downward pricing pressure
         - If the merging parties want to advance fixed cost efficiencies as a defense, they will need to develop a dynamic model of competition that will make it in their profit-maximizing interest to pass on some or all the fixed costs savings to customers
           - I am unaware of any merger the agencies accepted fixed cost savings as cognizable efficiencies, although the agencies may consider them in the exercise of prosecutorial discretion
       - According, any analysis of these types of efficiencies would have to analyze the pass-through rate of the efficiencies
         - Pass-through analyses are often heavily contested in litigation

Be sure to remember this!

Defense 3: Efficiencies

3. Are the alleged efficiencies *timely and sufficient*?
   - Sufficiency in practice
     - Sufficiency is the least developed of the elements—Neither the agencies nor the courts have developed an operational test beyond restating the consumer welfare standard
     - In practice, courts avoid analyzing sufficiency—except in extreme cases where the claimed efficiencies could not plausibly offset the merger's likely anticompetitive effects
     - Instead, most decisions dispose of efficiency claims on verifiability or merger-specificity grounds, making further sufficiency analysis unnecessary

Defense 3: Efficiencies

- The efficiencies defense in practice
  - The Supreme Court has cast doubt on an efficiencies defense in three cases[1]
    - These 1960s cases were decided when increased market concentration was the foundational anticompetitive harm of Section 7
    - Efficiencies would do nothing to diminish the increase in market concentration caused by a merger, and indeed may exacerbate it
    - This would make efficiencies an affirmative defense
  - That said, some (and perhaps most) modern lower courts recognize that efficiencies resulting from the merger may be considered in rebutting the government's prima facie case of anticompetitive harm
    - Today, the foundational anticompetitive harm is decreased consumer welfare or productive efficiency, both of which can be offset by procompetitive efficiencies
    - This makes efficiencies a negative defense
    - Courts that entertain an efficiencies defense use the Merger Guidelines' requirements

[1] Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963); FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967).

Defense 3: Efficiencies

- The efficiencies defense in practice
  - However, no court has yet found that the merging parties have successfully defended a merger through a showing of efficiencies alone[1]
    - Courts typically assume the defense is available, then find the claimed efficiencies not merger-specific, not verifiable, or too small to offset the likely harm
  - Several courts, however, have credited efficiencies as one factor among others in finding the government's prima facie case rebutted under *Baker Hughes*[2]
    - Each declined to rest on efficiencies alone

[1] *See, e.g.*, FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160 (3d Cir. 2022); United States v. Anthem, Inc., 236 F. Supp. 3d 171 (D.D.C.), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017); FTC v. Sysco Corp., 113 F. Supp. 3d 1 (D.D.C. 2015).

[2] *See* FTC v. Butterworth Health Corp., 946 F. Supp. 1285 (W.D. Mich. 1996) (denying a preliminary injunction: nonprofit status of the merging hospitals, a written community commitment to limit prices, and substantial efficiencies rebutted the FTC's prima facie case), *aff'd*, 121 F.3d 708 (6th Cir. 1997) (unpublished decision); United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121 (E.D.N.Y. 1997) (denying an injunction: the government failed to prove a relevant market or a reasonable probability of anticompetitive price increases, and efficiencies backed by a commitment to the state attorney general to pass on savings supported the result); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) (denying a preliminary injunction: the FTC's prima facie case was weak and the market showed no history of coordination, with efficiencies providing only limited additional support); New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (denying a permanent injunction: defendants rebutted the presumption through efficiencies, Sprint's weakened competitive position, and the DOJ/FCC remedies establishing DISH as a new fourth carrier, with efficiencies not dispositive alone); *see also* United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018) (denying a permanent injunction against a vertical merger: the government failed to prove its increased leverage theory of harm, and the court credited savings from eliminating double marginalization that the DOJ's own expert conceded), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

Defense 3: Efficiencies

- *Sanford Health* district court
  - *Factual findings*
    - Only Imagenetics was merger specific
      - FTC expert: MDC could make all other improvements without merger
        - Patient demands—not practice size—drive physician recruitment
        - A combined electronic medical record system did not require a merger and was neither required nor certain to integrate and coordinate patient care
        - Mid Dakota and Sanford already provided community outreach services and could expand those services without the merger
      - Sanford witness
        - Admitted that MDC could employ a behavioral health therapist without the merger

Defense 4: Failing/weakened company

- Merging parties argument:
  - MDC had only dim long-term prospects
  - Given Mid Dakota’s weakened condition, MDC will not be able to compete in the future in the absence of the merger with the same competitive force as it has had historically
  - When this reduction in MDC’s future competitiveness is taken into account, MDC’s acquisition by Sanford Health would not be anticompetitive

Failing firm defense

- Requirements: 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[1]
     - A "reasonable alternative offer" to the agencies means any offer above the liquidation value of the failing firm
     - To the agencies, a "good faith effort" to find a less anticompetitive buyer is tantamount to a full-press offering of the company
- Observations
  - The failing firm defense has had essentially no success since the Supreme Court recognized it in 1930 in *International Shoe*[2]

[1] 2010 DOJ/FTC Horizontal Merger Guidelines § 11.
[2] International Shoe Co. v. FTC, 280 U.S. 291, 302 (1930).

Weakened firm defense

- The idea
  1. The firm in question is in a weakened financial condition
  2. The firm's weakened financial condition will not enable it to perform going forward as competitively in the market as it has historically
  3. Therefore, the firm's current market share and other indicia of competitiveness should be discounted below current levels
  4. When the future competitive force of the weakened firm is properly discounted, the merger would not be anticompetitive
- Nomenclature
  - Sometimes called the *flailing firm defense*
- Merger Guidelines
  - The 2023 Merger Guidelines reject a weakened firm defense as inconsistent with precedent[1]

[1] 2023 Merger Guidelines § 3.1 ("Although merging parties sometimes argue that a poor or weakening position should serve as a defense even when it does not meet these elements, the Supreme Court has 'confine[d] the failing company doctrine to its present narrow scope.'") (citing *Citizen Publ'g*, 394 U.S. at 139).

Weakened firm defense

- Judicial acceptance
  - Credited only in rare cases where the defendants make a substantial showing that the firm's weakness—
    1. cannot be resolved by competitive means, *and*
    2. will materially reduce the firm's future competitive significance below that suggested by current market share and other historical evidence
  - Mere poor financial performance is not enough; the strongest cases involve structural constraints on the firm's ability to compete going forward
  - Doctrinally, think of the defense as a variant of *General Dynamics*
    - *General Dynamics* permits defendants to rebut a structural prima facie case by showing that current market shares overstate a firm's future competitive significance
    - The weakened firm defense applies that principle where the firm's financial or structural weakness means that it will compete less effectively going forward than its current share or historical performance suggests
    - The issue is therefore not whether the firm will exit the market, but how much competitive force it will exert in the but-for world absent the merger

Weakened firm defense

- Contrast with the failing firm defense
  - *Failing firm:* The firm and its productive assets would otherwise exit the market; the defense asks whether the merger preserves those assets in the market when no less anticompetitive purchaser is available
    - The counterfactual is essentially exit versus acquisition
    - If the assets would disappear from the market anyway, the merger does not cause their loss as a competitive constraint
  - *Weakened firm:* The firm will remain in the market absent the merger, but its future competitive significance will be materially less than its historical performance or current market share suggests.
    - The counterfactual is continued but diminished competition versus acquisition.
    - The analysis therefore discounts the firm's expected future competitive force rather than treating the firm or its assets as exiting the market.

Failing firm → preservation of assets that otherwise would leave the market
Weakened firm → discounting the magnitude of the firm's future competitive effect

Defense 4: Failing/weakened company

- District court
  - Factual findings
    - MDC was financially healthy—
      - Increased revenues in the three years prior to the FTC action
      - Physician compensation was 32% above the national average
      - 2015 MDC shareholder minutes showed that the motivation to sell was the high share price offered by Sanford Health, not concern about MDC's long-term financial viability
- Eight Circuit
  - (Implicit) A weak financial condition is a necessary condition to consider this factor
  - No clear error in factual finding that MDC was not a weakened company